FOREWORD

PART I: REFEREED ARTICLES

REPRESENTATIVE DEMOCRACY AND RESPONSIBLE GOVERNMENT – TWO AUSTRALIAN CONSTITUTIONAL MYTHS
Dr Bede Harris

ASPECTS OF CORPORATE DELEGATION, RELIANCE AND FINANCIAL REPORTING

LESSONS FROM AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION V HEALEY (2011) 29 ACLC 11-67
Gregory Laing, Susan Douglas and Gregory Watt

PART II: COMMENTARIES

FAMILY VIOLENCE AND PROTECTION ORDERS IN THE AUSTRALIAN CAPITAL TERRITORY
Shawni-Rose Fisher

MR FLUFFY: ACQUIRING A TOXIC LEGACY
Alyssa Dunne
ABSTRACT

Two fundamental assumptions about the Australian Constitution are that it embodies a system of representative democracy, and that the executive is subject to oversight by the legislature in accordance with the doctrine of responsible government. Such statements have become truisms, but they conceal the fact that concepts such as democracy and legislative control over the executive are matters of degree. The argument presented in this paper is that an analysis of our constitutional arrangements reveals that we live in a duopoly, rather than a democracy, and that legislative control over the executive has become so attenuated as to become almost meaningless. The paper argues that Australia should adopt proportional representation in the form of the Single Transferrable Vote system for electing the House of Representatives, and that members of parliamentary committees should be able to approach the courts to obtain a remedy for contempt where members of the executive refuse to give information to legislative committees, subject to a public immunity defence.

The article concludes by arguing that despite the view that voters are unreceptive to constitutional change, the unfairness of the electoral system and the contempt with which ministers treat parliamentary committees would, if adequately ventilated in public debate, create sufficient voter outrage as to create an opportunity for reform.

I INTRODUCTION

Although as teachers of constitutional law we are accustomed to tell our students that we live in a representative democracy and that the executive operates subject to the restraints inherent in the doctrine of responsible government, an analysis of our electoral system and of the level of control which parliament has over the executive in practice, rather than in theory, reveals that our electoral system does not accurately represent the political views of the country as a whole and that the executive refuses to provide information to the legislature frequently and with impunity. Part II of this paper examines the distortions to which our current electoral system gives rise and argues for the adoption of a system of proportional representation in order to ensure that election results accurately reflect the will of the people. This Part also

* BA (Mod) Dublin, LLB Rhodes, DPhil Waikato, Senior Lecturer in Law, Charles Sturt University. This paper is based on one delivered at the Australian Political Studies Association 2015 Conference, Canberra, 27-30 September 2015.
counters arguments that proportional representation systems lead to instability in government and recommends the adoption of the Single Transferrable Vote electoral system, which is already used in the chambers in which governments are formed in the ACT and Tasmania. Part III discusses how the mechanisms that are available to the legislature to ensure accountability of the executive, which rely on respect for the conventions of parliamentary government, have become so weak in Australia as to be of little effect. The paper then suggests a legislative solution to this problem which would allow members of parliamentary committees to approach the courts to secure co-operation from ministers who refuse to answer questions put to them. The way in which the courts in the United States successfully use the concept of public interest immunity to balance the competing interests of the legislature to obtain information and of the executive to withhold it is also examined. Part IV of the paper concludes by arguing that the shortcomings in the current electoral system and the lack of ministerial responsibility to Parliament could, if sufficiently ventilated among voters, inspire public support for constitutional reform.

II DEMOCRACY

If the purpose of that system is the election of a legislature which accurately reflects the will of the voters, then it is clear that the current electoral system embodied in the Commonwealth Electoral Act 1918 (Cth) falls far short of achieving that objective. As is well-known, single-member electorate systems such as ours inevitably lead to dominance by two parties and fail to give representation to voters who vote for candidates from other parties. The distortions produced by this system, and the manifest unfairness to smaller parties and to the voters which support them, are striking.

In the 1990 federal election, the Australian Democrats won 11.4% of first preference votes but no seats – yet the 8.4% of votes cast for the Nationals in that election yielded 9.5% of the seats in the House of Representatives. In 2004 and 2007 the Greens won over 7% of the vote but no representation, and when they won a single seat 2010, that was after winning 11.7% of first preference votes nationwide.

Even more disturbing is the fact that the system not infrequently delivers power to a government which has fewer votes nationwide than does its opposition – this happened in 1990 when Labor won only 39.4% of first preference votes nationwide and yet won 52.7% of the seats, and again in 1998 when the Coalition won 39.1% of the popular vote and 54% of the seats. And this is by no means rare: Federal governments came to power with fewer votes than the opposition in 1954, 1961, 1969 and 1987. Surely it is a fundamental principle of democracy that the legislature should accurately reflect the view of voters, that each vote should have equal impact no matter where it is cast? Yet these results reflect a system which seems almost purpose-built to deny fair representation.

In light of this it is puzzling that so much attention is paid during elections to national opinion polls, as they are largely irrelevant to the outcome which is determined in a handful of marginal seats. The decisiveness of the marginals - and the comparative irrelevance of votes cast elsewhere - is shown by the fact that while 12 930 814 votes were cast in the 2007
election, the outcome was effectively decided by 8 772 voters in 11 electorates\(^2\) who, if they had given their first preferences to the Coalition instead of to Labor, would have handed victory to the former – and this in an election which, the allocation of seats in Parliament (83 to Labor and 65 to the Coalition) gave the appearance of a Labor landslide. In 2010 the margin was even closer - 13 131 667 votes were cast, but had just 2 175 voters in two electorates\(^3\) voted for the Coalition instead of Labor (and had the Greens and Independents made the same decisions as to who to support in government), the Coalition would have won power. How can an electoral system under which the formation of government depends upon the geographical location of a tiny number of voters be considered fair?

The current system encourages blandness and lack of differentiation between the two major parties, both of which find it in their interests to be as unspecific as possible about their policies and to avoid staking out definite positions which might alienate voters. The lack of viable alternatives to the two main political blocs, and the fact that it is in their interests to maintain that situation, also means that, when in opposition, neither of the parties use the mechanisms of parliamentary scrutiny to their fullest extent against the other, as is discussed in Part III of this article.

Despite this, the suggestion that we should adopt a system of proportional representation – as our trans-Tasman cousins in New Zealand did in 1996 - meets with vigorous opposition, based on the erroneous argument that it leads to governmental instability. Since it is rare for a single party to obtain more than 50% of the vote nationwide under proportional representation, such systems almost inevitably lead to coalition government. Fear of governmental instability is easy to instil in a population unused to radical thinking. Yet that argument is flawed on two counts: First, its implicit requirement that one should put pragmatism over principle and accept unfairness as the price of stability is fundamentally unjust. The electoral results discussed at the start of this article illustrate how distorted are the results delivered by the electoral system and how unfair they are to voters. But even leaving aside matters of principle, the second reason why the argument is flawed is that its own hypothesis – that coalition government is inevitably unstable – is incorrect.

The most comprehensive study conducted by University College Dublin academic David Farrell,\(^4\) indicated that whereas some countries (for example, the UK and Jamaica) using disproportionate single-member constituency systems produce long-lived governments, other countries using the same system (such as India and PNG) are afflicted with severe governmental instability. Conversely, while some countries using proportional representation (such as Italy and Israel) are prone to instability, others (such as Switzerland and Austria) have governments that are more stable than those in the UK. In other words, the data does not support a causative relationship between proportional electoral systems and governmental instability. This is not surprising. It reflects the fact that a range of factors - economic prosperity, ethnic homogeneity and national character - affect politics in a country, and thus how stable its governments are. Contrary to the idea that internal disputes are likely to cause coalition governments to fracture, coalitions have a powerful incentive to ensure that they endure, as voters are likely to punish parties which undermine governmental stability. In other words, there are both centrifugal and centripetal forces at work in a coalition, and it is wrong to assume that simply because coalition governments contain two or more partners

\(^2\) These electorates were: Bass, Bennelong, Braddon, Corangamite, Cowan, Deakin, Flynn, Hasluck, Robertson, Swan and Solomon.
\(^3\) The electorates of La Trobe and McEwen.
they are inevitably unstable – as witness the fact that the Liberal / National Coalition has endured over the 43 years it has governed since federation. Why would coalitions between parties which were elected to a Parliament under a system which accurately and fairly reflected voter sentiment be any less stable?

The next major criticism levelled against proportional representation systems is that because they almost never lead to a single party being able to win power and form government on its own, voters have no control over who forms government, as governments are formed as the result of back-room post-election negotiations between political parties. There are a number of difficulties with this argument.

First, it is fundamentally erroneous, in a system of parliamentary government such as ours, to say that the voters ‘elect a government’. They do not. The voters elect a Parliament, and Parliament elects a government. This rule of the Constitution has been lost sight of precisely because, in a two party system, voters know that one or other of the main parties will win a majority in Parliament and will therefore form government. They therefore erroneously believe that the purpose of the election is to choose a government. However, it is vital to grasp that the two processes - election of the legislature, and formation of the executive government - are separate and distinct.

This distinction would be quite obvious to us if we were to travel back in time to 17th or 18th-century Britain, when the system of parliamentary government was developed, long before the era when politics was dominated by two major parties. The critical constitutional outcome of the victory of Parliament over the monarchy during two wars in 17th century England (the Civil War between Parliament and Charles I from 1642-51, and the Glorious Revolution against James II in 1688) was that the monarch would govern with the consent of Parliament. The practical implication of this, which gradually became established during the 18th century, was that after Parliament had assembled, the monarch would choose as leader of the government (formally the First Lord of the Treasury, an office which became known as that of Prime Minister in 1721) whoever could command the support of Parliament, rather than simply whoever he or she favoured. However, no-one knew, until Parliament assembled, where the balance of power between members of the loose, nascent political parties (Whigs and Tories) and the large number of non-aligned MPs. No-one voting in elections in the 18th century believed that they were ‘electing a government’. The government emerged from the interplay of factions in Parliament. It was only well into the second half of the 19th century, when party discipline had hardened to the extent that, as is still true in both the United Kingdom and Australia, where there is no role for small groupings of MPs or independents, that one could predict who would win government by observing which of the two main political parties had won the election.

The consequences of that two-party dominance has been that voters no longer see elections and government-formation as the discrete events that they are - everyone simply assumes that the purpose of elections is to choose a government, whereas adherence to the system of parliamentary government as it truly is requires an acceptance that it is Parliament, not the voters, who choose the government. Confusion over this issue became particularly evident in the aftermath of the 2010 federal election, which produced a result in which neither the Coalition nor Labor had an absolute majority. During the days that followed, each of the major parties claimed on various grounds (having a greater number of seats than the other or having a larger share of the popular vote than the other) that they should be regarded as having been ‘elected as government’ by the voters. From a legal point of view, the ultimate
determination of who would form government depended on who could demonstrate that a majority of MPs was willing to support one or other party - that is, choose someone who had the confidence of the House. The role of the voters in the process had long since expired and was, from a constitutional perspective, irrelevant.

Once one understands how the parliamentary system of responsible government works, it becomes apparent that there would be nothing odd at all about having a multiplicity of parties negotiate to determine who should form government. In fact, that was the norm when the system originated - and one would be hard pressed to say that Britain, at the height of its international military and economic dominance was badly governed because of it. Such a process is also the norm in other democracies which have parliamentary government in combination with proportional representation: The voters elect the legislature and then the parties in the legislature determine who will govern.

Given that, under our system, voters do not ‘elect a government’, one could end the argument about government being formed by deals between parties by saying that that is what the system anticipates, and that it is only the fact that the electoral system produces distorted results, and a resultant dominance by two major parties, that gives the illusion that voters are electing the government. Such a response would be correct as a matter of law, but it would be unlikely to defuse the suspicion that opponents of proportional representation would be able to engender among voters who are unaware of these constitutional rules. Therefore, one also has to address the argument on political, and not just legal, grounds. So, does the process of government-formation by political parties after an election conducted under proportional representation mean that the voters do not have control over who forms government and cannot hold it accountable?

The answer to these questions is ‘No’, for the following reasons: It is very common for voters to know which parties will go into coalition, and with whom, long before election day in countries using proportional representation - in other words, the inter-party negotiation is as likely to occur before the election as after. Indeed, it is in the interest of political parties to be open about their intentions regarding possible coalition partners, precisely to avoid losing voters because voters mistrust them on that issue. Thus in many elections, voters will know ahead of time which parties are likely to go into coalition with which, and to factor that into their choice as to whom to vote for. Most importantly however, the reason why it is untrue to say that proportional representation and resultant coalitions do not give voters control over who governs them is that, unlike in the case of the current system, a government formed after a proportional representation election will have the support of a majority of voters - because the parties forming the coalition must, in combination, represent more than 50% of the voters - yet as the election results discussed at the start of this chapter demonstrate, it is a not uncommon, and obviously unjust, occurrence under electorate-based systems for governments to come to power with the support of less than 50% of the voters.

The final argument that needs to be addressed is that voters cannot hold coalition governments accountable in the same way as they can single-party governments, because coalition parties can blame the compromises they have had to make in order to secure a coalition agreement and the shortcomings of their coalition partners, for failures of government performance. This is spurious for a number of reasons: First, it ignores the fact that Australia voters historically appear to have no difficulty in determining accountability between coalition partners, given the compromises that are made between the Liberal and National partners of the Coalition over issues as diverse as voluntary student unionism,
emissions trading and the National Broadband Network, to name only the most recent. Second, it must be recognised that parties in a coalition government are judged on the compromises they make. In other words, it is a myth to say that parties are able to deflect responsibility to coalition partners for compromises, because the very fact of having compromised on a key policy carries the substantial risk of punishment at the next election. Parties therefore do not have carte blanche to betray voters, nor does the fact that they are in a coalition provide them with immunity from the need to be accountable to voters – the deals they make become part and parcel of their record, and voters can and do hold them accountable accordingly.

Australia is not a true democracy – it is a Coalition/Labor duopoly, with the electorate performing the role of a hapless tennis ball hit between them every three years. Is it any wonder that Australians feel increasingly disengaged from, and disenchanted with, the political system? A reflection of this is the fact that an ever-increasing number of voters are venting frustration with the major parties by directing their support to parties other than Labor or the Coalition: In the 2007 election 14.5% of first preference votes went to minor parties or independents.\(^5\) This increased to 18.2% in 2010 and to 21% in 2013 – and this is despite the fact that a first preference vote cast other than for one of the major parties amounts, in most instances, to no more than a gesture to be made before having to make a reluctant choice between parties that can actually win a seat.

The manifest unfairness of the current system if sufficiently emphasised to the public, could lead to sufficient outrage to lead to a successful campaign to adopt proportional representation. There are of course a multitude of proportional representation systems. One already familiar to Australians is the multi-member seat Single Transferrable Vote system, already used in houses that provide government in the ACT and Tasmania, as well as in the Senate and all State upper houses, barring Tasmania.\(^6\) The system is also used in the house that forms government in the Republic of Ireland, to name but one example from many other jurisdictions.

Under STV, country or State is divided into a number of large electorates, each returning more than one member. Parties may nominate as many candidates for each electorate as there are seats to be filled. Voters receive a ballot paper on which all the parties’ candidates are listed. In the system used in Tasmania and the ACT candidates are listed randomly, and voters must indicate their preferences for individual candidates.

The number of votes required for a candidate to be elected in an STV system (referred to as the ‘threshold’) is one vote plus the number of votes cast in the electorate, divided by the number of seats plus one. If a candidate reaches the threshold after the first count of votes, he or she is declared elected. Any votes a candidate receives in excess of what they required to be elected are redistributed among the remaining candidates – the calculation is somewhat complex, but the objective is to ensure that if, for example, candidate A needed 14 000 votes to be elected and obtained 15 000, the 1 000 excess votes are distributed among the remaining candidates in the same proportions that all voters for candidate A indicated their preferences. The process of distributing preferences goes on in successive rounds of

\(^5\) That is to parties other than the Liberals, Labor and the various manifestations of the Nationals (Liberal Nationals, Nationals and Country Liberals). The calculation ignores informal votes. Data are derived from the Australian Electoral Commission website at \(<www.aec.gov.au>\).

counting. If no remaining candidate reaches the threshold after redistribution of the preferences of the most recently elected candidate, the candidate who received the fewest votes is eliminated and his or her second preferences are transferred to the remaining candidates. The process continues until all seats in the electorate are filled. There is range of STV systems, differing in the way in which votes are transferred, but all have in common the feature of multi-member electorates and transferrable preferences. The advantage of STV is that as well as leading to highly proportionate results, all members of the legislature are identifiable with a specific electorate, and voters, rather than parties, have ultimate control over whether each candidate succeeds in being elected.

If STV was adopted, the most important issue to determine would be the number of members returned by each multi-member electorate. The critical factor to remember here is that the greater the number of MPs returned by each electorate, the more proportional the outcome of elections, and the less likelihood there is that a government can be elected without securing a majority of votes nationwide. As we have seen, that is a scandalous, but by no means rare, occurrence under our current single-member electoral system. By contrast, in Ireland this has occurred only twice in the 18 elections held since the introduction of the system, which uses a mix of three, four and five member electorates. In Tasmania governments have been able to win power with a minority of votes state-wide only twice over a much longer period of history in which 26 elections were held under a system which uses seven-member electorates - which illustrates the point that the more members per seat, the less likely it is that an anomalous result will occur.

Another important factor to consider is how the number of seats per electorate affects the threshold for election: In a five-member electorate, the threshold is just over 16% of the vote plus 1. Thus a party that had, for example, 15% support nationwide, but no sufficient concentration of voters in any particular electorate, would not obtain representation in Parliament. Clearly, that is unsatisfactory. In a seven-member electorate, the threshold is 12.5% + 1 vote. If there were nine-member electorates, the threshold would be 10% + 1 vote. The critical question here is how to balance the representivity of the system against the degree of contact voters have with their representatives. A 10% threshold is probably the highest that one should permit for a system to be fair to smaller parties. If the House of Representatives was kept at approximately its current size, there would need to be 16 electorates each returning nine members (giving a total of 154). However, some multi-member electorates in rural areas would be vast, and this might therefore constitute grounds to increase the size of the House. Because under STV multi-member electorates would be

---


8 Information on elections in Ireland is obtainable from the Department of Environment, Community and Local Government at <http://www.environ.ie/en/LocalGovernment/Voting/>. A convenient summary of election results since 1918 can be found at Nicholas Whyte, Dail Elections (3 June 2007) <http://www.ark.ac.uk/elections/gdala.htm>.

9 In 1965 and 1969.


11 In 1982 and 1989.
delineated without reference to State boundaries in order to achieve nationwide proportionality, its adoption would necessitate the amendment of s 24 of the Constitution which assigns seats to States and s 29 which prohibits electoral boundaries from crossing State boundaries.

Proportional representation is right in principle as it gives equal weight to every vote, irrespective of location and ensures that governments would always represent a majority of voters. It would also have a positive practical impact on politics in Australia: It would enhance the quality of government by expanding the pool of political talent beyond those who are willing to join Labor, Liberals or Nationals - the only parties in which there is currently a realistic chance of a political career. Furthermore, since proportional representation would lead to more parties being represented in Parliament, those currently represented would be forced to improve their performance or lose power to new entrants.

III RESPONSIBLE GOVERNMENT

Turning now to the concept of responsible government, the fact that executive accountability to the legislature is founded upon convention rather than law is a significant weakness of the Westminster system, because it means that the degree of accountability to which the executive is subject depends to an almost complete extent on ministers voluntarily submitting to Parliamentary oversight. The principal mechanism available to Parliament to call the government to account is the committee system. In theory, committees of either house have the power to call ministers and public servants to account and to punish them for contempt if they refuse to do so or to provide information, although the practice is for an invitation to be sent to a person to attend and for them to attend voluntarily.

However, in practice, the rigidity of party discipline in Australia means that committees of the House of Representatives, on which the government of course has a majority, will never pursue an unco-operative minister. That leaves the Senate, but in the case of that chamber too committees are likely to call ministers to account only in periods when opposition parties have a majority. Yet even under those circumstances ministers who refuse to answer questions are unlikely to face sanctions, because although such conduct is punishable as contempt, under the rules of parliamentary privilege the power to impose a sanction vests not in the committee, but rather in the chamber as a whole – and here again one encounters the nefarious effects of the Coalition / Labor duopoly, because neither side of politics will use its power when in control of the Senate to set a precedent that will come back to bite it when positions are reversed and it is in government rather than in opposition.

This was revealed most starkly in 2002, when a Senate committee was established to inquire into the Children Overboard affair. As those who followed the events of that era will recall, the critical issue in contention was at what stage information from defence personnel to the effect that children had not been thrown overboard by asylum-seekers was communicated to ministers in the then Coalition government. Peter Reith, who had been Defence Minister at

---

12 In the case of the Senate see Harry Evans (ed), Ogdens’ Australian Senate Practice (Department of the Senate, 11th ed, Canberra, 2004) 30, 57 and 377.
13 Ibid 378.
the time the events occurred, refused to give evidence before the Senate committee, and the cabinet also ordered that his staffers not comply with the committee’s requests to attend. At the time, the Coalition lacked a majority in the Senate, which meant that Labor, in conjunction with the minor parties, had sufficient numbers in the Senate to compel attendance, and could have used their majority in the Senate to initiate contempt proceedings, against Reith. The reason that this did not occur was that despite the fact that the Australian Democrats and Greens supported such a step, Labor refrained from using its Senate votes to exercise the contempt powers. 15 So the most that ever happens when ministers refuse to provide evidence to Senate committees is that a motion of censure (in other words, a formal slap on the wrist) is passed against them - a remedy which the major parties are happy to use when in opposition because it causes political embarrassment to the government, but which does not establish a precedent that would be used to impose significant penalties such as suspension from the house, a fine or imprisonment on them once they are back in power. 16

The result of this is that ministers commonly refuse to answer questions put by parliamentary committees or instruct public servants not to do so. Examples of these include the ministerial prohibition of defence force personnel appearing before the inquiry into what knowledge the ADF had of torture of Iraqi prisoners at Abu Ghreib, 17 and the prohibition against public servants appearing before the inquiry into the AWB scandal. 18 The most striking recent example of ministerial defiance of legislative oversight occurred in 2014 when the then Minister for Migration, Scott Morrison, refused to answer questions posed by a Senate committee relating to how many asylum-seeker boats had been intercepted in Australian territorial waters, and also refused to provide the committee with documents it had requested. This is in line with an emerging trend on the part of the government to label virtually all information relating to border control as too sensitive for public discussion. The problem with this, of course, is that there is no test – other than the government’s own assertion – for determining whether the public interest justifies non-disclosure of information, and thus nothing to prevent ministers adopting the same approach to matters as mundane as the number of vehicles on the roads in Australia or the number of paintings in the store-rooms of the National Gallery.

In light of this it is no wonder that the late Harry Evans, Clerk of the Senate, made the following comment in relation to the condition of responsible government in Australia: 19

Responsible government was a system which existed from the mid-19th century to the early 20th century, after which it disappeared. It involved a lower house of parliament with the ability to dismiss a government and appoint another between elections. This system has been

---

18 See Samantha Maiden, ‘Gag in Senate illegal, clerk warns’, The Australian (Sydney), 12 April 2006, 4; and Ross Peake, ‘Cover-up claim as officials gagged’, Canberra Times (Canberra), 14 February 2006, 2.

replaced by one whereby the government of the day controls the lower house by a built-in, totally reliable and “rustedin” majority. Not only is the government not responsible to, that is, removable by, the lower house, but it is also not accountable to it. The government’s control of the parliamentary processes means that it is never effectively called to account...

How then is this to be remedied? Clearly constitutional conventions have lost their binding force in Australia and thus it is no longer satisfactory to leave the workings of responsible government to the good-will of ministers. The answer is therefore to replace these conventional rules with statutory provisions, which compel executive subordination to legislative oversight with penalties for non-compliance.

Obviously provision would have to be made for genuine cases where the national interest militates against public disclosure – but this would not mean allowing the executive to claim immunity from providing information to parliamentary committees merely on its own assertion that the public interest requires that, or allowing blanket suppression of information where public interest immunity exists in relation only to part of it. Rather what is required is a set of rules under which (i) the default position is that there is a legal, not just political, duty on ministers to answer questions and provide such other evidence as is required by parliamentary committees, (ii) which allows proceedings to be taken in the courts in cases of non-compliance, with an appropriate regime of penalties and (iii) which allows ministers the opportunity to make out a defence of public interest, in in camera proceedings if necessary, in relation to such part of the information as is being requested ought not to be disclosed for objective reasons of national interest. It would be critical to the success of such a system that the right to initiate proceedings for non-compliance should vest not only in houses of Parliament and in committees as a whole, but should also extend to individual committee members. None of this would require a change to the Constitution – ordinary legislation, most suitably appropriate amendments to the Parliamentary Privileges Act 1989 (Cth), would suffice.

Putting executive accountability to the legislature on a legal, rather than a conventional, footing, and making the application of penalties no longer subject to political majorities, would have dramatic consequences for the doctrine of responsible government.

First, in the vast majority of cases, ministers would simply acquiesce and answer questions, because in the vast majority of cases the reality is that public immunity would not apply. Then, in those cases where ministers do decline to provide information on grounds of public immunity, on many occasions agreement might be reached between the minister and committees as to measures which might be taken to limit publication of the information – for example, by holding closed-door hearings. It would in all likelihood be that only a small minority of cases would ever need to be taken to the courts for adjudication as to whether ministerial silence was contemptuous or was based on a genuine claim of immunity. This has certainly been the experience in the United States, where long-standing precedent gives Congress the right to obtain information from the executive,20 and where the legislature has had recourse to the courts to enforce subpoenas against members of the administration, most famously during the Nixon era.21 However, in most cases, the two branches reach a political compromise,22 and it is a quite normal feature of the political process in the United States for

---

20 See Anderson v Dunn 19 US (6 Wheat.) 204 (1821) and McGrain v Daugherty 273 US 135 (1927).
members of the executive, including members of the cabinet, to appear voluntarily before public hearings of congressional committees, or for information to be provided in a confidential briefing to members of a committee. Disputes are thus almost always settled by negotiation between Congress and the administration. The fact that the judicial branch is the ultimate determiner of the degree to which the executive is accountable has not led to the courts being confronted with policy questions that they are incapable of deciding without becoming involved in party-political disputes – there is sufficient case law for the courts to engage with in determining whether a claim of executive privilege is valid. It is a matter of supreme irony that the legislative branch in the United States has far greater power than is the case under the system of responsible government we have in Australia, which supposedly subjects the executive to legislative control.

The important consequence of implementing such a reform in Australia would be that no longer would it be the case – as it is at present – that ministers could refuse to provide information to the legislature without fear of sanction and without having to satisfy a test as to whether there are objective grounds justifying non-disclosure.

IV ACHIEVING REFORM

This paper has not yet addressed the practicalities of reform. As someone who has taught constitutional law in South Africa and in New Zealand during periods when both jurisdictions underwent profound constitutional change, I find the lack of debate about constitutional reform in Australia disheartening – all the more so given the many issues (apart from the ones canvassed here) that need to be addressed. It seems to me that the difficulty in achieving success at referendum deters people, academics included, from engaging in critique of the Constitution and from proposing constitutional change. The basis of the problem lies in the fact that the poor standard of civics education in Australia, which means that voters have little knowledge of how the Constitution works and are, therefore, understandably fearful of changing that which they do not understand. Add to this the ease with which politicians whose interests would be adversely affected by constitutional reform are able to play upon those fears, and one ends up with an environment in which it is extraordinarily difficult to achieve constitutional reform.

Yet I would argue that conditions are, in fact, more propitious for constitutional change than they have been in many years. The results of a 2014 public opinion survey of the attitude of a representative sample of voters to various questions on a wide range of constitutional reforms published by the author are instructive. The answers to five of these questions are instructive for the purposes of this paper:

23 Ibid 394-401. Although an incumbent President has never been summoned to appear before a congressional committee, President Ford agreed to do so voluntarily to answer questions relating to his pardoning of former President Nixon - see Mark Rozell, Executive Privilege: The Dilemma of Secrecy and Democratic Accountability, Johns Hopkins Press, 1994, 90.
24 Ibid, 150.
Do you think that the electoral system should ensure that parties are allocated seats in Parliament in proportion to their percentage share of the votes they receive throughout Australia?

Yes 75%
No 25%

Under the current electoral system for the House of Representatives, MPs are elected in single-member electorates. A single party usually gets enough seats to form government, but parties do not get representation in proportion to their support nationwide. This can even lead to a government coming to power with fewer votes nationwide than were received by the opposition. By contrast, under a proportional representation system, parties always get seats in proportion to their share of the national vote. Governments are usually formed by a coalition of parties which, in combination, will always represent a majority of voters. In light of the above, which of these systems do you prefer:

The current electoral system 42%
Proportional representation 58%

In other words, even when advised of the fact that proportional representation usually leads to government by coalition, a significant majority of respondents remained in favour of it.

So far as responsible government is concerned, respondents were asked the following:

Parliamentary Committees scrutinise legislation, conduct public inquiries on matters referred to them by Parliament as a whole and hold the government to account by asking questions of Ministers and public servants. In your view, should Ministers and public servants be obliged to answer questions put to them by parliamentary committees?

Yes 96%
No 4%

Should Ministers who fail to answer questions put by parliamentary committees, or who instruct public servants not to do so, face penalties?

Yes 89%
No 11%
If a Minister says that they or public servants working for them should not answer questions put by a parliamentary committee because the answer might disclose matters which it is in the public interest to keep confidential (such as internal government deliberations or information relating to national security), then which of the following should happen:

The Minister’s statement should be accepted without question. 15%

The courts should consider whether the Minister’s claim is valid, in a closed (non-public) hearing if necessary. 85%

The answers given to these questions indicate that, provided that the issues are clearly delineated, and care is taken to explain to voters the shortcomings of the current system, their appetite for reform is stronger than one might expect.

Popular disenchantment with the two major political blocs is at an all-time high. The fact that electoral reform and the strengthening of legislative controls over the executive are not only good in themselves but would also provide a mechanism to overturn the dominance currently enjoyed by the two major political blocs, means that a campaign which focuses on the inherent unfairness of the electoral system and on the unaccountability of the executive to Parliament would have a chance of inspiring sufficient public outrage to lead to constitutional change. And therein lies the challenge: Voters need to overcome their fear of constitutional reform and take the initiative to effect change, rather than passively bewail their dissatisfaction with the status quo.
ASPECTS OF CORPORATE DELEGAION, RELIANCE AND FINANCIAL REPORTING

LESSONS FROM AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION V HEALEY (2011) 29 ACLC 11-67

GREGORY LAING,
*SUSAN DOUGLAS† AND GREGORY WATT‡

* BBus(Acc), MCom(Hons), PhD (W‘gong), Senior Lecturer in Accounting, Faculty of Arts & Business, University of the Sunshine Coast.
† LLB, PhD (USC), Lecturer in Law, Faculty of Arts & Business, University of the Sunshine Coast.
‡ BA, LLB, Cert Bar Practice, Barrister-at Law.
This case note assesses the impact of the recent decision in the Federal Court of Australia on the duties of company directors with regard to financial reporting. The case is important because it established Negligence as a new test for determining a contravention of s 344(1) of the Corporations Act 2001 (Cth). Up to this point in time an offence under the Act had to be the result of Dishonesty. For this reason, the case imposes a greater duty of care on company directors with regard to reliance on delegation in meeting their obligations under the Act.

I INTRODUCTION

The case against the directors was focused on the failure to disclose the correct amount of current liabilities in the 2007 annual reports of the Centro Properties Group. The current liabilities had been understated by $1.5 billion which had been classified as non-current liabilities. The directors had also failed to disclose guarantees (current liabilities) by an associated company of approximately US$1.75 billion that had been given after balance date but before the joint board meeting of 6 September 2007. The joint board meeting of 6 September 2007 was the meeting at which the directors resolved to approve the financial reports for the year ending 30 June 2007. In addition, there was another Centro company which had wrongly classified as current liabilities $500 million as non-current liabilities. ASIC’s case was that the errors were so obvious that it could be readily inferred that the directors were negligent to have failed to detect them.

Section 180 of the Corporations Act 2001 (Cth) requires directors to take reasonable steps to place themselves in a position to be able to guide and monitor the company’s management. However, the Corporations Act does not require directors to be qualified and experienced accountants or auditors nor are they responsible for the preparation of the financial reports. They are required by s 344 to take all reasonable steps to secure compliance with the financial reporting obligations imposed by Parts 2M.2 and 2M.3 and in this regard must exercise diligence and care. The Act states that a person commits an offence if they contravene s 344(1) and the contravention is dishonest. Therefore, according to the Act for a contravention to be an offence it must be proven to be the result of dishonesty.

The decision by Middleton J\(^1\) was that the directors had failed to exercise the statutory duty of care and diligence by approving inaccurate financial reports and had therefore breached their duty under s 344. In reaching this decision, Middleton J introduced the element of negligence\(^2\) as a basis for determining a contravention of a director’s obligations under the Act.

II DISHONESTY v NEGLIGENCE (SECTION 344)

The decision by Middleton J established that dishonesty is no longer the only reason for a court to conclude that directors have contravened the Act. The case revolved around the directors being held liable for not ensuring that the information contained in the financial reports was consistent with their own knowledge of the company’s affairs. The issue here

---

\(^{1}\)Australian Securities and Investments Commission v Healey (2011) 29 ACLC 11-067.

\(^{2}\)Ibid 1 247 [127].
being that whilst the directors may not have been acting dishonestly there was a degree of negligence Middle}

The director’s obligation, under s 344 is to take all reasonable steps to comply, or secure compliance, with Pt 2M.3 (which deals with financial reports, directors’ reports, audit, reporting to members and lodgement with ASIC). They are under the same duty with respect to the financial records which the entity must keep under Pt 2M.2. If they fail to take all reasonable steps to comply or secure compliance, they contravene the Act.

In response to the argument that directors relied upon the expertise of the chief executive officer and chief financial officer, Middleton J made the following observations in rebuttal to this as a defence against any breach of the Act by directors:

S 295A says that in the case of a listed entity, the directors’ declaration for a full financial year must be made only after each person who performs a chief executive function or a chief financial officer function has given the directors a declaration. The declaration must say whether, in the opinion of the person giving it:

- The financial records of the entity have been properly maintained in accordance with s 286;
- The financial statements and notes comply with the accounting standards;
- The financial statements and notes give a true and fair view; and
- Any other matters prescribed by the regulations are satisfied (none have yet been prescribed): s 295A(2).

However, even here the extent of reliance should not be taken too far. The purpose of the introduction of s 295A was according to the Explanatory Memorandum to the Bill introducing the requirement to “ensure that those who are responsible for the preparation of financial statements are accountable for their content thereby heightening the accountability of senior management”: Explanatory Memorandum, paragraph 4.330. S 295A was not to detract from the responsibilities otherwise imposed upon directors.

It is apparent that the legislative scheme imposes overall responsibility for the financial report and the directors’ report upon the directors. When the Bill for the legislation that introduced s 295A was introduced, the Explanatory Memorandum also stated that:

... having executive sign off to the board of directors is the preferred option. This approach will retain the overall responsibility of directors for the financial statements but will at the same time impose a specific requirement on those responsible for preparing the statements to turn their minds to the actual legal requirements and compliance with the accounting standards.

There is little doubt that there may be liability under s 344 and the civil penalty provisions for directors who have not taken all reasonable steps to ensure compliance with the requirements prescribed in s 295A. This will be so whether the director was responsible for making the declaration or was merely one of the board members who failed to ensure that the declaration was obtained. In this case, the decision was that a particular declaration was not a

---

3 Ibid.
5 Ibid [133].
6 Ibid 1 323 [507].
declaration of the opinion of the CEO and CFO as to the matters specified in s 295A(2)(a), (b) and (d) and therefore did not satisfy the requirements of the section.\textsuperscript{7}

Further, the obligation that a director may have to make a declaration under s 295A\textsuperscript{8}, is in addition to the responsibility that the director has pursuant to s 344 which requires the director to take all reasonable steps to ensure compliance with the financial records and financial reporting requirements.\textsuperscript{9}

\textbf{III SECTION 295}

Section 295 requires the directors to form an opinion with all due care and diligence. It has been held that, at a minimum, the directors must inform themselves as to the financial affairs of the company to the extent necessary to form each year the opinion required.\textsuperscript{10}

In \textit{response to this particular issue} Middleton J stated the following:\textsuperscript{11}

\begin{quote}
Whilst the Act now requires that the annual directors’ report be prepared by the entity, rather than by the directors themselves, the report must be made in accordance with a resolution of the directors and must be signed by a director. Whilst the obligation to “prepare” it is placed on the entity, the directors have an important responsibility for the contents of the report. Additionally, the financial report which a company must prepare must contain a declaration by the directors that the financial statements comply with the accounting standards and give a true and fair view, and must contain the directors’ opinion as to whether there are reasonable grounds to believe that the entity will be unable to pay its debts as and when they become due and payable and as to whether the financial statements are in accordance with the law: s 295(4).
\end{quote}

Whilst, again, the obligation to “prepare” the directors’ declaration is placed on the entity, the directors have a primary responsibility for the declaration. In essence, the Act requires directors to take particular responsibility for the company’s financial reports.

This is not to say that directors are not entitled to seek assistance in carrying out their responsibilities, and may rely on others.

For instance, directors are entitled to rely upon declarations by the CEO and the chief financial officer, such as made pursuant to s 295A of the Act.

\textbf{IV THE DECISION}

The finding\textsuperscript{12} was that there had been a failure to comply with the relevant AASBs, and as a result there was a failure to give a true and fair view, which was contrary to the provisions of s 296 and 297. In turn there was a failure to disclose information in the terms of s 299 and 299A which meant that the financial reports did not comply with s 298.

\begin{flushleft}
\textsuperscript{7} Ibid 1 324 [510].
\textsuperscript{8} \textit{Corporations Act 2001} (Cth) s 295A(8).
\textsuperscript{9} Ibid 1 248 [134].
\textsuperscript{10} Ibid 1 250 [146].
\textsuperscript{11} Ibid 1 248 [128] – [129].
\textsuperscript{12} ibid 1 332 [574].
\end{flushleft}
Each director was held to have:

- not taken all reasonable steps to focus and consider for himself the content of the financial statements, particularly as to short-term debt and whether the guarantees should have been disclosed.

- failed to make enquiries of management, the BARMC or other directors as to proposed statements in the financial statements relating to the short-term debt and guarantees, and failed to have apparent errors corrected.

- failed to request that the directors be given declarations pursuant to s 295A of the Act which accorded with its requirements, after failing to consider the requirements of s 295A and read the management representation letter.

- to have been aware of or should have been aware of the relevant accounting principles which would have alerted each director to the apparent error in the proposed financial statements. They could then and should have made the relevant enquiries, if they had taken all the reasonable steps required of them.

- failed focus upon or properly consider the issues the subject of ASIC’s allegations. Each director may have had different reasons for not focusing.
  
  o For instance, Mr Scott did not focus, as he was concentrating on the key risk areas and investors, and did not consider the existence of current debt liabilities as a problem. Mr Scott considered that the concern of investors at the time was with total liabilities. Mr Scott assumed that management and the advisors would bring to his attention any information necessary, and did not turn his mind specifically to the guarantees or to short-term debt.

  o The other directors relied solely on management and their advisors to be properly informed of information relevantly to be put into the financial statements.

The differences between the individual analysis of each director provided by ASIC, in the authors’ view, do not detract from the above position pertaining to each director and the findings I make. Whether, for instance, a director went through the financial statements ‘line by line’, he is not thereby taking all reasonable steps, if the director in doing so is not focussed for himself upon the task and considering for himself the statutory requirements and applying the knowledge he has of the affairs of the company.

The failure to notice certain omissions may well be explicable – but here the directors, in some cases on their own admission, clearly looked solely to management and external advisors. If they had acted, as Senior Counsel for ASIC suggested, as the final filter, taking care to read and understand the financial accounts, the errors may have been discovered earlier than they were.

Middleton J ruled that in relation to each director in his capacity as a director (or officer) of each relevant entity each director failed to take the following reasonable steps and failed to
take the following steps that a reasonable person would have taken if they were in the director’s position:

(a) to properly read, understand and give sufficient attention to the content of the financial statements prior to participating in the resolutions occurring on 6 September 2007 in so far as they related to:

   (i) the classification of liabilities as either current or non-current;

   (ii) the disclosure of guarantees relating to Super LLC and Centro NP LLC.

(b) to consider or properly consider the content of the financial statements prior to participating in the resolutions occurring on 6 September 2007 in so far as they related to:

   (i) the classification of liabilities as either current or non-current;

   (ii) the disclosure of guarantees relating to Super LLC and Centro NP LLC.

(c) to raise or make enquiry or adequate enquiry with management, the BARMC and other members of the Board prior to participating in the resolutions occurring on 6 September 2007:

   (i) the apparent failure of the financial statements to properly classify current and non-current liabilities;

   (ii) the apparent failure of the financial statements to properly disclose the guarantees relating to Super LLC and Centro NP LLC.

(d) to have the apparent failures with respect to the financial statements corrected prior to participating in the resolutions occurring on 6 September 2007;

(e) prior to participating in the resolutions on 6 September 2007;

   (i) to take the necessary steps to ensure they had a sufficient knowledge of the requirements of s 295A;

   (ii) to read, understand and give sufficient attention to the management representation letter provided to the directors;

   (iii) to request that the directors be given a declaration pursuant to s 295A of the Act which accords with its requirements.

(f) not participating in the resolutions occurring on 6 September 2007 prior to being given a declaration pursuant to s 295A of the Act.

Under the circumstances, each director was held to have contravened ss 180(1), 601FD(3) and 344(1) of the Act in that:

(a) each director failed to take all reasonable steps to secure compliance with each of the provisions of the Act alleged against them;
(b) each director failed to take all steps that a reasonable person would take if they were in each director’s position to ensure compliance by the relevant entity with each of the provisions of the Act alleged against them;

(c) each director failed to exercise the degree of care and diligence required by failing to take each of the steps I have found that each director failed to take in the course of his review of the financial statements.

Once the Court was satisfied that a person had contravened the above provisions, it is incumbent upon it to make a declaration of contravention (see s 1317E). S 1317E(2) provides that the declaration must specify the following:

(a) the Court that made the declaration;

(b) the civil penalty provision that was contravened;

(c) the person who contravened the provision;

(d) the conduct that constituted the contravention;

(e) if the contravention is of a corporation/scheme civil penalty provision - the corporation or registered scheme to which the conduct related.

V GROUNDS FOR THE DECISION

Middleton J made the following statement at [574]:

… there has been a failure to comply with the relevant AASB’s, and a failure to give a true and fair view, contrary to the provisions of s 296 and 297, and a failure to disclose information in the terms of s 299 and 299A so as to not comply with s 298.

The grounds for the decision against the directors was more fully identified by Middleton J at [583]:

I find that each director failed to take the following reasonable steps and failed to take the following steps that a reasonable person would have taken if they were in the director’s position:

(a) to properly read, understand and give sufficient attention to the content of the financial statements prior to participating in the resolutions occurring on 6 September 2007 in so far as they related to:

(i) the classification of liabilities as either current or non-current;
(ii) the disclosure of guarantees relating to Super LLC and Centro NP LLC.
(b) to consider or properly consider the content of the financial statements prior to participating in the resolutions occurring on 6 September 2007 in so far as they related to:

(i) the classification of liabilities as either current or non-current;
(ii) the disclosure of guarantees relating to Super LLC and Centro NP LLC.

(c) to raise or make enquiry or adequate enquiry with management, the BARMC and other members of the Board prior to participating in the resolutions occurring on 6 September 2007:

(i) the apparent failure of the financial statements to properly classify current and non-current liabilities;
(ii) the apparent failure of the financial statements to properly disclose the guarantees relating to Super LLC and Centro NP LLC.

(d) to have the apparent failures with respect to the financial statements corrected prior to participating in the resolutions occurring on 6 September 2007;

(e) prior to participating in the resolutions on 6 September 2007:

(i) to take the necessary steps to ensure they had a sufficient knowledge of the requirements of s 295A;
(ii) to read, understand and give sufficient attention to the management representation letter provided to the directors;
(iii) to request that the directors be given a declaration pursuant to s 295A of the Act which accords with its requirements.

(f) not participating in the resolutions occurring on 6 September 2007 prior to being given a declaration pursuant to s 295A of the Act.

VI PENALTIES AND DECISION

On the 31 August 2011, Middleton J handed down the penalties imposed on the defendants.\(^{13}\) With respect to the relief from liability sought by the directors on the basis of s1317S and s1318, these sections provide relief from liability if it appears to the Court that the directors acted honestly. Whilst the directors were not found to have acted dishonestly Middleton J declined to grant relief. His decision was based on the need to promote the policy rationale of general deterrence in view of the seriousness of the contraventions. However, he considered that the more severe orders sought by ASIC were not warranted under this policy rationale.

Table 1
Summary of penalties in the judgment

<table>
<thead>
<tr>
<th>Defendants</th>
<th>Corporations Act Declarations of contravention?</th>
<th>Pecuniary penalty?</th>
<th>Disqualification from managing corporations?</th>
<th>Orders made for costs?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Six (6) non-executive directors</td>
<td>Yes!</td>
<td>No!</td>
<td>No!</td>
<td>1/8th of ASIC’s costs in the penalties proceeding.</td>
</tr>
</tbody>
</table>

*Breached s180(1) and 601FD(3) by failure to

\(^{13}\) Australian Securities and Investments Commission v Healey (No 2) (2011) 29 ACLC 11-068.
The former managing director and CEO  

<table>
<thead>
<tr>
<th>Exercise required degree of care and diligence; and</th>
<th>Breached s 344 by failure to take all reasonable steps to secure compliance with certain provisions of the Corporations Act governing the preparation of accounts.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes!</td>
<td>Middleton J did not grant relief from liability under s1317S or s1318.</td>
</tr>
<tr>
<td>Same as for the non-executive directors above.</td>
<td>1/7th of ASIC’s costs in the earlier liabilities proceedings. This reflects that the former CFO did not contest liability.</td>
</tr>
</tbody>
</table>

The former CFO  

<table>
<thead>
<tr>
<th>Breached s180(1) and 601FD(3) by failure to exercise required degree of care and diligence; and</th>
<th>Contrary to s601FD(1) had failed to take all reasonable steps to secure compliance with certain provisions of the Corporations Act governing the preparation of accounts.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes!</td>
<td>Two (2) years from 10 October 2011.</td>
</tr>
<tr>
<td>No!</td>
<td>Because the CFO did not contest the earlier liability proceedings no costs for that were awarded.</td>
</tr>
</tbody>
</table>

A class action was settled, in May 2012, against the auditors and companies for $200 million, with the legal costs of $15 million and IMF funders receiving $60 million and leaving the shareholders to divide the remaining $125 million for their losses.\(^{14}\)

**VII LEGACY**

The applications of the principles developed in this case, while not confined to listed public companies, are more relevant to these entities because of the reporting requirements contained within s 292 of the Corporations Act. Small proprietary companies have much lower and restricted reporting obligations than listed public companies that are required to produce half yearly financial and director’s reports.\(^{15}\)

The central question in the proceeding has been whether directors of substantial publicly listed entities are required to apply their own minds to, and carry out a careful review of, the proposed financial statements and the proposed directors’ report, to determine that the information they

---


\(^{15}\) Corporations Act 2001 (Cth), s302.
Canberra Law Review (2015) 13(1)

contain is consistent with the director’s knowledge of the company’s affairs, and that they do not omit material matters known to them or material matters that should be known to them.\textsuperscript{16}

Middleton J importantly recognised that the directors and officer breaches were not a mere technical lapse, but director oversight of financial reporting was a fundamental aspect of shareholder protection and market integrity.\textsuperscript{17} However, the court was also cognisant that placing too great an onus on board functions may create an impossible impediment to business and addressed this issue:

I do not consider this requirement overburdens a director, or as argued before me, would cause the boardrooms of Australia to empty overnight. Directors are generally well remunerated and hold positions of prestige, and the office of director will continue to attract competent, diligence and intelligent people.\textsuperscript{18}

Perhaps the most enduring legacy of this case has been on the related issues of reliance and delegation more broadly.\textsuperscript{19} It was readily accepted that directors are not expected to be perfect or to have, ‘… infinite knowledge or ability.’\textsuperscript{20} Delegation by directors in compiling books of accounts is a commonplace and a legitimate business practice. However, in ratifying and validating financial statements, directors must purposefully apply their individual discerning judgement, even if that requires further inquiry.\textsuperscript{21}

Importantly, even in situations where a director may be appointed to exploit a particular expertise, he or she is not expected to constrain his or her consideration or interest to areas within his or her ken.\textsuperscript{22} A director is not entitled to rely exclusively or unconditionally upon management or external consultants regardless of their calibre or qualifications. ‘No director stood back, armed with his own knowledge, and looked at and considered for himself the financial statements.’\textsuperscript{23}

Directors cannot substitute reliance upon the advice of management for their own attention and examination of an important matter that falls specifically within the Board’s responsibilities as with the reporting obligations.\textsuperscript{24}

Herein lies a fine distinction worthy of greater analysis. It has long been recognised that company directors may delegate their responsibilities and rely upon competent advice limited some restrictions. However, directors may not abrogate their responsibilities and functions. The \textit{Corporations Act} provides, that subject to any constitutional impediments, directors may delegate “any of their powers”\textsuperscript{25} with the caveat that:

\begin{itemize}
  \item [(a)] the director believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution (if any); and
\end{itemize}

\begin{itemize}
\item \textsuperscript{16} \textit{ASIC V Healey} (2011) 29 ACLC 11-067, 1 228 [13] (emphasis added).
\item \textsuperscript{17} Ibid 1 228 [15].
\item \textsuperscript{18} Ibid.
\item \textsuperscript{19} See \textit{Corporations Act 2001} (Cth), ss 189 190 198D and discussion below.
\item \textsuperscript{20} \textit{ASIC V Healey} (2011) 29 ACLC 11-067, 1 229 [20].
\item \textsuperscript{21} Ibid.
\item \textsuperscript{22} Ibid 1 228 [18].
\item \textsuperscript{23} Ibid 1 332 [569].
\item \textsuperscript{24} Ibid 1 257 [175].
\item \textsuperscript{25} \textit{Corporations Act 2001} (Cth), s198D.
\end{itemize}
(b) the director believed:

(i) on reasonable grounds; and

(ii) in good faith; and

(iii) after making proper inquiry if the circumstances indicated the need for inquiry; that the delegate was reliable and competent in relation to the power delegated.\(^{26}\)

Moreover, a director is entitled to reliance upon expert advice if:

(b) the reliance was made:

(i) in good faith; and

(ii) after making an independent assessment of the information or advice, having regard to the director's knowledge of the corporation and the complexity of the structure and operations of the corporation.\(^{27}\)

These sections were inserted into the Corporations Act to clarify the vexing issue of directors performing duties of a multifarious nature that may be outside their ken, so as not to create an “overly conservative approach to management” and extinguishing entrepreneurism.\(^{28}\)

Striking the balance between good corporate governance and shareholder protection and entrepreneurship in terms of delegation and reliance upon advice has proven historically difficult.

Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to a conferring of an authority to do things which otherwise the person would have to do himself... [It] is never used by legal writers...as implying that the delegating person parts with his power in such a manner as to denude himself of his rights...[The] word “delegate” means little more than an agent”.\(^{29}\)

More recently, the Supreme Court of South Australia has interpreted the issue as simply as the extent of independent judgement required by a director when turning his or her mind to advice received is to do “no more than that they, having listened to and assessed what their colleagues have to say, must bring their own mind to bear on the issue using such skill and judgment as they may possess”.\(^{30}\)

In summary, abrogation of duty is inappropriate for a fiduciary (a director) under any circumstances, while, at least some, independent judgment and consideration (recognising the subjective knowledge possessed by the individual in question) is mandated in all cases.

\(^{26}\) Corporations Act 2001 (Cth), s190(2).
\(^{27}\) Corporations Act 2001 (Cth), s189.
\(^{29}\) Huth v Clarke (1890) 25 QBD 391 at 395 per Wills J.
\(^{30}\) Southern Resources Ltd v Residues Treatment and Trading Co Ltd (1990) 3 ACSR 207 at 225.
FAMILY VIOLENCE AND PROTECTION ORDERS
IN THE AUSTRALIAN CAPITAL TERRITORY

SHAWNI-ROSE FISHER

I. INTRODUCTION

On 2 April 2015 the Attorney-General of the ACT Government, Simon Corbell, announced the ACT Government will embark on a major family violence legislative reform program that will address the recommendations of the 2010 report Family Violence – A National Legal Response prepared by the Australia Law Reform Commission.¹ The report² was published on 11 November 2010 and relies on prior research that is likely to be dated. This begs the question: why is the ACT government only now looking to the recommendations of this report, five years later?

This article will discuss the calls for procedural reform in respect of the issuing and enforcement of Domestic Violence Orders in the Australian Capital Territory. This article identifies a number of procedures requiring reform, more particularly the aid and abet provisions that allow the applicant of the domestic violence order to be liable for the respondent’s breach; the lack of protection provided to victims during the high risk period after service of the domestic violence order; and the current sanctions for breaching a domestic violence order.

II. THE CURRENT CLIMATE

According to the World Health Organization (WHO), one in three women throughout the world will experience physical and/or sexual violence by a partner or sexual violence by a non-partner.³ The 2013 WHO report explains:

Violence against women is not a small problem that only occurs in some pockets of society, but rather is a global public health problem of epidemic proportions. It pervades all corners of the globe, puts women’s health at risk, limits their participation in society, and causes great human suffering.⁴

In their analysis of domestic violence and sexual violence in Australia, Phillips and Vandenbroek recognised that ‘domestic, family and sexual violence is found across all

⁴ Ibid, 5.
cultures, ages and socio-economic groups, but the majority of those who experience these forms of violence are women.  

It is extremely difficult to comprehend the prevalence of family violence globally or within a community. Any family violence statistics are limited due to a long culture of non-reporting by victims and its occurrence in the private sphere. The statistics at least serve as an indication that family violence is indeed a problem of epidemic proportions. For example, in the ACT region police attended 3,309 family violence incidents during the 2013/2014 financial year. This means ‘the ACT police are being called to reports of family violence on average nine times a day.’ By itself this is an alarming figure yet it only represents reported incidents of family violence in the ACT where Police have been called out.

According to the 2013 WHO report ‘globally, as many as 38% of murders of women are committed by an intimate partner’. In the ACT region, there have been a total of four homicides this year and of those four, three involved a man killing a partner or former partner.

This year alone in Australia, two women have died every week at the hands of a partner or ex-partner. The ACT has seen three family violence-related deaths in three weeks; two involving a man allegedly killing a partner or ex-partner, and the other a man allegedly killing his mother's partner in Wanniassa.

From the data available, many homicides committed by a partner or ex-partner tend to show a history of domestic violence with the fatal incident being ‘a beating gone too far’. Unfortunately, recent occurrences suggest when protection orders are in place they are not always effective in preventing domestic violence. This was the case with the death of 11-year-old Luke Batty and with the death of Canberra mother of three, Tara Costigan in February 2015.

In February 2014, Luke was tragically murdered by his father Greg Anderson. At cricket practice his father hit him over the head with a cricket bat and stabbed him with a knife. During the inquest into Luke’s death, it was found that Luke’s mother, Ms Rosie Batty, had been before the court 10 times in the previous year. On these occasions Ms Batty had been

---

7 World Health Organisation, above n 3.
9 World Health Organisation, above n 3, 2.
12 A. Browne, Violence Between Intimate Partners: Patterns, Causes, and Effects (Allyn and Bacon, 1997).
seeking and clarifying intervention orders against Luke’s father for family violence matters.\textsuperscript{14} Anderson had also been arrested for breaching the family violence intervention order against him and threatening to kill Luke’s mother. Anderson was released on bail.\textsuperscript{15} Luke’s brutal murder by his father raised national concern as to the rising level of family violence in Australia and the limitations of protection orders.\textsuperscript{16} Luke’s mother, Rosie Batty, was named the Australian of Year of 2015 and has used her public position to continue the dialogue nationally.

In February 2015, Canberra mother Tara Costigan was brutally axe-murdered by her former partner. Tara’s murder left her two boys, Rhily aged eleven, Drew aged nine, and one-week-old baby Ayla without a mother. Since this tragedy, the process for obtaining protection orders in the ACT and their effectiveness once in place, have been questioned for reform. The concern about the procedures arose where Ms Costigan had obtained an interim domestic violence order the day before her death.\textsuperscript{17}

\section*{III. WHAT IS DOMESTIC VIOLENCE?}

‘Domestic violence’ is more recently referred to as ‘family violence’. Family violence is considered more inclusive of all the family relationships in which violence is known to occur, not just the typical husband and wife arrangement. As this paper is based on research and commentary from various sources, these terms will be used interchangeably.

In recent years Australian jurisdictions have expanded the legislative definition of family violence to include a wider range of relationships, such as same sex, de facto and elderly parent and child. The definition was also expanded to include various forms of violence such as verbal, emotional, economic and sexual abuse. These forms of violence more accurately reflect the experiences of victims.\textsuperscript{18}

Family violence protection orders are titled differently in each jurisdiction. In the Australian Capital Territory (“the ACT”), the \textit{Domestic Violence and Protection Orders Act 2008} (ACT) authorises the Court to issue a Domestic Violence Order (“DVO”), a Personal Protection Order or a Workplace Order\textsuperscript{19}. This article is primarily concerned with Domestic Violence Orders within the context of family violence.

Section 13(1) of the \textit{Domestic Violence and Protection Orders Act 2008} (ACT) defines domestic violence as any conduct or threat to cause physical or personal injury to a partner, former partner, a relative, a child of a partner or former partner or a parent of the person’s child\textsuperscript{20}. It includes conduct that causes damage to property; is harassing or offensive; is directed at a pet and constitutes an animal violence offence; or constitutes a contravention of

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{15}] Melissa Davey, above n 13.
\item[\textsuperscript{19}] \textit{Domestic Violence and Protection Orders Act 2008} (ACT) s 7.
\item[\textsuperscript{20}] \textit{Domestic Violence and Protection Orders Act 2008} (ACT) s 15.
\end{enumerate}
\end{footnotesize}
an existing protection order\textsuperscript{21}. In these circumstances a protection order may be sought from the Court.

### IV. PROTECTION ORDERS

Australian States and Territories have enacted protection order legislation in an effort to prevent family violence and increase the safety of victims. Protection orders straddle civil and criminal court procedures. They are a civil order but breaches are considered a criminal offence.\textsuperscript{22} In a comparative analysis of Australian protection order law, Karen Wilcox identifies the need for the hybrid nature of protection orders:

The strategic value of protection orders in Australia has rested on the fact that they function injunctively rather than punitively, and are available in emergency situations. This means that protection orders can supplement criminal justice interventions or provide a remedy when the criminal law does not apply; for example, in the event of future likelihood of violence. They are also invaluable as a legal strategy for victims who want the violence to stop but are not interested in engagement with the criminal justice system.\textsuperscript{23}

A person can apply to the ACT Magistrates Court for a non-emergency domestic violence order to protect themselves and their children if they are exposed or at risk of being exposed to domestic violence. A police officer may apply for an emergency domestic violence order on behalf of a person if it is required in the circumstances.\textsuperscript{24}

For a non-emergency domestic violence order, the aggrieved person submits an application to the Court and the Registrar sets a first return date for the matter to be heard before the Court.\textsuperscript{25} The Registrar may also order the parties to attend a preliminary conference or mediation prior to the first return date in the hope of settling the matter by consent.\textsuperscript{26} In the meantime, the Court may grant an interim domestic violence order for the protection of the applicant.\textsuperscript{27} The application and the interim order are served on the respondent by the Police.

The applicant and the respondent are both required to attend the first return date of the application. If the respondent does not attend the first return date, the Court may decide the application in the respondent’s absence.\textsuperscript{28} If the respondent does appear, the respondent will be given the opportunity to indicate if they consent to the domestic violence order being made on a final basis. If they consent the Magistrate will make the final domestic violence order that day and both parties will receive a copy of the order. If the respondent objects to the domestic violence order being made, then the matter will be listed for final hearing. An interim domestic violence order will usually remain in place until the next court date. The ‘paramount consideration’ by the Court in deciding an application for a protection order is

\textsuperscript{21} Domestic Violence and Protection Orders Act 2008 (ACT) s 90.
\textsuperscript{25} Domestic Violence and Protection Orders Act 2008 (ACT) s 22.
\textsuperscript{26} Domestic Violence and Protection Orders Act 2008 (ACT) ss 24, 25.
\textsuperscript{27} Domestic Violence and Protection Orders Act 2008 (ACT) s 29.
\textsuperscript{28} Domestic Violence and Protection Orders Act 2008 (ACT) ss 26, 36.
‘the need to ensure that the aggrieved person, and any child at risk of exposure to domestic violence, is protected from domestic violence.’

A domestic violence order may restrain the respondent from contacting, harassing, threatening or intimidating the aggrieved person or damaging their property. A domestic violence order may prohibit the respondent from being within a physical proximity of the applicant or prescribe conditions on which the respondent may be on particular premises; be in a particular place; approach or contact the applicant. If necessary, the protections awarded by the domestic violence order can encompass the applicant’s dependent children. The domestic violence order remains in force generally for two years however it may be extended upon application to the Court if justified in the circumstances.

Domestic violence orders taken out in one jurisdiction are not automatically recognised in other jurisdictions therefore creating enforcement issues. At the COAG meeting held April 2015 it was agreed a national domestic violence scheme is necessary to enable such orders to be recognised across all States and Territories. The legal framework for this national scheme is said to be in place by the end of the year.

V. THE ADVERSARIAL APPROACH TO DOMESTIC VIOLENCE PROCEEDINGS

Over the past decade reforms to Australian State and Territory family violence legislation were victim safety focussed. The reforms included expanding the definitions of ‘family’ and ‘domestic’ violence and the relationships covered therein; increasing access to protection orders; provision of emergency protections; and recognising the needs of the children. However, it is the procedural application of the law and the enforcement of the orders that now require reform. A 2015 report by the Victims of Crime Commissioner ACT suggests many of the procedures for domestic violence proceedings in fact act as a disincentive to victim’s considering whether to seek protection from the legal system.

In 2008 the ACT Magistrates Court and the ACT Supreme Court underwent reforms to implement case management procedures in civil matters. In the traditional adversarial system, it is the primary responsibility of the parties to define the issues, conduct the investigations and advance the case in preparation for trial, where the matter is finally ‘played-out’ before a Judge. The Court’s traditional role was passive in the pre-trial preparation of the case, only intervening in specific circumstances such as when an interlocutory application was made.

29 Domestic Violence and Protection Orders Act 2008 (ACT) s 7.
31 Domestic Violence and Protection Orders Act 2008 (ACT) s 55.
32 Australian Broadcasting Corporation, ‘Domestic violence order national scheme promised, says Minister Assisting Prime Minister for Women’, The 7.30 Report, 17 April 2015 (Sabra Lane) <http://www.abc.net.au/7.30/content/2015/s4218864.htm>.
High costs, extensive delays and congested courts called for procedural reform. Case management schemes were implemented in an effort to reduce cost and delay.35

Contrastingly, domestic violence proceedings in the ACT continue to operate according to the traditional adversarial system. Victims of Crime ACT suggest this is an inappropriate system for domestic violence proceedings:

The adversarial approach of domestic violence order proceedings, particularly beyond a conference, can have the effect of re-traumatising or re-victimising vulnerable people. Applicants have reported experiencing the following at court, in particular at final hearings: encountering the respondent in the court precinct, difficulty in obtaining experienced legal representation, delays in the matter being heard, aggressive cross-examination by barristers on behalf of the respondent to the order, personal cross-examination by the respondent if not legally represented, and difficulty accessing the option to give their evidence via closed circuit television.36

Similar criticisms have been made internationally. For example, Fritzler and Simon made the following comment in review of United States procedure:

The adversarial system may be better suited to litigating crimes between strangers and certain other issues brought before our court system. However, it may be less effective when dealing with crimes between intimate partners where the adversarial approach may exacerbate the problem and increase the danger to victims.37

A hallmark of our criminal justice system is the presumption of innocence. The onus lies with the prosecution to rebut this presumption and prove beyond all reasonable doubt the guilt of the respondent. In domestic violence proceedings, this presumption puts the applicant at a disadvantage as it fails to take into account the nature of family violence and the vulnerability of the victim. Imagine a victim who has been locked in a physical and abusive relationship for tens of years. Imagine the emotional taunts the victim hears regularly, ‘who are you going to tell? No one will believe you. You’re no one’. Then imagine seeking help from a system that is virtually telling you the same thing: ‘Prove it!’ The legal system is exposing the victim to the same intimidation tactics their tormentor does.

The legal system is inherently apprehensive of the applicant’s integrity, motives and intentions in bringing a claim against the respondent. This was the experience of Rosie Batty. Ms Batty said on ABC’s Q&A program that harsh judgments and criticism from people who were meant to support victims were not uncommon. Ms Batty reflected from her own experiences:

You can’t always trust the response from the people that you need to turn to [to] help you in a way that is non-judgmental…So your journey is as tough going through that process as it is for the abuse that you’ve been subjected to.\(^{38}\)

The ACT Law Society has commented that ‘applications for Domestic Violence are sometimes made in order to gain some tactical advantage over an ex-partner in Family Court proceedings’\(^{39}\) indicating that the ACT Law Society is sceptical of some applicant’s motives for seeking a domestic violence order.

Once proceedings have commenced, the adversarial system allows the respondent to lead cross-examination of the victim if the respondent is self-represented. Retired Chief Justice of the Family Court Alastair Nicholson told the ABC that ‘men accused of physically or sexually abusing their partner are able to directly cross examine their victim in court, because they lack legal representation’.\(^{40}\) The same ABC story notes that Legal Aid groups say this is so traumatising that ‘some women are too frightened to leave their abusive partners and go through the family court system’.\(^{41}\) If there are concurrent proceedings arising out of the same conduct\(^ {42}\) then the victim may be required to give their evidence twice before the Court and be cross-examined twice. The legal system is effectively enabling the respondent’s emotional abuse of the victim.

In response to the Victims of Crime ACT report cited above, Attorney General Simon Corbell announced on 11 May 2015 the ACT Government will introduce a new class of interim domestic violence orders to counter the reported re-victimisation of domestic violence victims.\(^ {43}\) This class of interim orders are to apply when the respondent has been charged with criminal offences in concurrent proceedings. Though there is little information available as to how this new regime will operate, this is a step in the right direction.

VI. AID & ABET PROVISIONS

Incredulously, in some Australian States, including the ACT, the applicant may be charged for aiding and abetting the defendant’s breach of the domestic violence order. The Law Reform Commission noted the following:

Until fairly recently, the long established common law position was that a person could not be convicted of aiding and abetting the commission of an offence of which he or she was the victim. In *Tyrell* [1894] 1 QB 710, the defendant, a girl under the age of 16, was charged with aiding and abetting the principal to have unlawful sexual intercourse with her. The court

---


\(^{40}\) Sally Sara, ‘Claims cuts to Legal Aid putting women in distress’ *ABC News* (online) 8 April 2013. <http://www.abc.net.au/pm/content/2013/s3732375.htm>.

\(^{41}\) Ibid.

\(^{42}\) Such as criminal proceedings for assault brought by the Crown and then the domestic violence proceedings brought by the victim.

found that the defendant could not be guilty of aiding and abetting a crime aimed at protecting girls of her age from sexual intercourse. However, in a number of recent cases, the party for whose benefit an apprehended violence order… was made has been convicted of aiding and abetting the criminal offence of breaching a domestic violence order.\textsuperscript{44}

The following case study submitted by National Legal Aid to the Australian Law Reform Commission highlights the ignorance of the aid and abet provisions:

An Aboriginal woman living in the Pilbara had been in a long-term violent relationship. After being physically assaulted again, she obtained an interim violence restraining order against her partner on the advice of the police. Some weeks later after pressure from extended family and her children she allowed her partner to attend her house to see the children. Her partner again assaulted her and the police were called to the house. The police charged her partner with assault and breach of the restraining order. The woman was also charged with breach of restraining order as a party to the offence. She pleaded guilty and was given a fine. She remarked to the refuge that she would never seek a protection order again.\textsuperscript{45}

The practice of charging victims of family violence for the respondent’s breach of the domestic violence order fails to take into account the nature of family violence. Completely severing ties with the respondent may be impossible for the applicant, particularly if the parties share children, social connections and/or reside in a small town.

If it is clear to the police or the court that the DVO process is being used for other than appropriate reasons, the DVO should be varied or revoked. It is inappropriate to charge a victim of family violence for aiding and abetting breaches based on concern for the misuse of public resources as this undermines the policy intent of family violence legislation. Brown and other criminal law academics pinpoint the flaws of this reasoning:

While the frustration and concern for ‘wasted resources’ on the part of police can be appreciated, it is questionable whether the practice of laying breach charges against the person for whose benefit the order has been made is likely to advance the preventative objective of apprehended violence laws. The risk of being charged as an accessory to breach is likely to represent a significant disincentive to victims of domestic violence who are considering applying for an order.\textsuperscript{46}

The ‘control theory’ is just one social theory that attempts to explain the complex dynamics of family violence relationships:

Abusers, in an effort to maintain control over other members of the family, may use many forms of intimidation, such as coercion, isolation, economic abuse, and denial of personal blame. The victim(s) typically learn how to respond to the various forms of intimidation, although the struggle to challenge the abuse/abuser may become too overwhelming or dangerous for the victim(s). As a result, the victim(s) may begin to modify his/her/their own behaviour, slowly giving up control in order to survive and avoid continued abuse. Isolating the victim from any social contracts may be the most harmful form of intimidation the abuser

\textsuperscript{44} Australian Law Reform Commission, Family Violence – A National Legal Response, ALRC Report 114 (2010).


uses because the possibility of escape for the victim(s) is greatly reduced in the absence of social support.47

‘Why didn’t you just leave’ is a common question levelled at victims of domestic violence. American Psychologist Martin E.P Seligman and his colleagues conceptualised the theory of ‘learned helplessness’ to describe the failure of dogs to escape a punitive environment, even when given the opportunity to do so.48 Walker then used the learned helplessness theory to explain why victims of family violence remain in volatile relationships.49 The repeated exposure to abuse causes the victim to become passive because they feel there is nothing they can do that will result in a positive outcome.50 Safety concerns for themselves and their children, isolation, shame and embarrassment and a lack of trust in the police may affect the victim’s decision not to apply for protection from the legal system or report any breaches of the domestic violence orders.51

Seligman and colleagues criticised the application of the theory of learned helplessness to domestic violence victims. Seligman and colleagues argued that while women may use ‘strategies that seem passive or tantamount to doing nothing, these may actually be active efforts to reduce the risk of violence and abuse to themselves and their children’52 This passivism is therefore a rational defence mechanism calculated by the victim when it is apparent leaving the relationship or seeking legal assistance might only place the victim and their children in greater danger. This was the experience of Rosie Batty as she explained in a live cross with Studio 10:

We keep punishing the person who's already being punished. Women don't leave not because they don't want to. It's because they are potentially too frightened to because of what might happen.

And you know what happened to me? Greg had finally lost control of me and to make me suffer and the final act of control, which was the most hideous form of violence, was to kill my son so don't you ever think that if we don't report it's because we don't want to. It's because we are so scared about what might happen53.

49 L.E. Walker, ‘Battered Women and Learned Helplessness’ (1977) 2, 3-4 Victimology 525-534.
VII. FAILURE TO PROTECT APPLICANTS DURING THE HIGH RISK PERIOD

Once an application for a domestic violence order is made the Court will provide a copy to the ACT Policing Service and Process Team for service on the respondent. This happens as soon as practicably possible, usually within 24 to 48 hours of the order being made. The interim domestic violence order takes effect once the respondent receives their copy from the Police.

Domestic violence orders are sought at a time when the applicant feels most threatened by the respondent. However, in line with the theories outlined above, the act of taking out a domestic violence order against the respondent may heighten the risk to the applicant. For example, Tara Costigan was murdered just 24 hours after she obtained a DVO from the ACT Magistrates Court. It was another victim’s experience that after the domestic violence order was served on the respondent threats and vandalism only increased. The victim told the Canberra Times ‘so far I have had six DVOs against him, he gets served it and all the threats happen again, I can’t prove it, so then I just don’t go ahead. If these things are happening to me because of the DVO, then I’m not going to take that risk.’ Experiences such as this are not uncommon, so much so that support workers are advising victims against applying for such orders ‘if it is likely to trigger further violence.’

The ACT has no procedures for managing the victim’s safety during the high risk period that immediately follows service of the protection order. Once the domestic violence order is served on the respondent, the law graduates from proactive to reactive, waiting for the DVO to be breached before the system can intervene again.

Legislators must consider measures to reduce the likelihood of harm to the applicant and neutralise the defendant during this high risk period. The Court should make it clear to the applicant that this is an especially high risk period for them and their children, and suggest practical ways the applicant can protect themselves. For example, the applicant might be encouraged to stay with family or friends for the 72 hours following service of the DVO. Funding might be provided to domestic violence services to provide respite services of this kind should applicants not have an appropriate support network to facilitate this. However, it is conceded these suggestions place the applicant upon the victim to again protect themselves from the respondent. The government must come up with mechanisms that shoulder this burden with the victim. Perhaps a heightened allocation of police resources during this high risk time is more effective. Consideration might also be given to establishing a domestic violence unit purposeed to manage these risks.

No matter what safety mechanisms are devised, the safety of the applicant must be accounted for in policy and in practice during this high risk period. At present, the legal system fails in this regard.


VIII. Weak Sanctions & Shifting the Australian Culture

It is an offence to breach a domestic violence order, the maximum penalty being a fine of $75,000 or five years imprisonment\(^\text{56}\) and yet a Canberra Times article notes that ‘more than half of those breaking domestic violence and protection orders are getting off with a good behaviour order.’\(^\text{57}\) While good behaviour orders may deter the defendant from reoffending, punitive sanctions for domestic violence breaches should also be rehabilitative.

A reoccurring theme of the national dialogue on domestic violence is the need to change cultural behaviour. Since Luke’s death, Rosie Batty has been a key voice influencing this movement. When awarded as the Australian of the Year 2015, Ms Batty pleaded with the Australian people in her speech:

To the Australian people, look around. Do not ignore what you see and what you know is wrong. Call out sexist attitudes and speak up when violence against women is trivialised. To men, we need you to challenge each other and become part of the solution. Raise the conversation and don’t shy away from this uncomfortable topic. We cannot do this without you. To the women and children who are unsafe, in hiding or living in fear, who have changed their names, left their extended families and moved from their communities to find safety, you do not deserve to live a life that is dictated by violence. You are not to blame.\(^\text{58}\)

Ms Batty spoke of proactive campaigns to ‘educate and challenge community attitudes’. Such education programs are vital. The message that domestic violence will not be tolerated must target men, women, children, teenagers, schools and workplaces; it must reach every corner of society. However, it is just as important for resources to be applied to programs that target known offenders. Once an application is made against someone for domestic violence, the respondent should be required to attend some sort of counselling and education program. If they breach the order, greater consideration should be given to punitive sanctions rather than just a good behaviour order as such orders downplay the seriousness of the offence. Further counselling and education programs should be mandatory following any breach. Greater attention to changing the behaviour of known offenders may have a greater impact on changing the culture of domestic violence in Australia.

IX. Conclusion

Family violence is thoroughly canvassed by the Australian media and is scheduled on most political agendas. Nevertheless, family violence is ever present in our communities. Rosie Batty comments ‘the statistics are unacceptable, indisputable and, if they did happen on our streets, there would be a public outcry.’\(^\text{59}\)

---

\(^\text{56}\) Domestic Violence and Protection Orders Act 2008 (ACT) s 90 (as at 21 April 2015).


\(^\text{59}\) Ibid.
The family violence legislative reform program announced by Attorney-General Simon Corbell\(^60\) must address the current Court procedures followed in domestic violence proceedings. In the ACT, domestic violence protection orders are a somewhat effective tool used to protect those at risk of family violence. However, their effectiveness is limited by the procedural deficiencies outlined in this article. Certain adversarial procedures employed by the ACT legal system fail to properly account for the vulnerable state of family violence victims and inadvertently contribute to their re-victimisation. The safety of the applicant is not currently accounted for in the high risk period that immediately follows service of the domestic violence order on the respondent. Certain sanctions downplay the seriousness of domestic violence and aid and abet provisions punish the applicant for the respondent’s breaches of domestic violence orders.

Domestic violence orders must be recognised across borders to ensure applicants are protected wherever they are. It is inappropriate to charge a victim of family violence for aiding and abetting a respondent’s breach of a domestic violence order based on concern for the misuse of public resources. The aid and abet provisions should thus be repealed. The safety of the applicant must be accounted for in policy and in practice during the high risk period immediately following service of the domestic violence order on the respondent and finally, the sanctions ought to serve both as a sanction for offenders \textit{and} a mechanism for cultural change. This requires the sanctions to be appropriately punitive, to act as a deterrent to offenders and the general public, and include programs rehabilitative in nature.

Family violence is a social evil difficult for any legal system to manage. Commitment by the Government to addressing this epidemic and continual evaluation and reform of current procedures can only lead to positive change. The future generations of this country deserve our best efforts to ensure domestic violence is no part of the culture they are raised in.

MR FLUFFY: ACQUIRING A TOXIC LEGACY

ABSTRACT

Asbestos has long been recognised as a deadly substance. Yet its presence in older buildings throughout Canberra and surrounding regions had been underappreciated for equally as long. Since early 2014, the revelation that more than one thousand homeowners may be exposed to airborne asbestos fibres has become a dominant public policy concern. This paper surveys the history of the installation of loose fill asbestos in these homes by the business known as Mr Fluffy, the unsuccessful removal program in the 1990s and removal program now underway in Canberra. Discourse surrounding this current removal program has contemplated whether contaminated homes could be compulsorily acquired by the Australian Capital Territory (ACT) government. This paper will also examine the legitimacy of any potential compulsory acquisition.

I. THE MR FLUFFY STORY

Between 1968 and 1979 ‘Mr Fluffy’ loose fill asbestos was installed in homes in Canberra and the surrounding region. Dirk Jansen through his company D. Jansen & Co. Pty Ltd (more commonly known and nicknamed as ‘Mr Fluffy’) marketed ‘Asbestosfluf’ as a safe, inexpensive but effective insulation product.1

Asbestosfluf was installed by spraying the roof space with a layer of the material approximately 5cm thick across the ceiling. Asbestosfluf was comprised of 100% amosite asbestos (brown asbestos), a small minority of the Mr Fluffy houses in Canberra contained crocidolite asbestos (blue asbestos).2 Crocidolite was marketed as a premium product, however it is more dangerous as the fibres are thinner. The asbestos used by Mr Fluffy was loose fill asbestos, comprised of crushed raw asbestos fibres. The crushed asbestos particles are significantly more likely to become airborne and cause health problems than sheet asbestos which was a commonly used building material.3

In 1968 Mr Major, a government occupational health expert, recommended to the ACT government that the Mr Fluffy business be stopped from installing more loose fill asbestos, and that asbestos products only be used for essential purposes.4 This recommendation was

---

1 Advertisement, ‘New asbestosfluf the perfect thermal insulating material’ 30 March 1968 The Canberra Times (Canberra) 6; Advertisement, ‘Asbestosfluf the perfect thermal insulating material’ 7 March 1969 The Canberra Times (Canberra) 24.

2 Explanatory Statement, Planning and Development (Loose-Fill Asbestos Insulation Eradication) Amendment Regulation 2014 (ACT).

3 Ibid.

made on the basis of health concerns for the both the installers and the wider community.\(^5\) No action was taken by the government in response to Mr Major’s report and Mr Fluffy was permitted to continue installing loose fill asbestos until the ACT introduced asbestos controls in 1978.\(^6\)

In 1972, Dirk Jansen’s son took over D. Jansen & Co. Pty Ltd and launched J & H Insulations. The Asbestosfluf was rebranded and renamed ‘Amoswool’. The new advertisements proudly boasted that the insulation material was ‘completely harmless’ and would ‘add market value to the home’.\(^7\) The new advertisements did not mention that the product was composed of asbestos.

Loose fill asbestos was installed not only in Canberra, but also its surrounding regions including, Bungendore,\(^8\) Queanbeyan and Yass. A separate company called ‘Bowers Asphalt’ was responsible for installing loose fill asbestos in Sydney homes.\(^9\) In Canberra, some homeowners were able to purchase loose fill asbestos in bags so that they could install the product themselves.\(^10\) Homeowners transported the asbestos in trailers to the South Coast and installed it in their coast houses themselves, without using any protective gear.\(^11\) It is believed that Mr Jansen also gave several tonnes of the loose fill asbestos to an unknown company somewhere in the Berrigan Shire in New South Wales (NSW).\(^12\)

The proliferation of loose fill asbestos in NSW is unknown due to an absence of information regarding Mr Fluffy and Bower’s Asphalt operations. Queanbeyan has the highest amount of contaminated houses in NSW which is expected given its close proximity to the ACT.\(^13\) The NSW government has located a total 53 affected homes, some of which have already been remediated or demolished at the owner’s expense.\(^14\)

In a study commissioned by the NSW government, PricewaterhouseCoopers has estimated

---

\(^5\) Ibid.

\(^6\) Lenore Taylor ‘Up to 8000 ACT houses at asbestos risk’ *The Canberra Times* (Canberra); Rod Campbell ‘Authorities knew of asbestos risk’ *The Canberra Times* (Canberra) 8 October 1987, 1.


\(^8\) Emma Macdonald ‘Bungendore family face ruin after their horrific Fluffy Discovery’ *The Canberra Times* (Canberra) 14 December 2014.

\(^9\) Alexis Carey ‘Revelations Rozelle’s former Bowsers Asphalt Pty Limited used Mr Fluffy-style loose-fill asbestos in Sydney buildings* The Sydney Telegraph (Sydney) 6 August 2014; Nicole Hasham ‘Mr Fluffy asbestos in more than 300 NSW homes: government left with clean-up bill’ *The Sydney Morning Herald* (Sydney) 12 November 2014; Emma Macdonald ‘Mr Fluffy descendants express sympathy for affected families’ *The Canberra Times* (Canberra) 24 July 2014.


\(^13\) Ibid.

\(^14\) Kirsten Lawson ‘Another Queanbeyan property tests positive to Mr Fluffy asbestos insulation’ *The Canberra Times* (Canberra) 5 March 2015.
that it is likely that between 372 and 5376 NSW homes are affected by Mr Fluffy loose fill asbestos.\textsuperscript{15} In their interim report, their highest calculation of 5376 has captivated large amounts of media attention;\textsuperscript{16} however PricewaterhouseCoopers are not due to produce a final report until 30 April 2015. In the interim, a voluntary testing scheme is currently operating in NSW for concerned homeowners.\textsuperscript{17} However, given the lack of financial support or certainty for affected homeowners many are reluctant to participate in the program even if they suspect loose fill asbestos.\textsuperscript{18}

Between 1989 and 1993, the Commonwealth government and the ACT government jointly funded a program to remove the loose fill asbestos from the 1060 identified affected homes. On 11 May 1989, the ACT became self-governing\textsuperscript{19} and the Territory became responsible for the administration of the removal program subject to a memorandum of understanding with the Commonwealth.\textsuperscript{20} The memorandum set out the arrangements for the program; including a provision for further Commonwealth support should the houses require further remediation.

The removal program had three stages, the first stage was to inspect all residential Canberra homes constructed prior to 1979 to determine which houses were affected by loose fill asbestos; secondly to seal off the roof spaces in those affected homes and finally a removal phase to be conducted on the affected homes.\textsuperscript{21} At the time, the then general manager of the Asbestos Branch advised that the removal program would be unsuccessful as the remediation would not result in complete removal of loose fill asbestos.\textsuperscript{22} This was supported by evidence of homes that had privately undertaken asbestos removal continuing to reveal signs of residual asbestos.\textsuperscript{23} The ACT Chief Executive of the Housing Industry Association also identified that the costly asbestos removal program would not remove all of the asbestos and that the only way to ensure all of the asbestos fibres were removed would be demolition.\textsuperscript{24}

Importantly, the program did not investigate the presence of loose fill asbestos in commercial properties despite information held by the Territory that a limited number of commercial buildings were believed to have loose fill asbestos.\textsuperscript{25} There is evidence that Bowers Asphalt installed loose fill asbestos into commercial buildings in Sydney.\textsuperscript{26} Neither the ACT government nor the NSW government are currently investigating the potential presence of loose fill asbestos in commercial properties.

The ACT ‘removal program’ concluded in 1993 and each homeowner received a notice of Completion of Asbestos Removal Work, advising that some residual asbestos may be present

\begin{itemize}
\item[15] Letter from PricewaterhouseCoopers to NSW Department of Finance and Services above n 12.
\item[16] Emma Macdonald ‘NSW government endorses asbestos inquiry and announces crisis package’ \textit{The Canberra Times} (Canberra) 19 December 2014.
\item[17] Kirsten Lawson above n 14.
\item[18] Joint Select Committee on Loose-Fill Asbestos Insulation above n 10.
\item[19] \textit{Australian Capital Territory (Self-government Act) 1988} (Cth).
\item[22] Mark Hourigan ‘Hidden costs in asbestos removal’ \textit{The Canberra Times} (Canberra) 1 August 1989, 1.
\item[23] Maurice Blackburn Lawyers above n 21.
\item[25] Emma Macdonald ‘Fears of asbestos in commercial buildings’ \textit{The Canberra Times} (Canberra) 25 July 2013; Emma Macdonald ‘Mr Fluffy asbestos in Ainslie shops’ \textit{The Canberra Times} (Canberra) 7 February 2014.
\item[26] Kirsten Lawson ‘NSW Fluffy families overjoyed at buyback and demolition’ \textit{The Canberra Times} (Canberra) 19 December 2014.
\end{itemize}
in the home.\textsuperscript{27} Crucially, this information was placed on the building file of the property but was not required to be disclosed on any contract for sale until 2004.\textsuperscript{28}

The Mr Fluffy crisis would not revive until 2013 with the discovery of the ‘Downer House’. Despite prior knowledge of the risks of residual asbestos after the removal program, the discovery of the Downer House revealed that residual loose fill asbestos had migrated down through the walls of the house.\textsuperscript{29} The impact of the Downer House was heightened as the visual inspections conducted in the 1990s as part of the removal program had missed the presence of loose fill asbestos.\textsuperscript{30}

ACT Worksafe responded to the discovery of the Downer House by writing to Mr Fluffy affected homeowners previously identified by the removal program, and who had obtained certificates of removal, recommending that their houses be tested for the presence of residual asbestos. Many of those homeowners had purchased their home after the removal program, believing it to be free of asbestos. Many of the Mr Fluffy affected homeowners found that the loose fill asbestos had migrated into walls, cupboards down through their houses, some being forced to leave or seal off parts of their house.\textsuperscript{31}

\section*{II. ACT Buyback}

On 25 June 2014, The ACT government established the ACT Asbestos Taskforce (‘The Taskforce’) in response to what was dubbed the Mr Fluffy asbestos crisis. The Taskforce aimed to ‘eradicate the ongoing exposure risks from the continuing presence of loose fill asbestos insulation in Canberra houses.’\textsuperscript{32} The taskforce determined that the only safe way to fully eradicate the risks of the loose fill asbestos was for the demolition of the affected homes.

The ACT government received a loan from the Commonwealth to facilitate the Loose Fill Asbestos Insulation Eradication Scheme,\textsuperscript{33} more commonly known as the ‘buyback scheme’ to pursue the demolition of the affected homes. ‘Under the scheme the ACT government will acquire, demolish, and safely dispose of all affected homes, remediate affected blocks and then resell them to defray overall Scheme costs.’\textsuperscript{34} The loan received by the ACT government was received because of the memorandum of understanding entered into during the 1990s removal program, under which the Commonwealth agreed to indemnify the ACT government for the costs associated with future removal of Mr Fluffy asbestos in the Territory.

\begin{itemize}
\item[27] Maurice Blackburn Lawyers above n 21.
\item[28] Ibid.
\item[29] Asbestos Response Taskforce above n 20.
\item[30] Emma Macdonald ‘Fears of asbestos in commercial buildings’ \textit{The Canberra Times} (Canberra) 25 July 2013.
\item[31] Kirsten Lawson ‘Katy Gallagher sets up a Mr Fluffy asbestos crisis taskforce’ \textit{The Canberra Times} (Canberra) 25 June 2014.
\item[34] Explanatory Statement, \textit{Appropriation (Loose-fill Asbestos Insulation Eradication) Bill 2014–2015} (ACT) 2.
\end{itemize}
The ACT government announced the introduction of the buyback scheme on 28 October 2014. The buyback scheme was optional for all affected homeowners, and will close on 30 June 2015. Currently the Taskforce has received 948 applications for property valuations under the buyback but only 773 of those offers had been accepted. It is anticipated that a small minority of affected homeowners will not opt into buyback scheme. The ACT government has reserved its right to acquire affected homes through compulsory acquisition.

Given the ongoing health risks associated with being in the property, the ACT government has imposed strict regulations on affected homes. The risk for home owners is that if they do not accept the buyback, and the ACT government chooses not to go ahead with the compulsory acquisition of their property, they will be required to comply with the stringent requirements imposed by the Dangerous Substances Act 2004 (ACT). The new requirements include the address of the house being added to a publically available register of loose fill asbestos affected properties. The costs of compliance will be borne by the homeowner, as the costs of compliance with the provisions of the Dangerous Substances Act will not be reimbursed or subsidised by the government in any way.

III. NSW RESPONSE

The NSW government was invited by the Commonwealth to participate in the 1990s removal program. They declined the offer. Additionally, the NSW government also refused to partake in the investigation stage of the removal program to identify affected homes. The investigation would have revealed the number of affected houses in NSW, and failure to partake in this program means that the NSW government is currently unaware of the number of affected houses.

The Commonwealth views that the removal of asbestos in NSW is a matter for the state. ‘In NSW, the Commonwealth did not see itself as having a role; its role in the ACT program was because of its status as a former Territory administrator’. It was left to the NSW government to fund the removal of the loose fill asbestos in NSW homes. Due to the concentration of affected homeowners, the Queanbeyan City Council is responsible for a large amount of lobbying to both the state and Commonwealth government for assistance with the Mr Fluffy crisis. The affected homeowners in Queanbeyan have petitioned for NSW and Commonwealth government assistance since the 1990s when the ACT removal process was conducted.

While the affected ACT homes were being remediated in the 1990s, the NSW government instead offered asbestos testing to homeowners that provided the government with a sample.

36 Kirsten Lawson ‘Mr fluffy home owners will be forces to seal dwellings if they stay’ The Canberra Times (Canberra) 30 October 2014.
37 Ibid.
38 Meredith Clisby ‘Queanbeyan Homes still have asbestos’ The Canberra Times (Canberra) 3 July 2013.
39 Joint Select Committee on Loose-Fill Asbestos Insulation above n 10.
40 Adam Spence ‘Revealed: How the scandalous Mr Fluffy Legacy lives on’ City News (Canberra) 6 August 2014.
41 Joint Select Committee on Loose-Fill Asbestos Insulation above n 10.
A letter was sent to 5,000 NSW houses that were built before 1980 inviting them to have a home inspection to determine if their house contained asbestos, however only 272 houses were inspected.\textsuperscript{42} If an affected house was identified, any subsequent remediation was undertaken at the homeowners’ expense as there was no government funding available. NSW currently rely on voluntary testing to identify loose fill asbestos affected homes.\textsuperscript{43} As the extent of affected houses is yet to be determined, it is impossible to estimate the costs of any removal or demolition program in NSW. Homeowners in NSW are reluctant to come forward for voluntary testing, as unlike the ACT there is no expected funding for removal of the hazardous substance, the discovery of asbestos is likely to devalue the home.\textsuperscript{44}

The discovery of the Downer House and consequent actions by the ACT government placed greater pressure on the NSW government to take action. In response the NSW government created the Loose Fill Asbestos Insulation Taskforce to advise the government on the best solution.\textsuperscript{45} The NSW commissioned and subsequently received their report highlighting the health risks of Mr Fluffy loose fill asbestos and recommending a demolition program similar to the ACT.\textsuperscript{46} Importantly, the NSW government immediately implemented emergency funding for affected homeowners. The Loose Fill Asbestos Insulation Taskforce is currently considering the best course of action to deal with the Mr Fluffy crisis, which may include an option for NSW owners to rebuild on their own land after a demolition had taken place, an offer not extended to ACT residents in the buyback scheme.\textsuperscript{47}

The recent actions of the NSW government indicate a major turnaround when compared to the NSW government’s actions in the 1990s. Prior to the report being received by the NSW government maintained that Mr Fluffy loose fill asbestos did not pose a health risk so long as it was contained.\textsuperscript{48} The Heads of Asbestos Coordination Authorities was tasked with all NSW policies in relation to all forms of asbestos, rather than just the presence of loose fill asbestos.\textsuperscript{49} Previously, there was no provision for NSW government funding for remediation, demolition or sealing of the property.

In the Queanbeyan City Council there is currently no legal requirement for an existing owner to disclose information about the property having loose fill asbestos insulation.\textsuperscript{50} This is contrasted with the ACT approach where it is mandatory to have an asbestos report detailing the risk that asbestos may be present in the home included contract for sale.

\textsuperscript{42} Ibid.
\textsuperscript{43} ‘Free asbestos checks for Queanbeyan Homes built pre-1980’ The Queanbeyan Age, (Queanbeyan) 28 October 2014
\textsuperscript{44} David Butler ‘Mr Fluffy’s toxic asbestos legacy in Qbn’ The Queanbeyan Age, (Queanbeyan) 26 June 2014
\textsuperscript{45} Emma Macdonald ‘NSW government endorses asbestos inquiry and announces crisis package’ The Canberra Times (Canberra) 19 December 2014.
\textsuperscript{46} Kirsten Lawson ‘NSW inquiry calls for ACT-style buy back and demolition of Fluffy houses’, The Canberra Times, (Canberra) 18 December 2014; Joint Select Committee on Loose-Fill Asbestos Insulation above n 10, 75.
\textsuperscript{47} Kirsten Lawson ‘NSW Fluffy Families overjoyed at buyback and demolition’ The Canberra Times (Canberra) 19 December 2014.
\textsuperscript{48} Kirsten Lawson ‘Queanbeyan residents told Mr Fluffy asbestos homes are safe’ The Queanbeyan Age, (Queanbeyan) 27 June 2014
\textsuperscript{49} Joint Select Committee on Loose-Fill Asbestos Insulation above n 10, 67.
\textsuperscript{50} ‘Free asbestos checks for Queanbeyan Homes built pre-1980’ The Queanbeyan Age, (Queanbeyan) 28 October 2014.
IV. COMPULSORY ACQUISITION

After the conclusion of the buyback scheme it is likely that the ACT government will have some affected homeowners who have not voluntarily entered into the scheme. As at 13 May 2015, 948 buyback applications had been received by the Taskforce, 909 offers had been made accepted but only 773 of the offers had been accepted. There were 73 homes that had not made buyback applications.51 The application period for the buyback scheme close on 30 June 2015. From these figures, it is highly likely that not all homes will accept the buyback offer, meaning the ACT government will have to consider alternatives which may include compulsorily acquiring the homes.

In May 2015, the ACT Asbestos Taskforce sent a letter to affected homeowners who had not accepted a buyback offer. The offer stated that after the buyback scheme closed, the government would become a ‘purchaser of last resort’ offering the market value of the home (which would consider the presence of asbestos), and remove the stamp duty concession and first right of refusal on the remediated block.52 The government has previously reserved its right to compulsorily acquire blocks. The announcement demonstrates that compulsory acquisition will be last resort for the ACT government and it will exhaust all potential avenues to acquire the property by agreement.

A. The Process of Compulsory Acquisition

The ACT is the only jurisdiction in Australia with an exclusively leasehold land tenure system. Under the leasehold land tenure system land is held subject to a crown lease from the Commonwealth. An acquiring authority of the Territory government may acquire a crown lease by agreement with the leaseholder or by a completion of the compulsory acquisition process under the Land Acquisition Act 1994 (ACT).

To begin the compulsory acquisition process, the acquiring authority makes a pre-acquisition declaration that it is considering the acquisition of an interest in land for a public purpose.53 The declaration must identify the acquiring authority, the land, the interest in the land and the public purpose for which the land is intended to be used.54 The pre-acquisition declaration is given to a person with an interest in the land.55 It must also be published in the Gazette and a daily newspaper, and a copy is given to the Registrar General.56

The executive may determine that there is an urgent necessity for the acquisition and that it would be contrary to the public interest for the acquisition to be delayed, or that the making of a pre-acquisition declaration would result in disclosure of information prejudicial to the ACT.57 In these circumstances, the executive may issue a certificate, disclosing what it

---

53 Land Acquisition Act 1994 (ACT) s 19(1).
54 Ibid s 19(2).
55 Ibid s 19(6).
56 Ibid s 20(a)-(b).
57 Ibid s 21(1).
believes to be the appropriate information relating to the proposed acquisition. The result of the executive issuing a certificate is that a pre-acquisition declaration is not required, and if a pre-acquisition declaration has already been issued then it ceases to have effect. The certificate is forwarded to the any person affected by the certificate and published in the same way as the pre-acquisition declaration. It is unlikely that the executive will deem that there is an urgent necessity for the acquisition unless the Mr Fluffy is presenting an immediate health risk to the wider community.

Assuming a pre-acquisition declaration is made and no certificate has been issued by the executive, any person affected is given an opportunity to respond to the declaration by way of application to the executive within 28 days. The application for reconsideration of the declaration must be in writing and set out the reasons for seeking reconsideration. The executive will reconsider the pre-acquisition declaration, giving consideration to the reasons that were specified in the application. The executive is then empowered to revoke, confirm or vary the declaration, giving reasons for their decision. If no application is lodged, the pre-acquisition declaration automatically becomes absolute 28 days after it is issued.

Once a pre-acquisition becomes absolute, the executive declares that the interest is acquired by way of compulsory acquisition, publishes that declaration (which again must identify the land and the public purpose for which it is being acquired) in the Gazette, at which time the interest in the land is vested in the acquiring authority.

During the process of the compulsory acquisition, the owner of the property is not permitted to enter into an agreement with any other person in respect of the owner’s interest in the land without first disclosing the existence of the declarations.

If a person has their interest acquired by compulsory process, they are entitled to be paid compensation. Under s 45 of the Act, a dispossessed landowner is entitled to claim:

(a) the market value of the interest acquired;
(b) special value, that is value additional to the market value;
(c) reduction in the market value of other land held by the person caused by the acquisition.

---

58 Ibid s 21(2).
59 Ibid s 21(3).
60 Ibid s 22.
61 Ibid s 21(4)-(5).
62 Ibid s 23(1) and s 23(3).
63 Ibid s 23(2).
64 Ibid s 24(1).
65 Ibid s 24(3).
66 Ibid s 34(2).
67 Ibid s 33(1).
68 Ibid s 33(2).
69 Ibid s 33(3).
70 Ibid s 33(4).
71 Ibid s 31(1).
72 Ibid s 42.
73 Ibid s 45(2)(a)(i).
74 Ibid s 45(2)(a)(ii).
75 Ibid s 45(2)(a)(iii).
(d) other losses that were a direct, natural and reasonable consequence of the acquisition;\textsuperscript{76} and
(e) legal and other professional costs.\textsuperscript{77}

Unlike the buyback offer, the market value of the interest acquired is calculated at the date of the acquisition. For affected homeowners the market value of their property would be calculated including the presence of asbestos of the home. Even with remediated homes, the market value of the property is significantly reduced by the presence of asbestos. As an example, a Mr Fluffy property in Curtin sold above its land value, but well below the previous sale price.\textsuperscript{78} The current buyback offer calculates the market value of the property ignoring the presence of asbestos.

\textbf{B. Public Purpose Test}

The main issue is whether the acquisition of loose fill asbestos affected houses can be held to be for a ‘public purpose’. Public purpose is defined within the act and means ‘a purpose in respect of which the Legislative Assembly or the Commonwealth Parliament has power to make laws’.\textsuperscript{79}

The ACT Legislative Assembly is empowered to make laws for the “peace, order and good government” of the Territory.\textsuperscript{80} The Assembly has no power to make laws with regard to the acquisition of property other than on just terms.\textsuperscript{81} This is equivalent to the ‘just terms’ clause in s 51(xxxi) of the \textit{Commonwealth Constitution},\textsuperscript{82} which was included to prevent the arbitrary use of power when acquiring property.\textsuperscript{83}

For compulsory acquisitions, ‘Public purpose’ usually extends to the use of land for constructing new roads and railways, widening and deviations to existing roads, creating parks, reservoirs, sewerage works and drainage reserves. In the ACT, acquisitions appear to occur mainly for the public purpose of building public roads or community developments.\textsuperscript{84}

The protection of community health and wellbeing by removing asbestos from local structures almost certainly falls within the Assembly’s broad power to legislate for the “order” of the Territory. Hence, it is likely the acquisition of Mr Fluffy homes would be considered to be for a public purpose. (Specific term not tested)

Public health and safety is a core reason why Mr Fluffy homes would fall within the public purpose test. The ACT government has previously stated that the presence of loose fill asbestos is a health concern not only for residents of affected homes. The health risk extends to tradespersons or visitors to the property. Andrew Kefford, the head of the ACT Asbestos

\textsuperscript{76} Ibid s 45(2)(c).
\textsuperscript{77} Ibid s 45(2)(e).
\textsuperscript{78} Elizabeth Byrne and Clarissa Thorpe ‘Mr Fluffy home at Curtin sells above land value, but below previous sale price’ \textit{The Canberra Times} (Canberra) 14 September 2014.
\textsuperscript{79} Land Acquisition Act 1994 (ACT) dictionary.
\textsuperscript{80} \textit{Australian Capital Territory (Self government) Act 1988} (Cth) s 22(1).
\textsuperscript{81} Land Acquisition Act 1994 (ACT) s 23(1)(a).
\textsuperscript{82} Aerial Capital Group Ltd v ACT [2013] FCA 1411.
\textsuperscript{83} \textit{Grace Bros Pty Ltd v Commonwealth} (1946) 72 CLR 269.
Response Taskforce highlighted that there had been reports of situations where carers have refused to enter affected homes to care for residents due to the presence of loose fill asbestos.\(^{85}\) There is a high risk of exposure to asbestos during natural disasters or emergency situations which may disturb the residual asbestos in the homes. As an example, hospitals and schools contained sheet asbestos became a health threat in Vanuatu after Cyclone Pam which broke up the asbestos sheeting, placing the community at risk of inhaling loose asbestos fibres.\(^{86}\)

The health impacts of asbestos are undoubtable, including asbestosis, lung cancer and mesothelioma. The extent of the health impacts may not be known for several years as mesothelioma has a latency period that spans across decades.\(^{87}\) The nature of loose fill asbestos being comprised of small fibres increases the likelihood of a person inhaling them. In the ACT, there already are reported cases of people who have lived in loose fill asbestos affected houses being diagnosed with mesothelioma.\(^{88}\) Consequently, the argument of public safety will likely satisfy the public purpose test.

Furthermore, acquiring Mr Fluffy homes in order to demolish their structures and remove extant asbestos seems to be the kind of public purpose endorsed by the High Court, which has said:

> It follows that the power compulsorily to acquire land for a public purpose which is conferred by the Act is limited to a power to acquire land for some purpose related to a need for or proposed use (be it active or passive) or application of the land to be acquired. It does not extend to the acquisition of land merely for the purpose of depriving the owner of it and thereby achieving some purpose in respect of which the Parliament has power to make laws or, in relation to land in a Territory, a purpose in relation to that Territory.\(^{89}\)

The public purpose test is a core part of the limitation of state power in the area of acquisition. The public purpose test does not restrict the government from using the land from additional purposes. When no longer required for the public purpose the land can be disposed of by the acquiring authority. For affected homeowners, this means that the government’s plan to recoup the costs of the buyback scheme by dividing and reselling blocks after they have been remediated falls within the public purpose test.

**C. Private Demolitions**

Some residents have indicated an intention to demolish their own homes rather than participate in the buyback scheme. It would be undoubtedly argued by those homeowners that if the demolition had taken place, there would be no public purpose behind any acquisition as the health risk has been abated. The nature of loose fill asbestos is that if a single fibre is left it

---


\(^{88}\) Kirsten Lawson ‘Two Mr Fluffy homeowners diagnosed with mesothelioma’ *The Canberra Times* (Canberra) 22 July 2014.

would pose a minimal but still existent health risk.\textsuperscript{90} The ACT government, if pursuing compulsory acquisition wants to be satisfied that all of the risks associated with Mr Fluffy asbestos have been abated, and would argue that unless the property has been remediated to their standard there remains a public health and safety risk. If however, a homeowner has demolished and remediated their property in accordance with government standards then it is likely that the homeowner may be able to challenge the public purpose behind any acquisition.

\textbf{IV. PRIVATE PROPERTY INTEREST v PUBLIC PURPOSE}

Compulsory acquisition, by its nature reflects the idea that a public interest is paramount to the interests of a single landowner.\textsuperscript{91} The rights of a private landowner are interrupted for the purpose of pursuing a greater public good.

The power to compulsorily acquire privately owned land is one of the most significant powers that the government possesses, and must be carefully exercised.\textsuperscript{92} However, there is a legitimate need for the state too be able acquire property, a role that exists with fee-simple and leasehold absolute use of land.\textsuperscript{93} ‘[W]hat appears to be an assault on property rights in Australia and other developed nations from time to time, is little more than government exercising its statutory right to acquire or regulate the use of land’.\textsuperscript{94} Simply put, when a homeowner purchases a piece of land some do not fully understand the rights of the government in relation to that land and the potential for a government to compulsorily acquire that land, is inherent in the purchase of a piece of land. Consequently, the anger and frustration of some homeowners, seeing the government ‘take’ their land, may not realise the right to acquire is an avenue that is available to the government for any piece of land.

Gradually, individual rights in relation to property have been eroded, but some safeguards remain. Justice Murphy has stated ‘[t]he exaltation of property rights over civic and political rights is a reflection of the values of a bygone era’.\textsuperscript{95} Even with diminishing importance of property rights, the principle of no acquisition unless on just terms prevails. Constitutionally only the Commonwealth is required to acquire land on just terms.\textsuperscript{96} The High Court has held that the territories are also bound by this requirement, but the state’s acquisition laws are not bound by these obligations, in practice the states continue to apply just terms to potential

\begin{thebibliography}{99}
\bibitem{90} Emma Macdonald ‘Asbestos bombshell: Govt knew about Mr Fluffy risk 25 years ago’ \textit{The Canberra Times} (Canberra) 22 October 2014.
\bibitem{91} Brian Schwarzwalder ‘Compulsory Acquisition’ in Roy Prosterman and Tim Hanstad (eds) \textit{Legal Impediments to Effective Rural Land Relations in Eastern Europe and Central Asia} (The World Bank, 1999) 226, 227.
\bibitem{92} Standing Committee on Public Administration and Finance, Parliament of Western Australia, \textit{The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia} (2004) 43.
\bibitem{93} Tom Allen \textit{The right to Property in Commonwealth Constitutions} (Cambridge University Press, 2000).
\bibitem{94} Vince Mangioni ‘The evolution of the Public Purpose Rule in compulsory acquisition’ (Paper presented at Pacific Rim Real Estate Society, Sydney, 18 January 2009).
\bibitem{95} Attorney-General (Cth); \textit{Ex rel Mckinlay v Commonwealth} (1975) 135 CLR 1.
\bibitem{96} Larraine Finlay ‘The Attack on Property Rights’ (Paper presented at 22\textsuperscript{nd} Conference of the Samuel Griffith Society, Perth, August 2010).
\end{thebibliography}
acquisitions. By requiring governments to compensate landowners, it acts as a check on government power to restrain them from continually acquiring private property. In *ICM Agriculture Pty Ltd v Commonwealth* it was discussed that ‘legislatures will tend to experience undue temptation to acquire the property of citizens, and will tend to give into it, because this will usually be cheaper than employing some alternative technique.’ By requiring government to provide adequate compensation ensures that compulsory acquisitions occur only in pursuit of a public good.

...those necessary infringements of the private sphere will be allowed only in instances where the public gain is clearly greater than the harm done by the disappointment of normal individual expectations. The chief purpose of the requirement of full compensation is indeed to act as a curb on such infringements of the private sphere and to provide a means of ascertaining whether the particular purpose is important enough to justify an exception to the principle on which the normal working of society rests.

The need to provide compensation for a compulsory acquisition acts to discourage government from interfering with the rights of individuals, unless they have a legitimate reason for doing so. For the ACT government, they must ensure that there is a public good, which may be the health concerns of the community prior to pursuing a compulsory acquisition.

Protects offered to homeowners are limited by the notion of parliamentary sovereignty. In 2009 the High Court declared a compulsory acquisition for re-development of land as unlawful. The NSW legislature passed the *Land Acquisition (Just Terms Compensation) Amendment Bill* with the express purpose of overcoming the unfavourable High Court decision. For Mr Fluffy affected homeowners in both NSW and ACT, it is important to be cautious as legislative supremacy may overcome any successful judicial challenges to any potential compulsory acquisition.

Overall, the ACT has demonstrated a positive approach to balancing of individual and public interests. Mr Fluffy buyback scheme clearly presented a respect for private property rights, as it offered flexibility of timeframes, stamp duty concessions and more compensation than pure market value as the valuation excluded the presence of asbestos. The buyback program is an example of a territory governments not immediately resorting to the authoritarian compulsory acquisition powers to take land. These methods occur even when states are not bound by the just terms requirement. Overall, the response to the Mr Fluffy crisis in the ACT, in which compulsory acquisition was avoided in the first instance, illustrates a great respect for and consideration of private property interests.

---

100 *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac’s Pty Ltd v Parramatta City Council* [2009] HCA 12.
101 *Land Acquisition (Just Terms Compensation) Amendment Bill 2009* (NSW).
V. CONCLUSION

Mr Fluffy presents a unique challenge for the ACT and NSW governments. The earlier removal program proved to be unsuccessful, as some houses were missed and others are now known to contain residual asbestos. This has left a toxic legacy with which the ACT Asbestos Taskforce is now grappling. A radical solution was developed: to buyback affected houses, demolish and remediate the blocks. Although the buyback program in the ACT has been successful to date—with the majority of affected homeowners opting into the program—there are a significant minority that do not appear inclined to accept a buyback offer. This leaves the ACT government in a precarious position, seeking to protect the public interest while respecting and upholding the rights of private landowners. The dangers of loose fill asbestos are such that it is plausible that the ACT government will acquire those houses that are not surrendered under the buyback scheme.