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Editors: Dr John Gilchrist and Robert MacLean

FOREWORD

Dr John Gilchrist

PART I: REFEREED ARTICLES

[ORIGIN AND SCOPE OF THE PREROGATIVE RIGHT TO PRINT AND PUBLISH CERTAIN WORKS IN ENGLAND](#)

Dr John Gilchrist

[THE EXTENT TO WHICH THE PREROGATIVE RIGHT OF THE CROWN TO PRINT AND PUBLISH CERTAIN WORKS EXISTS IN AUSTRALIA](#)

Dr John Gilchrist

[HINCH, KABLE AND OPEN JUSTICE: THE APPROPRIATE AND ADAPTED TEST](#)

Liam Boyle

[TARGETED KILLING IN MODERN WARFARE](#)

Jim Serpless

[A BASIC GUIDE TO TAXING ECONOMIC RENT IN AUSTRALIA](#)

John Passant

[COMPARING THE GAARS UNDER THE INCOME TAX AND GST SYSTEMS](#)

Louisa Huang

PART II: COMMENTARIES

[THE POWER OF THE COMMONWEALTH EXECUTIVE TO CONTRACT, POST *WILLIAMS V COMMONWEALTH OF AUSTRALIA*](#)

Robert MacLean

[COPYRIGHT EXCEPTIONS BEYOND THE *COPYRIGHT ACT 1968 \(CTH\)*](#)

Professor Brian Fitzgerald, Cheryl Foong and Professor Anne Fitzgerald

[PPSA AND CONSTRUCTION PROJECTS](#)

Michael McCagh

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Canberra Law Review

This issue of the *Canberra Law Review* features topical articles on:

- the scope of prerogative copyright in Australia,
- the open justice principle under Chapter III of the Australian Constitution,
- targeted killing in modern warfare,
- taxing economic rent, and
- the anti-avoidance rules for the Australian income tax and GST systems

as well as three valuable commentaries. One is by the joint editor, Robert MacLean, on the High Court decision in *Williams v Commonwealth of Australia* which discusses the limits to the capacity of the federal executive to enter into contracts, the second by Professors Brian and Anne Fitzgerald and Cheryl Foong on copyright exceptions beyond the *Copyright Act 1968* (Cth), which are little known and discussed, and the third by Michael McCagh on the *Personal Property Securities Act 2009* (Cth) an important piece of legislation affecting all Australian commercial law and particularly the area of construction contracts.

The articles reflect the focus of this School of Law and Justice and that of our University, which has a National Security Institute. The article on prerogative copyright is a sequel to an article published in the 3/2011 issue of the *Canberra Law Review*. That article is re-published in this issue without the editorial errors that appeared in the original.

The *Canberra Law Review* will in future publish articles as they are approved for publication with consequent less delay for authors. Contributions will be accepted on an annual edition basis throughout the year. While the *Canberra Law Review* will continue to focus on articles relating to theory and practice, and traditional, innovative and cross-disciplinary approaches to law, we are particularly interested in articles connected to Commonwealth law, legal developments and reform, the Australian Capital Territory and the wider Canberra region. We encourage submissions from postgraduate and other research-active students and it is our hope that the Review will be an outlet for the publication of dissertations and research papers of article length, as well as an outlet for publishing for members of the legal profession and legal scholars.

This issue has been largely the responsibility of only two people. The editorial board has comprised Dr John Gilchrist and Mr Robert MacLean, with the recent assistance of Mr Tony Meacham and Mr Michael McCagh. Dr Gilchrist was the co-editor of the inaugural issue of the *Canberra Law Review*. The caricature of Sir Isaac Isaacs returns in this issue.

John Gilchrist

Robert MacLean.

ORIGINS AND SCOPE OF THE PREROGATIVE RIGHT TO PRINT AND PUBLISH CERTAIN WORKS IN ENGLAND

JOHN GILCHRIST*

ABSTRACT

There have been a number of claims made in courts in England and other parts of the United Kingdom over the last three centuries concerning the scope of the Crown's exclusive right to print and publish certain works. This right is currently preserved under s 171 of the Copyright, Designs and Patents Act 1988 (UK) but has been substantially altered by that Act. The right remains preserved in Australia under s 8A(1) of the Copyright Act 1968 (Cth).

The exclusive right to print and publish certain works is based on an ancient prerogative of the Crown. This article examines the basis and origins of the right, its nature and scope and the extent of the works presently subject to the right in England. An analysis of the extent of those works presently subject to the right in Australia is the subject of the succeeding article.

I INTRODUCTION

Historically, the exclusive right to print and publish has been claimed to extend to Acts of Parliament, royal Proclamations, law books, Orders in Council, the Authorised Version of the Bible, the Book of Common Prayer, almanacs¹ and other public documents.² The exercise of the Crown's prerogative right in England over the centuries has been by the grant in letters

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¹ Almanacs were sold in the form of sheets or little books which contained a calendar for the year and prognostications and information of various kinds on such matters as astrology, meteorology, history, agriculture and medicine. This information was of varying accuracy and value. *Old Moore's Almanack* (Vox Stellarum) is probably the best known of the early almanacs, the first edition appearing in July 1700.

² Yates J in *Millar v Taylor* (1769) 4 Burr 2303, 2382; 98 ER 201, 243 took the view that 'State-papers' fell within the right but there is no other authority for this view. As to 'year-books', refer note 108. As to the 'Latin Grammar', refer page 34. Refer also note 94. In *Rex v Bellman* [1938] 3 DLR 548, 553-557, Baxter CJ held that Admiralty charts were subject to Crown copyright but it is not clear whether he regards the prerogative or a common law proprietary right of the Crown as the basis of the right or not. The judgment is in many respects unsatisfactory.

patent of exclusive licences to print and publish those works.³ Most of these grants have been made to persons holding the office of King's Printer.^{3a}

The practice of granting exclusive rights to print and publish works arose in England partly as a means of reward⁴ and source of revenue⁵ and partly as one instrument in the Crown's exercise of control over all forms of publication in the 16th and 17th centuries.⁶ This control

³ The term 'licence' which was used in the grants is frequently used to describe the nature of the Crown's grants. The licence was in the nature of an exclusive licence rather than a bare licence, although it should be pointed out that there are some instances of the Crown granting concurrent rights in works subject to the prerogative right: refer, for example, *Universities of Oxford and Cambridge v Richardson* (1802) 6 Ves Jun 689, 713-714; 31 ER 1260, 1271-1272. Those grants of rights in prerogative works which appear in the Patent Rolls were sometimes made under the authority of a writ of privy seal. This writ was merely an authority to the Lord Chancellor for affixing the Great Seal to letters patent: refer, for example, grants to Richard Grafton and Edward Whitchurche (books of divine service) of 22 April 1547 - Great Britain, Public Record Office, *Calendar of Patent Rolls: Edward VI*, Vol 1 (1547-1548) (London, 1924), 100, (Calendars of Patent Rolls published by or for the Public Record Office are hereinafter cited merely as 'Calendar of Patent Rolls'): to John Cawood (office of Queen's Printer) of 29 December 1553 - *Calendar of Patent Rolls: Philip and Mary*, Vol 1 (1553-1554) (London, 1937), 53; and to Richard Tottle (law books) of 5 May 1556 - *Calendar of Patent Rolls: Philip and Mary*, Vol III (1555-1557) (London, 1938), 18. Refer also J Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (London, 1820), 390. In the 18th century it is clear that grants over the more general works at least were made by warrants which were executive acts. Refer WR Anson, *The Law and Custom of the Constitution* (4th ed, AB Keith) (Oxford, 1935), Vol 11, Part I, 62-70, Vol 11, Part II, 353-355; *Calendar of Patent Rolls: Edward III* (1327-1330) (London, 1893), xi. The abbreviation 'By p.s.' in the Patent Rolls stands for 'Per breve de privato sigillo'.

^{3a} The first King's Printer appears to have been Richard Pynson, who was appointed to the position around 1508/9: refer JS Gilchrist, 'The Office of King's Printer and the Commercial Dissemination of Government Information - Past and Prospect' (2003) 7 *Canberra Law Review* 145, 146-147.

⁴ For example, Queen Elizabeth I granted a privilege over certain school books to Henry Stringer, one of her footmen, for a period of 14 years in 1597: Great Britain, Public Record Office, *Calendar of State Papers, Domestic, 1595-1597* (London, 1869), 352; (The State Papers Domestic series are hereinafter cited as 'S P Dom') Charles I granted a privilege over certain school books including 'Aesopi Fabulae' to George Weckherlin, Under-Secretary of State, in March 1630. The petition of Weckherlin was received with the comment, 'His Matie taking a gracious notice of the peticoners good service, is pleased for his encouragemt. and [...] 'help' to grant vnto him his request.' (WW Greg, *A Companion to Arber* (Oxford, 1967), 267, *S P Dom: Charles I 1629-1631* (London, 1860), 514, 557). Sir Roger L'Estrange, Surveyor of the Press under Charles II and James II received a privilege from Charles II in 1663. The State Papers record that 'after he had spent above 20 years in the service of the Crown, almost four of them in Newgate under a sentence of death, the King in 1663 granted him a patent for the 'Newsbook', with other privileges of printing, and appointed him overseer of the Press.' (*S P Dom: Charles II 1680-1681* (London, 1921), 665).

⁵ In 'Considerations on the Nature and Origin of Literary Property', John Maclaurin (Lord Dreghorn) stated that the *Statute of Anne* saved authors and booksellers, 'the Trouble and Expencc (from 80 to 100 l.) of applying to the King for a Privilege every Time they printed a new Book': *Freedom of the Press and the Literary Property Debate: Six Tracts 1755-1770* (New York, 1974), Item D, 30 (part of the Garland Publishing Series, *The English Book Trade 1660-1853* edited by Stephen Parks). In a petition by the Stationers Company to the Council of State dated 8 October 1653, it was stated that the cost of buying the right to print almanacs was 'above 1000 l.', apart from those annuities paid to James Robertes, the surviving patentee, and the estate of Richard Watkyns, *S P Dom: 1652-1654* (London, 1879), 193 and C. Blagden, 'The English Stock of the Stationers' Company in the Time of the Stuarts', *The Library Fifth Series*, Vol XII (London, 1957), 167, 168 n.2. As to other payments made in respect of works which formed the basis of the Company's English Stock, refer LR Patterson, *Copyright in Historical Perspective* (Nashville, 1968), 106, 107, 108.

⁶ The motives for this control were principally those of censorship - the prevention of the publication of treasonable, seditious and libellous pamphlets and books in a period of political unrest - and also of the

was exercised by these grants, most of which included penalties for contravention and some of which contained powers of search for and seizure of, pirate books, which were enforced by the Star Chamber, by the grant of a charter from the Crown to the Stationers Company in 1557 which gave the Company a virtual monopoly^{6a} over printing and power to enforce its own regulatory regime, and by various decrees of the Star Chamber regulating printing until that Chamber's abolition in 1640. The general licensing regime created by the decrees was perpetuated during the Interregnum and by the *Licensing Act* 1662.

The grants of monopoly rights were originally made by letters patent in respect of a wide variety of works and were not restricted to those listed above which are generally religious or legal in character. For example, Queen Elizabeth I granted exclusive licences to Thomas Marshe for a period of 12 years to print certain school books including 'the shorte diccyonary for children with the englyshe before the latyn',⁷ to Lodovick Lloyd for a period of eight years to print his translation of Plutarch's 'Of the Lives of Emperours etc'⁸ and to Thomas Tallys and William Byrde, 'two of the gentlemen of the chapel', for 21 years in survivorship for as many 'sett songe or songes in partes as to them shall from tyme to tyme seame expedient in the Englishe, Laten, Frenche and Italian tongues', or any language that may serve for 'the musick either of churche or chamber or otherwyse to be songe or playde'.⁹ These grants, which were then usually referred to as privileges,¹⁰ began early in the reign of King Henry VIII and although they changed in form over time, there is little in their nature to distinguish legal and religious works from other works.

Privileges normally arose in response to a petition from a printer, bookseller or author to the Crown¹¹ and were generally made in respect of specific works in the English language, but

encouragement of an infant printing industry and its protection from piracy both at home and abroad. As to the encouragement of industry refer to the grant in note 7.

^{6a} WW Greg in a paper entitled 'Entrance in the Stationers' Register: Some Statistics', states that while theoretically all copies were supposed to be entered and stationers could be, and occasionally were, fined for printing or publishing works without the formality of entrance, (343) it would seem for the period from 1576 to 1640, the proportion of London-printed books regularly entered at Stationers' Hall was somewhere between 60 and 70 per cent (348). Maxwell JC (ed), *WW Greg: Collected Papers*, Oxford, Clarendon Press, 1966, 343,348.

⁷ Dated 29 September 1572, *Calendar of Patent Rolls: Elizabeth I, Vol V (1569-1572)* (London, 1966), 333.

⁸ Dated 18 April 1573, *Calendar of Patent Rolls: Elizabeth I, Vol VI (1572-1575)* (London, 1973), 93.

⁹ Dated 22 January 1575, *Calendar of Patent Rolls: Elizabeth I, Vol VI (1572-1575)* (London, 1973), 471. Thomas Tallys and William Byrde were joint organists of the Chapel Royal when granted their privilege.

¹⁰ There is some confusion over the use of the word 'privileges' in secondary sources. H Ransom in *The First Copyright Statute* (Austin, 1956), 25, 26, and TE Scrutton in *The Law of Copyright* (2nd ed, London, 1890), 6, 7, 9, 11 use the terms patents and privileges to distinguish between grants over what became known as prerogative right works and other works. However, as Sir Walter Greg points out, the term privilege was the term generally current at the time for all grants of printing rights made by the Crown (WW. Greg, *Some Aspects and Problems of London Publishing Between 1550 and 1650* (Oxford, 1956), 89-102.

¹¹ The texts of petitions are not frequently found in published records but reference is sometimes made to them in the course of grants. Examples of abstracts of petitions are: Robert Scott of London, bookseller, to print the works of John Selden in Latin: February 1676; *S P Dom: 1675-1676* (London, 1907), 542; and Edw. Sayer of the Inner Temple, to print all manner of law books touching the common laws of England: June 28 1701; *S P Dom:1701-1702* (London, 1937), 391. The microfilm publication *Hanoverian State Papers Domestic 1714-1782* contains copies of some original petitions and grants, for

also in respect of classes of works and in other languages. The earliest class monopoly was that to Richard Tottel (sometimes Tathill, Tottle or Tottell) who in 1553 was granted the exclusive right to print for seven years ‘all and almaner of bokes of our Temp[or]all lawe called the comon lawe’.¹² The most important examples of class monopolies were those of law books, almanacs and various religious works. All the grants were made for a specific period of time which, although normally short, in fact varied from between two years and perpetuity.¹³ Their chief impact, particularly while the printing trade was still largely an infant industry, lay in their commercial value and although Crown grants were never very numerous,¹⁴ their profitability was revealed in a dispute in the early 1580s between the privileged and unprivileged printers of the Stationers Company which led the latter to engage in the widespread production of pirate copies of works subject to exclusive licences and ultimately to the resolution of the dispute by the surrendering of a list of works by the privileged printers for the use of the poor of the Stationers Company.¹⁵

Grants of exclusive licences to print the more general works in addition to the legal and religious works continued throughout the 16th and 17th centuries, except for the period of the Interregnum, and although it would have been expected that grants of licences for the more general works might have ceased after the enactment of the first Copyright Act of 1709/10 - the *Statute of Anne* - published and unpublished records reveal that the Crown still purported to make these grants long after the passage of that Act.¹⁶ However these grants have been the subject of few reported cases and works which were the subject of the grants have long

example: 1715, SP 35/74 No 10, petition of John Baskett for the grant of the office of King's printer for the term of 41 years; 1724, SP 35/54 No 87, petition of James Weston to the King for a licence to print ‘Stenography Completed’; 1726, SP 35/61 No 70, petition of William and John Innys of London, booksellers, for a licence to print a new edition of Sir Isaac Newton's *Philosophiae Naturalis Principia Mathematica*.

¹² The earliest class monopoly was that to Richard Tottel (sometimes Tathill, Tottle or Tottell) who in 1553 was granted the exclusive right to print for seven years ‘all and almaner of bokes of our Temp[or]all lawe.’ (L Rostenberg, ‘The Preservation of the English Legal Tradition: Thomas Wight, ‘Patentee in Law Books’, *Literary, Political, Scientific, Religious and Legal Publishing, Printing and Bookselling in England 1551-1700: Twelve Studies*, Vol I (New York, 1965), 23. See also *Calendar of Patent Rolls Edward VI*, Vol V (1547-1553) (London, 1926), 47. An example of a grant for 14 years in respect of works in a language other than English is that to John Dunmore, Richard Chiswell, Benjamin Tooke and Thomas Sawbridge, booksellers of the City of London, to print various classical works in Greek and Latin ‘which by their present scarceness are very dear’, and ‘provided always that the said books or any of them, were never before printed in the King's dominions and that no other subject has acquired any right in the printing of the said books or any of them, and provided also that, as any of the said books be printed, the Archbishop of Canterbury or the Bishop of London or such as they shall appoint set moderate and reasonable prices on the same for the case of scholars and other buyers’ (March 12, 1678): *S P Dom: 1678* (London, 1913), 37, 38.

¹³ King James I expressed the grant of monopoly rights in psalters, psalms, prymer, almanacks and other similar books to the Stationers Company on 29 October 1603 and later 8 March 1615, to be ‘for ever’ (see note 117). Richard Pynson held a privilege over Tunstall's oration in praise of matrimony for two years - the first recorded privilege (1518) (WW Greg, *Some Aspects and Problems of London Publishing Between 1550 and 1650* (Oxford, 1956), 93).

¹⁴ Usually numbering less than five grants per year although it is to be noted that some of these grants were in respect of classes of works.

¹⁵ Refer Edward Arber, *A Transcript of the Registers of the Company of Stationers of London 1554-1640*, Vol II (London, 1875), 14-21, 783-785, 786-789).

¹⁶ Refer to the discussion in the final paragraphs of this article.

been considered to fall outside the scope of works subject to the prerogative right of the Crown. Further reference is made to these grants at the conclusion of this article.

II BASIS AND ORIGINS OF THE PREROGATIVE RIGHT

The exclusive right to print and publish certain works is one of the more obscure prerogatives of the Crown. The right is that residue, recognised by the common law, of the general prerogative over printing and publication which was exercised by the Crown prior to the growth of responsible government and the establishment of a constitutional monarchy in the 17th century. In an exhaustive examination of the authorities, Long Innes CJ in *Eq in Attorney-General for New South Wales v Butterworth and Co (Australia) Ltd*¹⁷ concluded that the exclusive right to print and publish was a prerogative right in the nature of a proprietary right and not merely an exercise of an executive power such as the granting of a patent for an invention. The prerogative right therefore fell within the same broad category as the Crown's right to escheats, to the royal metals gold and silver, and to the ownership of vacant lands in a new colony.¹⁸

The legal development of the exclusive right to print and publish certain works rests ultimately in the courts' attempts to define a rational basis for the right consistent with the King's status and duties as a constitutional monarch and with wider notions of the rights and liberties of the subject.¹⁹ Nowhere is this more evident than in the case of *Basket v University of Cambridge*²⁰ in which a grant by King Henry VIII to the University of Cambridge in 1534 to print 'omnes et omnimodus libros' (all and all manner of books) which might be approved by the Chancellor and three doctors of divinity, a right which was not prejudiced by the *Statute of Anne*,²¹ was construed by Lord Mansfield in 1758 to relate only to the 'copy-

¹⁷ (1938) 38 SR (NSW) 195 (Sup Ct).

¹⁸ (1938) 38 SR (NSW) 195, 246-247. Long Innes C.J. adopted a classification of the prerogatives enunciated by Evatt J in his then unpublished thesis 'Certain Aspects of the Royal Prerogative' which may be briefly summarised as consisting of (1) executive powers, such as the power to declare war and make peace, and to pardon offenders and confer honours, (2) certain immunities and preferences, such as the King's right to the payment of his debts in priority to all creditors, and (3) proprietary rights. This work has since been published. Refer H V Evatt, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' (unpublished Doctor of Laws Thesis, Law Library, Sydney University, 1924), 47-73 or H V Evatt, *The Royal Prerogative* (Sydney, 1987), 35-50.

¹⁹ The reduction in the Crown's absolute power in the 17th century was considerable, both by Parliament - for example, the abolition of the Crown's arbitrary power of imprisonment (the Petition of Right (1628), and the abolition of the prerogative courts of Star Chamber and High Commission by Acts in 1641 - and to a lesser extent, by the common law courts, - for example, the case of *Proclamations* (1611) 12 Co Rep 74 (77 ER 1352) in which the King was denied the power to create new offences by proclamation, and the case of *Prohibitions Del Roy* (1607) 12 Co Rep 63 (77 ER 1342) in which it was decided that the King could no longer sit as a judge in his own courts. Although the *Statute of Monopolies* (1623) (21 Jac I c.3) did not extend to '... letters patents or grants of privilege ... for or concerning printing' (s.X), the notion of rights and liberties of the subject runs through the cases on the prerogative right over printing and in the almanac cases in particular. Refer, for example, *Company of Stationers v Partridge* (1712) 10 Mod 105 (88 ER 647) and also the judgment of Lord Mansfield CJ in *Millar v Taylor* (1769) 4 Burr 2303, 2401-2403 (98 ER 201, 254-255).

²⁰ (1758) 1 Black W 105 (96 ER 59); 2 Keny 397 (96 ER 1222) and 2 Burr 661 (97 ER 499) (KB).

Blackstone's report appears generally to be the most accurate.

²¹ Section IX of the Statute (8 Anne, c.19) provided that nothing in the Act 'shall extend, or be construed to extend, either to prejudice or confirm any right that ... any person or persons have, or claim to have, to

rights' of the Crown - that is, the works of a legal and religious character –‘for the construction of the law is, that the Crown intended only to do that, which by law it is entitled to do’.²²

The first reported case dealing with the right was decided in 1666 and it was evident from the early cases that for some time the legal basis of the right was the subject of dispute. Initially, the right of the Crown to make grants of monopoly rights over works was asserted in the widest terms and in a number of early cases, licensees of the Crown enforcing their rights sought to base their right not upon the prerogative but on various notions of ‘civil property’. It was argued in *Hills v Universitat Oxon*²³ for instance, that the exclusive right to print certain works included the Authorised Version of the Bible because King James I paid for the translation so that ‘the copy was his’,²⁴ and in *Company of Stationers v Seymour*²⁵ that the almanac which the defendant had printed had no certain author and, therefore, the King had the property in the copy.²⁶ The proprietary concept was the basis of the majority view in the later case of *Millar v Taylor*,²⁷ which sought to support a common law right in perpetuity in all published works by analogy from the prerogative right. Willes J expressed the view in that case,

...that the King is owner of the copies of all books or writings which he had the sole right originally to publish; as Acts of Parliament, Orders of Council, Proclamations, the Common-Prayer Book. These and such like are his own works, as he represents the State.²⁸

Similarly, Lord Mansfield C.J. concluded:

The King cannot, by law, grant an exclusive privilege to print any book which does not belong to himself. Crown-copies are, as in the case of an author, civil property.²⁹

However, other courts adopted the now settled view that the right was in the nature of a proprietary right but based on the prerogative, although the reasons advanced in support of this conclusion have varied and in some cases have been specifically disputed in later decisions. For example, in the earliest reported case of *Stationers v The Patentees about the*

the printing or reprinting any book or copy already printed, or hereafter to be printed’. Although the section may refer to claims of authors at common law, it would also encompass privileges granted by the Crown. The extent of the Crown's right to grant privileges had, by that time, already been the subject of dispute in the courts and of doubts expressed in published documents and in Parliament (see note 143).

²² (1758) 1 Black W 105,120 (96 ER 59,65); cf. Kenyon's notes on the same case at 2 Keny 397, 420 (96 ER 1222, 1230). The right in question had been confirmed by Charles I in letters patent of 6 February 1628. The word copy was then used in the technical sense to signify an incorporeal right to the sole printing and publishing of the work (refer discussion by Lord Mansfield CJ in *Millar v Taylor*, (1769) 4 Burr 2303, 2396 (98 ER 201, 251) and also Willes J. in the same case at 4 Burr 2303, 2312 (98 ER 201,206)).

²³ (1684) 1 Vern 275 (23 ER 467) (Ch).

²⁴ Ibid.

²⁵ (1677) 1 Mod 256 (86 ER 865) (CP).

²⁶ (1677) 1 Mod 256, 258 (86 ER 865, 866).

²⁷ (1769) 4 Burr 2303 (98 ER 201) (KB).

²⁸ (1769) 4 Burr 2303, 2329 (98 ER 201, 215).

²⁹ (1769) 4 Burr 2303, 2401 (98 ER 201, 254).

*Printing of Roll's Abridgment*³⁰ it was argued that the King had a general prerogative over printing because, inter alia, he had an ownership of it, derived from having introduced it at the King's expense and that he had a particular prerogative over law books because, inter alia, the salaries of the judges were paid by the King and reporters in all courts at Westminster were paid by the King formerly. The first proposition is based on a long discredited legend and was disputed by counsel for the defendant in *Basket v University of Cambridge*³¹ and by Lord Mansfield in *Millar v Taylor*.³² The second proposition has not been advanced by other courts.

In the second reported case of *Roper v Streater*³³ the House of Lords upheld the validity of a patent to print law books on grounds including that the printing of law books concerned the state, and was a matter of public care.³⁴ The reference to 'a matter of public care' appears to be the first reference to the rationale which had been adopted by most courts by the mid-18th century. It was that the basis of the right lay in 'the character of the duty imposed upon the chief executive officer of the Government, to superintend the publication, of the Acts of the Legislature, and Acts of State of that description, and also of those works, upon which the established doctrines of our religion are founded - that it is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative'.³⁵ This view was clearly accepted by Lord Camden in *Donaldson v Beckett*,³⁶ the dissenting judge Yates J in *Millar v Taylor*³⁷ and the courts in *Eyre and Strahan v Carnan*³⁸ and *Manners v Blair*.³⁹ It also appears to have been the opinion of the court in *Universities of Oxford and Cambridge v Richardson*.⁴⁰ It was adopted more recently in the Australian case of *Attorney-General for New South Wales v Butterworth and Co (Australia) Ltd*.⁴¹

Lord Lyndhurst LC in *Manners v Blair* further clarified this duty of the Crown in the course of considering an argument that the prerogative right in relation to works enumerated in the patent of the King's Printer in Scotland, which were also works of the established religion in England, did not apply in Scotland because the right over these works depended upon the King's character as supreme head of the church, and the King was not the supreme head of the church in Scotland. He concluded:⁴²

³⁰ Also known as *Atkins* case (1666) Carter 89 (124 ER 842) (HL).

³¹ (1758) 1 Black W 105, 113 (96 ER 59, 62); 2 Keny 397, 407 (96 ER 1222, 1226).

³² (1769) 4 Burr 2303, 2401 (98 ER 201, 254).

³³ (1672) Bac Abr 7th ed, Vol VI (London, 1832) 507 (HL) (a brief reference is also made to this case at 2 Chan Cas 67 (22 ER 849)).

³⁴ Ibid.

³⁵ Lord Lyndhurst LC in *Manners v Blair* (1828) 3 Bli NS 391, 402-403 (4 ER 1379, 1383) (HL). Refer also 2 State Tr NS 215, 234.

³⁶ (1774) Cobbett's *Parliamentary History* Vol XVII (London, 1813), 953, 995. (HL).

³⁷ (1769) 4 Burr 2303, 2381, 2383 (98 ER 201, 243, 244).

³⁸ (1781) Bac Abr 7th ed, Vol VI (London, 1832) 509, 511 (Ex).

³⁹ (1828) 3 Bli NS 391, 402-403 (4 ER 1379, 1383) (HL).

⁴⁰ (1802) 6 Ves Jun 689, 711-712 (31 ER 1260, 1271) (Ch).

⁴¹ (1938) 38 SR (NSW) 195, 229.

⁴² (1828) 3 Bli NS 391, 404 (4 ER 1379, 1383).

I do not refer the prerogative to the circumstance of the King being, in a spiritual or ecclesiastical sense, the supreme head of the church in England, but to the kingly character - to his being at the head of the church and state, and it being his duty to act as guardian and protector of both, - a character which he has equally in Scotland and England.

Lord Lyndhurst went on to point out that the duty of the King to act as guardian of the church in Scotland arose from ‘the statute by which the Reformation was established in Scotland’⁴³ in which it was declared to be the duty of the magistrates, and the King as supreme magistrate, to be the protector of the church, and by ‘the Act of 1690, by which the Presbyterian church was established, when the Episcopalian church authority was finally put an end to in Scotland’,⁴⁴ in which the same principle was laid down and acknowledged. The religious works in question - which included the King James Version of the Bible - had, with one exception, been sanctioned or ratified by the General Assembly of the Presbyterian Church for use in the Church, and Lord Lyndhurst therefore concluded that the King possessed the prerogative to confer rights to print these works on his printer in Scotland.

The earliest manifestations of this duty of the Crown were described by Skinner LCB in *Eyre and Strahan v Carnan*:

This is certain respecting such origin, that it has ever been a trust reposed in the king, as executive magistrate, and the supreme head of the church, to promulgate to the people all those civil and religious ordinances which were to be the rule of their civil and religious obedience. There are traces of the ancient mode of promulgating the ordinances of the state yet remaining to us, suited to the gloominess of the times when few who heard them could have read them; the king's officers transmitted authentic copies of them to the sheriffs, who caused them to be publicly read in their county court. When the demand for authentic copies began to increase, and when the introduction of printing facilitated the multiplication of copies, the people were supplied with copies by the king's command by his patentee. This seemed a very obvious and reasonable extent of that duty which lay upon the crown to furnish the people with the authentic text of their ordinances. Our courts of justice seem to have so considered it when they established it as a rule of evidence, that acts of parliament printed by the king's printer should be deemed authentic, and read in evidence as such. As to the promulgation of religious ordinances by the king's command, or by his patentee, it is not to be expected that instances

⁴³ Presumably a reference to an Act ‘Concerning the jurisdiction and authority of the bishop of Rome called the Paip’, dated 24 August 1560, which provided penalties for administering sacraments of the ‘popish church’ and for hearings on the same ‘to be called before the Justice or his deputies or before the lords of feffion’ (*The Acts of the Parliament of Scotland (Scotch Acts) Vol II (1424-1567)* (London, 1814), 534, 535). This Act referred to a Confession of Faith which was adopted by the Scottish Parliament on 17 August 1560 which contained a chapter entitled ‘Of the Civile Magistrat’. This chapter declared that Empires, Kingdoms and dominions were ordained by God and that the powers and authorities of the same be they Emperors, Kings, Dukes, Princes and ‘vtheris Magiftratis in fre cieteis’, are not only appointed ‘for ciuile policie bot alwa for maintenance of the trew religioun’ (Ibid, 534). The Confession of Faith more expressly describes the duty described by Lord Lyndhurst.

⁴⁴ Presumably a reference to ‘An Act Ratifying the Confession of Faith and fettleing Presbyterian Church Government’ dated 7 June 1690. A revised Confession of Faith approved by the Scottish Parliament in the same year (26 May 1690) and expressed to be ‘subjoyned’ to the above Act, contained a chapter entitled ‘Of the Civil Magistrate’ which expressed the duty described. *Acts of the Parliament of Scotland (Scotch Acts) Vol IX (1689-1695)* (London, 1822), 127, 128, 133.

should be found of the execution of this trust by the crown during the papal usurpation of the supreme authority over all ecclesiastical matters in this kingdom. It appears, however, by a grant made in the 34th year of King *Henry* the Eighth, to *Richard Grafton* and *Edward Whitchurch*, of the sole right of printing the Mass-book and certain other books of divine service, that such books had never at that time been printed in *England*, but had been brought into this kingdom from other countries, probably from *Rome*; though, as the grant recites, printing was at that time arrived at great perfection here. ... The period between the time of the re-establishment of the supremacy of the crown and the completion of the Reformation under Queen *Elizabeth*, considering the fluctuating state of religion, was not likely to afford, and in fact has not afforded, any instance of the superintending care of the crown in printing books of divine service, except that which I have alluded to, and which I have referred to chiefly to shew how the demand of the public for such books had been supplied before that time, namely, from foreign countries...but in the first year of Queen *Elizabeth*, the exclusive right of printing books of divine service was inserted in the same patent with the right of printing the acts of parliament, which had some time before been granted, and from that time they have been regularly granted together, and enjoyed by the king's patentee.⁴⁵

A *Extent of Duty on the Crown*

Courts have regarded the chief object of the duty imposed on the Crown as to ensure that works of state and religion were published and preserved in a correct and authentic form.⁴⁶

It is also implied from the nature of the works falling within the prerogative and the practice of granting exclusive rights to print and publish, that the duty entails an obligation to satisfy public demand for those works since, without this, the state could not expect citizens to be aware of the law and to faithfully observe the tenets of the established religion. Such an obligation was specifically recognised by Lord Skinner LCB in *Eyre and Strahan v Carnan*⁴⁷ where he stated 'the right now in question imposes upon the crown an obligation to publish and disperse as many books of divine service as the interest of religion and the demands of the public require' and Lord Eldon LC in *Universities of Oxford and Cambridge v Richardson*.⁴⁸ The importance of the observance of the rites of the Church of England to the

⁴⁵ (1781) Bac Abr 7th ed, Vol VI (London, 1832) 509, 510-511. The use of the word 'trust' suggests that the duty which lies at the basis of the right is a moral duty. There is no suggestion to the contrary in any other case on the prerogative right.

⁴⁶ Refer, for example, to Skinner LCB in *Eyre and Strahan v Carnan*, (1781) Bac Abr 7th ed, Vol VI (London, 1832) 509, 511, where he refers to 'that duty which lay upon the crown to furnish the people with the authentic text of their ordinances', and Lord Eldon LC in *Universities of Oxford and Cambridge v Richardson* (1802) 6 Ves Jun 689, 711 (31 ER 1260, 1271) (Ch) where he states '... the communication of which to the public in an authentic shape, if a matter of right, is also [a] matter of duty in the Crown'. Also Lord Lyndhurst LC in *Manners v Blair* (1828) 3 Bli NS 391, 405 (4 ER 1379, 1384): 'I think, therefore, that this right and prerogative depends upon the King's character as guardian of the church and guardian of the state, to take care that works of this description are published in a correct and authentic form'; and the court in *Grierson v Jackson* (Irish - Ch.) (1794) Ridg L&S 304, 306, '... the King should have a power to grant a patent to print the statute books, because it is necessary that there should be responsibility for correct printing...'

⁴⁷ (1781) Bac Abr 7th ed, Vol VI (London, 1832) 509, 512

⁴⁸ (1802) 6 Ves Jun 689, 704 (31 ER 1260, 1267): Lord Eldon LC referred to the need for a 'sufficient supply for the subjects of this country' and later to the 'regular supply by authorised persons of books, which the constitution has supposed to be of such a species, that the public ought to have a security'.

state, in particular, was shown by the fact that worship according to the reformed rites established by the Books of Common Prayer of Edward VI and Elizabeth I, and later Charles II, was made compulsory under the various Acts of Uniformity of 1548, 1551, 1558 and 1662.⁴⁹ Throughout the 16th and 17th centuries conformity to the established religion became inextricably bound up with obedience to the state.⁵⁰

There are also suggestions in some cases dealing with the prerogative right that the duty to superintend the publication of Acts of state and of works of the established religion may entail an obligation to ensure that an unreasonable price was not charged for those works. In *Universities of Oxford and Cambridge v Richardson* for instance, Lord Eldon stated that where fees for prerogative works were not ascertained by reference to the privilege, ‘the benefit shall be reasonable; and if an unreasonable price should be placed upon these works, these authorities and patents would be put in considerable hazard.’⁵¹ In *Eyre and Strahan v Carnan*, however, Skinner LCB considered the question whether the price charged for a work was reasonable or not only in respect of the issue of whether the plaintiff could obtain the equitable relief of an account.⁵² It is clear, though, that prior to 1947 in England the Crown could have sought a writ of scire facias to repeal a grant where there were abuses of it and in view of the nature of the grant it would be logical for such action to be taken for matters such as unreasonable pricing or unsatisfactory printing,⁵³ but there are no recorded instances in the cases of it having done so in respect of grants of this kind. The Crown's right to claim this relief was preserved and is now governed by the *Crown Proceedings Act 1947* (UK).⁵⁴

In the *Calendar of Patent Rolls, Philip and Mary* there is a reference in the record of grant of the office of Queen's printer to John Cawood dated 29 December 1553 to the office having become void because Richard Grafton who held it beforehand ‘forfeited it by printing a proclamation in which was contained that a certain Jane, wife of Guildeford Dudley, was queen of England’, (Lady Jane Gray's proclamation). Counsel for the defendant in *Basket v*

⁴⁹ 2 and 3 Edw VI, c I (1548); 5 and 6 Edw VI, c I (1552); I Elizabeth I, c. II (1558); 13 and 14 Car II, c 4 (1662).

⁵⁰ As the Guy Fawkes plot (1605) shows. The Elizabethan *Act of Supremacy*, I Elizabeth I, c.I. (1558), which imposed an oath of supremacy on all holders of public office effectively excluded catholic recusants from a wide variety of official positions (see s. XIX).

⁵¹ (1802) 6 Ves Jun 689, 712 (31 ER 1260, 1271).

⁵² (1781) Bac Abr 7th ed, Vol VI (London, 1832) 509, 510.

⁵³ In *Roper v Streater* (1672) Bac Abr 7th ed, Vol VI (London, 1832), 507, the writ appears from the report of the case to have been regarded as an appropriate remedy for abuses such as ‘unskilfulness, selling dear, printing ill etc’. In the *Calendar of Patent Rolls, Philip and Mary* Vol I (1553-1554) (London, 1937) 53, there is a reference in the record of grant of the office of Queen's printer to John Cawood dated 29 December 1553 to the office having become void because Richard Grafton who held it beforehand ‘forfeited it by printing a proclamation in which was contained that a certain Jane, wife of Guildeford Dudley, was queen of England’, (Lady Jane Gray's proclamation). Counsel for the defendant in *Basket v University of Cambridge* referred to this event by stating merely that Queen Mary ‘obliged’ Grafton to resign his patent but precisely how this was achieved was not discussed: (1758) 1 Black W 105,116 (96 ER 59, 63).

Arber records that in 1632 the King's printers Robert Barker and Martin Lucas were fined 3000 l. for having printed in an edition of the Authorized Version of the Bible the Seventh Commandment as ‘Thou shalt commit adultery’ leaving out the ‘not’: Refer Edward Arber, *A Transcript of the Registers of the Company of Stationers of London 1554-1640*, Vol III (London, 1876) 27.

⁵⁴ 10 and 11 Geo 6, c 44 (see ss 13, 23).

University of Cambridge referred to this event by stating merely that Queen Mary ‘obliged’ Grafton to resign his patent but precisely how this was achieved was not discussed.

III NATURE OF THE PREROGATIVE RIGHT

In contemporary terms the prerogative right over legal and religious works is frequently said to relate to the printing and publication of those works. The phrase ‘printing and publication’ is the description used in the more recent cases and by commentators such as Lahore.⁵⁵ Nevertheless, it is a shorthand description and not one typically found in the grants, since their language has usually referred only to an exclusive right to print or causing to be printed the works in question.⁵⁶ However, while the wording of grants has changed over time, they have, in addition to the inclusion of printing rights, normally contained separate prohibitions on others printing, uttering, selling and importing the works into the country.⁵⁷ These prohibitions would seem to be particularly important since the object of the grants was to disseminate the work and the right to print works does not, on its face, ensure control over dissemination. But, as the courts pointed out in *Universities of Oxford and Cambridge v Richardson and Manners v Blair*,⁵⁸ the effect of each privilege rested on its true construction and if on such a construction the Crown purported to grant the whole of its authority, then the right to print must necessarily carry with it the right to exclude others. As Lord Lyndhurst LC stated in *Manners v Blair*, this right of excluding others included the power of excluding

⁵⁵ JC Lahore, *Intellectual Property Law in Australia: Copyright* (Sydney, 1977), 11 (para. 115); JC Lahore, *Intellectual Property in Australia : Copyright Law* (Sydney, 1988-), para 10. 21. 35 and JC Lahore, *Copyright and Designs* (Sydney, 2004-), para 20,200.

⁵⁶ It is implicit that the right to print need not be undertaken directly by the grantee provided he causes the printing to be carried out (i.e. by his authority). Skinner LCB in *Eyre and Strahan v Carnan* (1781) Bac Abr 7th ed, Vol VI (London, 1832) 509, 512 appears to accept that the right includes the right to authorize others to print.

⁵⁷ A few early grants did not contain the prohibitions (see, for example, the grant of the office of stationer to the King on 5 December 1485, to Peter Actors in CB Judge, *Elizabethan Book-Pirates* (Cambridge, 1934), p 6, but normally they were a standard part of them. Examples of the full text of grants in the 16th and 17th centuries can be found in:

- Edward Arber, *A Transcript of the Registers of the Company of Stationers of London 1554-1640* (5 Vols) (London, 1875-1894), Vol II, 60-63, 746.
- TF Dibdin's edition of *Ames' Typographical Antiquities* (4 vols) (London, 1810-1819) see for example Vol III, 430, and Vol IV, 74.
- Thomas Rymer, *Foedera* (3rd ed., 10 Vols.) (The Hague, 1739-1745), Vol VI, Part III, 77, 85, 157; Vol VII, Part III, 8, 11, 51, 55, 56, 77 particularly. A full list of all grants found in Rymer's *Foedera* is found in the Appendix to TE Scrutton, *The Laws of Copyright* (1st ed.) (London, 1883), 293-298. Later editions of his work do not contain that Appendix. Examples of the full text of 18th century grants can be found in:
 - *Hanoverian State Papers Domestic Series 1714-1782* (microfilm publication) (Sussex, 1978): see for example, Part I 1714-1722, SP 35/8 No. 87 (March 26, 1717 to Bernard Lintott, bookseller); Part II 1722-1727, SP 35/61 No. 70 (25 March 1726 to William and John Innys, booksellers).The full text of some grants are also contained in cases on the prerogative right, for example, *Stationers' Company v Carnan* (1775) 2 Black W 1004 (96 ER 590), *Manners v Blair* (1828) 3 Bli NS 391 (4 ER 1379), and *Universities of Oxford and Cambridge v Eyre and Spottiswoode Ltd* [1964] Ch 736.

⁵⁸ Refer to judgment of Lord Eldon LC in the former case 6 Ves Jun 689, 712-714 (31 ER 1260, 1271, 1272) and Lord Lyndhurst LC in the latter case 3 Bli NS 391, 409-413 (4 ER 1379,1385,1386).

others from participating in the right of circulating works as well as printing them and he held in *Manners*' case that the power to prevent others circulating works was not limited by a prohibition which was only expressed to prevent importation from 'beyond the seas'.⁵⁹

Accordingly, it is implicit in the nature of the authority granted in the patents as well as from the prohibitions themselves that the prerogative right has always been exercised and can be regarded as a right to 'print and publish' in the sense in which these terms are presently understood, that is, the mass reproduction of the work and the dissemination or circulation of copies of the work to the public, usually by sale.

A Scope of the Right

The rights of those granted exclusive licences by the Crown depended not only on a proper interpretation of their privileges but ultimately, since the Crown could not grant rights which it did not possess, on the precise scope of the right of printing and publication.

There is no definitive examination of the right in any of the reported cases but there have been decisions and dicta on various patents which provide some clarification of its scope. It is clear, for instance, that courts have considered that the prerogative right extends to prevent others importing copies of works for the purpose of trading, but the extent to which the right goes beyond this has never been clearly elucidated in any of the cases. The Crown, in grants of exclusive licences in respect of other works, had included prohibitions in respect of the distribution of works,⁶⁰ and it is implicit from the object of the grants and the power to exclude others from circulating works that the right must extend to prevent others importing for the purpose of unauthorised gratuitous dissemination of copies of the work to the public. It is, though, logical to assume that the importation of a copy or copies of a work for personal or family use would not constitute an infringement of the right because it could not amount to a dissemination or circulation of copies of the work to the public.

It is also clear law that the exclusive right to print and publish prerogative works includes the right to print and publish abridgments of those works. This right was specifically included in some early patents and was upheld in *Basket v University of Cambridge*.⁶¹ However, there is little authority which would provide assistance on what types of dealing with a prerogative work a court would regard as 'fair' and not be an infringement of the right. It is settled that the reproduction of an entire work with the addition of annotations or other independently collected material does not take the new work outside the scope of the prerogative right. In *Baskett v Cunningham*⁶² the King's Printer in England sought to restrain the defendants from the publication of certain Acts of Parliament in a book entitled 'A Digest of the Statute Laws,

⁵⁹ (1828) 3 Bli NS 391, 410-412 (4 ER 1379, 1385, 1386). As to the right to prevent importation of works for sale, refer *Company of Stationers v Lee* (1681) 2 Show KB 258 (89 ER 927); *Company of Stationers Case* (1681) 2 Chan Cas 76 (22 ER 854) and *Company of Stationers* (1682) 2 Chan Cas 93 (22 ER 862).

⁶⁰ Refer, for example, to the prohibition against distribution contained in the grant of George I to Bernard Lintott, bookseller of London, to print 'The Reformade', dated 26 March 1717: *Hanoverian State Papers Domestic Series, 1714-1782 Part I 1714-1722* (Sussex, 1978), SP 35/8 No. 87.

⁶¹ (1758) 1 Black W 105 (96 ER 59); 2 Keny 397 (96 ER 1222).

⁶² (1762) 1 Black W 370 (96 ER 208); 2 Eden 137 (28 ER 848) (Ch).

containing the statutes at large, from Magna Charta to the end of the last parliament in 1760, in alphabetical order, together with such cases determined thereon as are necessary to explain them. By T Cunningham, esq Vol I'. The statutes were methodised under different heads and had large notes and references at the beginning and end of each statute or title, and in the margin. Although the court only granted a limited injunction, leaving the parties to adjust their rights in due course of law, it was of the opinion that the new work was 'entirely within the patent of the king's printer' and that the notes were 'merely collusive'.⁶³

There is, however, no authority on the question whether the unauthorised reproduction of a prerogative work as an appendix to a book such as a textbook amounts to an infringement of the right. A common example is the inclusion of an Act of Parliament at the end of a legal textbook. The reproduction of such a work in this context would, when the book is published, amount to a printing and publication of the work, and would also be prejudicial to the interests of the Crown's exclusive licensee since it would deprive the licensee of sales of the work. It should, therefore, be regarded as an infringement of the right. As Lord Eldon LC stated in *Universities of Oxford and Cambridge v Richardson*:

for the duty [on the Crown] cannot be exercised without great expense; and then every infringement, having a tendency to defeat the purposes of that expence incurred in the necessary establishment for the execution of that duty, has a tendency, not only to the pecuniary damage of those entrusted to discharge it, but also to put an end to the regular supply by authorised persons of books, which the constitution has supposed to be of such a species, that the public ought to have a security.⁶⁴

There is also no authority on the question whether the printing and publication of a portion of a prerogative work amounts to an infringement of the right in that work, for example, the reproduction of a substantial part of an Act of Parliament such as a Division or Part, since all litigation has concerned the reproduction of whole works. However, the report of the case of *Roper v Streater* indicates that the House of Lords took the view that the Crown's rights in law books did not extend to a book containing a quotation of law, and although there are no decisions in point, it would be reasonable to assume that courts, if faced with the issue, would adopt a test of infringement of the right which, in paying due regard to the objects of the right and the economic interests of the licensee, would permit some measure of fair or lawful use with the work for certain purposes such as review or criticism just as the equity and common law courts did in relation to copyright works in the 18th and 19th centuries.⁶⁵

Some patents of the Crown, including that of 29 May 1901 granting the office of King's Printer to the firm of Eyre and Spottiswoode, also purported to grant rights to print prerogative works in languages other than English.⁶⁶ The tradition of such grants emanates

⁶³ 1 Black W 370, 371 (96 ER 208); 2 Eden 137, 138 (28 ER 848, 849).

⁶⁴ (1802) 6 Ves Jun 689,704 (31 ER 1260, 1267).

⁶⁵ Refer EJ Macgillivray, *A Treatise upon The Law of Copyright* (London, 1902), 103-118 for a discussion of the early cases.

⁶⁶ Refer to the text of the grant in *Universities of Oxford and Cambridge v Eyre and Spottiswoode Ltd.* [1964] Ch 736, 738-740. An early example is a grant by Charles II in 1662: 'Oct. 6 Order by the King

from the 16th century when Latin and French were in more common use and there were Printers to the King in different languages.⁶⁷ Although there are no cases in point, it would be anomalous if the Crown's right did not include the capacity to sanction the printing and publication of translations of the works of religion and state in England, particularly if this was required to ensure understanding of the law and religion amongst immigrant communities whose grasp of English was less than adequate.⁶⁸

There is only a little assistance to be gained from cases on the prerogative as to whether the making of one or a small number of copies of a prerogative work would infringe the right of printing the work. There has been no suggestion in any of the cases that the right in question extends to a right of reproduction in the broad sense and there is also an implication in the judgment of Long Innes CJ in *Eq in Butterworth's* case that the making of a copy or a small number of copies of a prerogative work would not infringe the prerogative right. In discussing the right of an individual at common law to inspect and take copies of documents which are of a public nature, Long Innes CJ took the view that the extent of the right depended on the interest of the individual in what he wanted to copy and what was reasonably necessary for the protection of that interest. He concluded that the right encompassed those New South Wales statutes enrolled and recorded in the office of the Registrar-General under provisions of the *Registration of Deeds Act 1897* (NSW). He stated:

It seems to me that the extent of the interest which a member of the public has in inspecting the statutes enrolled and recorded in the office of the Registrar-General is to inform himself of the state of the law with a view to knowing his rights and liabilities, or of being in a position to advise others, and to make such copy or copies as will suffice to keep himself so informed; it cannot, in my view, extend to allowing him to deprive the Crown of its proprietary rights in the nature of copyright or to affect them except to that limited extent.⁶⁹

The view that the making of a copy or a few copies of a prerogative work is not an infringement of the prerogative right in that work, a view which is implicit in this statement, would appear to be correct in principle since it is unlikely that such reproduction could be regarded or would amount to the 'printing' of that work in the sense that the word 'printing'

that John Durel's French translation of the Prayer Book be used as soon as printed, in all the parish churches of Jersey and Guernsey, etc., in the French congregation of the Savoy, and all others conformed to the Church of England, with licence to him for the sole printing of the said translation'. *S. P. Dom 1661-1662* (London, 1861), 508.

⁶⁷ Refer, for example, to the grant of Edward VI to Richard Grafton 'of the office of the kings's printer of all books of statutes, acts, proclamations, injunctions and other volumes issued by the king ... in English or English mixed with any alien tongue, except only instructions in the rudiments of Latin grammar', for life, (22 April 1547): *Calendar of Patent Rolls: Edward VI Vol I (1547-1548)* (London, 1924), 187; and the grant of Edward VI to Reynold Wolff of the office of the King's typographer and bookseller in Latin, Greek and Hebrew which included a licence 'not only to print all Latin, Greek and Hebrew books but also grammars of Greek or Latin, although mixed with English, and also charts and maps useful or necessary to the king and his countries in those tongues; also to provide all such books as the king orders', for life, (19 April 1547) (Ibid).

⁶⁸ The translation right would also seem to be necessary in the historical sense for the adequate dissemination of prerogative works in other areas of the United Kingdom where there are indigenous languages (for example, Welsh (Cymraeg) and Gaelic and Lallans). Refer note 66.

⁶⁹ (1938) 38 SR (NSW) 195, 257.

is normally used and understood and as contemplated by the grant of exclusive rights. Prohibitions contained in the grants preventing others printing, selling or importing works were often expressed to be construed ‘contrary to the true meaning of this our Graunt’ or ‘contrarie to the meaninge of this our prefente Lycence and Priviledge’ or words similar in effect. These words themselves suggest that the grants were directed toward the mass reproduction and circulation of works since the purpose behind the grants was to provide a monopoly in the commercial exploitation of the works.⁷⁰

A further issue relating to the scope of the right is whether it is infringed by the reproduction of the work in another form or medium, for example, by the microform reproduction of statutes or by the incorporation of statutes in a database of an online computer-based legal information retrieval system. This issue highlights the difficulty of relating the prerogative of printing and publication to modern conditions.

Ricketson and Creswell argue that the prerogative is flexible and can extend to new non-print technologies such as online dissemination,⁷¹ while others have argued that it cannot because in the words of Diplock LJ in *BBC v Johns* ‘it is 350 years and a civil war too late for the Queen’s courts to broaden the prerogative’. The grants of exclusive rights were directed at mass reproduction and circulation of works with the objective of providing a commercial monopoly in the exploitation of the works. To the extent that electronic technologies achieve this object then it is arguable that the Crown’s prerogative right will encompass mass reproduction and circulation in these forms.

Bearing in mind the opposition of courts to broadening the prerogative, there is some doubt whether placing statutes online and enabling reproduction of statutes through down-loading on to disk or through print-outs, would be considered ‘printing’ within the plain meaning of that term, although it is akin to ‘publication’ as contemplated by the right. Online dissemination of statutes has largely replaced traditional publication of statutes in the sense understood by the right and governments have approved electronic sites which provide

⁷⁰ The Star Chamber decree of 1586 also made reference to the ‘true intent and meaninge’ of the grants (refer note 124). The right is distinguishable from those prerogatives which are more broadly expressed and in respect of which courts have taken a more expansive view, eg., with respect to the granting of a patent for an invention (refer *National Research Development Corporation v Commissioner of Patents* (1959) 102 CLR 252 and s.VI of the *Statute of Monopolies* 1623).

⁷¹ S Ricketson and C Creswell, *The Law of Intellectual Property: Copyright, Designs & Confidential Information* (2nd ed 2002) vol 2 looseleaf 14.205: ‘...that the promulgation of statutes etc in non-printed form comes within existing prerogative rights as a necessary adaptation to changing circumstances, rather than their extension into a new field altogether’; ‘...[the prerogative] should be capable of being applied in a flexible way so as to accommodate changing circumstances and conditions, so long as the fundamental objective of the exercise remains the same’. In *BBC v Johns* [1965] Ch 32, 79. Diplock L.J. stated ‘... it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints on citizens of the United Kingdom without any statutory authority are now well settled and incapable of extension’ and in particular Diplock LJ stated that the Crown's claim to a general prerogative right to the monopoly of any activity was denied and circumscribed by the *Statute of Monopolies* 1623. Section X of this Act, it should be noted, exempted ‘letters patents or grants of privilege ... for or concerning printing’ from its operation. Printing patents should be construed in such a way as not to go beyond the prerogative right of the Crown, refer Chitty, op cit, 394.

authorised electronic versions of that law.⁷² It is therefore suggested that courts would regard online dissemination as a new circumstance by which the prerogative right may be exercised.

Although the facsimile reproduction of statutes in microfiche, microcard or other microform is not 'printing' in the sense traditionally understood, it is nevertheless closely analogous, and a work may be published in this way. It is therefore likely that courts would regard the making and distribution of microform copies of statutes or other prerogative works as falling within the scope of the right.

IV WORKS FALLING WITHIN THE PREROGATIVE RIGHT

A Works of the Established Religion

Both Blackstone in his *Commentaries on the Laws of England* and Chitty in his early monograph on the prerogatives of the Crown stated that, as supreme head of the Church, the Crown in England had 'a right to the publication of all liturgies and books of divine service'.⁷³ Most recent commentators on the subject, however, list only a small number of specified religious works as subject to the prerogative.

It is clear that in England the Crown's prerogative right extends not to Bibles generally but only to the Authorised Version of the Bible of 1611 and its principal parts, the Old and New Testaments and most probably the Books and Gospels contained therein. Although at one time the Crown made grants of exclusive rights in respect of other versions of the Bible such as the Genevan edition⁷⁴ and continued to express grants over three centuries in broad terms such as 'all Bibles and Testaments in the English language',⁷⁵ it was settled in *Universities of Oxford and Cambridge v Eyre and Spottiswoode Ltd*⁷⁶ that the Crown's prerogative right did

⁷² For example, Australian Capital Territory. *A.C.T Legislation Register*, (approved under the Legislation Act 2001) (ACT) *Legislation register—authentication of material* (23 August 2011) <<http://www.legislation.act.gov.au/Updates/authentication.asp>>. 'Until recently, ACT legislation was authorised only when viewed electronically on this web site or when the copy was printed by the government printer. Extra security is necessary to make sure the documents that are downloaded are true copies of ACT legislation. The ACT Parliamentary Counsel's Office (PCO), the office that drafts and publishes ACT legislation, has implemented measures to provide this security'. Refer ss24-26 of the *Legislation Act 2001* (ACT). Similarly, also refer to the *Acts Publication Act 1905* (Cth) ss 4-8.

⁷³ W. Blackstone, *Commentaries on the Laws of England Book II* (Oxford, 1766), p 410 and Chitty, *op cit*, 240.

⁷⁴ 8 January 1561, Licence for seven years for John Bodeleigh to print the English Bible 'with annotations faithfully translated and fynyshe'd' in the present year A.D. 1560 and dedicated to the queen; no others to print it on pain of the queen's displeasure and forfeiture to the Crown of 40s for every Bible printed, and all such books to be forfeited to the person who shall bear the costs and sue the forfeiture on behalf of the Crown; provided that the Bible printed may be so ordered in the edition thereof as may seem expedient by the advice of the bishops [sic] of Canterbury and London. By ps *Calendar of Patent Rolls: Elizabeth I Vol II* (1560-1563) (London, 1948), 218. Reference is also made to this edition in Arber, *op. cit.* Vol II 15, 63 (full text of the grant).

⁷⁵ This appears to have been the expression used in the grant of the office of King's printer to John Basket dated 19 December 1715 (refer *Eyre and Strahan v Carnan* (1731) Bac Abr 7th ed, Vol VI (London, 1832), 509).

⁷⁶ [1964] Ch 736.

not extend this far. The plaintiffs in that case had published an entirely new translation of the New Testament called the 'New English Bible: New Testament' and the defendants, the Queen's Printers, relying on a patent which had granted to them the right to print 'all and singular Bibles and New Testaments whatsoever in the English Language or in any other language', printed and published one of the Gospels from the plaintiffs' translation. That translation was not authorised by the Crown as head of the Church of England although it had the support of the Christian churches and Bible societies. Plowman J held that there was no legal authority for the view that the prerogative extends to any translation of the Bible other than the Authorised Version and that the prerogative did not cover the right to print a work which would amount to an infringement of copyright. It should be noted that the Crown's grants in various letters patent to the King's Printer have formally expressed its rights to include Testaments and there is authority for the view that they so extend: *Re 'The Red Letter New Testament (Authorized Version)'*.⁷⁷

There is also some early authority which suggests the Books and Gospels of the Bible are in themselves subject to the right and it would be anomalous if this were not so, in view of the separate nature of these works and of the likely prejudice to the interests of the exclusive licensee and the Crown which would occur through the pirate printing and publication of them. In *Company of Stationers v Lee*⁷⁸ it was successfully argued that the King as head of the Church had a particular prerogative in the printing of primers, psalters and psalms which, it appears from the case, had, with a number of almanacks, been imported and sold in breach of the plaintiff's patent. Further support for this proposition rests on some unreported decisions mentioned in both the judgment of Yates J in *Millar v Taylor*⁷⁹ and by counsel for the plaintiff in *Company of Stationers v Partridge*.⁸⁰ Yates J in fact took the view that these works fell within the Crown's right.⁸¹

The Psalter is the Book of Psalms which forms part of the Old Testament and is the hymn book and prayer book of the Bible, being divided into five collections or books which comprise 150 psalms. Although the Crown made grants of printing rights in psalms and psalters of various versions which were not derived from the Authorised Version of the Bible, the Crown's right could not now extend to include the right to print and publish any version other than the Book of Psalms in the authorised form. Furthermore, while Crown grants over psalters or psalms have used the expression 'books' of psalters or psalms or 'the Psalms of David',⁸² the absence of any clear authority makes it difficult to determine whether the

⁷⁷ (1900) 17 TLR 1 (Ch). Obiter dicta in other cases also suggests that the prerogative right does not extend to any other early version of the Bible: refer, for example, to *Millar v Taylor* (1769) 4 Burr 2303, 2405 (98 ER 201, 256).

⁷⁸ (1681) 2 Show KB 258 (89 ER 927) (Ch).

⁷⁹ (1769) 4 Burr 2303, 2382 (98 ER 201, 244).

⁸⁰ (1712) 10 Mod 105, 107 (88 ER 647, 648) (KB).

⁸¹ 4 Burr 2303, 2382 (98 ER 201, 243).

⁸² Refer, for example, to the grant of 3 July 1559 to William Seres (*Calendar of Patent Rolls: Elizabeth I Vol I* (1558-1560) (London, 1939), 54; grant to John Daye of 2 June 1567 (*Calendar of Patent Rolls: Elizabeth I Vol IV* (1566-1569) (London, 1964), 108; grant to William Seres the elder and William Seres the younger of 23 August 1571 (*Calendar of Patent Rolls: Elizabeth I Vol V* (1569-1572) (London, 1966), 268; grant to the Company of Stationers dated 29 October 1603 (Arber, op cit, Vol III, 42). The

Crown's right over psalms extended to the printing and publication of an individual psalm. For reasons which were advanced earlier,⁸³ however, it would be anomalous if an exclusive licensee of the Crown could not prevent the unlicensed printing of the Authorised Version of the Book of Psalms or one of the five collections of psalms under a grant even where that grant was expressed only to cover Bibles, as is the case with the grant to the existing Queen's Printer.

Primers were used principally as school books and books of private devotion and were the subject of Crown grants in the 16th and 17th centuries. They took a number of early forms, originally being printed in Latin, but in Elizabethan times had become 'nothing more nor less than a school edition of [the] Morning and Evening Prayer from the Prayer Book, with the Catechism. To this was added an ABC, the Litany, the Seven Penitential Psalms, with sundry graces drawn largely from Henry VIII's Prymer, with the title of "The Primer, and Catechisme"'.⁸⁴ After 1585 it seems probable that the work became 'merely a glorified ABC book containing certain elements drawn from the Prymer, and bound cheaply in paper or vellum wrappers for school use'⁸⁵ and although James I granted the Company of Stationers the monopoly in them, which Charles II later confirmed,⁸⁶ the nature of the works and the Crown's ultimate abandonment of grants compellingly suggest that the work could not now be subject to the prerogative right.

It is nevertheless clear that the prerogative encompasses the 1662 Book of Common Prayer which is still the principal authorised form of worship in the Church of England.⁸⁷ This right has been accepted in a number of cases although it is by no means clear that judges have viewed the right as restricted merely to the 1662 version. Yates J in *Millar v Taylor*, for instance, took the view that the right extended to 'Common-Prayer Books' and his use of the plural suggests that he may have referred to more than the 1662 version. Similarly grants in letters patent to the King's Printer have over the centuries referred to such descriptions as 'all Books of Common Prayer',⁸⁸ and 'any Books of Common Prayer'⁸⁹ which suggest that the Crown purported to claim rights in earlier versions of the work. However, although these versions were once authorised forms of worship, they have long since ceased to be and it is extremely doubtful whether the Crown may validly claim these works to be within the

expression 'books' has been construed widely (refer *Eyre and Strahan v Carnan* (1781) Bac Abr 7th ed, Vol VI, 509 where a 'form of prayer' was included within the description.

⁸³ Refer pages 17/18, '... every infringement, having a tendency to defeat the purposes of that expence incurred in the necessary establishment for the execution of that duty, has a tendency, not only to the pecuniary damage of those entrusted to discharge it, but also to put an end to the regular supply by authorised persons of books, which the constitution has supposed to be of such a species, that the public ought to have a security ...' Lord Eldon LC in *Universities of Oxford and Cambridge v Richardson*.

⁸⁴ Edwyn Birchenough, 'The Prymer in English', *The Library* Fourth Series, Vol XVIII (1937-1938), 177, 194. According to the author it seems probable that the Prymer, either in Henry VIII's version, or according to the Book of Common Prayer, was rarely printed after 1585 (194).

⁸⁵ *Ibid*, 194.

⁸⁶ *Ibid*.

⁸⁷ *Halsbury's Laws of England* (4th ed.) Vol 14 (London, 1975), 489, 490, 493-495.

⁸⁸ Grant of 19 December 1715 to John Baskett of the office of King's printer cited in *Eyre and Strahan v Carnan* (1781) Bac Abr 7th ed, Vol VI (London, 1832), 509.

⁸⁹ Letters patent to the Queen's printer of 29 May 1901 in *Universities of Oxford and Cambridge v Eyre and Spottiswoode Ltd* [1964] Ch 736, 738-740.

modern scope of the prerogative since the duty on the Crown which lies at the basis of the prerogative cannot be present in respect of the works.

The extent of the Crown's duty as supreme head of the Church of England to print and publish works upon which the established religion is founded is particularly evidenced in *Eyre and Strahan v Carnan*.⁹⁰ In that case the plaintiffs, who were the King's Printer, relied upon a patent which purported to give them the right to print 'all Bibles and Testaments in the English language; and all Books of Common Prayer and Administrations of the Sacraments, and other Rites and Ceremonies of the Church of England...and of all other books which he, [the King] his heirs or successors, should order to be used for the service of God in the Church of England'.⁹¹ The defendant, without the permission of the plaintiffs, printed a Form of Prayer which had been ordered by King George III to be read in all churches on 4 February 1780. Skinner LCB held that this Form of Prayer fell within the patent and the prerogative of the Crown, and granted the King's Printer an account of profits in relation to the sale by the defendant of copies of the work. It is interesting to note that the Crown included words of similar import to the above in letters patent to the current Queen's Printer.⁹²

B Legal Works

Prior to the commencement in England of the *Copyright, Designs and Patents Act 1988* (UK), which provides specifically that Crown copyright rather than the Crown's prerogative right subsists of every Act in Parliament, the Crown's right to print and publish Acts of Parliament and their abridgments was well established. It has previously been referred to. It should be pointed out, however, that there is no suggestion in any of the cases that the prerogative right extended or extends to Bills before Parliament nor has the Crown ever made such a claim. Bills are not Acts of state which, to use the language of Skinner LCB, determine a subject's civil obedience,⁹³ and do not therefore fall within the rationale behind the right. Other Acts of state of similar description which fall within the rationale of the prerogative are royal Proclamations, Orders in Council and instruments made under an Act such as Regulations and Ordinances, and all must, in principle, be considered to be encompassed by it.⁹⁴

⁹⁰ (1781) Bac Abr 7th ed, Vol VI, 509.

⁹¹ Ibid.

⁹² Refer *Universities of Oxford and Cambridge v Eyre and Spottiswoode Ltd* [1964] Ch 736, 739, 740.

⁹³ *Eyre and Strahan v Carnan* (1781) Bac Abr 7th ed, Vol VI, 509, 511.

⁹⁴ Willes J in *Millar v Taylor* (1769) 4 Burr 2303, 2329 (98 ER 201, 215) took the view that Acts of Parliament, Orders of Council, Proclamations 'and such like' fell within the right. The listed Acts of State would fall within this scope. See also Yates J in the above case (4 Burr 2303, 2381, 2382: 98 ER 201, 243) and Lord Eldon LC in *Universities of Oxford and Cambridge v Richardson* (1802) 6 Ves Jun 689, 704 (31 ER 1260, 1267) who appears to have accepted the view that Proclamations and other 'Acts of State' (apart from statutes) fell within the right.

The following commentators have expressed similar views: Chitty, op cit, 239 - the right encompassed 'Acts of Parliament, proclamations, and orders of council'; Blackstone, op cit, Book II, 410 was of the same view; Lahore, op cit, 11 citing *Millar v Taylor* included Acts of Parliament, Proclamations, Orders in Council, and 'similar State ordinances'.

A more controversial area, however, is that of the Crown's right over what have been termed 'law books'. The privilege in law books is the earliest example of a 'class monopoly' in printing grants and various grants were made over the period 1553 to 1788, when the last one was made for a term of 40 years.⁹⁵ The precise meaning of the term 'law book' is not clear, a matter recognised in the case of *Roper v Streater*,⁹⁶ and the grants have not all been couched in the same wording. The first recipient of a grant, Richard Tottel, who was licensed to print 'all and almaner of bokes of our Temp [or] all lawe called the comon lawe'⁹⁷ was able to list 25 legal works in his stock, apart from year books, which he considered fell within his grant. Included in those works were Brooke's *Newe Cases* and Littleton's *Tenures*.⁹⁸ Later, Thomas Wight who, with Bonham Norton, purchased the law patent of Charles Yetsweirt in respect of 'the bookes of the laws of this realme' in 1599, published before his death in 1609 textbooks and books of practice, case law and precedents, statute law, abridgments and source books. These works included *A Direction or Preparative to the Study of the Lawe* by William Fulbecke, *A Profitable booke treating of the lawes of England* by John Perkins, *A Collection of Statutes* edited by William Rastell, Coke's *Reports* and Lambarde's work *Eirenarcha*.⁹⁹

In the first case dealing with this right, *Stationers v Patentees about the Printing of Roll's Abridgment*¹⁰⁰ the House of Lords held that a patent to print 'all law-books that concern the common law' included within it the right to print Roll's Abridgment which was in the nature of a digest of statute and case law as well as parliamentary records, and not merely a topical collection of cases. In the second major case, *Roper v Streater*, a grant to the defendant of the right to print law books 'touching or concerning the common or statute law' was regarded as

⁹⁵ Great Britain, Public Record Office, *M.S.S. Calendars and Indexes to the Patent Rolls: 1 Elizabeth I - 7 William IV*, (London, 1965), (microfilm publication) 90, (179 Patent Roll):

29 George III '20th day of August Doth Give and Grant unto Andrew Strahan and William Woodfall the Privilege of Printing all Law Books touching the Common Law of England for forty years from the 30 Day of April 1789'.

The manuscript copy of the grant expresses it as 'full power Licence Privilege and sole Authority of printing or causing to be printed ALL and all manner of Law Books whatsoever they may be which in any manner or wise touch or concern the Common Law of that part of this Our Kingdom of Great Britain called England'. Fifth Part of Patents in the Twenty Ninth Year of King George the Third (5 /29 Geo 3d), National Archives (UK) Kew, Surrey, England.

⁹⁶ (1672) Bac Abr 7th ed, Vol VI (London, 1832) 507.

⁹⁷ Dated 12 April 1553. The wording is that described in L Rostenberg, 'The Preservation of the English Legal Tradition: Thomas Wight, 'Patentee in Law Books'', *Literary, Political, Scientific, Religious and Legal Publishing, Printing and Bookselling in England 1551-1700: Twelve Studies*, Vol I (New York, 1965), 23. The relevant Patent Roll abstract reads,

'Licence and privilege to Richard Tathill of London, 'stacioner and printer' to have the sole printing for seven years from this date of 'almaner bokes of oure temporall lawe called the Common lawe' for which no other person has at present any special privilege, provided that 'the same bokes be allowed and adjudged mete to be imprinted either bi one of the justeces of the lawe or two serjantes or three apprentices of the lawe whereof th'one to be a reder in Courte'. By p.s.' (*Calendar of Patent Rolls: Edward VI Vol V (1547-1553)* (London, 1926), 47.

⁹⁸ WW Greg, *Some Aspects and Problems of London Publishing Between 1550 and 1650* (Oxford, 1936), 99, and Arber, op cit, Vol II, 419. Tottel received two subsequent grants on 5 May 1556 and 12 Jan 1559 in respect of books of the common law: *Calendar of Patent Rolls: Philip and Mary Vol III (1555-1557)* (London, 1938), 18, and *Calendar of Patent Rolls: Elizabeth I Vol 1. (1558-1560)* (London, 1939), 62, respectively.

⁹⁹ Rostenberg, op cit, 40, 43, 44.

¹⁰⁰ (1666) Carter 89 (124 ER 842).

including a right to print the third part of Croke's *Reports*, a right which the plaintiff had specifically purchased from the executors of Mr Justice Croke. The House of Lords in making its decision reversed the decision of the Court of Common Pleas which had been made on grounds which included that the wording of the grant was 'loose and uncertain'. However, the House of Lords hardly clarified the scope of the grant, the report of the case merely indicating that it took the view that the words in the grant 'were to be taken secundum subjectam materiam, and not to be extended to a book containing a quotation of law, but where the principal design was to treat on that subject'.¹⁰¹

The Crown's right over law books was accepted by the courts in *Company of Stationers v Seymour*¹⁰² and *Company of Stationers v Partridge*,¹⁰³ although both those cases concern the pirating of almanacks. It appears also to have been accepted by one judge in *Millar v Taylor*.¹⁰⁴ However, in the light of the decision in *Universities of Oxford and Cambridge v Eyre and Spottiswoode Ltd* which held that the prerogative did not cover the right to print, or authorise others to print, any works the printing of which would be an infringement of copyright, the modern scope of the right over law books cannot be considered to cover secondary sources such as original textbooks, or original headnotes, annotations, abridgments or compilations of cases prepared by a reporter, as well as published editions of law reports, the printing of which would be an infringement of copyright. To the extent that the Crown's right over law books may still exist, it can only do so in relation to the written judgments of its judges.¹⁰⁵

By virtue of the prerogative the Crown is the source and fountain of justice, from whom all jurisdiction is ultimately derived.¹⁰⁶ Although this jurisdiction is invariably now statute-based, judges still derive their authority from the Crown, by commission required by law, and

¹⁰¹ (1672) Bac Abr 7th ed, Vol VI (London, 1832) 507.

¹⁰² (1677) 1 Mod 256, 257, 258 (86 ER 865, 866). In this case the court took the view that almanacks were a stronger case than that of law books for being subject to the prerogative, but appears to have accepted the rationale that law books were 'matters of State... [which] were never left to any man's liberty to print that would'.

¹⁰³ (1712) 10 Mod 105, 107 (88 ER 647, 648). The court stated, 'the patent for the sole printing of law books is not now to be shaken, having had the sanction of the House of Lords', (apparently a reference to *Roper v Streater*).

¹⁰⁴ Though subject to the expression of some doubt: refer judgment of Willes J at 4 Burr 2303, 2315, 2316, 2329 (98 ER 201, 208, 215).

¹⁰⁵ The right would encompass written reasons for a decision of a judge and probably formal court orders. The right to print and publish a verbatim report of an oral judgement not delivered from script would probably vest in the reporter - refer *Walter v Lane* [1900] AC 539 and G Sawyer, *Copyright in Reports of Legal Proceedings* 27 ALJ. 82, 84-86 (discussed 250, 465). As to edited reports, refer Lahore, op cit, p 100.

In a sequel article in this Review, it is argued that copyright does not subsist in written judgments. Even if copyright co-existed with the prerogative right, the printing of judgments under the authority of, or by the Crown, would not be an infringement of copyright because:

- (a) in England, assuming copyright was held by the judge as author, there would be an implied licence to the Crown to print and publish or to authorise others to print and publish such judgments, or
- (b) in Australia, any copyright would vest in the Commonwealth or State.

¹⁰⁶ Bac Abr 7th ed, Vol VI, (London, 1832) 'Prerogative (D)', 428.

judicial power is still deemed to be exercised in the Queen's name.¹⁰⁷ Because judges in writing reasons for their decision are exercising that judicial power, in principle it follows that rights in judgments should be held by the Crown. Further, the nature of judgments, that is, their role in formulating the law, is such that it is arguable that the Crown has a duty to superintend their publication to ensure they are disseminated in an accurate and authentic form in the same way it has in relation to statutes. However, the Crown has displayed little direct evidence of a duty on it to do so. Although there is some evidence that the state was involved in the production of some reports in the reign of James I,¹⁰⁸ law reporting has, over the centuries, been almost entirely left to members of the legal profession and private publishers.

There have, however, arguably been some indirect manifestations of such a duty, exercised through the Crown's judicial officers. Licensing by judges of 'books of the common law' was required under the Star Chamber decrees of 1586 and 1637 and this regime continued under the *Licensing Act* of Charles II after the Civil War.¹⁰⁹ Even after the *Licensing Act* lapsed in 1694, the practice of obtaining judicial approval for reports of cases continued until the early part of the 18th century.¹¹⁰ As the Report of the Law Reporting Committee points out, the requirement in s 2 (in fact, s III), of the *Licensing Act* 1662 that 'all books concerning the common laws of this realm, shall be printed by the special allowance of the lord chancellor, or lord keeper of the great seal of England for the time being, the lords chief justices, and the lord chief baron for the time being, or one or more of them, by their, or one of their appointments' was interpreted to cover the publication of law reports long after the Act lapsed, and 'a number of volumes of reports published in the last third of the 17th and the early years of the 18th century bear an imprint allowing their printing and publishing'. This role continued as a correcting and revising role and ultimately assisted in the development of

¹⁰⁷ In legal contemplation, the Sovereign is deemed always to be present in court (W Blackstone, *Commentaries on the Laws of England* 18th ed, Book 1, 269); '... all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers', Blackstone, op cit, 1st ed, (1765) Book 1, 257. Refer also *Halsbury's Laws of England*, 4th ed., Vol 8, (London, 1974), 603.

¹⁰⁸ Great Britain, Lord Chancellor's Dept, *Report of the Law Reporting Committee* (March 1940) (London, 1940), 6. There have been claims made in some cases on the prerogative that the Crown's prerogative right specifically included 'year books' - refer, for example, to the argument of counsel for the defendant in *Basket v University of Cambridge* (1758) 1 Black W 105, 114 (96 ER 59, 62) that they fell within the prerogative right on the basis of 'property by purchase' as it was claimed that they were made by reporters paid by the King. Willes J in *Millar v Taylor* (1769) 4 Burr 2303, 2329 (98 ER 201, 215) in fact accepted that they fell within the right. It is certain that year books were published by law book patentees (for example, Tottel) but the claim that they were made by reporters paid by the King is based on legend. (Refer *Report of the Law Reporting Committee*, above, 6, W. Holdsworth, *A History of English Law*, (3rd ed.) Vol II (London, 1923), 525-556 (534 particularly)).

¹⁰⁹ Arber, op cit, Vol II 807-812, Decree of 1586 (s.4); Vol IV 529-536, Decree of 1637 (s.III); *Licensing Act* 1662 (13 and 14 Car II c.33, s.III).

¹¹⁰ Report, op cit, 6, 7. The Report points out that the Act was repealed by the *Statute Law Revision Act* 1863, but fails to mention that it had already lapsed in 1694 (7).

authorised reports in the late 18th century.¹¹¹ The role was confirmed in the establishment of the Incorporated Council of Law Reporting¹¹² and has continued until the present day.

While this area of the law is not free from doubt, the better view would appear to be that the Crown's prerogative right encompasses the judgments of its judicial officers and that this right represents the last vestiges of the law book monopoly which it exercised until the 19th century. It should be pointed out that the absence of evidence relating to the grant of monopoly rights over law books in more recent times is not determinative of the existence of the prerogative right. Even if the grant of monopoly rights was the only evidence relevant to this question, there is no doctrine that a prerogative right may cease to exist merely because it is not used.¹¹³

C Other Works

Courts took the view for about a century after the Restoration that almanacs were encompassed within the prerogative largely on the basis, which was erroneous, that they were derived from the calendar that was printed with the Book of Common Prayer (see *Company of Stationers v Seymour*)¹¹⁴. Almanacs were popular, ephemeral and therefore lucrative works which 'by the end of the sixteenth century, had become a necessary annual publication which was consulted by all classes of the community ...'.¹¹⁵

The Crown's first privilege in them was granted in 1571¹¹⁶ although the earliest copies now extant date from the 12th century. In 1603 the Company of Stationers acquired the monopoly by a grant from James I which was expressed to be 'for ever'¹¹⁷ and these works formed the basis of what become known as the Company's English Stock. Subsequently the privilege

¹¹¹ W Holdsworth, *A History of English Law*, Vol XII, 112, 117 and Vol XIII, 424-426.

¹¹² A recommendation of the Law Amendment Society in 1853 rejected the idea of a voluntary association amongst the profession for the publication of *Reports* but instead advocated the creation of a Board, appointed by the Crown, to superintend the production and publication of *Reports*. It pointed out that it was as much the duty of the state to undertake this work, as it was its duty to undertake the work of publishing the statutes and Parliamentary papers. (Holdsworth, op cit, Vol XV (London, 1965), 251). However the notion of a voluntary association advocated by W.T. Daniel in 1863 ultimately led to the formation of the Council composed of the law officers, representatives from Lincoln's Inn and the Inner and Middle Temple and the Law Society, and the Council induced nearly all the authorized reporters to take service under it. As Holdsworth states, 'The judges were asked to approve the reporters appointed, to permit the editors and reporters to have access to their written judgments, to revise their unwritten judgments before publication, and that they '[would] recognize the editors and reporters as members of the Bar exercising a professional privilege for a public object, under responsibility, through the Council, to the Judges, the Bar and the Profession at large' (Holdsworth, op cit, Vol XV, 253, 254 quoting W.T.S. Daniel, *The History and Origin of the Law Reports*, 276, n.v).

¹¹³ *Burmah Oil Company v Lord Advocate* [1965] AC 75, 101 (HL); *Universities of Oxford and Cambridge v Richardson* (1802) 6 Ves Jun 689, 710 (31 ER 1260, 1270); *Toy v Musgrove* (1888) 14 VLR 349, 378. *Contra*, *State of South Australia v State of Victoria* (1911) 12 CLR 667, 703; *Wensleydale Peerage Case* (1856) 5 HLC 958, 961, 962 (10 ER 1181, 1183).

¹¹⁴ (1677) 1 Mod 256 (86 ER 865).

¹¹⁵ EF Bosanquet, 'English Seventeenth-Century Almanacks', *The Library*, Fourth Series, Vol X No 4, (March 1930) (London, 1930), 361, 362.

¹¹⁶ *Calendar of Patent Rolls: Elizabeth I*, Vol V (1569-1572) (London, 1966), 240 to Richard Watkyns and James Robertes of London, 'starcyoners' for 10 years.

¹¹⁷ Refer grants of 29 October 1603 (Arber, op cit, Vol 111, 42) and 8 March 1615 (quoted in part in *Stationers' Company v Carnan* (1775) 2 Black W 1004 (96 ER 590, 591).

was also granted to the Universities of Oxford and Cambridge, but most early English almanacs were published by the Company, and their popularity continued throughout the 17th and 18th centuries and were often the subject of piracy. The Stationers Company asserted its right to the monopoly in a number of reported cases and it was upheld in *Company of Stationers v Seymour* and *Company of Stationers v Lee*,¹¹⁸ but in 1775 doubts about the validity of the right, which had been evident in *Company of Stationers v Partridge*,¹¹⁹ were ultimately resolved in *Stationers' Company v Carnan*¹²⁰ when the Court of Common Pleas held that the Crown did not have a prerogative or power to make such a grant to the plaintiff exclusive of any other or others. Crown grants in respect of almanacs thereafter ceased.

In *Millar v Taylor* there are references in the judgments of Lord Mansfield C.J. and Willes J. to the Crown's rights in 'the Latin Grammar'.¹²¹ Both judges considered this work to be the property of the Crown on the basis that the Crown had paid for the compiling and publishing of it. The claim was also mentioned by counsel for the defendant in *Basket v University of Cambridge*.¹²² The Latin Grammar was a school textbook vulgarly known as Lily's Latin Grammar and was prescribed during several reigns as the only grammar to be taught in schools, in order to avoid problems associated with a diversity of grammars. Although it was produced by a committee appointed by King Henry VIII, from a number of works including those of William Lily and first authorised by the King in c1540,¹²³ and was once the subject of the grant of monopoly rights, the nature of the work is such that it cannot, in the light of authority, be within the modern scope of the prerogative right.

Reference has already been made at the beginning of this article to the Crown's practice of granting privileges in a wide variety of works apart from those in which courts have considered the Crown has special duties and rights. The practice of petitioning for, and the making of, such grants which began in the 16th century was well established by the 18th century and was similarly observed in other European jurisdictions. While grants were originally supported by the Star Chamber decrees of 1585 and 1637¹²⁴ and their validity was

¹¹⁸ (1681) 2 Show KB 258 (89 ER 927).

¹¹⁹ (1712) 10 Mod 105 (88 ER 647) where the Court of King's Bench failed to give an opinion, and ordered the case 'to be spoke to again' to enable the Company of Stationers to show the Crown had some special interest in the printing of almanacs. Judgment was never given in the case.

¹²⁰ (1775) 2 Black W 1004 (96 ER 590) (CP).

¹²¹ Refer 4 Burr 2303, 2329 (Willess J) (98 ER 201, 215); 4 Burr.2303, 2405 (Lord Mansfield CJ) (98 ER 201, 256).

¹²² (1758) 1 Black W 105,116 (96 ER 59, 63); 2 Keny 397, 412 (96 ER 1222, 1228).

¹²³ F Watson, 'The Curriculum and Text-Books of English Schools in the First Half of the Seventeenth Century', *Transactions of the Bibliographical Society*, Vol VI (1900-1902), (London, 1903), 159, 182. See also generally CG Allen, 'The Sources of 'Lily's Latin Grammar'. A Review of the Facts and Some Further Suggestions', *The Library*, Fifth Series, Vol IX (London, 1954), 85-100.

¹²⁴ For the Decree of 1586 refer Arber, op cit, Vol II, 807, 810. Section 4 provided, inter alia, that no person 'shall ymprint or cause to be ymprinted any book, work or coppie against the fourme and meaninge of any Restraynt or ordonnaunce conteyned or to be conteyned in any statute or lawes of this Realme ... or against the true intent and meaninge of any Letters patentes, Commissions or prohibicons vnder the great seale of England ...'

For the Decree of 1637 see Arber, op cit, Vol IV, 529, 531. Section VII provided:

further recognized by the *Licensing Act* 1662,¹²⁵ the *Statute of Anne* provided in s IX, that nothing in the Act should be construed to ‘prejudice or confirm any right that ... any person or persons have, or claim to have, to the printing or reprinting any book or copy already printed, or hereafter to be printed’.¹²⁶

Crown grants made after the *Statute of Anne* which were not religious or legal in character include the right to print and publish Newton’s *Philosophiæ Naturalis Principia Mathematica*¹²⁷ and the vocal and instrumental music of J C Bach¹²⁸ and Handel.¹²⁹ These grants were consistently phrased and differed from earlier grants in a number of respects. They were all expressed to relate to the printing and publication of works and were all made for a period of 14 years, the principal term of protection of the *Statute of Anne*, and all purported to be consistent with that Statute by being expressed ‘... agreeable to the Statute in that behalf made and provided ...’ or with words similar in effect. Some grants specifically referred to the right and title of the copy having vested in the grantee, that is, a reference to the rights given by the Statute¹³⁰ or as claimed at common law.

¹²⁵ ‘That no person or persons shall within this Kingdome, or elsewhere imprint, or cause to be imprinted, nor shall import or bring in, or cause to be imported or brought into this Kingdome, from, or out of any other His Maiesties Dominions, nor from other, or any parts beyond the Seas, any Copy, book or books, or part of any booke or bookes, printed beyond the seas, or elsewhere, which the said Company of Stationers, or any other person or persons haue, or shall by any Letters Patents, Order, or Entrance in their Register book, or otherwise, haue the right, priuiledge, authoritie, or allowance soly to print...’
13 and 14 Car II, c.33, s.XXII.

¹²⁶ ‘Provided also, That neither this act, nor any thing therein contained, shall extend to prejudice the just rights and priviledges granted by his Majesty, or any of his royal predecessors, to any person or persons, under his Majesties great seal, or otherwise, but that such person or persons may exercise and use such rights and priviledges as aforesaid, according to their respective grants; anything in this act to the contrary notwithstanding’.

¹²⁷ 8 Anne, c.19, s.IX. This section was also relied upon by those who claimed that there was a common law right to print and publish works in perpetuity after publication which was not extinguished by the *Statute of Anne*, a right upheld in *Millar v Taylor* but subsequently overruled in *Donaldson v Beckett* (1774) 2 Bro PC 129 (1 ER 837), 4 Burr 2408 (98 ER 257).

¹²⁸ *Hanoverian State Papers Domestic 1714-1782*, Part II (1722-1727) (Sussex, 1978), SP 35/61, No. 70; March 25, 1726, Licence to William and John Innys, booksellers.

¹²⁹ CS Terry, *John Christian Bach*, (2nd ed, London, 1967), 78 (text of grant).

¹³⁰ OE Deutsch, *Handel: A Documentary Biography*, (London, 1955), 105, 106 (14 June, 1720). Subsequent grants in respect of Handel’s works were made to John Walsh on 31 October 1735 (ibid, 488, 489) and 19 August 1760 (ibid, 844).

¹³⁰ Refer grant to Stephen Austin of 8 January, 1741/2 for ‘A new history of the holy Bible, from the beginning of the world to the establishment of Christianity, etc’ in ‘Campbell, Hay: Information for A.D. and J. Wood, Booksellers in Edinburgh ...’, *The Literary Property Debate, Six Tracts 1764-1774*, (New York, 1975), Item B, 1, 2. (one of the Garland Series ‘*The English Book Trade 1660-1853*’ (ed. Stephen Parks)).

Refer also ‘Rae, Sir David, Lord Eskgrove: Information for Mess. J. Hinton ...’ *The Literary Property Debate: Six Tracts 1764-1774*, (New York, 1975), Item D, 24, 25, where the author states, ‘it is not the patent which creates the right, but it only tends to secure and preserve it, by a public prohibition of encroachments upon it’ (24), and later arguing that the royal grants recognise a common law right in authors states, ‘... it appears, that Mr Auftein did then positively and truly assert his having obtained the sole right and title of the copy of the said work, antecedent to his application to his Majesty; and he only demanded the aid of the royal licence, during such time as his Majesty pleased to grant it, for the better publication of his right, and preventing others from interfering in his enjoyment of it’ (25). It is possible that the reference to ‘the sole right and title of the copy of the said work’ is a reference to the right given by the *Statute of Anne* and not as claimed at common law. No examples of grants containing this or

There are a number of explanations for the continuation of these grants. There were a number of uncertainties surrounding the scope of the *Statute of Anne* and it was natural for booksellers and authors, particularly in view of doubts expressed by courts about their claims at common law to print and publish works after publication,¹³¹ to petition the Crown for grants of exclusive rights in circumstances where their rights or acquired rights were not clear under the Statute. For example, it was not settled until the case of *Bach v Longman* in 1777¹³² that musical compositions were protected by the Statute. In that case Lord Mansfield held that the Act extended to ‘books and other writings’ which were not confined to language or letters but included the signs and marks of music. Similarly it was also uncertain whether the Act extended beyond merely ‘learned works’, since it was expressed to be ‘An act for the encouragement of learning, by vefting the copies of printed books in the authors or purchafers of fuch copies’. In *Pope v Curl*¹³³ it was argued unsuccessfully that a collection of letters from Swift, Pope and others on familiar subjects and about the health of friends was not properly called a learned work. Although this decision may have dispelled a fear in relation to that particular work, a number of later grants may be explained on this general basis, such as those relating to a *Court and City Register*¹³⁴ *The Military Register*,¹³⁵ *Different Marginal indexes or classes, to be printed with a dictionary*¹³⁶ and *The Complete English Traveller*¹³⁷. Furthermore, the *Statute of Anne* provided in s VII that it did not extend ‘to prohibit the importation, vending, or felling of any books in Greek, Latin, or any other foreign language printed beyond the feas’ and there is strong circumstantial evidence that the printers William and John Innys obtained a privilege in 1726 in respect of Newton's *Principia*, of which all principal editions were in Latin, in order to secure protection for the third edition of that work against unauthorised copies printed overseas. The second edition of Newton's *Principia* had apparently been pirated and printed in Amsterdam as ‘Editio Ultima’ in 1714 and again in 1723.¹³⁸ The language of the grant to the printers purported to provide that protection:

similar phrases have been found in respect of works which were outside the period of protection of the Statute.

¹³¹ Refer note 126. Cases prior to *Millar v Taylor* concerning the common law right to print and publish in perpetuity after publication are discussed by Willes J in that case at 4 Burr 2303, 2325-2328 (98 ER 201, 213, 214), and in a number of secondary sources, for example, TE Scrutton, *The Laws of Copyright*, (1st ed, London, 1883), 99, 100, and Patterson, op cit, 158-168. Doubts about the right began to be evident from about 1750.

¹³² 2 Cowp 623 (98 ER 1274) (KB).

¹³³ (1741)2 Atk 342 (26 ER 608) (Ch).

¹³⁴ Great Britain, Longman and Co, *Calendar of Home Office Papers 1760-1765*, (London, 1878), 500. Warrant of 29 November 1764 to John Rivington, bookseller (for 14 years). The Home Office Papers are herein after merely cited as ‘Calendar of Home Office Papers’.

¹³⁵ *Calendar of Home Office Papers 1766-1769*, (London, 1879), 270. Warrant of 9 November 1767 to John Almon, bookseller (for 14 years).

¹³⁶ *Calendar of Home Office Papers 1770-1772*, (London, 1881), 165. Warrant of 18 July 1770 to William Hooper, Gentleman (for 14 years).

¹³⁷ Ibid 622. Warrant of 7 May 1772 to John Cooke, bookseller (for 14 years).

¹³⁸ IB Cohen, *Introduction to Newton's 'Principia'*(Cambridge, 1971), 256-258; *The National Union Catalog Pre-1956 Imprints* (London, 1975), Vol 417, 468 (cols 1,2); *British Museum General Catalogue of Printed Books* (London, 1963), Vol 171, cols 325, 333.

... Strictly forbidding all Our Subjects within Our Kingdoms and Dominions to reprint the fame ... or to Import, Buy, Vend, Utter or Distribute any Copies thereof, Reprinted beyond the Seas, during the aforesaid Term of 14 Years, without the Consent or Approbation of the [said] Wm. Innys and John Innys ... Whereof Our Commifisioners and other Officers of Our Customs, the Master Warden and Company of Stationers are to take Notice, that due obedience be rendred thereunto.¹³⁹

This lack of adequate statutory protection was remedied in 1739 when an Act (12 Geo. II, c. 36) prohibited the importation from abroad of any book first written or printed in Great Britain.

Similarly, since the *Statute of Anne* applied only to Great Britain, privileges may also have been sought in an attempt to secure protection against piracy in Ireland and the American colonies in which it was rife, since grants of such privileges were expressed to apply to all the kingdoms and dominions of the Crown.¹⁴⁰ There are also some recorded instances of

¹³⁹ Refer note 127 and also A Koyre and IB Cohen (ed), *Isaac Newton's Philosophiae Naturalis Principia Mathematica: The Third Edition (1726) with Variant Readings* Vol 1 (Harvard, 1972), 3, for the full text of the privilege as printed in the third edition of the '*Principia*'.

¹⁴⁰ Contemporary concern about book piracy in Ireland is evidenced in 'Campbell, Hay: Information for AD and J Wood, Booksellers in Edinburgh ...', *The Literary Property Debate: Six Tracts (1764-1774)* (New York, 1975), Item B, 59, 60 and 'Richardson, Samuel: The Case of Samuel Richardson, of London, Printer...', *English Publishing, the Struggle for Copyright, and the Freedom of the Press: Thirteen Tracts 1666-1774* (New York, 1975) Item L, 3. (Both are pamphlet reprints which are part of the Garland Publishing Series - *The English Book Trade 1660-1853*). There have been statements in some American works that the *Statute of Anne* applied to the American colonies. LE Abelman and LL Berkowitz in 'International Copyright Law', *The Complete Guide to the New Copyright Law* (New York, 1977), 330, state that the *Statute of Anne* as well as English common law extended to the American colonies citing as authority F. Crawford, 'Pre-Constitutional Copyright Statutes' (1975) 23 Bull Cr Soc 11, 12. That author states, 'of course, since the laws of Great Britain applied throughout its empire, printers and publishers in Usher's time [1672] were protected by English common law copyright and later by the British Copyright Act of 1710, which policed violations of intellectual property rights'. The authority cited in support of this statement was J Shulman, 'The Battle of the Books Revived -Copyright Law Revision in the Year 1971'(1977) 17 Bull Cr Soc, 397, 404 who states that 'in the half century which followed the adoption of the Statute of 1710, no copyright legislation appears to have been necessary in the colonies since the rights of authors were undoubtedly governed by the statute which had been enacted in Great Britain'. No authority was cited in support of this conclusion.

The principles governing the reception and status of English law in the 'settled colonies' were set out in a Privy Council Memorandum of 9 August 1722 (Case 15 - *Anonymous*, 2 Peere Williams 75: 24 ER 646). In relation to statutory law, the Memorandum stated that 'after such country is inhabited by the English, acts of Parliament made in England, without naming the foreign plantations, will not bind them'. This position is in accord with that position generally adopted by American colonial courts and later by the Supreme Court of the United States, that is, that no post-settlement British statute applied in the American colonies unless it operated by paramount force or by an Act of a local colonial legislature: refer *Morris's Lessee v Vanderen* (1782) 1 Dallas 64, 67 (1 US 62, 65); *Cathcart v Robinson* (1831) 5 Peters 264, 280 (30 US 170, 180); *Tayloe v Thomson's Lessee* (1831) 5 Peters 358, 368 (30 US 229, 236). There is, however, occasional evidence of application by long usage (refer, *Respublica v Mesca* (1 Dallas 73, 75: 1 US 72, 73) and generally JH Smith, *Cases and Materials on the Development of Legal Institutions* (St. Paul, 1965), 448-449). The *Statute of Anne* did not either expressly or impliedly refer to any of the colonies or Ireland. Nor was it adopted by local enactment in any of the colonies. In relation to the common law, Story J in the United States Supreme Court decision of *Van Ness v Pacard* (1829) 2 Peters 137 (27 US 85) pointed out that early British settlers did apply generally the principles of the common law, but not without certain reservations and exceptions, based upon local attitudes and conditions. As to the recognition of the claimed common law right of authors in published works, refer GT Curtis, *A Treatise on The Law of Copyright* (Boston, 1847), 74-81, who stated that a common law

privileges being obtained in an attempt to extend protection for a work beyond the period of protection which the work enjoyed under the *Statute of Anne*.¹⁴¹

Thus the practice of petitioning for privileges which had been long established by the 18th century was obviously regarded as an additional means of seeking protection for works over and above those rights provided by statute and as claimed at common law. Although the privileges were almost always printed with the works to which they related¹⁴² and would have carried substantial prestige and authority, they were, in the light of common law authority such as *The Company of Stationers v Partridge* and *Basket v The University of Cambridge* at the time, invalid, and doubts about their validity were certainly expressed in some contemporary documents.¹⁴³ However, unpublished records show that the grants continued until the early 19th century¹⁴⁴ and this alone suggests that regardless of their legal validity, they may have been reasonably efficacious.



right was 'tacitly assumed and acted upon' in the American colonies and that there was evidence of such a right in several of the States before the adoption of the U.S. Constitution. He took this view despite the decision of the Supreme Court (by a majority of three to two) in *Wheaton v Peters* (1834) 8 Peters 591 (33 US 374) that the English common law right did not exist by the common law of Pennsylvania and that the first federal copyright Act of 1790 did not sanction an existing perpetual right in an author in his works but created a right for a limited time.

¹⁴¹ Refer, for example, to 'Information for J Robertson..., Defender; against J Mackenzie...and others...', *The Literary Property Debate: Seven Tracts 1747-1773* (New York, 1974), Item D, 1, 2. Pages 1 and 2 record how Mr Ruddiman, a Latin teacher, compiled and published a book entitled 'The Rudiments of the Latin Tongue' and also a 'Latin Grammar', but 'neither at that time applied for any patent to exclude others from printing these books, nor did he follow the method pointed out by the Statute 8^{vo} Annae, which had passed a few years before, and in virtue whereof he might have vested in himself, under certain conditions, a temporary exclusive right to the publication and profits of his books'. However the information records that 'when advanced in years' he 'began to think of making some profit to his family by an exclusive sale of them' and he applied to the King in 1756 for a 'patent' in respect of his two books setting forth their merits, which he subsequently received for a term of fourteen years from 5 May 1756. The patent was expressed 'so far as may be agreeable to the statute in that case made and provided'. The privilege was apparently respected, the defendant in the action having pirated the work after the privilege's expiration (p 3). Refer also 'Rae, Sir David, Lord Eskgrove: Information for J Mackenzie and others, trustees appointed by Mrs A Smith...' *The Literary Property Debate: Seven Tracts 1747-1773* (New York, 1974), Item E, 2, 3. (against J Robertson, in the same action).

¹⁴² Refer, for example, to A Koyre and IB Cohen (ed) op cit, Vol I, 3 (note 139) and W Beawes, *Lex Mercatoria Rediviva: or, the Merchant's Directory* (4th ed) (London, 1783) ii.

¹⁴³ Doubts had been expressed well prior to the *Statute of Anne*, for example, in the debate over the renewal of the *Licensing Act* 1662. The Journal of the House of Commons records that the Commons could not agree to its renewal on grounds including 'Because that Act gives a Property in Books to such Persons, as such Books are, or shall be, granted to by Letters Patents, whether the Crown had, or shall have, any Right to grant the same, or not, at the time of such Grant'. (Great Britain, *Journal of the House of Commons* Vol XI, 306 (17 April 1695). These reasons were accepted by the House of Lords on 18 April 1695 and the Act lapsed (Great Britain *Journal of the House of Lords* Vol 15, 545, 546).

¹⁴⁴ Unpublished records in the National Archives (UK) Kew, Surrey, show that grants continued until at least 1810 when Thomas Christopher Banks was granted, by Geo III's command, the 'sole Right and Privilege to republish and vend the said New Editions of Dugdale's Baronage' for the term of 14 years on 19 April 1810. HO 38/13, National Archives (UK), Kew, Surrey England.

THE EXTENT TO WHICH THE PREROGATIVE RIGHT OF THE CROWN TO PRINT AND PUBLISH CERTAIN WORKS EXISTS IN AUSTRALIA

JOHN GILCHRIST*

ABSTRACT

This article follows the preceding article on the analysis of the origins and scope of the prerogative right of the Crown to print and publish certain works in England. This article explores the extent to which those works are presently subject to the prerogative right of the Crown to print and publish in Australia. The prerogative right is expressly preserved by s 8A(1) of the Copyright Act 1968 (Cth).

There is clear case law authority in Australia for the recognition of the prerogative right of the Crown over the printing and publication of statutes. The article explores the scope of the right in Australia, the interrelationship of the rights in a federal system such as the extent to which the prerogative right is enforceable in other jurisdictions and the impact of the introduction of s 8A(2) of the Copyright Act on the prerogative right.

I INTRODUCTION

If an uninhabited country be discovered and peopled by English subjects, they are supposed to possess themselves of it for the benefit of their Sovereign, and such of the English laws then in force, as are applicable and necessary to their situation, and the condition of an infant colony; as for instance, laws for the protection of their persons and property, are immediately in force.¹

Chitty's description of the legal principle applicable to the reception of English law into those British colonies acquired by settlement, as distinct from conquest, applied in respect of the Australian colonies at the time of their establishment.² In the case of the eastern colonies of Australia this principle was supplemented by the Act to provide for the *Administration of Justice in New South Wales and Van Dieman's Land* (9 Geo. IV, c.83) section 24 of which provided that 'all laws and Statutes' in force in England at the time of the passing of the Act in 1828 'shall be applied ...so far as the same can be applied within the said Colonies'. 'The laws so brought to Australia', said Griffith C.J. in *The King v Kidman*, 'undoubtedly included all

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¹ J. Chitty, *A Treatise on the Law of the Prerogative of the Crown* (London, 1820) 30. Refer also *Mabo v Queensland (No 2)* (1992) 175 CLR 1, at 34 - 38, 79- 80.

² Refer *The King v Kidman* (1915) 20 CLR. 425, 435 where Griffith CJ reiterates this principle. Also *Cooper v Stuart* (1889) 14 App Cas. 286, 291 (PC.).

the common law relating to the rights and prerogatives of the Sovereign in his capacity as head of the Realm and the protection of his officers in enforcing them... When the several Australian Colonies were erected this law was not abrogated, but continued in force as the law of the respective Colonies applicable to the Sovereign as their head'.³ The law applicable to the prerogatives of the Crown continued as the law of the respective States at the time of the establishment of the Australian Commonwealth and in respect of the Commonwealth the Crown in that capacity succeeded to all those prerogatives subsisting at the time the Commonwealth came into being as were appropriate to a federal government of limited competence and which were not inconsistent with provisions of the Commonwealth Constitution.⁴ Some of those prerogatives, of course, came into being to the exclusion of the rights of the Crown in right of the several States where, on the construction of the *Constitution Act 1900* the Crown's prerogatives were to be exclusively enjoyed and exercised by the Governor-General on the advice of his federal advisers, such as, for example, certain prerogatives related to defence: *Joseph v Colonial Treasurer of New South Wales*.⁵

As Evatt has pointed out,⁶ the question of the exercise of prerogative rights in the nature of executive powers as between the Commonwealth and the States is largely dependent on the division of legislative powers in the Australian federation. Those prerogative proprietary rights, however, generally remain with the States, subject to the effect of valid Commonwealth legislation. But the nature of the proprietary right of the Crown to print and publish certain works, which is derived from the Crown's position as head of a self-governing territorial unit, itself suggests that it vests in both the Crown in right of the Commonwealth and in right of the several States.

The existence and exercise of the prerogatives of the Crown from the time of the establishment of the Colony of New South Wales have been demonstrated both by judicial decisions recognising such rights⁷ and by governmental practice, but it would be a mistake to

³ *The King v Kidman* (1915) 20 CLR 425, 435.

⁴ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 230; *New South Wales v The Commonwealth* (1975) 135 CLR. 337,497-498. It is not meant to be implied that all those prerogatives inherited by the Crown in right of the various Australian colonies, or in right of the Commonwealth, were exercisable solely by the Crown in those capacities. Some prerogatives, such as those external prerogatives, remained for some time exercisable by the Crown on the advice of its Imperial ministers. Refer generally, L. Zines, 'The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth' and JE. Richardson, 'The Executive Power of the Commonwealth' in L. Zines (ed.), *Commentaries on the Australian Constitution* (Sydney, 1977) 1, 14-15, 42-43, and 50, 56-57. (1918) 25 CLR 32.

⁵ HV Evatt, *The Royal Prerogative*, (LBC, Sydney, 1987) 203-205. Refer prerogatives in the nature of proprietary rights *ibid* at 209. This work at pp 1-268 contains HV Evatt's LLD thesis, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' or refer HV Evatt's LLD thesis, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' (unpublished Doctor of Laws Thesis, Law Library, Sydney University, 1924) 344, 389-391, and *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd.* (1940) 63 CLR 278, 321-323.

⁷ For example, in *Woolley v Attorney-General of Victoria* (1877) 2 App. Cas. 163, the Privy Council recognised that the prerogative right of the Crown existing in England to gold and silver found in mines was introduced as part of the common law of England into the colony of Victoria (166). Also *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 (prerogative of the King as owner of wastelands in the colonies); *Toy v Musgrove* (1888) 14 VLR 349 and [1891] AC 272 (prerogative right to exclude aliens).

assume that all the prerogatives were necessarily inherited by the colonies as both the common law and statutory principles referred to deem only those prerogatives applicable to the condition of the colonies to be in force. Evatt maintains in his thesis on the prerogative entitled 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' that 'the only exception which is indicated by the Courts so far as the prerogatives of the King are concerned in their application to the Australian Colonies, either on the settlement or the passing of 9 Geo. IV, is the prerogative in relation to the Church'⁸ and later in the same work, that '...those prerogatives [of the King as head of the Church] never came into existence at any stage in the history of the Commonwealth'.⁹ His view, which was consistent with authority at the time he wrote his work, must, however, be regarded with some doubt in the light of more recent judicial authority. The implications of this as far as the prerogative right to print and publish certain works is concerned are discussed below.

II NATURE AND SCOPE OF THE PREROGATIVE RIGHT TO PRINT AND PUBLISH CERTAIN WORKS IN AUSTRALIA

It is clear law that the prerogatives of the Crown cannot be curtailed except by express words in a statute or by necessary implication arising from a statute.¹⁰ By necessary implication it is meant that it is manifest from the very terms of the statute that it was intended by the legislature that the Crown was to be bound.¹¹ The nature of the prerogative right to print and publish certain works has not, in any part of Australia, been the subject of any express or implied legislative limitation, either Imperial, Federal or State in the history of Australian settlement, until the passage of the Commonwealth *Copyright Amendment Act 1980*. Indeed the Commonwealth *Copyright Acts* passed in 1912 and 1968 expressly and fully preserved the prerogative rights of the Crown in this respect including those rights held by the Crown in right of the Commonwealth and of the several States.¹²

It follows from what has been said that the nature of the Crown's prerogative right over certain works in Australia, as distinct from its scope, was, at least until the limitations imposed by the *Copyright Amendment Act 1980*, the same as the right which exists in the Crown in England and which was described in the previous issue of the Canberra Law

⁸ HV Evatt, *The Royal Prerogative*, (LBC, Sydney, 1987) 140 or refer HV Evatt's LLD thesis, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' (unpublished Doctor of Laws Thesis, Law Library, Sydney University, 1924) 225.

⁹ HV Evatt, *The Royal Prerogative*, (LBC, Sydney, 1987) 141 or HV Evatt's LLD thesis, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' (unpublished Doctor of Laws Thesis, Law Library, Sydney University, 1924) 228. In the same work at 141 (227) he states '...the only qualification we need to make on the statement that all the King's prerogatives which exist or have existed in respect of England exist or have existed with respect to the Colonies, is that the King's rights as head of the Church never came into existence in the Commonwealth of Australia at all'. His view is based on the view that 'the mode of maintenance of the Established Church' is neither necessary nor convenient for the colonies and the prerogative rights are not therefore in force (refer 140 (226)).

¹⁰ Refer, for example, to *Woolley v Attorney-General of Victoria* (1877) 2 App. Cas. 163, 167, 168 (PC.); *The Odessa* [1916] 1 AC 145, 162 (PC.).

¹¹ *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58, 61.

¹² Refer to the discussion following.

Review.¹³ The changes brought about by the *Copyright Amendment Act* are discussed later in this article.

A Religious Works.

The scope of works subject to the prerogative right in Australia would, however, appear to differ from that in England. It is clear on the basis of evidence as well as judicial opinion¹⁴ that there is no established church in Australia and it should be borne in mind that the Crown's right to print and publish certain religious works in England is based on a duty which emanates from the Crown's position as head of the Church of England. As previously described this duty arises by virtue of the Crown's position as head of state and church because the church is the established church, and is not derived from any spiritual function.¹⁵ The Crown either in right of the Commonwealth or of a State could not have this duty in Australia and in principle it follows, to use the words of one Australian commentator, that 'the Royal Prerogative in relation to the printing of the Bible and the books of the established religion in England would not exist in the Crown in right of the Commonwealth or a State'.¹⁶

The accuracy of this statement is nevertheless not as self-evident as it would seem. There is some judicial authority which suggests that the Church of England was the established church in the early colonial beginnings of Australia. As Dixon J. stated in *Wylde v Attorney-General for New South Wales*,

notwithstanding several judicial statements of a contrary tendency, the better opinion appears to be that the Church of England came to New South Wales as the established church and that it possessed that status in the colony for some decades.¹⁷

Although Dixon J. did not define what he meant by 'established church' it is clear that he used the expression to mean the church by law established as the public or state recognised form of religion and not in any general sense. According to Lord Selborne, the establishment of the church by law 'consists essentially in the incorporation of the law of the Church into that of the realm, as a branch of the general law of the realm, ...in the public recognition of its Courts and Judges, as having proper legal jurisdiction; and in the enforcement of the sentences of the Courts, when duly pronounced, according to law, by the civil power'.¹⁸ It also connotes, at

¹³ John Gilchrist, 'Origins and Scope of the Prerogative Right to Print and Publish Certain Works in England', (2011) 10 (3) *Canberra Law Review* 139.

¹⁴ The Commonwealth is prohibited under the *Constitution Act 1900* from making any law establishing any religion (s 116). In all States the churches are governed by the law relating to voluntary associations or corporations and the courts will not interfere in their internal affairs except on that basis: refer *Ex parte Hay* (1897) 18 LR (NSW) 206, 209 (SC.); *Macqueen v Frackleton* (1909) 8 CLR 673 (particularly at 696, 697, 704, 705).

¹⁵ *Manners v Blair* (1828) 3 Bli. NS. 391, 404 (4 ER 1379, 1383) (HL).

¹⁶ JC. Lahore, *Intellectual Property Law in Australia: Copyright* (Butterworths, Sydney, 1977) 12 (para 115) and Lindgren K, Lahore J and Rothnie WA, *Copyright and Designs* (LexisNexis/Butterworths, Sydney, 2004-) vol 1, 20,209 (para 20,200).

¹⁷ *Wylde v Attorney-General for New South Wales* (1948) 78 CLR 224, 284. (contra, *Ex parte The Rev George King* (1861) Legge 1307).

¹⁸ Quoted in JT. Ross Border, *Church and State in Australia 1788-1872: A Constitutional Study of the Church of England in Australia* (London, 1962) 52.

least in England, broad state support for, and control of, the Church, including the involvement of the Sovereign as head of the Church in the appointment of its great officers, as well as the state's recognition of the Church's institutions and doctrine.¹⁹

There is a range of evidence which supports Dixon J's view that the Church of England was the established church in the early colonial development of New South Wales. Evidence of broad state support for the Church is apparent from the beginnings of the Colony. In particular, the first chaplain, the Rev. Richard Johnson, who arrived with the first British settlers in the first fleet, and all the early chaplains formed part of the civil establishment and were supported from the public purse.²⁰ With very few exceptions, the early chaplains were all clergymen of the Church of England who were officers of the Colony appointed in the initial period, by Commission from the King, and subsequently by nomination of the

'The process of establishment means that the state has accepted the church as the religious body which in its opinion truly teaches the Christian faith, and has given to it a certain legal position and to its decrees, if given under certain legal conditions, certain legal sanctions. What is called the 'establishment' principle in relation to the church is the principle that there is a duty on the civil power to give support and assistance to the church, though not necessarily by way of endowment, and where this principle prevails a church is said to be established when it receives such support and assistance. In the fullest sense a church is said to be established when all the provisions constituting the church's system or organisation receive the sanction of a law which establishes that system throughout the state and excludes any other system.' *Marshall v Graham* [1907] 2 KB 112,126.

¹⁹ The Crown itself is held on condition that the holder should be in communion with the Church of England as by law established. The Convocations of the Church are summoned, prorogued, and dissolved by the Crown; they cannot enter on ecclesiastical legislation without royal permission, nor make canons without the royal licence and assent. The royal assent must be given to the Church Measures passed by the Church Assembly and approved by Parliament. The Crown appoints the great officers of the Church, and of these the Bishops are not only administrators and judges of ecclesiastical law, but constitute the Lords Spiritual in the House of Lords'. (WR. Anson, *The Law and Custom of the Constitution*, (4th ed. AB. Keith) Vol. II, Part II, (Oxford, 1935) 250).

In England the Church of England is an institution of the state and the Sovereign is its supreme head by virtue of the Act of Supremacy 1558 (1 Eliz. I, c.1. see s. xix particularly). The Church's ecclesiastical laws are part of the law of England and its courts derive their authority from the Crown and have power to enforce their decisions. Those tribunals set up by churches which are merely voluntary associations are not courts, their jurisdiction entirely depending on the agreement of the members of the association (see discussion in *Long v Bishop of Cape Town*(1863) 1 Moo. PC. NS. 411, 460 : 15 ER 756, 774 (PC)). The state's recognition of the Church's institutions and doctrine is evidenced by, amongst other things, the confirmation by statute (13 Eliz. I, c.12 (1571)) of the Thirty Nine articles of faith agreed by the convocation of 1562 setting the standard of doctrine and practice of the Church of England, and the ratification by the Act of Uniformity in 1662 of the Prayer Book presented by the Convocations of Canterbury and York (13 and 14 Car. II, c.4 (1662); the three earlier Books of Common Prayer were also the subject of legislative ratification.

²⁰ Johnson was the only clergyman allowed to travel with the First Fleet. An application from two Roman Catholic priests was refused, even though they offered to pay their passage and work without charge to the Government: E C. Rowland, *A Century of The English Church in New South Wales* (Sydney, 1948) 17.

As to state support refer *Attorney-General v Wylde* (1948) 48 S R (NSW) 366, 381 (SC.) and *Wylde v Attorney-General for New South Wales* (1948) 78 CLR 224, 284 and *Historical Records of Australia* (hereinafter referred to as *HRA*) Series I, Volume xi, 370-371 (Bathurst to Brisbane, 24 September 1824) and Volume xiii, 771-778 (Darling to Goderich and Scott to Darling, 11 February 1828 and 2 August 1827 respectively).

Governor.²¹ In 1824 the privileged position of the Church of England became further entrenched when an Archdeaconry of New South Wales was established subject to the jurisdiction of the Bishop of Calcutta. The Archdeaconry was constituted by letters patent of the Crown and it took over responsibility for the administration of the Church of England chaplains in the Colony. The letters patent established the Archdeacon as a corporation sole and provided that he,

... shall be within the said Archdeaconry assisting to the Bishop of Calcutta in the exercise of his Episcopal Jurisdiction and Function according to the duty of an Archdeacon by the Ecclesiastical Laws of our Realm of England - and in as full and ample manner as the same are or may be lawfully exercised by any Archdeacon within our Realm of England save as hereinafter excepted. And we do further will, ordain, and declare that the said Archdeacon shall, within his Archdeaconry be and be taken to be without further appointment the Commissary of the said Bishop and his Successors and shall exercise Jurisdiction in all matters as aforesaid, according to the duty and function of a Commissary by the said Ecclesiastical Laws.²²

The excepted jurisdiction referred to was jurisdiction over testamentary and matrimonial causes. No matrimonial jurisdiction was conferred on any court in Australia until 1858.²³ Testamentary jurisdiction had however been conferred on the Court of Civil Jurisdiction under the First Charter of Justice,²⁴ and subsequently in the Supreme Court by the Second and Third Charters of Justice of 1814 and 1823.²⁵ The Act 4 Geo.IV, c.96 (1823) which gave the Supreme Court a statutory basis, provided in section 10 that the Supreme Court was a court of ecclesiastical jurisdiction with such 'Ecclesiastical Jurisdiction and Authority' as might be committed to it by His Majesty. Furthermore, the letters patent constituting the Archdeaconry provided that the Archdeacon had power to appoint a Registrar for his Court and that in respect of proceedings before the Court, 'the Supreme Court of Jurisdiction in New South Wales shall have such and the like Jurisdiction and power of interfering by writ of prohibition or mandamus subject to the same laws, restrictions and rules of practice as is or

²¹ As to other appointments refer *HRA*, I, x, 204 (Bathurst to Macquarie, 20 October 1819). In 1825, assistance was extended to the Presbyterian Church *HRA*, I, xii, 62-68 (Bathurst to Darling, 1 October 1825).

²² The letters patent are reprinted in R. A. Giles, *The Constitutional History of the Australian Church* (London, 1929) 198-200.

²³ The earliest legislation was enacted in South Australia 'An Act to amend the Law relating to Divorce and Matrimonial Causes in South Australia' known as the *Matrimonial Causes Act 1858* (SA) (22 Vic 1858, No 22). Other colonies followed soon after: *Matrimonial Causes Act 1860* (Tas), *Divorce and Matrimonial Causes Act 1861* (Vic), *Ordinance to Regulate Divorce and Matrimonial Causes 1863* (WA), *Matrimonial Causes Jurisdiction Act 1864* (Qld), *Matrimonial Causes Act 1873* (NSW). All the colonial Acts were modelled on the English *Matrimonial Causes Act of 1857* (20 and 21 Vic., c.85).

Refer also to Dr. C. H. Currey, 'The Law of Marriage and Divorce in New South Wales (1788-1858)' 41 *Royal Australian Historical Society Journal* 97 and P. Toose, R. Watson and D. Benjafield, *Australian Divorce Law and Practice* (Sydney, 1968) xcvi, xcix, c, where it is pointed out that despite local suggestions and a recommendation by J. T. Bigge that the Supreme Court should have a matrimonial jurisdiction the lack of such a jurisdiction resulted from a deliberate policy of the British Government, which was apparently later followed by the Legislative Council of New South Wales.

²⁴ *HRA*, IV, i, 6,7 'And Wee do further Will, Ordain and Grant to the said Court full power and Authority to Grant probates of Wills and Administration of the personal Estates of Intestates dying within the place or Settlement aforesaid'.

²⁵ *HRA*, IV, i, 77, 90-91 (Second Charter); *HRA*, IV, i, 509, 514-516 (Third Charter).

has been exercised by our Court of Kings Bench at Westminster in regard to proceedings in the Ecclesiastical Courts of England regard being had nevertheless to any special provisions or exceptions contained in these our Letters Patent or to any other laws and regulations specially applicable to ... our Colony or Settlement of New South Wales ...'.²⁶ This evidence suggests the Archdeacon's Court was regarded as an integral part of the Colony's court system.

The later history of the Church's ecclesiastical jurisdiction is described by Dixon J. in *Wylde's* case:

In 1825 an Act in Council of New South Wales recognized and made use of this jurisdiction by requiring that the registers of baptisms, marriages and burials should be transmitted to the Archdeacon's Court of the Colony: 6 Geo. IV., No. 21, s.5 and s.8. In 1835 the Colonies of New South Wales and Van Dieman's Land were dis-severed from the Diocese and See of Calcutta and shortly afterwards those colonies and that of Western Australia were by letters patent under the great seal constituted a bishop's see or diocese to be styled the Bishopric of Australia under the authority of the Archiepiscopal See of the province of Canterbury. The letters patent granted the Bishop ecclesiastical jurisdiction according to the ecclesiastical laws of England lawfully made and received in England in the several causes or matters specified and no others. Among the matters specified were the behaviour in their stations of chaplains, ministers, priests and deacons in holy orders and their correction and punishment. The letters patent gave to persons aggrieved by any judgment or sentence pronounced by the bishop or his commissary an appeal to the Archbishop of Canterbury: ... In 1836 an Act of Council of the Colony dealing with clandestine marriages referred to suits in an Ecclesiastical Court (7 Wm. IV., No. 6, ss. 3 and 4) and in 1839 another Act of Council recited that the Archdeacon's Court had been discontinued since the establishment of the Archbishopric of Australia and directed that register books of baptisms etc. be sent to the registrar of the Bishop instead of that court (3 Vic. No. 23, s.2.).²⁷

Dixon J. concluded in *Wylde's* case that it appeared that an ecclesiastical jurisdiction did exist in New South Wales, 'the duty of the Ecclesiastical Court [being] ... to administer the ecclesiastical law for the correction of ecclesiastical offences and for the enforcement of the discipline of the clergy' although there was no information as to how the jurisdiction was exercised.²⁸

Further evidence of the position of the Church of England in the new Colony not adverted to by Dixon J., but touched on by Roper C.J. in *Wylde's* case at first instance, lies in the practice of disposing lands for the support of the clergy of the established church and for the building of churches and schools of that church.²⁹ A substantial proportion of the land in fact granted

²⁶ Giles, op.cit. 199-200.

²⁷ *Wylde v Attorney-General for New South Wales* (1948) 78 CLR 224, 284, 285. The Acts referred to may be found in Public Statutes of New South Wales 1824-1837 and Public Statutes of New South Wales 1838-1846 (Sydney, 1861).

²⁸ *Wylde v Attorney-General for New South Wales* (1948) 78 CLR 224, 285.

²⁹ Governor Phillip in his Additional Instructions was directed to set apart land in or near each town for the building of a church and to allot four hundred acres adjacent thereto for the maintenance of a minister and two hundred acres for the maintenance of a schoolmaster. *HRA*, I, i, 124, 127.

The same direction was inserted in the royal Instructions issued to Governors Hunter (*HRA*, I, i, 520, 526) King (*HRA*, I, iii, 391, 397) Bligh (*HRA*, I, vi, 8, 14) Macquarie (*HRA* I, vii, 190, 196) and Brisbane (*HRA*, I, x, 596, 602).

was intended to serve as glebe land.³⁰ There is also evidence that in addition to these grants, it was common for Colonial Governors to grant land to clergymen of the Church (as well as other settlers) for their personal use and benefit.³¹ This aspect of public support for the Church reached its zenith in the formation by Royal Charter in 1826 of the Clergy and School Estates Corporation (formally entitled the Trustees of the Clergy and School Lands in the Colony of New South Wales).³² The Corporation was established to '[make] provision for the maintenance of Religion, and the education of Youth in our Colony of New South Wales',³³ and it was intended to set aside sufficient lands in each district which would ultimately produce funds adequate for the maintenance of the clerical and school establishments of the Church of England.³⁴ The governing body of the Corporation consisted of the Governor (as President), the Archdeacon of New South Wales (Vice-President), the Chief Justice, the Secretary of the Colony, the Attorney-General, the Solicitor-General, the members of the Legislative Council and the nine senior Chaplains of the Church of England. No other denominations were represented or provided for in the activities empowered to the Corporation.³⁵ It appears that this rather ambitious project arose out of representations from the Church of England in the Colony,³⁶ and it faced local opposition by non-Church of England elements in the Colony from the time of its inception.³⁷ The Corporation was, however, short lived, due largely to the fact that the methods empowered to it under its Charter were not sufficient to meet the objects of the Corporation. This left the maintenance of the clergy and the schools to continue to be largely met from colonial revenue.³⁸

³⁰ Refer Surveyor-General Oxley to Archdeacon Scott *HRA*, I, xii, 392-396.

³¹ Refer *HRA*, I, i, 438; ii, 459-461; iii, 613; iv, 314, 498; v, 34, 606, 774; vi, 162; vii, 653; x, 561-564. Governor Darling outlined the extent of the provision of such grants of lands for the support of the clergy of the Church of England to Earl Bathurst 27 February 1827, *HRA*, I, xiii, 129-130. The ten clergymen of the colony together held between them a total of 17,731 acres, 10,931 of which had been acquired by Crown grant.

³² Refer *HRA*, I, xi, 434-454 particularly at 438-439 and 444-454 (Bathurst to Brisbane, 30 June 1825). It was also sometimes referred to as the 'Church and School Corporation', refer *HRA*, I, xxii, 537 and the 'Church and School Estates Corporation' refer *HRA*, I, xi, 444; xii, 250. A further but nearly identical draft charter of incorporation for the management of the Clergy and School Estates was attached to Additional Instructions to Governor Darling *HRA*, I, xii, 125, 126. The charter was sealed on March 9, 1826.

³³ *HRA*, I, xi, 444.

³⁴ It was announced in 1825 that the Corporation would receive one seventh of the lands in each county to be erected in the Colony as well as the glebes and the lands hitherto appropriated for the maintenance of the male and female orphanages. (*HRA*, I, xi, 434, 438, 452 (Bathurst to Brisbane, 1 January 1825)). It was empowered to manage, sell and lease lands vested in the Trustees and could appropriate up to twenty acres for the personal use of any Church of England minister and for the erection of churches, schoolhouses, cemeteries and parsonage houses and for the personal use of schoolmasters. Income from land sales and rents, as well as profits from the land, went to the Trustees who were in the first instance responsible for the salaries and wages of the Corporation and then for buildings and improvements on Corporation lands and the maintenance and support of clergy and schools under the control of the Church.

³⁵ Refer to draft Charter *HRA*, I, xi, 444-454.

³⁶ Particularly by Archdeacon Scott. Scott's views accorded with Lord Bathurst's declared policy on education and religious instruction. JT. Ross Border, *Church and State in Australia 1788-1872: A Constitutional Study of the Church of England in Australia* (London, 1962) 48.

³⁷ *Ibid* 72-73. See also E C. Rowland, *A Century of The English Church in New South Wales* (Sydney, 1948) 53, 54.

³⁸ *HRA*, I, xiv, 784, 787 (Murray to Darling, 25 May 1829); *HRA*, I, xvi, 80, 81 (Goderich to Darling, 14 February 1831).

Instructions purporting to revoke the Charter were issued in June 1830 a little over four years after the Corporation was established and only 16 months after the first grants of land had been made by the Governor to its Trustees.³⁹ Although it must be borne in mind that allowances were also paid to a small number of clergymen of other denominations during this period the evidence of state support of the Church of England suggests more than an Anglican ascendancy in the Colony. It is significant in this respect that there was a contemporary perception by the Home Government and in the Colony that the Church was the established church. This is evidenced by numerous descriptions in official despatches and instructions in this early colonial period to the Church of England as 'the established church'.⁴⁰

Accordingly, despite the fact that courts have accepted that the Act of Uniformity was never in force in New South Wales,⁴¹ there is considerable evidence to suggest that the Church of England was the established church for some time in the early settlement of Australia. The precise time at which the Church became disestablished and merely adopted the status of a voluntary association is difficult to ascertain. In Dixon J.'s view the chief reason for this change lay in the grant of representative government and the separation of the colonies.⁴² Roper C.J. took the view that 'clearly it was no longer an established church after the abolition of State aid to religion in 1862' and that 'probably it ceased to be the established church before the introduction of responsible government in 1850'.⁴³

Although it is difficult to determine the date with precision it is nevertheless clear that in New South Wales and the other Australian colonies, the Church of England ultimately became a voluntary association with the vesting and management of Church property being governed by various Colonial Acts. In New South Wales the Church itself recognized this status at its

³⁹ *HRA*, I, xv, 560 (Murray to Darling, 19 June 1830) (Instructions re revocation of letters patent for the Clergy and School Estates Corporation). The first grants had been made on 3rd February 1829, - see *HRA*, I, xii, 814 n. 37 for a list of all grants made to the Corporation.

⁴⁰ The occurrences are so frequent as to suggest that there was a contemporary perception that the Church had the status of an established church in the colony, and that the use of the term was not merely a customary one. Refer, for example, *HRA*, I, xi, 434, 438 (paragraph 18) (Bathurst to Brisbane, 1 January 1825); *HRA*, I, xii, 125, 126 (Additional Instructions to Darling); *HRA*, I, xiv, 784, 788 (Murray to Darling, 25 May 1829); *HRA*, I, xiii, 774, 777 (Scott to Darling, 2 August 1827). As to the question of establishment generally refer Border, op.cit. 47-62.

⁴¹ *Wylde v Attorney-General for New South Wales* (1948) 78 CLR 224, 296, also 276, 303, refer also *Attorney-General v Wylde* (1948) 48 S R (NSW) 366, 384.

⁴² *Wylde v Attorney-General for New South Wales* (1948) 78 CLR 224, 286.

⁴³ *Attorney-General v Wylde* (1948) 48 S R (NSW) 366, 381, 382. The disestablishment took place through a series of steps, including early dissolution of the Clergy and School Estates Corporation and the reversion of its lands to the Crown, Governor Bourke's Church Act of 1836 (7 Will. IV, No. 3) which gave State support 'on an equitable footing' to all the principal Christian churches in the colony and by judicial decisions in New South Wales in 1861 and in England in 1863, one of which recognised that the ecclesiastical law of England was no longer in force in the Colony and the other which decided that after constitutional government had been granted in a colony, the Crown, by letters patent appointing a bishop, could no longer grant any coercive ecclesiastical jurisdiction to him. The use of letters patent to appoint colonial bishops ceased after that date. (Refer *Ex parte The Rev George King* (1861) Legge 1307; also *Ex parte Ryan* (1855) Legge 876, 879 and *Re Howard* [1976] 1 NSWLR 641, 644, 645 (SC)); and refer *Long v Bishop of Capetown* (1863) 1 Moo. PC. NS. 411, 460 (15 ER 756, 744) (PC) and also *In re Lord Bishop of Natal* (1864) 3 Moo. PC. NS. 115, 148 (16 ER 43, 56) (PC)).

1866 General Conference in which a constitution was agreed to for the management of the Church in that Colony.⁴⁴ In other colonies which were founded later and in which evidence relating to the establishment of the Church is weak this same result was achieved.⁴⁵ Public funding of the major Christian churches in those colonies paralleled such funding in New South Wales⁴⁶ and later the withdrawal of state aid for religion by the New South Wales *Grants for Public Worship Prohibition Act 1862* heralded similar legislation in other colonies. The other principal churches also became governed by Colonial (and later State) Acts relating to the vesting and management of church property. The status quo in the colonies at the end of the 19th century was, in fact, reflected in the *Commonwealth Constitution*, section 116 of which prohibits the Commonwealth making 'any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion' and also provides that 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth'.

If the Church of England was the established church for sometime in the early colonial development of Australia, the Crown's duty and right to print and publish the Authorized Version of the Bible and other religious works would have existed in the Colony of New South Wales as a prerogative related to the established church. But, notwithstanding that the right cannot be lost by desuetude, it can no longer be said that the Crown has a right to print and publish those works in any of the States or the Commonwealth since the basis of the right does not exist, that is, the duty of the Crown as head of the established church to superintend the publication of the religious works of the established church. This conclusion is not, however, consistent with the decision in *Manners v Blair*⁴⁷ in which the House of Lords held that the Crown's duty extended to the Book of Common Prayer although that work was not the book of worship of the established church (Presbyterian) of which the Crown was head, but was the book of worship of the once established church (Episcopalian), which had at the time of the case long ceased to be established. It is nevertheless submitted that such a view cannot be satisfactorily sustained because the prerogative right of the Crown is dependent upon a duty and that duty can only relate to the works of the church which is established at any given time. In Australia, of course, there is no established church and the Crown in right

⁴⁴ Refer Giles, op.cit. 103-111 at 110-111 particularly and Border, op.cit. 254-255.

⁴⁵ In particular in relation to Victoria see *Church Constitution Act 1854* (18 Vic. No. 45), as to New South Wales refer *Church of England Property Management Act* (30 Vic. 1866), as to Tasmania refer *Church of England Act 1858* (22 Vic. No. 20).

Refer generally Rowland, op.cit., Chapters VI, VII and VIII, H W Nunn, *A Short History of the Church of England in Victoria 1847-1947* (Melbourne, 1947) 11-14 and A E. David, *Handbooks of English Church Expansion: Australia* (London, 1908) 10 - 63.

Note in relation to Van Dieman's Land *HRA*, I, xiv, 784, 789 (Murray to Darling, 25 May 1829) where Murray informed Darling he had not deemed it advisable to recommend to His Majesty to create in Van Dieman's Land a body corporate similar to that established in New South Wales (i.e. the Clergy and School Estates Corporation).

⁴⁶ Both the *Tasmanian Constitution Act* of 1855 (18 Vic. No. 17) and the *Victorian Constitution Act* of 1855 (Schedule I to the Imperial Act 18 and 19 Vic., c. 55) contained provisions reserving funds for 'Public Worship' (s.31 of the Tasmanian Act) or 'the Advancement of the Christian Religion' (s. LIII of the *Victorian Constitution Act*). These provisions were later repealed.

⁴⁷ (1828) 3 Bli. NS. 391, 404 (4 ER 1379, 1383) (HL).

of the Commonwealth or of the several States could not be under a duty to print and publish the works in question. No prerogative right over these works can therefore exist.

B Legal Works.

The Crown's right to print and publish certain legal works has nevertheless received judicial recognition in Australia. In *Butterworth's case*,⁴⁸ the Attorney-General for New South Wales sued the publishing firm of Butterworth and Company after it had printed and published copies of certain Acts and reprints of Acts passed by the Legislature of New South Wales in certain volumes entitled 'The Public Acts of New South Wales'. Long Innes C.J. in Eq. took the view that the prerogative right to print and publish the statutes of New South Wales was vested in the Crown in right of the Colony of New South Wales immediately prior to the confederation of the Commonwealth and neither by the confederation nor since confederation had this prerogative been affected, as there had been no exercise of the Commonwealth's legislative powers under section 51 pl. xviii and pl. xxxi of the *Constitution Act 1900*, and it had not been abridged or curtailed by the *Copyright Act 1911*, or lost by desuetude. This right therefore remained vested in the Crown in right of the State of New South Wales.

Although the decision directly related to Acts of Parliament dicta in the case suggests that Long Innes C.J. accepted the wider scope of the right⁴⁹ and notwithstanding the absence of direct authority in point, it is submitted that the rights of the Crown, as chief executive magistrate, in right of the Commonwealth and of the several States extend to print and publish all those legal works described in the previous issue of the Canberra Law Review.⁵⁰ These rights are proprietary in nature being derived from the position of the Crown as supreme executive authority of a particular self-governing territorial unit, and they are not referable to some head of legislative power as an executive power. As Evatt has said '... the ordinary rule is that the antecedent prerogatives [prior to the formation of the Commonwealth] in the nature of proprietary rights survive in the executives of the various States of the Commonwealth'.⁵¹ And while the Commonwealth may validly acquire this property of the States under the constitutional powers mentioned above,⁵² no legislation purporting to acquire this property has been passed. The grant of legislative powers to the Commonwealth in respect of the property of the States does not, of course, in itself deprive the States of their proprietary rights.

⁴⁸ (1938) 38 S R (NSW) 195.

⁴⁹ (1938) 38 S R (NSW) 195, 229, 236-238. Refer also case note at 11 ALJ 533.

⁵⁰ John Gilchrist, 'Origins and Scope of the Prerogative Right to Print and Publish Certain Works in England', (2011) 10 (3) *Canberra Law Review* 139, 159-163, refer also 151-156.

⁵¹ HV Evatt, *The Royal Prerogative*, (LBC, Sydney, 1987) 209 or refer HV Evatt's LLD thesis, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' (unpublished Doctor of Laws Thesis, Law Library, Sydney University, 1924) 334. Evatt expresses the same view in *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd.* (1940) 63 CLR 278, 322.

⁵² Refer to the later discussion in this article.

C The Interrelationship of Prerogative Rights.

The existence of the prerogative right to print and publish certain legal works in each of the jurisdictions named raises a number of hitherto unexplored issues relating to the interrelationship of the rights on which there is, unfortunately, little judicial assistance. First, the question arises as to whether the Crown's prerogative right to print and publish certain legal works in one State is enforceable in other States of Australia. If it is not so enforceable, a publisher would be entitled to publish in one State legal works in which the Crown in right of another State has a prerogative right, without infringement of that right. Secondly, when State courts exercise federal jurisdiction, the question arises as to whether the Crown in right of the State or of the Commonwealth or both may exercise the prerogative right to print and publish the written judgments produced in the exercise of that jurisdiction. Finally, there are numerous Imperial Acts which still apply in the States and Territories of the Commonwealth and the Commonwealth of Australia *Constitution Act 1900* is, of course, one such Act. Although these Acts are laws of the States, Territories or Commonwealth in the wider meaning of the expression, does the Crown in right of the United Kingdom, or the Crown in right of the Commonwealth or the several States have the right to control the printing and publication of these Acts in Australia?

Long Innes C.J. in Eq. accepted in *Butterworth's* case that the Crown in right of the State of New South Wales had established title to the statutes of New South Wales which were the subject of the dispute and that the Attorney-General for New South Wales was entitled to sue in respect of the prerogative right in question, as representative of the Crown in that right. He added on the question of title to the statutes: 'Should, however, the conclusion to which I have arrived be erroneous I am of [the] opinion that the present informant is competent to maintain this suit for the protection of His Majesty's prerogative proprietary right whether it belongs to the Crown in right of the United Kingdom or in right of the Commonwealth'.⁵³

In his view this principle followed the legal axiom that the Crown is one and indivisible and ubiquitous throughout the British dominions, although its power may be exercised in different localities by different agents:

... applying the legal axiom as stated, I can see no reason on principle why such proprietary right of the Crown should not be capable of being asserted by His Majesty's Attorney-General for that constitutional unit which has established the Court which has jurisdiction to entertain the appropriate action.⁵⁴

The obvious implication to be drawn from this statement is that while the proprietary right of the Crown derives from the Crown's position as supreme executive authority of a particular self-governing territorial unit it is capable of being asserted in any part of the British Commonwealth which has the Crown as its head of state and whose Courts have jurisdiction over the subject matter of the proceedings. Consequently, on this view the Crown's rights in

⁵³ (1938) 38 S R (NSW) 195, 249-250.

⁵⁴ Ibid 250.

Acts of the British Parliament or of a State Parliament or of the Commonwealth Parliament could be enforced in the courts of any jurisdiction in Australia.

Whether such a view would now be followed by a court in Australia is not clear. While clause 2 of the *Commonwealth of Australia Constitution Act 1900*⁵⁵ expresses the notion of the indivisibility of the Crown, indivisibility of the Crown has been described as inconsistent with the existence of autonomous governments within the Queen's dominions.⁵⁶ Notwithstanding the trend of more recent decisions has been to stress the divisibility of the Crown,⁵⁷ there is nothing in any of the cases on this prerogative which suggests a contrary conclusion to that put forward by Long Innes C.J. and in principle it would seem arguable that the proprietary right should be capable of being asserted in any jurisdiction in which it is recognized. Long Innes' view is not '... in any degree inconsistent with the fact that in certain classes of cases, where the rights of the Crown in right of one constitutional unit are opposed to its rights in respect of another constitutional unit ... it is necessary for procedural purposes that the Crown should be regarded as separate juristic entities'.⁵⁸

Long Innes C.J. also took the view in *Butterworth's* case that section 18 of the *Imperial Copyright Act* which was brought into force in the Commonwealth of Australia by the *Copyright Act 1912* did not abridge or curtail by necessary implication the Crown's prerogative with regard to statutes.⁵⁹ Section 18 of the Act provided,

Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.

The word 'Crown' was not defined in that Act although it is implicit in Long Innes C J's judgment that he regarded the word 'Crown' as including the Crown in right of the United Kingdom.⁶⁰ The British Act of 1911 operated of its own force in Australia and not as an enactment in the exercise of Commonwealth legislative power.⁶¹ Its provisions applied throughout 'Her Majesty's dominions' including self-governing dominions that declared it to be in force. It created an Imperial copyright and not merely one limited to Australia. It is therefore suggested that the word 'Crown' in that Act, which is not defined, must be regarded in its widest sense and should be construed in its application to Australia as including the Crown in right of the United Kingdom. Any narrow view that the word 'Crown' must be

⁵⁵ 63 & 64 Vict. c12.

⁵⁶ Constitutional Commission, *Final Report*, (AGPS, Canberra, 1988) 76,79.

⁵⁷ Refer, for example, to *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and others* [1982] 2 All ER 118 (CA).

⁵⁸ Ibid 252.

⁵⁹ Ibid 225, 226.

⁶⁰ Refer *Butterworth's* case (1938) 38 S R (NSW) 195, 224, 225 and 249, 250.

⁶¹ Refer *Gramophone Co. Ltd. v Leo Feist Inc.* (1928) 41 CLR 1, 11, 28, 29 and *Copyright Owners Reproduction Society Ltd. v E M I. (Australia) Pty. Ltd.* (1958) 100 CLR 597, 604, 612, 613, 616, 617.

construed as referring to the legislating government only cannot be satisfactorily advanced in relation to this Act.⁶²

Sub-section 8A(1) of the *Copyright Act 1968* also makes a proviso in similar broad terms to that of the 1911 Act,

Subject to sub-section (2), this Act does not affect any prerogative right or privilege of the Crown.

By virtue of sub-section 10(1), the meaning of the expression 'the Crown' is defined to 'include the Crown in right of a State and the Crown in right of the Northern Territory and also includes the Administration of a Territory other than the Northern Territory'. The Act is also expressed to bind the Crown. There is nothing in these words or in other provisions of the Act to suggest that rights of the Crown in right of the United Kingdom are excluded under the 1968 Act and the Act deals with rights which are international in character. The word 'includes' in definition sections normally suggests that the words following are intended to expand the natural and ordinary meaning of the defined word. If the narrow view of the word 'Crown' is adopted by a court the word would be construed to mean the Crown in right of the legislating government only and thus there would be no specified preservation of the rights of the Crown in right of the United Kingdom. But it is submitted that the word 'Crown' should be interpreted in the context of the rights dealt with by the legislation as a whole and its historical background, and as the definition is extensive rather than restrictive it is arguable that the nature of the right should not lead to a restrictive view of the word 'Crown', and that therefore rights of the Crown in right of the United Kingdom and other jurisdictions which were recognised under the 1911 Act should continue to be preserved under the 1968 Act. The adoption of the narrow view would, however, lead to the conclusion that all rights of the Crown in right of the United Kingdom and other foreign jurisdictions recognised under the 1911 Act must by necessary implication have been abolished by the 1968 Act because only certain rights of the Crown outside the rights of the legislating government are expressly preserved.

The argument which Long Innes C.J. advances in *Butterworth's case* on the enforcement of this prerogative proprietary right in other jurisdictions finds some support in decisions on other aspects of the prerogative of the Crown. These decisions show that some prerogative rights may be enforced in other jurisdictions. One particular example is the Crown's prerogative right to issue process and be paid in full in priority over all other creditors in respect of a debt due from a company in the course of liquidation. This right was one of the immunities and preferences described by Evatt in his classification of the prerogatives. In *re Oriental Bank Corporation*,⁶³ the question arose as to whether this right was barred by

⁶² Refer Peter W Hogg & Patrick J Monahan, *Liability of the Crown* (Carswell 3rd ed, Toronto, 2000) 12 - 13, 323-326. A proper interpretation of the scope of the word 'Crown' should have regard also to the greater acceptance by courts at the time of the coming into force of that Act, of what has been described as the 'verbally impressive mysticism' of the concept of the indivisibility of the Crown. Refer Latham C.J., in *Minister for Works (WA) v Gulson* (1944) 69 CLR 338, 350 - 351.

⁶³ (1884) 28 Ch D 643.

statutory provisions in England. The Crown's claims against the banking company were in fact derived from both the Crown in respect of its Imperial right and the Crown in respect of various colonial rights including the Colonies of Victoria and Ceylon and the company had acted as bankers for the Crown in those Colonies. The Crown in both its Imperial right as well as its colonial rights was represented by the Attorney-General and Solicitor-General respectively. Chitty J. held in that case that the Crown was not barred and was therefore entitled to issue process and be paid in full in priority over other creditors. He commented in relation to the colonial claims:

No distinction was drawn in argument, and very properly, between the rights and prerogatives of the Crown suing in respect of Imperial rights, and the rights of the Crown with regard to the colonies.⁶⁴

The same question arose between the States of Australia in *In re Commonwealth Agricultural Service Engineers Limited*.⁶⁵ In that case, the Supreme Court of South Australia held that the Governments of New South Wales and Queensland were entitled equally with the Government of South Australia to be paid in full in priority to the other simple contract creditors of a company which had gone into voluntary liquidation. Later, however, in *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd*⁶⁶ in which the High Court held that in the winding up of an insolvent company under the *Companies Act 1899* (NSW) debts due to the Crown in right of the Commonwealth and debts due to the Crown in right of the State of New South Wales have priority, by virtue of the prerogative, over debts due to the subject, Dixon J expressed some doubts as to whether the *Oriental Bank* case was still good law:

In the self-governing dominions and colonies of the Crown the prerogative right of priority operates to entitle the treasury of the dominion or colony to payment of debts due to the government in priority to debts due to its subjects. In other words, the claims of the government of the country are preferred to those of its subjects in accordance with the modern understanding of the principle. But the claims of other parts of the Empire have been thought entitled to a like preference over the claims of the citizens of the part under whose laws the assets of the debtor are administered. Thus in a winding up in England payment has been ordered of a debt due to the Crown in right of the Colony of Victoria in priority to debts due to English creditors... The indivisibility of the Crown is said to be the justification for this conclusion... But the unity of the Crown does not mean that distinctions do not exist between the parts of the King's dominion for and in respect of which the rights of the Crown are exercised. A right or prerogative of the Crown in right of New Zealand, to take an example, and conferred by, or subsisting under, the law of New Zealand, by which debts due to the Crown in that right are to be preferred to debts due to subjects of the Crown, forms part of the governmental and fiscal system of New Zealand. If the Government of New Zealand, to pursue the example, proves its debt in a winding up in Newfoundland, why should the New Zealand treasury be preferred to ordinary creditors in Newfoundland? It is not in accordance with the division of the Empire into separate polities that a prerogative of government affecting the

⁶⁴ Ibid 649.

⁶⁵ (1928) SASR 342.

⁶⁶ (1940) 63 CLR 278.

treasury of one part of the Empire should be exercisable in another part and, moreover, exercisable to the prejudice of the citizens of that other part⁶⁷

Dixon J. considered the question in *Farley's* case differed from the question whether priority of Crown debts ran throughout the Empire:

... it is another and entirely different question how that priority operates in a federation like Australia, composed of Commonwealth and States, each with a separate treasury, but all combining to form one self-governing dominion.⁶⁸

He held as did the remainder of the court that debts due to the Commonwealth and a State took priority over those due to a subject and that as between these governments there were co-existing rights standing on an equality.

Evatt in his thesis on the prerogative expresses similar disquiet about the notion that other Dominions of the Empire or the Imperial Government are entitled in respect of the Commonwealth of Australia and in the Commonwealth to exercise the prerogative of preference or priority, although he does accept that the grant of immunity, which is an exercise of the prerogative, can be justified beyond territorial boundaries on the basis of comity.⁶⁹ He makes no reference to the prerogative right to print and publish certain works but states as a 'broad principle' that the only executives which are strictly entitled to exercise prerogative rights in the Commonwealth are the Federal and State Governments.⁷⁰

The prerogative in *Farley's* case is not a proprietary right and arguably the right to print and publish certain works does not raise concerns of national interest in the same way as the prerogative of preference or priority. Thus, there is no reason that the disquiet expressed by Dixon J is relevant to the prerogative right to print and publish certain works and although other proprietary prerogative rights of the Crown would normally all be held and exercisable by the States or the Commonwealth there is no reason that the proprietary right of the Crown held by the Crown in right of the United Kingdom over certain legal works, the nature and scope of which is recognized in Australia, should not be enforceable in any jurisdiction in Australia.

Although this area of the law is not free from doubt it is suggested that the prerogative right of the Crown in the nature of copyright is capable of being enforced in other jurisdictions; in principle and subject to relevant legislative enactment the Crown's right should be enforceable in all jurisdictions in which the Crown is head of state and the right is recognised even though the right arises by virtue of the Crown's position as supreme executive authority of a different territorial unit. Any suggestion that the right to print and publish certain legal works is one restricted to the jurisdiction to which the legal works relate is contrary to the

⁶⁷ Ibid 302.

⁶⁸ Ibid 303.

⁶⁹ HV Evatt, *The Royal Prerogative*, (LBC, Sydney, 1987) 237 or refer HV Evatt's LLD thesis, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' (unpublished Doctor of Laws Thesis, Law Library, Sydney University, 1924) 390.

⁷⁰ Ibid.

proprietary nature of the right and its recognition as a right in many jurisdictions of the British Commonwealth. In this regard it should be noted that it has been a frequent practice for the Crown to include in its grants of exclusive rights to print and publish works in England prohibitions on others printing or causing to be printed such works within 'our Kingdoms and Dominions', or 'any of our Realms or Domynions' or with words similar in effect.⁷¹

In the light of those views already expressed in relation to the recognition of the prerogative rights of the Crown in right of the United Kingdom and other foreign jurisdictions under the *Copyright Act 1968*, it is arguable therefore, though the subject of some doubt, that the prerogative right of the Crown in right of the United Kingdom to print and publish the Commonwealth of Australia *Constitution Act 1900* and other statutes of the British Parliament is enforceable in Australia. It is more strongly arguable, however, in view of the definition of the expression 'the Crown' in the *Copyright Act 1968*, that the prerogative rights of the Crown in right of a State or of the Commonwealth in certain legal works which are clearly recognised under the 1968 Act would be enforceable in all States and Territories of the Commonwealth.

Another aspect of the interrelationship of the prerogative rights in Australia is the question of the vesting of rights in respect of written judgments of State courts when exercising federal jurisdiction, or a federal court exercising appellate jurisdiction in relation to State law. Control over the printing and publication of all decisions of State courts has historically been exercised by Councils of Law Reporting or other semi-governmental or governmental bodies in the States. It follows from my discussion in the previous issue of the Canberra Law Review that the rights to judgments of courts should vest according to the source of power of those courts.⁷² In particular section 71 of the *Commonwealth Constitution* which vests the judicial power of the Commonwealth in the courts to which it refers including 'such other courts as it invests with federal jurisdiction' would imply, having regard to the terms of Part VI of the *Judiciary Act 1903* (Cth), that the rights of the Crown in right of the

⁷¹ Refer, for example, to the privilege granted to *John Christian Bach* for the sole printing of 'divers works consisting of Vocal and Instrumental Music' dated 15th December 1763, '...strictly forbidding all our subjects within our Kingdom and Dominions, to reprint, abridge, copy out in writing for sale, or publish the same...' reprinted in C S. Terry, *John Christian Bach* (2nd ed.) (London, 1967) 78; and the privilege granted to Henry Sibdale and Thomas Kenithorpe to print and publish various works written by William Fulke dated 4 April 1618 '... or fhall ymprint or caufe to be ymprinted either or any of the faid Booke or Bookes or Volumes before mentioned, or any part of them or either of them, within any of our Realms or Domynions...' in Thomas Rymer, *Foedera* (3rd ed., 10 vols.) (The Hague, 1739-1745) Vol. VII, Part III, 56 at 57; and the privilege granted to Richard Grafton and Edward Whitchurche to print primers in both English and Latin dated 28th May 1545, 'Wherefore, we wyll and streightly commaund and charge all and singuler our subjectes, as well printers as booksellers, and all other persons within our dominions, that they, ne any of them, presume to print or sel ... the sayd boke or any part thereof, contrary to the meanyng of this our present license and priuiledge...' in T.F. Dibdin's edition of Ames' *Typographical Antiquities* (4 Vols) (London 1810-1819) Vol. III, 430, 431.
Refer also to the full text of other privileges referred to in note 57 in John Gilchrist, 'Origins and Scope of the Prerogative Right to Print and Publish Certain Works in England', (2011) 10 (3) *Canberra Law Review* 139, 150.

⁷² John Gilchrist, 'Origins and Scope of the Prerogative Right to Print and Publish Certain Works in England', (2011) 10 (3) *Canberra Law Review* 139, 146-149.

Commonwealth extend to all judgments of judges exercising that jurisdiction whether the judges are those of a State court exercising federal jurisdiction or of a federal court.⁷³ Jurisdiction in respect of appeals from State courts to federal courts is governed by sections 71, 73 and 77 of the *Commonwealth Constitution* and provisions of the *Judiciary Act 1903* and other federal Acts. Federal courts acting in an appellate capacity are exercising the judicial power of the Commonwealth and rights in respect of the judgments should under the above analysis vest in the Crown in right of the Commonwealth. The Commonwealth has, in fact, historically exercised control over the printing and publication of all judgments of Commonwealth courts.

It is, however, common for State courts to exercise federal and State jurisdiction concurrently. This raises the question whether both the Crown in right of a State and the Crown in right of the Commonwealth may exercise concurrent rights to print and publish judgments of those courts written in the exercise of both federal and State judicial power. Evatt in his thesis on the prerogative of the Crown raises the question of the conflict of prerogative rights of the Crown in right of the Commonwealth and in right of a State and suggests that the meaning of 'law of the Commonwealth' in section 109 of the *Commonwealth Constitution* should be construed to cover common law rights.⁷⁴ Thus, when a State court exercises both federal and State jurisdiction in the one proceeding, the Crown in right of the Commonwealth would exercise, by virtue of the paramountcy given to Commonwealth laws by section 109 of the Constitution, the right to print and publish the written judgment of the court produced in that proceeding. The wide view of the expression 'law of the Commonwealth' under section 109 has not been adopted by the High Court nor indeed by Evatt himself as a judge of that Court. The High Court has interpreted the phrase which occurs in section 109 in such a way as to exclude common law rights⁷⁵ and *Farley's* case and the other mentioned debt priority cases are themselves authority for the proposition that such prerogative rights may exist concurrently and should be treated equally when both interact. In these circumstances therefore both the Crown in right of the Commonwealth and in right of a State should have concurrent rights to print and publish judgments produced in the exercise of both State and federal judicial power.

⁷³ It follows that to the extent to which the Council of Law Reporting in Victoria Act 1967 as amended, purports to control the printing and publication of judgments of State courts when exercising federal jurisdiction, the Act is invalid because it amounts to a purported acquisition by the State of the prerogative right of the Crown in right of the Commonwealth in those judgments: *Commonwealth v Cigamic Pty Ltd.* (1962) 108 CLR 372, 389.

⁷⁴ HV Evatt, *The Royal Prerogative*, (LBC, Sydney, 1987) 220 or refer HV Evatt's LLD thesis, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' (unpublished Doctor of Laws Thesis, Law Library, Sydney University, 1924) 362.

⁷⁵ *Re Colina; Ex Parte Torney* [1999] HCA 57 at paras 25, (Gleeson CJ and Gummow J, with whom Hayne J agreed) 37-41 (McHugh J) and contra 77-81 (Kirby J) *The Queen v Foster; Ex parte Commonwealth Steamship Owner's Association* (1953) 88 CLR 549, 556. See also *Sankey v Whitlam* (1978) 53 ALJA. 11, 42 (Mason J) *Spratt v Hermes* (1965) 114 CLR 226, 247 (Barwick CJ) and *The Commonwealth and the Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd.* (1922) 31 CLR 421, 431.

III IMPACT OF THE COPYRIGHT AMENDMENT ACT 1980 ON THE PREROGATIVE RIGHT OF THE CROWN IN AUSTRALIA

The prerogative right of the Crown to print and publish certain works was not mentioned in the early Imperial or Colonial Acts in force in the Colonies prior to the passing of federal legislation,⁷⁶ nor in the first federal Act, the *Copyright Act 1905*, but was specifically preserved in the *Copyright Acts of 1912 and 1968*. The 1912 Act was the first Act to eliminate entirely common law protection for literary works and the first Act to make provision for the vesting of ownership of copyright in the Crown for Government publications and the express saving of prerogative rights of the Crown therefore become prudent, if not necessary, for their continued existence.⁷⁷

Prior to the coming into force of the *Copyright Amendment Act 1980*, the *Copyright Act 1968* provided in sub-section 8(2) that the Act did 'not affect any prerogative right or privilege of the Crown'. The *Copyright Amendment Act 1980* repealed section 8 in its entirety and inserted section 8A in its stead. That section provides,

- 8A.(1) Subject to sub-section (2), this Act does not affect any prerogative right or privilege of the Crown.
- (2) Where a right or privilege of the Crown by way of copyright subsists in a work or published edition of a work, a person does not infringe that right or privilege by doing, or authorizing the doing of, an act in relation to the work or edition without the licence of the Crown if, assuming that that right or privilege of the Crown did not subsist in the work or edition, but copyright subsisted under this Act in the work or edition and was owned by a person other than the Crown, he would not infringe the copyright of that owner in the work or edition by doing, or by authorizing the doing of, that act without the licence of the owner.
- (3) Nothing in sub-section (2) shall be taken to limit the duration of the right or privilege of the Crown by way of copyright in a work or published edition of a work.

Sub-section 8A (2) purports to adopt a recommendation of the Copyright Law Committee on Reprographic Reproduction that the *Copyright Act* should make it clear that any act that is excluded from infringement of copyright under that Act should equally not be an infringement of any prerogative right of the Crown.⁷⁸ The sub-section enables the general

⁷⁶ Refer *Copyright Act 1842* (5 and 6 Vic., c.45) (the only Imperial Act relevant to the subject matter in question); *Copyright Act 1879* (NSW) 42 Vic. No. 20; *Copyright Act 1869* (Victoria) 33 Vic. No. CCCL; *Copyright Act 1890* (Victoria) 54 Vic. No. 1076; *Copyright Register Act 1887* (WA.) 51 Vic. No. 3; *Copyright Act 1895* (WA) 59 Vic. No. 24; *Copyright Act 1887* (Qld) 51 Vic. No. 2; and *Copyright Act 1878* (SA) 41 and 42 Vic. No. 95.

⁷⁷ The Commonwealth *Copyright Act 1905* did not expressly or by necessary implication abolish the prerogative right of the Crown to print and publish certain works. The Act did not bind the Crown and it made no particular provision for Crown publications. Without a special saving of prerogative rights the 1911 Act could have been regarded as repealing most, if not all, the prerogative by necessary implication.

⁷⁸ Australia. *Report of the Copyright Law Committee on Reprographic Reproduction* (October 1976) (Canberra, 1976) 58, 59 (para 8.06). Refer also Australia. Parl., Senate, *Copyright Amendment Bill* (No. 2) 1979 *Explanatory Memorandum* 1, 2 (paras 2, 4) and Australia. Parl., Senate, *Parliamentary Debates*

principles of infringement of copyright law to be applied in respect of prerogative right works. It would not, for example, be an infringement of any prerogative right of the Crown in a work to print and publish an insubstantial part of that work.⁷⁹ Moreover the defences to infringement of copyright provided in the Act would be available to persons engaged in the printing and publication of those works. Accordingly, it would not be an infringement of any prerogative right of the Crown to print and publish more than a substantial part of a prerogative work in circumstances which would amount to a fair dealing with that work for criticism or review.⁸⁰ Other defences to infringement of copyright such as fair dealing with a work for the purpose of research or study⁸¹ and certain copying permitted by libraries or archives⁸² would also be available although it is arguable that the limited reproduction of works generally envisaged by the exceptions to infringement contained in Division 3 of Part III of the Act would not amount to 'printing' of a work in the sense understood by the right.

A small number of provisions inserted in the *Copyright Act*, originally by the *Copyright Amendment Act 1980* and since expanded, permit large scale reproduction of prerogative works. Those sections principally are 135ZG, 135ZMB, 135ZL, 135ZMD and 135ZP, 135ZS of the Act. In general terms they relate to copying and communication by educational institutions for the teaching purposes of those institutions. Sections 135ZG and 135ZMB enable copying or communication to be undertaken on the premises of an educational institution 'for the purposes of a course of education' (or 'course of study') provided by it of up to two pages of an edition of a literary (or dramatic) work or of works that include the work, or 1% of the total number of pages in the edition, whichever is the greater, provided a whole work is not copied. No further copying or communication of the same work can be undertaken in reliance upon these sections within fourteen days. In effect the section provides a fixed and easily determined allowance for the multiple copying or communication by educational institutions of insubstantial parts of a work, and it must be doubtful whether the multiple reproduction or communication of so small an amount of a prerogative work would in any circumstances be an infringement of the Crown's rights in that work.

Section 135ZP provides a statutory licence for institutions assisting persons with a print disability which enables the making of multiple copies of, inter alia, literary works in forms appropriate for use by these readers, two of which - large print and photographic versions of works - would clearly fall within the scope of the prerogative right in so far as the section may be relied on to copy works subject to the prerogative. A similar provision - s 135ZS - deals with institutions assisting persons with an intellectual disability. The most significant provisions in the Act from the point of view of their potential utilisation are sections 135ZL and 135ZMD which establish statutory licences permitting the multiple copying (s135ZL) and copying or communication (s135ZMD) of works by educational institutions for the

(*Hansard*) Vol. S 81(1 May - 8 June 1979) (Canberra, 1979) 2533 at 2534 (Second Reading Speech of the Commonwealth Attorney-General on the above Bill).

⁷⁹ Refer s 14 of the *Copyright Act 1968*.

⁸⁰ Refer s 41 of the *Copyright Act 1968*.

⁸¹ Section 40 of the Act.

⁸² Refer provisions of Part III, Division 5 of the Act.

educational purposes of the institution or another educational institution, which extends to multiple copying of whole works where the work is not commercially available within a reasonable time or is not separately published. The licence otherwise permits copying of reasonable portions of works which in general terms is up to 10% of the number of pages in an edition of a work or one chapter whichever is the greater.⁸³ By virtue of sub-section 8A(2) this provision applies to prerogative works and may be relied upon as a defence to an infringement action once the recording requirements of the provision are fulfilled.⁸⁴

The copying of prerogative right works under the statutory licence provisions would enable the Crown in right of the Commonwealth or a State, and perhaps the Crown in right of certain other jurisdictions, to claim remuneration in respect of that copying within the prescribed period of time. A claim may similarly be made against copying under the statutory licence sections 135ZP and s135ZS.

Although multiple copying of prerogative works under sections 135ZL, 135ZMD and in certain cases under sections 135ZP and s135ZS would infringe the prerogative right of the Crown since the reproduction would be regarded as printing in the commonly accepted meaning of the word. The issuing of copies of works made in these circumstances to students of educational institutions arguably would also amount to publication of the works.

One other provision inserted by the *Copyright Amendment Act 1980* of particular interest is section 182A which provides that it is not an infringement of copyright or any prerogative right or privilege of the Crown to make, by reprographic reproduction, one copy of the whole or part of a prescribed work 'by or on behalf of a person and for a particular purpose'. The prescribed works are defined by sub-section 182A(3) to mean:

- (a) an Act or State Act, an enactment of the legislature of a Territory or an instrument (including an Ordinance or a rule, regulation or by-law) made under an Act, a State Act or such an enactment;
- (b) a judgment, order or award of a Federal court or of a court of a State or Territory;
- (c) a judgment, order or award of a Tribunal (not being a court) established by or under an Act or other enactment of the Commonwealth, a State or a Territory;
- (d) reasons for a decision of a court referred to in paragraph (b), or of a Tribunal referred to in paragraph (c), given by the court or by the Tribunal; or
- (e) reasons given by a Justice, Judge or other member of a court referred to in paragraph (b), or of a member of a Tribunal referred to in paragraph (c), for a decision given by him either as the sole member, or as one of the members, of the court or Tribunal.

The section also provides that if a charge is made for the making and supplying of a copy, the section will not apply unless the amount charged does not exceed the cost of making and supplying the copy.

⁸³ Refer section 10(2) of the Act.

⁸⁴ Refer sections 135ZL(1) and 135ZMD(1) of the Act.

While the precise scope of those legal works subject to the prerogative is not clear, the prescribed works listed above, apart from those works listed relating to tribunals which do not exercise judicial power, arguably fall within the scope of works subject to the prerogative right of the Crown. Nevertheless, the general effect of the section is to do little more than clarify the right of an individual to make a single copy of a Commonwealth, State or Territory statute, judgment or other prerogative work without infringing the prerogative right since, as described in the previous article, there has been no suggestion in any of the cases that the right is a right of reproduction in the broad sense and for the reasons there advanced would not include the right to make a single copy of a prerogative work. The section may, nevertheless, have a wider impact since the copying permitted can be undertaken on behalf of a person. The section was amended from a clause in the Copyright Amendment Bill (No. 2) 1979 which referred to the right to make by or on behalf of a person 'a copy of the whole or of a part of' a prescribed work. Apart from the use of the indefinite article, 'a' instead of 'one', there was no requirement that the copying had to be 'for a particular purpose'.⁸⁵ The clause did, though, make provision for charging for the supply of a copy to a person in the same terms as the 1980 Amendment Act. The clause purported to implement a recommendation in paragraph 8.07 of the Report of the Copyright Law Committee on Reprographic Reproduction that,

The Act should be amended to make it clear that a person is entitled to make reprographic reproductions of a statute or an instrument made under the authority of a statute, an order, judgment or award of a court or other tribunal, or of the reasons for decision of a court or other tribunal. The sale of a copy so made should not be permitted, except that this should not prevent the cost of making the copy being recovered from a person to whom the copy is supplied.

The Committee added, 'a provision to this effect would enable an organisation to make copies for distribution to its members'.⁸⁶

The changes adopted in section 182A appear to prevent more than one copy of a prescribed work being made by a person for himself or for another in any single copying instance, although it is difficult to appreciate what, if anything, is achieved by the addition of the requirement that the copying be undertaken 'for a particular purpose', as these words may be broadly construed. The question arises whether the section would permit the making of more than one copy of a prescribed work where the person doing the copying does so as agent for more than one person. A liberal interpretation of the section would appear to render it capable of applying to large scale reproduction situations which would unquestionably lead to infringement of the prerogative right of the Crown in circumstances where prerogative works were so reproduced. The section has not yet been judicially considered, but it should be pointed out that the encroachment evidenced by sections 8A and 182A in particular upon the prerogative right of the Crown not only affects the Crown in right of the Commonwealth, but also the Crown in right of the several States.

⁸⁵ Refer Copyright Amendment Bill (No. 2) 1979, clause 23.

⁸⁶ Australia. *Report of the Copyright Law Committee on Reprographic Reproduction* (October 1976) (Canberra, 1976) 59 (Parl. Paper No. 408, 1976).

While the Commonwealth Parliament has the capacity to reduce by enactment the scope of the prerogative right of the Crown in right of the Commonwealth, the adoption of a liberal interpretation of section 182A would have the effect of reducing the scope of the prerogative right of the Crown in right of the several States, which would amount to an acquisition of property within the terms of placitum xxxi of section 51 of the Commonwealth Constitution. It should also be observed that multiple copying of State prerogative works under sections 135ZL, 135ZMD, 135ZP and 135ZS would, of course, have the same effect.

In *Butterworth's* case, Long Innes C.J. suggests that placitum xviii - the legislative power with respect to copyrights, patents of inventions and designs, and trade marks - read with placitum xxxi of section 51 of the Constitution, enabled the Commonwealth 'to take away a prerogative of the Crown in right of the State in the nature of a proprietary right, if on the true construction of the legislation it purports so to do'.⁸⁷ Placitum xxxi of section 51 empowers the Commonwealth Parliament to make laws for the peace, order and good government of the Commonwealth with respect to 'the acquisition of property on just terms from any State ... for any purpose in respect of which the Parliament has power to make laws'. A law purporting to be a law with respect to copyright, which reduced the scope of the prerogative right of the Crown in right of the various States in the nature of copyright, would, it is suggested, be a valid exercise of legislative power under placitum xviii of the Constitution having regard to the general principles of interpretation of heads of power which have been established in such cases as *Bank of New South Wales v Commonwealth*,⁸⁸ *Lansell v Lansell*,⁸⁹ *The Queen v Public Vehicles Licensing Appeal Tribunal (Tas.)*,⁹⁰ *Western Australia v Commonwealth*,⁹¹ *In re Adamson*; *Ex parte WA National Football League*,⁹² *Commonwealth v Tasmania*,⁹³ *Nintendo Company Limited v Centronics Systems Pty Ltd*⁹⁴ and *Grain Pool of WA v Commonwealth*.⁹⁵ Long Innes CJ's view of the scope of placitum xxxi is also plainly correct since the terms 'acquisition' and 'property' in that placitum have been interpreted broadly to include any compulsory taking of any interest in property, including the acquisition of prerogative rights of the Crown in the nature of proprietary rights under the *Lands Acquisition Act 1906* (Cth) which was passed in pursuance of this constitutional power.⁹⁶ It is irrelevant that the acquisition of property by the printing of State prerogative

⁸⁷ *Attorney-General for New South Wales v Butterworth and Co.(Australia) Ltd.* (1938) 38 S R (NSW) 195, 248-249. Long Innes C.J. clearly regards, at 247 and 249, the prerogative right as 'Crown copyright' or the 'proprietary right of the Crown in the nature of copyright' and thus the subject of valid Commonwealth legislation under placitum xviii although this view is necessarily implicit in his discussion of the two placita, and is not a view he directly expresses.

⁸⁸ (1948) 76 CLR 1, 332-333.

⁸⁹ (1964) 110 CLR 353, 366-367, 370.

⁹⁰ (1964) 113 CLR 207, 225.

⁹¹ (1975) 134 CLR 201, 245-246.

⁹² (1979) 53 ALJR 273, 279, 281 and 289 but cf. the majority view in *Attorney-General for the State of New South Wales v Brewery Employees Union of New South Wales* (1908) 6 CLR. 469.

⁹³ [1983] HCA 21, 51, (1983) 158 CLR 1, 107 (per Mason J.), 226 (per Brennan J.), and 265 (per Deane J.)

⁹⁴ (1994) 181 CLR 134, 160.

⁹⁵ (2000) 202 CLR 479, 492-495, 501.

⁹⁶ *Commonwealth of Australia v State of New South Wales* (1923) 33 CLR 1. Refer generally *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349; *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 285; *Western Australia v Commonwealth* (1975) 134 CLR 201, 245-246, *Commonwealth v*

works may be carried out under section 182A or sections 135ZL, 135ZMD and 135ZP and 135ZS by persons other than the Commonwealth, since the placitum has been held by the High Court not to be limited to a law with respect to the acquisition of property by the Commonwealth, but extends to any nominee of the Commonwealth.⁹⁷ In addition, it has been held that the placitum does not require the Commonwealth or the Commonwealth alone to be the user of the property acquired.⁹⁸ Notwithstanding the above considerations, section 182A does not provide 'just terms' as required by the placitum, because there is no right to claim remuneration or a provision for compensation as there is in relation to copying under the statutory licence provisions section 135ZL, 135ZMD, 135ZP and s135ZS.⁹⁹ Those provisions clearly meet the requirements of 'just terms' under the placitum.¹⁰⁰

Because section 182A is capable of more than one interpretation, a court should, however, adopt a construction of that section which will ensure its validity: *Davies and Jones v State of Western Australia*,¹⁰¹ *R. v Director -General of Social Welfare for Victoria; Ex parte Henry*.¹⁰² As Rich J stated in *Ex parte Walsh and Johnson; In re Yates*, 'an Act of Parliament must always be read as within the Constitution unless its language makes that impossible.'¹⁰³ This approach finds statutory form in s15A of the *Acts Interpretation Act 1901* (Cth).¹⁰⁴

This principle of interpretation would oblige a court to read down the scope of section 182A so that it would be confined in its application within the limits allowed by the Constitution, that is, to the making under section 182A of a copy or a few copies on behalf of the copier or other persons but not to permit large scale reproduction of prerogative works so as to amount to a clear infringement of a prerogative right of the Crown, and an acquisition of proprietary rights held by the Crown in right of a State.

Tasmania [1983] HCA 21, per Mason J at 51, per Brennan J at 21, 90, *Nintendo Company Limited v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 160 and *Grain Pool of WA v Commonwealth* [2000] HCA 14, 41-42, 130-136, (2000) 202 CLR 479, 492-495, 501.

⁹⁷ *McClintock v Commonwealth* (1947) 75 CLR 1, 36; *P J. Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 401- 402, 422- 423, 429 - 430; *Commonwealth v Tasmania* [1983] HCA 21, (1983) 158 CLR 1, 107 (per Mason J.), 226 (per Brennan J.), and 265 (per Deane J.).

⁹⁸ Refer *Real Estate Institute of New South Wales v Blair* (1946) 73 CLR 213, 235-236, *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, and *Andrews v Howell* (1941) 65 CLR 255; but cf. *Attorney-General of the Commonwealth v Schmidt* (1961) 105 CLR 361, 372, 373.

⁹⁹ This right of 'just terms' also exists under the Crown use provision (s183) of the *Copyright Act 1968* (Cth), and similar provisions in the *Patents Act 1990* (Cth) (s163) and the *Designs Act 2003* (Cth) (s 96).

¹⁰⁰ Refer *Johnston Fear and Kingham and the Offset Printing Co. Pty Ltd. v Commonwealth* (1943) 67 CLR 314, 323 where Latham C.J. took the view that 'just terms' involved full and adequate compensation for the compulsory taking. Starke J. in *McClintock v The Commonwealth* (1947) 75 CLR 1, 24 stated, 'the Court should not hold legislation invalid on the ground that the terms provided are unjust unless they are such that a reasonable man could not regard the terms of the acquisition as being just'.

¹⁰¹ (1904) 2 CLR 29, 43. Refer also DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6th ed, Sydney, 2006) 62 (para 2.38).

¹⁰² (1975) 8 ALR 233, 237 (HC).

¹⁰³ (1925) 37 CLR 36, 127.

¹⁰⁴ 'Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power' (*Acts Interpretation Act 1901* (Cth) s 15A).

In practice, both Commonwealth and State governments have licensed the multiple reproduction and communication of works subject to their prerogative rights, normally without copyright charge, unless the official government version was reproduced.¹⁰⁵ The policy approaches across governments have not been entirely consistent. In 1982 the Commonwealth issued standing licences to publishers and to educational users allowing publication and multiple reproduction respectively of Commonwealth legislative material, which were royalty free, largely unlimited and required no notification. In all circumstances no publication was to claim it was the authorized version.¹⁰⁶ In 1995 and 1996 the State of New South Wales issued public waivers of copyright in judgements and legislation citing in the published waivers ‘that is in the interests of the people of New South Wales that access to such [decisions, legislation and extrinsic materials] should not be impeded except in limited special circumstances. Limited conditions were imposed including the publication must not directly or indirectly indicate that it is an official version of the material.’¹⁰⁷ More recently the adoption by Commonwealth and a number of State governments of Creative Commons BY licenses and other open content licences for public sector information has facilitated free and wide public access to legal works the subject of the prerogative right of the Crown in the nature of copyright.¹⁰⁸ There are strong public policy reasons for free and open access to the law, which lie at the basis of the prerogative right, and it is hoped that this approach will be adopted consistently across all jurisdictions. It is important that the duty on the Crown to disseminate the laws of the land should not be used to impede wider dissemination of, and access to, the law.



¹⁰⁵ In 2004, that did not preclude some governments charging for the supply of electronic data.

¹⁰⁶ Australia. (1982) 7(49) *Commonwealth Record* 1782: JC Lahore, *Intellectual Property in Australia: Copyright Law* (1988) looseleaf 4.12.90.

¹⁰⁷ New South Wales. ‘Notice: Copyright in judicial decisions’ *NSW Government Gazette* no 23 (1995) 1087 (The Hon John Hannaford); ‘Notice: Copyright in legislation and other material’ *NSW Government Gazette* no 110 (1996) 6611 (The Hon JW Shaw).

¹⁰⁸ Australia, Attorney-General’s Department, *Statement of Intellectual Property Principles for Australian Government Agencies* <http://www.ag.gov.au/www/agd/agd.nsf/Page/CopyrightStatement_of_Intellectual_Property_Principles_for_Australian_Government_Agencies>.

11(a) Agencies should encourage public use and easy access to material that has been published for the purpose of:

- *informing and advising the public of government policy and activities;*
- *providing information that will enable the public and organisations to understand their own obligations and responsibilities to Government;*
- *enabling the public and organisations to understand their entitlements to government assistance;*
- *facilitating access to government services; or*
- *complying with public accountability requirements*

...

11(b) Consistent with the need for free and open re-use and adaptation, public sector information should be licensed by agencies under the Creative Commons BY standard as the default.

Hinch, Kable and Open Justice: the Appropriate and Adapted Test

LIAM BOYLE

ABSTRACT

The decision in Hogan v Hinch was uncontroversial to say the least. The outcome of that case was undoubtedly correct, but it was not necessary in reaching its conclusions for the High Court to discuss one of the deeper issues underlying the case: how Chapter III of the Constitution interacts with parliamentary sovereignty in the context of open justice. This article argues that that a proportionality methodology best answers this issue; that is, by asking whether an impugned law is reasonably appropriate and adapted for an end consistent or compatible with observance of the open court principle. This approach, it is argued, is consistent with the history and purpose of open justice in the administration of justice, and provides a workable methodology for answering the constitutional question posed.

I INTRODUCTION

An opportunity arose in *Hogan v Hinch*¹ to test the extent to which the open justice principle, as a constitutional premise, is provided by Chapter III of the Constitution (*Chapter III*). The complexity of this enquiry was not explored fully. On one view, it is a shame that the impugned legislation in that case was not more severe in its effect. From one perspective, it would have been preferable to have a set of facts conducive to a more intricate debate. Instead, the issues in that case were dismissed quite easily by the High Court² and thus it was not necessary to provide clear and authoritative guidance on how Chapter III of the Constitution interacts with parliamentary sovereignty in the context of open justice.³

This interaction presents a conceptual difficulty in that the constitutional rules under Chapter III require, in this instance, analysis of another set of rules (the common law requirements of open justice) that involve exceptions from a general principle. The question is how these exceptions are to be constitutionally controlled. The judgments in *Hinch* did not state in detail why the impugned legislation did not fall foul of Chapter III.

¹ *Hogan v Hinch* (2011) 243 CLR 506 ('Hinch').

² French CJ and Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

³ This 'missed opportunity' is not suggested to be a criticism of the High Court: see Chief Justice Robert French AC, 'Judges and Academics - Dialogue of the Hard of Hearing' (Speech delivered to the Australian Academy of Law, Federal Court of Australia, 30 October 2012) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj30oct12.pdf>, 13.

There were attempts by counsel at the hearing of *Hinch* to try to flesh out this deeper issue. It was put in the form of an ‘appropriate and adapted’ test in the sense that the limitation established in *Kable*, in the context of open justice, depended upon a review of the legislation by means similar to the test under the freedom of political communication limitation. This issue underlying the argument raised in *Hinch* is unexpressed within both the judgments and is arguably to some degree latent. This article discusses this issue and argues that the constitutional test underlying *Kable* in the context of open justice ought to be one the High Court is now becoming accustomed to: whether the legislation is reasonably appropriate and adapted for an end consistent or compatible with observance of the open court principle.

Because the High Court did not deal with the issue, this article will focus on the debate in the transcript of the proceedings and the written submissions.

II THE ‘PRINCIPLE’ OF OPEN JUSTICE

The reasons for open justice in our legal system are both historical and normative. It has been said that openness in English courts has not ‘been the result of conscious policy but of their history.’⁴ Likewise, Chief Justice Spigelman has stated ‘the principle of open justice did not emerge in our legal history by a process of deduction from an abstract ideal’.⁵

It is difficult if not impossible to ascertain the precise point at which open justice entered our system of justice. For various reasons, it is fair to conclude that the ‘origins and practice of judicial openness are obscure.’⁶ At any rate, for present purposes such an enquiry is unnecessary; it is sufficient to observe that ‘throughout its evolution, the trial has been open to all who cared to observe’⁷ and this, as ‘one of the most conspicuous features’⁸ of judicial proceedings, ‘appears to have been the rule in England from time immemorial’.⁹ Sir Frederick Pollock, one of the most pre-eminent legal historians, commented with respect to the open court that ‘[here] we have one tradition, at any rate, which has persisted through all changes’.¹⁰

More important than the historical origins of open justice are the virtues it brings to the administration of justice. There is a plethora of inspiringly grandiose and delightfully eloquent pronouncements from jurists across the world that highlight the fundamental importance of open justice to the judicial process; each would provide a quaint summary of

⁴ Peter Wright, ‘The Open Court: the Hallmark of Judicial Proceedings’ (1947) 25 *Canadian Bar Review* 721, 721.

⁵ The Hon JJ Spigelman, ‘Seen to Be Done: the Principle of Open Justice - Part 2’ (2000) 74 *Australian Law Journal* 378.

⁶ Garth Nettheim, ‘The Principle of Open Justice’ (1984) 8 *University of Tasmania Law Review* 25, 26.

⁷ *Richmond Newspapers Inc v Virginia* 448 US 555 (1980) 564.

⁸ E Jenks, *The Book of English Law* (6th ed, 1967) 73.

⁹ *Ibid* 74. In 1649 for example, the principle seemed sufficiently entrenched to allow John Lilbourne to plead ‘the first fundamental liberty of an Englishman that all courts of justice always ought to be free and open for all sorts of peaceable people to see, behold and hear ... and no man whatsoever ought to be tried in holes or corners, or in any place where the gates are shut and barred’; see Geoffrey Robertson QC, *The Tyrannicide Brief* (2005) 219.

¹⁰ F Pollock, *The Expansion of the Common Law* (1904) 31-32.

the principle, alas, there is not room to canvass them all here. One succinct quote from the South African Constitutional Court neatly summarises this principle in the criminal context (though it is equally applicable to the civil realm as well):

Seeing justice done in court enhances public confidence in the criminal-justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate. Were criminal appeals to be dealt with behind closed doors, faith in the criminal justice system may be lost. No democratic society can risk losing that faith. It is for that reason that the principle of open justice is an important principle in a democracy.¹¹

There are many good reasons why such pronouncements are continuously endorsed by jurists. Parts of the above statements allude to some of these reasons. In general terms, there are many values that open justice brings to the system of justice. *First*, there is the element of providing a system conducive to finding out the truth. *Secondly*, there is the enhancement of judicial accountability. *Thirdly*, it upholds the rule of law. *Fourthly*, it is a prerequisite to maintaining public confidence in the judiciary. *Fifthly*, there is an element of deterrence to would-be transgressors of the law. *Sixthly*, an open court is important to free expression and is a necessary condition to public involvement in government affairs.

Each of these values individually provides a strong foundation for the maintenance of open justice; cumulatively, they place considerable weight in the conceptual balance. It is for these reasons that open justice operates as a strict and fundamental principle to be applied in the administration of justice.

Although open justice is an important principle in our society, it is inherently qualified. Chief Justice Spigelman was at pains to demonstrate that ‘the “principle of open justice” is a *principle*; it is not a freestanding right’.¹² His Honour continues:

As a principle, it is of significance in guiding the court in determining a range of matters ... However, it remains a principle and not a right.

A principle, as Professor Ronald Dworkin has stated:

... states a reason that argues in one direction, but does not necessitate a particular decision... There may be other principles or policies arguing in the other direction ... If so, our principle may not prevail, but that does not mean that it is not a principle of our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may be decisive.¹³

This view is consistent with the approach taken by the House of Lords in *Scott v Scott*. Viscount Haldane observed that the paramount object must be to do justice, and that open justice is but a means to this end.¹⁴ Consequently, at common law there are exceptions to this

¹¹ Justice Yacoob in *Shinga v The State and Another (Society of Advocates, Pietermaritzburg Bar as Amicus Curiae)*; *O’Connell and Others v The State* [2007] ZACC 3; 2007 (5) BCLR 474 (CC).

¹² *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 521 (emphasis original).

¹³ *Ibid*, citing R Dworkin, *Taking Rights Seriously* (1977) 26.

¹⁴ *Scott v Scott* [1913] AC 417, 437. Chief Justice French provided a similar observation; *Hinch* (2011) 243 CLR 506, [20].

generally strict requirement. These exceptions are strictly limited, and they must meet the criterion of necessity – that is, ‘necessary to secure the proper administration of justice’.¹⁵

President Kirby reviewed the authorities in this regard and reached the same conclusion. His Honour stated in *John Fairfax Group v Local Court of NSW*:

The common justification for these special exceptions is a reminder that the open administration of justice serves the interests of society and is not an absolute end in itself. If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourage its attainment in cases generally ... or would derogate from even more urgent considerations of public interest ... the rule of openness must be modified to meet the exigencies of the particular case.¹⁶

Formulated as a legal test at common law, the court begins with the dual propositions that proceedings ought to be administered openly and that this is generally fundamental to the administration of justice. However, departure from this general requirement may be warranted if a party can demonstrate that it is necessary to secure the proper administration of justice, and the court will make an order infringing open proceedings to the extent necessary to secure justice in the circumstances.

A Exceptions to the Principle

Understanding the exceptions to the principle of open justice enable its ambit to be understood better and will be significant in making a constitutional assessment of open justice. It would be imprudent to make some all-encompassing statement about the ambit and limits of open justice deduced from the current exceptions. Rather, the preferable approach is to understand the principles that have guided the exceptions to date. Obviously that is not to say the common law requirements and constitutional requirements are to be equated. It is well established that Parliament is not confined to common law principles, which are inherently susceptible to legislative modification. However, the common law’s approach to questions of fundamental importance will be of assistance in determining questions arising from Chapter III of the Constitution, which was framed under strict historical and normative expectations.¹⁷ Chief Justice French’s judgment in *Hinch* demonstrates that the common law of open justice informs or assists with the interpretation of the ‘institutional integrity’ criterion,¹⁸ and the approach his Honour took in *Totani* consolidates this view.¹⁹

Over time the common law has carved out from what would otherwise be the rule of open proceedings. These exceptions were developed as part of an overall test of necessity. The necessity test involves reviewing the information or circumstances to determine whether ‘there be identified some substantial detriment or risk of detriment to the administration of

¹⁵ *John Fairfax & Sons Pty Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 477, 485 (McHugh JA).

¹⁶ *John Fairfax Group v Local Court of NSW* (1991) 26 NSWLR 131.

¹⁷ See discussion in Sir Owen Dixon, *Jesting Pilate*, (1965) 198-213. See also *Cheatle v The Queen* (1993) 177 CLR 541, 552; and *State of South Australia v Totani* (2010) 242 CLR 1, [59]-[62], [72].

¹⁸ *Hinch* (2011) 243 CLR 506, [46]; see also [21]-[27].

¹⁹ *State of South Australia v Totani* (2010) 242 CLR 1, [69]-[73].

justice that would, in a significant way, be alleviated by suppression of the information' or otherwise closing off that information from the public.²⁰ Under this test, suppression of the information must be more than merely 'convenient, reasonable or sensible, or that it serves the public interest, or even on balance serves the public interest.'²¹ It is applied as a strict test.

One of the clearest demonstrations of the test of necessity at common law is with respect to trade secrets or secret processes. If the litigation involves such a subject matter, publicity would destroy the very thing the litigation was trying to protect. There would be, in these circumstances, a denial of justice if the secret were communicated to the world.²² Courts are keen to protect the subject matter of litigation so as not to render its proceedings futile or make orders that are 'idle or ineffectual'.²³ The same reasoning applies to protect an order in proceedings in which confidential information exists, where, to exhibit that information publicly, would be to frustrate the attainment of justice.²⁴ But even this consideration is qualified: the order or judgment will be limited or structured in such a way 'so as to reveal as much of what occurred as is possible without destroying the secret.'²⁵

From this reasoning follows other examples where it may be necessary to protect other secret processes or the object of the action, such as secret police methods or victims of blackmail.²⁶ In relation to secret police methods, orders may be made to suppress the publication of evidence that would disclose a secret police method used to solve cases and convict criminals.²⁷ Orders may be made that suppress or conceal the identities of witnesses²⁸ or national intelligence agency officers²⁹ involved in undercover operations. Pseudonyms are prevalently used for the parties' names, such that some volumes of law reports are beginning to read 'like alphabet soup'.³⁰ This is frequently under the justification of protecting the parties from potential threats or persecution.

The maintenance of order in courts may also justify an infringement with open justice. If rioters or protesters would impinge upon the proceedings the court may order a closed hearing.³¹ Earl Loreburn held:

²⁰ *Attorney-General (NSW) v Nationwide News Pty Ltd* (2007) 178 A Crim R 301 [39] (Hodgson JA, with Hislop and Latham JJ agreeing).

²¹ *Ibid* [34].

²² *Scott v Scott* [1913] AC 417, 445.

²³ *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 146, 154 (Lord Hatherley LC).

²⁴ See, for example, *Versace v Monte* [2001] FCA 1565, which involved an application for an order to be made under the now repealed s 50 of the *Federal Court of Australia Act 1976* (Cth) for a restriction on the publication of evidence, namely, a defamatory and confidential book critical of Gianni Versace.

²⁵ *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294, 308.

²⁶ *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 54.

²⁷ For a full discussion on these methods and the law in this regard, see Sharon Rodrick, 'Open Justice and Suppressing Evidence of Police Methods' (2007) 31 *Melbourne University Law Review* 171.

²⁸ *R v Ngo* [2003] NSWCCA 82; special leave to appeal to the High Court from this decision was subsequently refused, see [2004] HCATrans 185.

²⁹ *A v Hayden (No 2)*(1984) 156 CLR 532.

³⁰ These were the 'provocative words' used in *Re Guardian News & Media Ltd* [2010] 2 All ER 799, [1].

³¹ *R v Governor of Lewes Prison; Ex parte Doyle* [1917] 2 KB 254.

[t]umult or disorder, or the just apprehension of it, would certainly justify the exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general.³²

Another example, which was referred to in *Scott v Scott*, is the Court's role with respect to wards, lunatics, the mentally ill and children (as *parens patriae*).³³ The mentally ill and lunatics require the protection of the court,³⁴ and in seeking this protection suffer the indignity of the court discussing his or her sensitive affairs. They should not have to 'suffer the further indignity of the salacious press prying into them.'³⁵ The court's jurisdiction in this respect is paternal, in that the court is to look after the interests of this class of litigant. This may require different infringements on open justice, such as use of a pseudonym, exclusion of the public or making orders *in camera*.³⁶

It is clear that these exceptions were developed over time to address what would have otherwise been an inappropriate application of the strict rule. At common law, the exceptions are few and strictly defined.³⁷ In *John Fairfax Publications Pty Ltd v District Court of New South Wales* the Court held that it is 'now accepted that the court will not add to the list of exceptions'.³⁸ However, importantly, it is open to Parliament (subject to constitutional restraints) to develop new exceptions. Changing social conditions and judicial processes may warrant the application of a new exception previously unforeseen or unnecessary.³⁹

³² *Scott v Scott* [1913] AC 417, 446. This statement extends to policies encouraging protection of the court and its officers. Court practices involving the forfeiture of property or denying entrance upon suspicion of misconduct are justified under this exception; see Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (2002), 122-125.

³³ See, for example, *In re G (an infant)* [1892] 1 Ch 292. For a history of *parens patriae* see J Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origin' (1994) 14 *Oxford Journal of Legal Studies* 159.

³⁴ *In re E.S (A supposed lunatic)* 1876 4 Ch D 301.

³⁵ *John Fairfax Publication Pty Ltd v Attorney General (NSW)* (2000) 181 ALR 694, [168] (Meagher JA).

³⁶ See, for example, *In re B (an alleged lunatic)* [1892] 1 Ch 459.

³⁷ *McPherson v McPherson* [1936] AC 177, 200; *John Fairfax Publications Pty Ltd and Anor v District Court of New South Wales and others* (2004) 61 NSWLR 344, 353; *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 604 (Lord Steyn).

³⁸ (2004) 61 NSWLR 344, 353. However, if there is a sufficient analogy to the existing exceptions, an extension may be permitted; see *R v Kwok* (2005) 64 NSWLR 335, [16] (Hodgson JA). However, in a subsequent case, his Honour then provided a broader formulation of this rule; see *Attorney-General (NSW) v Nationwide News Pty Ltd* (2007) 178 A Crim R 301 [38] (Hodgson JA, with Hislop and Latham JJ agreeing).

³⁹ For example the advent of 'super injunctions' in the UK, see Master of the Rolls of the United Kingdom Court of Appeal, 'Report of the Committee on Super-Injunctions: Super-Injunction, Anonymised Judgments and Open Justice', 20 May 2011.

B Parliament May Add More Exceptions

It is trite but essential to recognise that Parliament may add to the list of exceptions.⁴⁰ Although courts have held that the common law is restricted in its ability to develop exceptions, only a constitutional restraint is imposed upon Parliament. This is an important recognition that new circumstances may arise that warrant a protective measure infringing open justice. This makes sense. It would be absurd to have the goal of doing justice in the circumstances, but being precluded from doing so because the situation did not fit into an established exception. This approach would be overly deferential to past norms and would invite a miscarriage of justice. Moreover, sensitive questions of policy are rightly reserved for Parliament. As the cases grappling with principles of open justice demonstrate, there are numerous considerations that need to be taken into account and Parliament should have an ability to make an assessment as to which competing interest should take precedence. The law, as it were, may ‘tilt the scales’.⁴¹

III THE OPERATION OF THE *KABLE* PRINCIPLE

The foregoing is necessary to lay the foundations for the central question of this article: how will the above-mentioned considerations inform the construction and application of a constitutional test? The principle derived and developed from *Kable*⁴² highlights that under Chapter III there is a nationally integrated court system. The focus of the *Kable* principle is about protecting the ‘institutional integrity’ of courts,⁴³ and asking whether the law is ‘repugnant to the judicial process in a fundamental degree’.⁴⁴ This includes an assessment of the defining characteristic of courts. But the discussion of this principle has at times been unclear and it has not been applied as a uniform test.

In *Hinch*, French CJ set out the relevant framework as follows. A law (whether federal or State) cannot empower or authorise a Court to do things that are ‘repugnant to or incompatible with the exercise of the judicial power of the Commonwealth.’⁴⁵ Further, ‘that broad criterion of invalidity encompasses functions which would be inconsistent with or inimical to the defining characteristics of a court, or which deprive a court of one or other of those defining characteristics.’⁴⁶ This raises two questions. First, what, in the present context, is the scope of the judicial power of the Commonwealth? Second, to what extent is open justice a defining characteristic of a court?

⁴⁰ *Russell v Russell* (1976) 134 CLR 495, 520; *John Fairfax Publication Pty Ltd v Attorney General (NSW)* (2000) 181 ALR 694, [70]-[73].

⁴¹ *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 41 (Wilson J).

⁴² *Kable v Director of Public Prosecutions for NSW* (1996) 189 CLR 51

⁴³ See *Forge v ASIC* (2006) 228 CLR 45; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532; *K-Generation v Liquor Licensing Court* (2009) 237 CLR 531; *International Finance Trust v New South Wales Crime Commission* (2009) 240 CLR 319 (‘*International Finance*’); *State of South Australia v Totani* (2010) 242 CLR 1; *Wainohu v State of New South Wales* (2011) 243 CLR 181.

⁴⁴ *International Finance* (2009) 240 CLR 319.

⁴⁵ See *Hinch* (2011) 243 CLR 506, [45].

⁴⁶ *Ibid.*

A Judicial Power and Judicial Process

One fairly well-settled view is that judicial power involves following what is described as the judicial process.⁴⁷ In *Bass v Permanent Trustee Co Ltd*, it was held that ‘judicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process.’⁴⁸ Justice Gaudron was one of the central advocates of the definition of judicial power involving a judicial process. Her Honour has stated:

Judicial power is usually defined in terms of its subject matter, but it is a power that, for complete definition, requires description of its dominant and essential characteristic, namely, that it is exercised in accordance with that process which is referred to as ‘the judicial process’.⁴⁹

She also expressed this view in a number of subsequent authorities.⁵⁰ There is further support for this. In *Leeth v Commonwealth*, Deane and Toohey JJ held that it was implicit in the terms of Chapter III that judicial power requires the observance of the ‘essential requirements of the curial process’.⁵¹ A similar statement was made by Brennan, Deane and Dawson JJ in *Chu Kheng Lim*, where their Honours also found it implied in Chapter III that legislation cannot validly require or authorise courts to exercise judicial power in a manner inconsistent with the ‘nature of judicial power’.⁵²

The judicial process encompasses a number of considerations. In ascertaining the content of the judicial process, similarly to that of open justice, regard must be had to the common law. The Constitution was founded upon certain assumptions, chief amongst which was the operation of the common law and the essential principles it had distilled through time.⁵³ These principles must therefore have a bearing on the interpretation of Constitutional terms. The High Court in *Cheatle v The Queen* held:

It is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law's history.⁵⁴

More specifically with respect to the meaning of judicial power, Brennan CJ has stated:

⁴⁷ See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J); *Harris v Caladine* (1991) 172 CLR 84, 150 (Gaudron J); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 (Gaudron J); *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 532 (Mason CJ), 703-704 (Gaudron J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 67 (McHugh J); *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J) and 362 (Gaudron J); *Nicholas v The Queen* (1998) 193 CLR 173, 208 (Gaudron J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁴⁸ (1999) 198 CLR 334, [56].

⁴⁹ *Harris v Caladine* (1991) 172 CLR 84, 150.

⁵⁰ See above n 47.

⁵¹ (1991) 174 CLR 455, 487.

⁵² *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27.

⁵³ See discussion in The Hon John Basten, ‘The Supervisory Jurisdiction of the Supreme Courts (2011) 85 ALJ 273, 281–283. For a similar view see Sir Owen Dixon, *Jesting Pilate*, (1965) 198-213.

⁵⁴ (1993) 177 CLR 541, 552.

The nature of judicial power and the essential character of the courts which are charged with its exercise can be ascertained in part from the Constitution, in part from the common law.⁵⁵

Open justice, as an important common law principle, will inform Constitutional interpretation; it will shape the way judicial power is constitutionally manifest. To a significant degree, judicial power must therefore be exercised in accordance with the principle of open justice. The development of the concept of judicial power is inextricably bound with the historical development of open justice. This view has been shared by some members of the High Court.

In *Russell v Russell*, a majority of the High Court invalidated a law that required State courts, exercising federal jurisdiction under s 77(iii) of the Constitution, to sit *in camera*.⁵⁶ Justice Gibbs held (in a frequently cited judgment):

In requiring them to sit in closed court in all cases - even proceedings for contempt - the Parliament has attempted to obliterate one of their most important attributes. This it cannot do.⁵⁷

Justice Stephen, in the same case, stated in a seldom quoted judgment:

To require that a Supreme Court, possessing all the attributes of an English court of justice, should sit as of course in closed court is, I think, in the words of Lord Shaw, to turn that Court into a different kind of tribunal and involves that very intrusion into its constitution and organization which s 77(iii) does not authorize.⁵⁸

Another constitutional endorsement from the High Court can be found from Gaudron J in *Re Nolan; Ex parte Young* where her Honour observed:

In answering that question it is important to bear in mind that an essential feature of judicial power is that it must be exercised in accordance with the judicial process. In *Harris v Caladine*, I described the general features of that process. Importantly for present purposes, *those features include open and public enquiry (subject to limited exceptions)*, the application of the rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts.⁵⁹

Her Honour therefore ties open justice into the definition of judicial power. Justice McHugh has taken a similar approach and has recognised open justice as a core part of the exercise of judicial power. In *Grollo v Palmer* he said ‘open justice is the hallmark of the common law system of justice and is an essential characteristic of the exercise of federal judicial power.’⁶⁰ In the same case, Gummow J said:

⁵⁵ *Nicholas v The Queen* (1998) 193 CLR 173, 185. Chief Justice French has made similar comments: see *State of South Australia v Totani* (2010) 242 CLR 1 [50], [72]. See also Basten, above n 53, 281-283.

⁵⁶ (1976) 134 CLR 495.

⁵⁷ *Ibid* 520.

⁵⁸ *Ibid* 532.

⁵⁹ (1991) 172 CLR 460, 496 (emphasis added).

⁶⁰ (1995) 184 CLR 348.

An essential attribute of the judicial power of the Commonwealth is the resolution of such controversies by the means described so as to provide final results which are delivered in public after a public hearing.⁶¹

The concept of judicial power thus entails a constitutional premise of open justice. The way in which the scope or extent of this premise is to be tested is discussed below.

B Defining Characteristic of Courts

For similar reasons open justice is a defining characteristic of a court. *Forge v ASIC*⁶² (*Forge*) provides some useful clarification as to the operation of *Kable* on this point:

But as is recognised in *Kable, Fardon v Attorney-General (Qld)* and *North Australian Aboriginal Legal Aid Service Inc v Bradley*, the relevant principle is one which hinges upon maintenance of the defining characteristics of a ‘court’, or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to ‘institutional integrity’ alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those *defining characteristics which mark a court apart from other decision-making bodies*.

It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court ... *An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial*. Essential to that system is the conduct of trial by an independent and impartial tribunal.⁶³

The reference here to the ‘common law system of adversarial trial’ provides a foundation for open justice. The common law system adversarial trial is conditioned on an independent, impartial and open tribunal, subject to limited exceptions. But the determination of the defining characteristics of courts under *Kable* is not to be limited to an enquiry as to independence and impartiality, as these are subsets of the broader enquiry of looking to the institutional integrity of a court. Thus in *Kirk*, for example, supervisory jurisdiction was held to be a defining characteristic of a State Supreme Court.⁶⁴ The High Court explained that this jurisdiction ‘is governed in fundamental respects by principles established as part of the common law of Australia’.⁶⁵ Removing this jurisdiction, in light of common law principles, as well as its purpose and history, would be to remove a defining characteristic of a State Supreme Court. The Constitution protects these common law institutional characteristics.⁶⁶

As is now accepted, it is beyond a mere ordinary incident of their operation that courts administer their functions publicly – it is a defining characteristic. So much has been

⁶¹ Ibid 394.

⁶² *Forge v ASIC* (2006) 228 CLR 45.

⁶³ *Forge v ASIC* (2006) 228 CLR 45, [63]-[64] (Gummow, Hayne and Crennan JJ) (emphasis added). See also *Gypsy Jokers* (2008) 234 CLR 532, [162].

⁶⁴ *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 (‘*Kirk*’).

⁶⁵ Ibid, [99].

⁶⁶ Basten, above n 53, 284.

explicitly stated by French CJ, amongst others.⁶⁷ For the historical and normative reasons outlined above, open justice is a defining characteristic.

It was against a background of open justice that Chapter III was framed. While a strict requirement, exceptions were permitted when necessary in the interests of justice and Parliament can determine, to some extent, what is necessary in the interests of justice and good policy. A crucial constitutional tension thus arises as to how far the legislature can go, and how any judicial review will operate in this context. The court must have some supervisory role lest Chapter III principles be subverted. But how far can Parliament go? When is the point reached when the infringement to open proceedings becomes repugnant, or when the defining characteristic of openness is no longer relevantly exhibited? How is this to be tested?

This was a point raised by the Solicitor-General for the Commonwealth both in written submission and at hearing. The debate was also picked up by counsel for Mr Hinch, and the Solicitors-General for Western Australia and South Australia.

IV THE APPROPRIATE AND ADAPTED TEST

At hearing, the Solicitor-General for the Commonwealth, Mr Gageler SC (as his Honour then was), elaborated his written submissions to argue that the principle properly underlying *Kable* in the context of open justice is:

that a substantial legislative derogation from the principle of open justice will require, if challenged, constitutional justification in terms of the pursuit of a legitimate end by proportionate means.⁶⁸

Mr Gageler argues that this is the result of the fundamental constitutional requirement picked up in *Bradley, Forge, Gypsy Jokers* and *K-Generation*, that the ‘root principle of *Kable* lies in the protection of a Chapter III court as an independent and impartial tribunal’.⁶⁹ Further, he argues that this is the consequence of the fact that traditionally open justice is not an end in itself: it is ‘a standard or common characteristic that reflects and promotes independence and impartiality – the very thing the constitutional principle protects.’⁷⁰

It is worth looking at this submission further, as it elucidates an important point.

[If] you admit of a rule that reflects and promotes the constitutionally protected independence and impartiality but you also admit of legislative derogations from that rule, then the scope of the legislative derogations that are constitutionally permissible need to be related to the reasons that underlie the rule. To say that any derogation has to be for an end that is itself consistent with the reason for the rule – independence and impartiality – and to say that the derogation must invoke means that having regard to the impact on independence and

⁶⁷ *McPherson v McPherson* [1936] AC 177, 200; *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 531 [10], [49]; *Totani* (2010) 242 CLR 1, [62]; *Hinch* (2011) 243 CLR 506, [20].

⁶⁸ *Hogan v Hinch* [2010] HCATrans 285 (3 November 2010) 89.

⁶⁹ *Ibid* 90.

⁷⁰ *Ibid*.

impartiality are proportionate to that end, is simply to apply the standard analytical technique that as a matter of constitutional principle is applied in other areas where it is recognised that there is a constitutional limit, but it is not a bright line.⁷¹

The gist of this submission should be accepted, though not entirely for the reasons expressed by the learned then Solicitor-General. One problem is that the root principle of *Kable* is not exclusively about maintaining independence and impartiality: it is more broadly about protecting the constitutionally mandated judicial process and concept of a court, of which independence and impartiality form a part. Although independence and impartiality are key concerns, they are not the sole objects of enquiry. Thus recently in *Wainohu v New South Wales*, French CJ and Kiefel J stated with respect to the defining characteristics of a court:

those characteristics include the reality and appearance of the court's independence and its impartiality. *Other defining characteristics* are the application of procedural fairness and adherence, as a general rule, to the open court principle.⁷²

As indicated by *Harris v Caladine*⁷³ and *Re Nolan; Ex parte Young*⁷⁴, discussed above, maintaining the judicial process is a constitutional end in itself in relation to the exercise of federal judicial power, and an essential feature of the judicial process is 'open and public enquiry (subject to limited exceptions)'.⁷⁵ Also, as *Forge* clarifies, preserving the defining characteristics of a State Supreme Court is required by Chapter III, and again, one of these characteristics is the 'open court principle'.⁷⁶ This leads into the second difficulty of Mr Gageler's approach: characterising the principle of open justice solely in terms of independence and impartiality. If open justice is analysed normatively, it is clear that its normative basis can be found as promoting independence and impartiality, as Bentham, Mirabeau and Sir Thomas Smith identified. However, although open justice incontrovertibly assists in securing independence and impartiality, it is more than this, providing many benefits to the system of justice generally.⁷⁷ Subject to limited exceptions, it is the way the judicial process operates and has operated 'from time immemorial', such that it can be deemed as a defining characteristic of a court.⁷⁸ In looking at the various benefits that open justice broadly provides to the judicial system, it is apparent that not all go to securing independence and impartiality.

Thus *Kable* is applied as a test of repugnancy to the judicial process⁷⁹ and 'upon maintenance of the defining characteristics of a "court"⁸⁰. As open justice is a defining aspect of a court

⁷¹ Ibid.

⁷² (2011) 243 CLR 181, [44] (emphasis added).

⁷³ (1991) 172 CLR 84.

⁷⁴ (1991) 172 CLR 460.

⁷⁵ Admittedly, those cases do not provide details on the content of this requirement, only that it is fundamentally a requirement of the exercise of judicial power. Mr Gageler argued that 'it has never been the case that judicial power is to be exercised in a traditional manner at any cost' *Hogan v Hinch* [2010] HCATrans 285 (3 November 2010), 91-92.

⁷⁶ *Totani* (2010) 242 CLR 1, [62]; *Wainohu v State of New South Wales* (2011) 243 CLR 181, [44].

⁷⁷ See the discussion in The Hon Beverley McLachlin, 'Courts, Transparency and Public Confidence – To the Better Administration of Justice' (2003) 8 *Deakin Law Review* 1.

⁷⁸ E Jenks, *The Book of English Law* (6th ed, 1967) 73.

⁷⁹ *International Finance* (2009) 240 CLR 319, [87], [103], [136], [140].

⁸⁰ *Forge v ASIC* (2006) 228 CLR 45, [63].

and the judicial process, Chapter III of the Constitution, to some extent, preserves open justice as a constitutional premise. Mr Gageler's suggested test is preferable insofar as it provides a mechanism for this *extent* to be tested.

As outlined above, exceptions to the norm of open proceedings are recognised as a part of the common law. Further, Parliament may legitimately add to these exceptions. The question of repugnancy, therefore, must recognise these exceptions to the rule. Once the *Kable* test is formulated to the effect that it will invalidate legislation that is 'repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia,'⁸¹ the question then becomes how this criterion of repugnancy will be tested, and how the exceptions will be treated in light of the rule?⁸² Adapting the submission of the Solicitor-General, the test in this context ought to be whether the law is reasonably appropriate and adapted for an end consistent or compatible with observance of the open court principle. In other words, whether the operation or effect of a law departs from open proceedings to serve the end of the interests of justice (broadly defined to include public policy) in a manner that is reasonably appropriate and adapted to that end. Once it is accepted that exceptions to the rule of open justice are justified on the basis that they serve a greater policy, e.g. prevention of harm or destruction of a secret, then this becomes the indicator under *Kable*: is the legislative measure a reasonable response? That is, does it attend to some legitimate public interest, and does it do so in a reasonably appropriate and adapted manner?

Thus while Parliament may assert that a law is necessary in the interests of justice or for some other public interest, this assertion will not be upheld if the quality of the legislative intrusion is such that it denies open justice in circumstances found not reasonably appropriate and adapted to the public interest. One of the corollaries of the constitutional premise of open justice is that courts must be able to exercise a supervisory role with respect to the exceptions to that premise and what lies in the interests of justice or the public interest.

The test of repugnancy must recognise that Parliament has an ability to determine when open justice may be infringed. The test must also, however, recognise the limitation of this ability, in that Parliament's assertion cannot remain untested – it must be reasonably based and the infringement must not go beyond what is necessary. Under the *Kable* principle, a law that required a court to sit in closed court, as a matter of course, would be invalid because there would be no discrimination between circumstances potentially warranting the infringement and circumstances that do not.⁸³ Axiomatically, this would deny open justice in a way not reasonably appropriate and adapted to what is necessary in the administration of justice and would be repugnant to the judicial process – and incompatible with Chapter III – by virtue of this fact. Further, it is submitted that this test would include assessing the circumstances, context and scheme within which a judicial discretion is to be exercised. A judicial discretion

⁸¹ Ibid [97]-[98]; see also [140], [159] (Heydon J). The subtle distinction between this approach and that of French CJ has been highlighted by Melissa Perry QC, see 'The High Court on Constitutional Law: The 2009 Term' (Paper delivered at the Gilbert + Tobin Centre of Public Law Constitutional Law Conference, 19 February 2010) 10-11.

⁸² Cf *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, 611 (McHugh J).

⁸³ *Russell v Russell* (1976) 134 CLR 495, 520.

of itself is no protection to open justice if the legislative scheme is such that a discretion is to be exercised within a clearly devised but proportionately offensive framework.

The Solicitor-General for South Australia, Mr Hinton QC, posited a similar argument in written submissions, although the point was not put orally at hearing. He submitted:

... providing modification of the open justice principle can be regarded as a reasonable response to a legitimate policy concern, a State Parliament may provide that classes of proceedings to which that policy concern applies are to be conducted in private.⁸⁴

Again, this recognises that the limitations under *Kable* in the context of open justice necessitate an enquiry into the reasons underlying the scheme and the form that it takes. He concludes:

Providing the rules fixed by State legislation can be seen as a *reasonable implementation of a legitimate policy*, a requirement that courts be closed to the public in particular circumstances will not be inconsistent with the defining characteristics of a State Court.⁸⁵

The appropriate and adapted test was also supported by counsel for Mr Hinch, Mr Bennett QC. Although his submission was neither as extensive nor as detailed as Mr Gageler's, it supported the view that 'any principle implied in the Constitution is going to have some exceptions and one has to work out the scope of them and what is the basis on which exceptions will be permitted.'⁸⁶ He continued:

So when one has implications from Chapter III in one sense, it may be necessary to look at questions analogous to the appropriate and adapted tests which apply in relation to the implied freedom of political communication.⁸⁷

This reasoning followed from a need to limit the exception. The reason underlying the appropriate and adapted test, as indicated above, is one of testing the discretion of Parliament to determine the contents of what lies in the interests of justice in a given context. It is this assessment by Parliament that is effectively reviewed. It would capture the heavy handed and more excessive legislative responses to problems where there is a disproportionate interference with open proceedings. Where a reasonable and proportional postulate is proffered by the government, it would be accepted by the courts under the proposed test. As will be discussed later, this was the tacit approach undertaken in *Hinch*.

These submissions were opposed by the Solicitor-General for Western Australia, Mr Meadows QC. He submitted that:

[A] law that has that incidental effect cannot be constitutionally justified by the pursuit of some other end. The presence of those [defining characteristics of a court], we would submit, is an absolute constitutional imperative which is not subject to any form of reasonable

⁸⁴ Solicitor General (SA), 'Written Submissions of the Attorney General for the State of South Australia (Intervening)', Submissions in *Hogan v Hinch*, M105 of 2010, 27 October 2010, 11.

⁸⁵ *Ibid* (emphasis added).

⁸⁶ *Hogan v Hinch* [2010] HCATrans 284 (2 November 2010) 24.

⁸⁷ *Ibid*.

regulation. If a State law deprives a court of those defining characteristics, it does not matter why it does so. There is no room, we would say, for an appropriate and adapted ... test.⁸⁸

A law which impairs the independence and impartiality of the court is invalid, whatever the reasons are for its imposition. So we would submit there is no occasion to consider whether the law is appropriate and adapted or necessary to the pursuit of some other end.

This argument would appear to have support in the comments of McHugh J in *Re Woolley; Ex parte Applicants M276/2003*.⁸⁹ Notwithstanding this, it is problematic for two reasons. First it seems to focus exclusively on independence and impartiality, in a similar way to Mr Gageler's submission. Secondly, it begs the question in that its conclusion is founded on an assumed content of 'defining characteristics of a court' as well as 'independence and impartiality', which need answering. The problem though is that these phrases require answering by reference to a complex enquiry in which a concept of proportionality may play a part once the exceptions to the rule are considered.

As outlined already openness is a defining characteristic but one subject to various exceptions. An analysis of these exceptions must recognise that traditionally courts can legitimately be closed in certain circumstances to protect a legitimate interest or to prevent a legitimate harm. This is constitutionally permissible. Thus, in accepting the traditional exceptions that permit a closed hearing, one must accept that the consequent impairment of openness is permitted (or legitimised) on the basis that it is reasonably appropriate and adapted to serving some end. For example, closing a hearing from the public to prevent disclosure of a trade secret, or in exercise of a court's *parens patriae* jurisdiction, is a reasonably appropriate and adapted policy to address the harms that would result if those proceedings were open. The interference is reasonable in the circumstances. Were it otherwise, the exception would have no basis.

Furthermore, and perhaps curiously, even the calculation of a court's institutional integrity with respect to its independence and impartiality can at times involve a question of proportionality. As will be elaborated below, in *Forge*, it was seen as important that the circumstances of the appointment of the acting judges to the Supreme Court of New South Wales be considered in determining the requirement of impartiality and integrity of a court. Thus:

*The greater the necessity for the appointment, the less influential on perceptions of impartiality and integrity may be the considerations of the possible frailties of the person or persons appointed. That is, the institutional integrity of the court is less likely to be damaged by response to pressing necessity than it is by the change of character that may be worked by a succession of short-term appointments for no apparent reason other than avoiding the costs associated with making full-time appointments or, perhaps worse, a desire to assess the 'suitability' of a range of possible appointees.*⁹⁰

⁸⁸ *Hogan v Hinch* [2010] HCATrans 285 (3 November 2010) 102-103.

⁸⁹ (2004) 225 CLR 1, [80].

⁹⁰ *Forge v ASIC* (2006) 228 CLR 45, [99] (Gummow, Hayne and Crennan JJ) (emphasis added).

The appropriate and adapted test adequately addresses the jurisprudential problems inherent in this limit to Chapter III and it is consistent with other constitutional tests.⁹¹ The suitability of this type of reasoning has been summarised recently by Kiefel J. In briefly outlining the history and operation of proportionality reasoning, as well as the various contexts in which it appears in Australian constitutional law, her Honour argues that it can be useful in resolving tensions where a constitutional principle may not be regarded as absolute.⁹² In the present context, it provides a structured way to address the tensions between a constitutional premise of open justice, parliamentary sovereignty and competing public policies. The test applies the requirements underlying *Kable* to a different context. The limits of *Kable* are maintained, however the constitutional questions posed by *Kable* and subsequent cases are answered in a way that best deals with these competing tensions. Accordingly, ‘only the most intrusive legislation’ or one without a proper policy basis would engage the test proposed.⁹³

V ANY JUDICIAL SUPPORT?

Although there has been no explicit judicial support, the appropriate and adapted test remained untested, though arguably tacit, in *Hinch* as well as in other cases. In *Hinch*, the decision of Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ is clear in its support of and reliance upon the decision of Gibbs J in *Russell v Russell*.⁹⁴ They cite with approval:

If the [Family Court Act] had empowered the Supreme Courts when exercising matrimonial jurisdiction to sit in closed courts *in appropriate cases* I should not have thought the provision went beyond the power of the Parliament. In requiring them to sit in closed court in all cases – even proceedings for contempt – the Parliament has attempted to obliterate one of their most important attributes. This it cannot do.⁹⁵

A similar comment was made by Jacobs J in the same case. In dissent, he noted that the objections made to that Act were ‘met by the *special nature* of the proceedings under the *Family Law Act 1975*.’⁹⁶ There is the recognition here that there exists a distinction between a law that is exempted from open proceedings in appropriate cases (or cases of a special nature) and one that is exempted in inappropriate cases. An analysis of what constitutes an ‘appropriate case’ was not strictly necessary in the *Hinch* case, because, first, their Honours could confidently reach the conclusion that the legislation left sufficient scope for

⁹¹ For example, the implied freedom of political communication as discussed in *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520; s 92 of the Constitution as discussed in *Betfair Pty Ltd v State of Western Australia* (2008) 234 CLR 418, [101]-[103]; the scope of the race power, as suggested by Gaudron J in *Kartinyeri v The Commonwealth* (1998) 195 CLR 337; a citizen’s entitlement to vote as discussed in *Rowe v Electoral Commissioner* (2010) 243 CLR 1. The test varies depending on its context, although it generally involves asking whether the law is ‘reasonably appropriate and adapted for an end consistent or compatible with observance of the relevant constitutional restraint upon legislative power’: *Roach v Electoral Commissioner* (2007) 233 CLR 162, [85].

⁹² The Hon Justice Susan Kiefel AC, ‘Proportionality: A rule of reason’ (2012) 23 *Public Law Review* 85, 86.

⁹³ *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, [98] (Spigelman CJ).

⁹⁴ See *Hinch* (2011) 243 CLR 506, [90].

⁹⁵ *Hinch* (2011) 243 CLR 506, [90]. See also note 57.

⁹⁶ *Russell v Russell* (1976) 134 CLR 495, 555.

determination of the exemption to the courts; and secondly, that the legislation was in any event clearly justified from a policy perspective.

Chief Justice French's approach in *Hinch* relied upon a similar assumption that was only partly elaborated. He conducts an analysis of the history of open justice in the common law, concluding that 'the open hearing is an essential aspect of courts'.⁹⁷ However, he recognised that the common law has been subject to various qualifications to the rule, and thus:

Chapter III does not impose on federal courts or the courts of the States a more stringent application of the open justice principle than that described above.⁹⁸

One of the curial characteristics is that open proceedings would be subject to some degree of qualification by laws enacted by Parliament. This leaves unanswered the question of how an unreasonable or extreme legislative qualification is to be tested. It cannot solely be by reference to 'analogous common law powers',⁹⁹ as there is a clear historical distinction between the common law powers and the powers of parliament to devise new exceptions (a distinction that his Honour acknowledged).¹⁰⁰ However, the analogous common law powers, as the Chief Justice recognised, will assist in the judicial determination of what a reasonable legislative response is. Because it was clear in *Hinch* that the legislation in that case was not inconsistent with the judicial function, there was no need for French CJ to engage in further analysis. Again, if the impugned legislation were more extreme or unreasonable in *Hinch*, French CJ's analysis may have elaborated on why the impugned law was or was not repugnant.

It is argued that further analysis would have required the High Court to engage in an enquiry into the reasonableness of the Victorian Parliament's legislative scheme, and the appropriate and adapted test may have seen the light. Although it was not necessary to do so on the facts of this case, a more elaborated judgment may have explained the decision for what it was: a reasonable infringement to open proceedings.

The appropriate and adapted test also appears to have been implicitly taken by Spigelman CJ in *John Fairfax v Attorney General (NSW)*, a case dealing with issues of open justice. In applying an early formulation of the *Kable* principle, his Honour concluded that the Act in question was valid on that basis.

The restrictions imposed on the presence of the public and on publicity by s 101A(7), (8) and (9), represents the implementation of a policy that an individual ... has a right not to have an acquittal of a criminal charge called into question. *This constitutes a limited and justifiable exception to the general principle*, which the public is, in my opinion, likely to appreciate.¹⁰¹

The mention here of 'policy', 'justifiable' and public appreciation suggests that the law must accord with the interests of justice on some level. That is, the policy underlying a law ought

⁹⁷ Ibid [46].

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid [27].

¹⁰¹ (2000) 181 ALR 694, [74] (emphasis added). Although the Act here was invalidated on other grounds.

to be scrutinised as to its purpose and proportionality. It is argued that, were, for example, an infringement on open justice not justifiable, or the public not be likely to appreciate it, it may not be reasonably appropriate and adapted to the interests of justice, and thus invalid.

There is a similar exercise of reasoning in *Forge*. Justices Gummow, Hayne and Crennan, in particular, took an approach to *Kable* that looked at the necessity of the appointment of acting judicial officers. Essentially, this required reviewing the circumstances of the appointments with a view to determining whether there was a ‘pressing necessity’ arising from the work of the court, rather than a merely desirable expedient.¹⁰² Thus:

Whether, or when, the institutional integrity of the court is affected depends, then, upon consideration of much more than the bare question: how many acting judges have been appointed? Regard must be paid to who has been appointed, for how long, to do what, and, no less importantly, why it has been thought necessary to make the acting appointments that have been made. Those alleging invalidity in the present matter did not seek to make a case *founded in any examination of the circumstances that led either to the successive appointments of Foster AJ, or any of the other appointments made at or about the time of his appointments.*¹⁰³

Underlying part of this reasoning is again a species of proportionality: the appointment being proportional to the legitimate end of assisting overworked courts with limited resources. In such circumstances, there would be less influence on the perception of impartiality and independence.¹⁰⁴ This point looks to the circumstances and context in which the legislative or executive scheme takes place.

VI CONCLUSION

Open justice provides many benefits to the system of justice generally. The historical and normative force of open justice makes it an integral and essential attribute of the common law judicial process under the Constitution and a defining characteristic of a court. Thus it is recognised implicitly by the terms and assumptions of Chapter III.

This recognition places a constraint upon the legislature’s ability to enact measures that infringe open justice. The precise limits of the constraint, however, are not clear. Crucially, there needs to be some room to allow Parliament to respond to competing considerations which too are placed in the scales of justice. Open justice is but a means to securing the attainment of justice (broadly defined) in the circumstances and must give way when necessary to do so. Parliament needs some control over these circumstances to protect legitimate interests and to prevent legitimate harms.

Although the High Court in *Hinch* did not fully explore the limits of open justice under the Constitution, this article has argued that the ‘appropriate and adapted’ test adequately addresses the competing tensions and provides a suitable methodology for analysis of the open justice principle as a constitutional premise. Under this test Parliament’s decision to

¹⁰² *Forge v ASIC* (2006) 228 CLR 45, [97].

¹⁰³ *Ibid* [101] (emphasis added); see also [90].

¹⁰⁴ *Ibid* [99].

infringe open justice must be reasonable; it must pertain to a circumstance warranting intervention, and the measure enacted must be a reasonably appropriate and adapted response. We await a more contentious case to see how (or indeed if) these issues will be addressed.¹⁰⁵



¹⁰⁵ As a postscript, the decision in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 came close to addressing some of these issues. Chief Justice French in particular observed the tension between the common law, parliament and the Constitution: see [2] and [3]. The issues in this case were put more as questions of procedural fairness than open justice per se.

Targeted Killing in Modern Warfare

JIM SERPLESS

ABSTRACT

State sponsored targeted killing is on the rise. Military technology and doctrine do not wait for legal frameworks to develop. There is a cognitive gap between state practice and the law regulating targeted killing. This results in unnecessary civilian casualties and a detrimental effect on strategic relations between states. There is no internationally agreed legal framework to regulate targeted killing. This article acknowledges the current military reality of low-intensity asymmetric wars between disparate forces where targeted killing takes place and argues that the current law of armed conflict is adequate to regulate this new phenomenon. Grey areas in need of refinement however do exist: in particular, categories of armed conflict and whether their breadth should be expanded, the notion of combatants in non-international armed conflicts, the concept of direct participation in hostilities and its resulting effect on the principle of distinction. These grey areas do not render the laws of armed conflict redundant, although international consensus must be achieved in order to adequately regulate the conduct of targeted killing. The article contends that a normative paradigm regulating targeted killing must be agreed upon by the international community in order to better protect civilians in conflict, maintain international relations and bring accountability to this new and fast-expanding phenomenon.

I INTRODUCTION

On 30 September 2011, in al-Jawf province Yemen, Anwar al-Awlaki a United States (US) citizen dubbed the ‘bin Laden of the internet’ and allegedly head of operations for Al Qaeda in the Arabian Peninsula (AQAP), was sitting down for breakfast with three other suspected AQAP members.¹ A predator drone was spotted by a member of the group. The group then attempted to flee in a vehicle. Two American predator drones fired hellfire missiles at the vehicle containing the group resulting in their deaths. The US has continued to employ this very same tactic used against Anwar al-Awlaki in its ‘Global War on Terror’. Other well-known examples include the December 2005

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¹ Aamer Madhani, ‘Cleric al-Awlaki dubbed 'bin Laden of the Internet'', *USA Today*, 25 August 2010; Mark Mazzetti, Eric Shmitt, Robert Worth ‘U.S.-Born Qaeda Leader Killed in Yemen’, *The New York Times*, 30 September 2011.

elimination of senior Al Qaeda (AQ) operative Abu Hamza Rabia in Pakistan² and the unsuccessful effort to kill AQ co-leader Ayman al-Zawahiri, also in Pakistan, that resulted in the death of 18 civilians³ and the infamous 2 May 2011 raid by US Navy Seals resulting in the death of Osama Bin Laden and four others.⁴ Taken collectively, these and other instances, of which there are many,⁵ appear to demonstrate that the US has adopted a tactic similar to one the Israeli government has openly used to counter terrorist attacks since the outbreak of the al-Aqsa Intifada in September 2000.⁶ Israel, through its policy of targeted killing, has identified, located, and killed hundreds of alleged terrorists through various means.⁷ The total number of Palestinians killed as a result of Israel's policy of targeted killing is estimated by B'Tselem to be 428 as at 31 December 2011.⁸

The increasing trend in state sanctioned targeted killing has elicited both condemnation and support. Amnesty International,⁹ Human Rights Watch,¹⁰ some entities of the United Nations¹¹ and numerous international legal scholars have shown their disdain for such practice.¹² However there seems to be a changing perception of the legality of

² Daniel Byman, 'Targeted Killing, American-Style', *L.A. Times* (Los Angeles), 20 January 2010.

³ Eban Kaplan, 'Q&A: Targeted Killings', *The New York Times* (New York), 25 January 2006

⁴ Cooper, Helene, 'Obama Announces Killing of Osama bin Laden', *The New York Times* (New York), 1 May 2011.

⁵ Concrete data is difficult to find in relation to targeted killings. However, the New America Foundation's statistics are widely seen as an objective representation. According to which there have been 283 drone strikes within Pakistan since 2004 resulting in the deaths of 38 militant leaders. See New America Foundation, *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2011*(2011), <<http://counterterrorism.newamerica.net/drones>> at 3 December 2011.

⁶ Steven R. David, 'Fatal Choices: Israel's Policy of Targeted Killings' (2002) 51 *Middle East Security and Policy Studies* 1-2; Orna Ben-Naftali & Keren R. Michaeli, 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings' (2003) 36 *Cornell International Law Journal* 233, 239-242.

⁷ Steven R. David, above n 6, 1-2.

⁸ B'Tselem, *Statistics: Fatalities* (2011), B'Tselem, <<http://old.btselem.org/statistics/english/Casualties.asp>> at 3 December 2011.

⁹ Amnesty International, *Israel and the Occupied Territories: Israel Must End its Policy of Assassinations*, 4 July 2003 AI Index: MDE 15/056/2003; Amnesty International Press Release, *Yemen/USA: government must not sanction extra judicial executions*, 8 Nov. 2002, AI Index: AMR 51/168/2002; Amnesty International, *Yemen, The Rule of Law Sidelined in the Name of Security*, 24 Sep. 2003, AI Index: MDE 31/006/2003.

¹⁰ Human Rights Watch, *US: Clarify Position on Targeted Killings*, Human Rights Watch, <<http://www.hrw.org/news/2010/12/07/us-clarify-position-targeted-killings>> at 7 December 2010 (although HRW recognises that targeted killing may be legal, it calls on the US to 'immediately clarify its legal rationale' for the practice)

¹¹ See, eg, Comm'n on Human Rights Res. 2003/6, 22, U.N. Doc. E/CN.4/2003/L.11 (April 15, 2003) (condemning Israel actions against individual terrorists as 'extrajudicial executions'); U.N. Econ & Soc. Council [ECOSOC], Comm'n on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, 61, U.N. Doc. E/CN.4/2001/121 (March 16, 2001) (stating that Israel's use of targeted killing constitutes 'political assassination').

¹² Steven R. David, 'Israel's Policy of Targeted Killing', (2003) 17 *Ethics and International Affairs* 111; Stefanie Schmahl, 'Targeted Killings – A Challenge for International Law?' in Christian Tomuschat, Evelyne Lagrange, Stefan Oeter (eds.), *The Right to Life*, Leiden 2010 264. Antonio Cassese on Whether Israel's Targeted Killings of Palestinian Terrorists in Consonant with International Humanitarian Law on Behalf of Petitioners, HCJ 5100/94 Public Committee Against Torture in Israel v. Israel (Israel 1999)

targeted killing. Numerous commentators contend that the practice is not only legal but also effective.¹³ A recent report by Philip Alston, the former UN Special Rapporteur on extrajudicial executions, stated that within certain situations targeted killings are legal under international law.¹⁴

This article acknowledges the political and military reality ‘on the ground’ where the policy of targeted killing is not only becoming more common, but being regarded as an ‘essential counterterrorism tool’.¹⁵

This article contends that an international norm of targeting killing is likely to emerge, if it has not already. Although there are strong arguments that the current international legal framework is adequate to regulate targeted killing in conflict - a view the author holds - there are compelling arguments against. Some commentators believe that the speed with which technology and military doctrine are advancing has created a cognitive gap between the law itself and the phenomenon it is supposed to be regulating. Given the apparent inevitability that targeted killing is on the rise and prolific throughout most modern conflicts, the international legal community must regulate targeted killing. Considering both these viewpoints the article will discuss whether current international humanitarian law is adequate to regulate targeted killing. It will also consider whether the practice of targeted killing has satisfied the law-creating process of international custom and should be regarded as legal in its own right. Regardless of the viewpoint taken the current state of the law is untenable.

II TARGETED KILLING AS CUSTOMARY INTERNATIONAL LAW

According to the classical sources of international law, codified in Article 38 of the Statute of the International Court of Justice, international law rules are primarily found in treaties, international custom, and general principles of law recognised by civilized nations. Presently, there is no multilateral treaty that includes a legal framework for undertaking targeted killing nor are there guidelines for the targeting process or the physical act of killing. This analysis also assumes that international humanitarian law is inadequate to regulate the practice. Therefore the legality of targeting killing is more likely to derive from international custom.

¹³ Daniel Byman, ‘Do Targeted Killings Work?’ (2006) 85 *Foreign Affairs* 95-96; Kenneth Anderson, ‘Targeted Killing in U.S. Counterterrorism Strategy and Law’ (Working Paper, American University Washington College of Law, 2009) 25; Ryan, J. Vogel, ‘Drone Warfare and the Law of Armed Conflict, (2010) 39 *Denver Journal of International Law and Policy* 113.

¹⁴ Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc A/HRC/14/24/Add.6 (2010) (Although Alston notes that current state practice ‘has been a highly problematic blurring and expansion of the boundaries of the applicable legal frameworks’)

¹⁵ Kenneth Anderson, *Targeted Killing*, Defining Ideas, Hoover Institute, <<http://www.hoover.org/publications/defining-ideas/article/5281>> at 4 December 2011.

A State Practice and Targeted Killing

There has been little discussion about whether the practice of targeted killing satisfies the requirements of international custom. Under the classical doctrine of customary international law, for a norm to be binding upon a state, there must exist extensive and uniform state practice carried out so as to show a general recognition that a rule of law or legal obligation is involved.¹⁶ Such extensive and uniform state practice is non-existent. Although there exists an increasing trend in the use of targeted killing programs by states, a reasonable observer would certainly conclude that practice is by no means extensive and uniform.

B The Problem with Customary International Law

The willingness and frequency of states to undertake targeting killing does not necessarily imply the existence of a right under international law for its use. The International Court of Justice in the *North Sea Continental Shelf Cases* stated that the frequency or even the habitual character of acts is not in itself enough for a proposed rule to have evolved into a principle of customary international law. For such a right to exist, targeted killing must be undertaken with a belief that the practice is lawful in its own right or with regard to the current laws of armed conflict. Whilst an argument could be put forward that states believe they are undertaking targeting killings within the bounds of the laws of armed conflict this argument is far from reproach.

Even if the requisite *opinio juris* exists, the scope and content of the right to undertake targeted killings in customary international law remains uncertain. For example, can targeted killing be undertaken outside the formally recognised categories of international armed conflict or does it constitute a separate individual right? Do the traditional restraints and principles of humanity apply to targeted killings? If so, how are they implemented in the process of targeting and the physical act of killing? Who can be targeted and why? The uncertainty raised by these issues, when the practice of targeted killing is on the rise and terrorism more prolific, has led to unnecessary loss of civilian life and undue strain on international relations between states.¹⁷ It is for these reasons that targeted killing can, and should, be regulated under the current international humanitarian law framework.

III REGULATION OF TARGETED KILLING: THE HOSTILITIES PARADIGM

A The Paradigm of Hostilities: An Introduction

¹⁶ Article 38, para. 1(b), of the Statute of the International Court of Justice; *North Sea Continental Shelf Cases*, ICJ Rep., 1969, 43 para. 74.

¹⁷ For an example see generally Dennis Kux, *US-Pakistan Relations in the Summer of 2011* (2011) Real Instituto Elcano.

Difficulties arise when attempting to regulate targeted killing under international humanitarian law in its current state; however it provides the most suitable framework to regulate targeted killing. International humanitarian law is the body of international law designed to regulate the conduct of armed conflict, thus its applicability is dependent on the situation in which the targeted killing takes place and whether it amounts to an armed conflict.

The laws of armed conflict have traditionally been divided into two categories – those of international armed conflict, and those of non-international armed conflict. This is reflected by the two Protocols of 1977 to the Geneva Conventions.¹⁸ However in reality this distinction is not so easily defined and arguably lacks utility.¹⁹ This distinction is pertinent to the current analysis as instances of targeted killing operations frequently occur in internationalised internal armed conflicts.²⁰ It is possible to have within one conflict three or more parties fighting under different defined categories of conflict. To illustrate, the current conflict in Afghanistan involves numerous foreign states as well as internal violence between the Afghan government and non-state actors. Further, the dubious ‘global war on terror’ or ‘War on Terrorism’ provides further challenges to the separation of international and non-international armed conflicts.²¹ A conflict between a state and a transnational network operating from numerous states, but not necessarily with their support, stretches the traditional concepts of international and non-international armed conflict. Again using Afghanistan as an example, US military actions against AQ have occurred both against AQ as a separate and distinct group and against AQ members who are a part of the Taliban and then later side with a new Afghan government. Numerous labels have been applied to the Afghan conflict such as an international armed conflict, non-international armed conflict, and internationalized non-international armed conflict²² as well as proposals of a ‘third’ new type of armed conflict.²³ As international humanitarian law is the body of law designed to regulate the conduct of armed conflict, the applicability of international humanitarian law to

¹⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) (8 June 1977) 1125 UNTS 3 (herein AP I); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (8 June 1977), 1125 UNTS 609 (herein AP II). This distinction is further highlighted in the separate categories of war crimes in the statute of the International Criminal Court.

¹⁹ For a detailed analysis of the distinction between international and non-international armed conflict, and its argued lack of utility see E Crawford, ‘Unequal Before the Law: The Case for the Elimination of the Distinction Between International and Non-International Armed Conflict’ (2007) 20(2) *Leiden Journal of International Law*.

²⁰ Hans-Peter Gasser, ‘Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon’ (1983) 33 *American University Law Review* 145. To determine whether and internal armed conflict becomes internationalised see *Prosecuter v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, 2 October 1995, para 84 (herein *Tadic*).

²¹ A Roberts, ‘The Laws of War in the War on Terror’ (2003) 32 *Israel Yearbook on Human Rights* 193-245, 196, 201-203.

²² Dinah Pokempner, ‘The “New” Non-State Actors in International Humanitarian Law’ (2006) 38 (3) *George Washington International Law Review* 551, 553-4.

²³ See below for a discussion of the ‘War on Terrorism’.

targeted killing is dependent upon it being carried out within a defined armed conflict. One must first endeavour to identify if the targeted killing is undertaken within an armed conflict – which can be a formidable task.

B International Armed Conflict

International jurisprudence and the majority of authors in this field agree with the following concept of international armed conflict:

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2 of the Geneva Conventions, even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces.²⁴

The pertinent question therefore is whether targeted killings against non-state actors can be considered part of an international armed conflict. The Conventions only apply to armed conflicts between contracting parties.²⁵ As non-state actors cannot be contracting parties to these treaties it follows that these rules will not apply as between a state and a non-state actor. Further, as non-state actors are not signatories to these treaties, under customary international law, there is no notion of a high contracting party, thus automatically excluding non-state actors coming under the purview of these rules.²⁶ Generally the rules of international armed conflict only apply in situations where two or more states are engaged in armed conflict against each other.²⁷

²⁴ Nils Melzer, *Targeted Killing in International Law* (2008), 251; Pictet, *Commentary GC III* (Art 2), 23. Confirmed in ICTY, *Delalic Case (Judgement of 16 November 1998)*, 184 and 208. See also Christopher Greenwood, *Scope of Application of International Humanitarian Law* (Dieter Fleck 2nded. 2008) 202; Dietrich Schindler, *Different Types of Armed Conflict* (Sijthoff and Noordhoff, 1980) 131; Hans-Peter Gasser, *International Humanitarian Law an Introduction* (P Haupt, 1993) 22.

²⁵ Article 2 of the Hague Regulations; Article 2 common to the 1949 Geneva Conventions (ratified by all member states of the United Nations).

²⁶ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford, 2010) 96. Although an argument may be made that the determination of custom focuses on the substantive elements of the rules rather than their applicability, the position of custom relating to extraterritorial force against non-state actors is unclear. However the major body of rules constituting international armed conflict is predicated on inter-state conflicts between two opposing states. See Sean Murphy, 'Evolving Geneva Convention Paradigms in the 'War on Terrorism'' (2007) 75 *George Washington Law Review* 8.

²⁷ There are limited exceptions. For example Article 1(4) of the First Additional Protocol to the Geneva Conventions extends the ambit of the rules of international armed conflict to 'include armed conflict in which peoples are fighting against colonial domination and alien occupation and against racist regimes in exercise of their right of self determination'. This article may be applicable to a conflict between a state and non-state actor but are not applicable to the situations examined in this article. Another is where the non-state actor is actually acting as an agent of, or within, the structure of another state. A plausible argument could be made that Al-Qaeda, as hostilities became protracted in Afghanistan, began to fight within the chain of command of the Taliban. The Taliban being the then *de facto* government making a strong argument those hostilities at that point in time would have been or could be part of an international armed conflict. See Lubell, above n 26, 98. The reverse of this scenario is another possibility: where a state becomes a party to a conflict between another state and non-state actor.

C *Non-international Armed Conflict*

Targeted killing of non-state actors may be better governed by international humanitarian law through the paradigm of non-international armed conflict. The laws of non-international armed conflict are derived from Common Article 3 to the 1949 Geneva Conventions and in the 1977 Second Protocol to the Conventions. Further rules have also been accepted as customary international law.²⁸ The test for the existence of a non-international armed conflict is more difficult than for international armed conflicts.²⁹ According to treaty and customary law, there are three elements deemed to constitute a non-international armed conflict against a non-state armed group:

- 1) the non-state armed group must be identifiable based on objective criteria;
- 2) there must be a minimal threshold of intensity and duration; and
- 3) the conflict must be confined to the restricted territory of a state.³⁰

Two major difficulties present in asserting that a conflict between a state and a non-state armed group constitutes a non-international armed conflict – especially considering the transnational context in which many armed groups now operate. The definitions of non-international armed conflict adopted in Common Article 3 to the Geneva Conventions and Additional Protocol II both refer to a conflict within the territory of a state party. Non-state armed groups such as AQ operate on a transnational basis and do not restrict their activities to one state. AQ does not discriminate between borders; as illustrated in the Federally Administrated Tribal Area that borders Afghanistan. The notion of a border here is completely foreign to many members of AQ operating within that area. This implies that international humanitarian law does not apply to conflicts between states and non-state armed groups who operate in one or more countries. This conclusion is untenable. There is no substantive reason that norms applying to armed conflict between a state and non-state armed group within a state should not also apply to transnational conflicts between a state and non-state armed group and as such the latter should incorporate the applicable body of international humanitarian law.

The second major obstacle is the scope and level of violence required for a conflict to be regarded as a non-international armed conflict.³¹ Assuming a conflict between a state and non-state armed group operating in a transnational context reaches the requisite level and scope of violence to constitute a non-international armed conflict, then the resulting conflict will again come under the applicable international humanitarian law

²⁸ *Tadic*, para 70; see also Jean-Marie Henckaerts & Louise Doswald Beck, *Customary International Humanitarian Law* (2005) (herein CLS).

²⁹ For example, it may depend on whether the State is party to Additional Protocol II to the Geneva Conventions.

³⁰ For a detailed analysis of the test see, Solis, *The Law of Armed Conflict* (CUP, 2010), 152; Alston, above n 14, para 52.

³¹ The ICTY in the *Tadic* case, at para 70, held that non-international armed conflict exists when there is ‘protracted armed violence between governmental authorities and organized armed groups’.

relevant to non-international armed conflict. The difficulty herein lies in identifying who are combatants under this scenario.³² The author argues that it should be determined by identifying the parties to the conflict – and an individual’s status in relation to these parties. This leads to the logical conclusion that non-international armed conflict involves a conflict between the armed forces of a state and an organised armed group with all individuals within these groups being deemed combatants. According to this analysis, the US and AQ are involved in a non-international armed conflict and are combatants who may be targeted.³³ Further examples include the targeted killing of Anwar al-Awlaki, within the context of increased hostilities in Yemen involving the US and Yemeni governments, on one hand, and AQAP on the other.³⁴

D A New Category of Armed Conflict: the ‘War on Terrorism’

International and non-international armed conflict were generally viewed as covering all possible forms of contemporary armed conflict. However, after 11 September 2001, the current framework, that has taken more than a hundred years to develop, is being challenged.³⁵ Predominantly driven by the US there is a claim that a third type of conflict now exists. This new conflict is referred to as the ‘War on Terrorism’ or ‘transnational’ armed conflict.³⁶ The US government asserts that the law of armed conflict governs the ‘War on Terror’ but that it constitutes neither an international or non-international armed conflict nor does customary international law apply.³⁷

There is little support for the incorporation of a new category of armed conflict. The argument that customary international law has expanded the current existing framework of international armed conflict beyond its current scope is unconvincing. The creation of custom requires constant and uniform state practice as well as the general belief that this practice conforms to a rule of law. With regard to the ‘War on Terror’, and targeted killing within this context, such qualified practice is absent. In particular the requisite *opinio juris sive necessitates* is non-existent.³⁸ The current state of international customary law leaves no doubt that customary law has not accommodated this third category of armed conflict.

³² M. Sassoli, A.A. Bouvier, *How Does Law Protect in War?* (ICRC, 1999) 208.

³³ D. Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?’ (2005) 16 *The European Journal of International Law* 198.

³⁴ Robert Chesney, ‘Who May be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force’ (Working Paper No 189, University of Texas, 2010) 30.

³⁵ Jean-Phillippe Lavoyer, ‘International Humanitarian Law and Terrorism’ in L Lijnzaad et al (eds) *Voice of Humanity* (Leiden/Boston: Martinus Nijhoff Publishers, 2004) 262.

³⁶ The US Government referred to the 11 September 2001 attacks as ‘acts of war’ and claimed to be engaged in a ‘war against terrorism’. See George W. Bush, White House press statement: *Statement by the President in Address to the Nation*, 11 September 2001.

³⁷ Melzer, above n 24, 263; US Department of Justice, Memorandum: *Application of Treaties*, 12. For a detailed examination see generally: Duffy, *The ‘War on Terror’ and the Framework of International Law* (2005) 250-271.

³⁸ Melzer, above n 24, 267.

A more suitable analysis of the ‘War on Terrorism’ would be that of a socio-political phenomenon. The so called ‘War on Terror’ is of an unknown duration and takes place within undefined territorial boundaries; furthermore actors within it are neither identifiable nor clearly specified.³⁹ It resembles more of a unilateral campaign against a socio-political phenomenon than an armed conflict between specific parties. Although means of combating the phenomenon include targeted killing and traditional conventional means of warfare, numerous other instruments are also utilised. These include, but are not limited to, domestic law enforcement agencies, international diplomacy, intelligence gathering, financial sanctions, trade and immigration control and aid and development activities. Similar to the US ‘War on Drugs’ or the ‘War on Poverty’, the ‘War on Terror’ does not permit the expansion or creation of a new category of international conflict. It is the author’s view that such conflict can be adequately regulated under the current international humanitarian legal regime in relation to non-international armed conflicts.

IV WHO MAY BE LAWFULLY TARGETED

In a situation of armed conflict international humanitarian law is enlivened. Targeted killing presents new challenges to the established *jus in bello*, particularly given civilian-saturated environments prevalent in modern warfare. Distinction with relation to targeting, particularly relating to civilians taking direct part in hostilities and members of armed groups, is the main focus of this section. The principle of distinction is more easily applied within the framework of international armed conflicts between nation states. In non-international armed conflict - the main focus of this analysis - where one party is a non-state actor, some of the rules based on this principle become highly contentious and open to numerous interpretations.⁴⁰ It should be noted that the debate around such issues in no way detracts from the paramount importance and applicability of the principle of distinction.⁴¹ This analysis assumes that targeted killing is undertaken within the context of a non-international armed conflict and as such can be regulated by international humanitarian law. The following applicable rules of international humanitarian law provide the best opportunity to assist in the regulation and accountability of targeted killing. With regard to the targeting killing of non-state actors, however, there remain complex obstacles in the interpretation of these principles.⁴²

³⁹ Ibid 266.

⁴⁰ For a discussion with relation to modern warfare see R Brooks, ‘War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror’ (2004) 153 *University of Pennsylvania Law Review* 730.

⁴¹ J Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Vol 1: Rules* (ICRC/CUP, 2006) 3; Y Dinstein, C Garraway and M Schmitt, *The Manual on the Law of Non-International Armed Conflict: With Commentary* (International Institute of Humanitarian Law, 2006) 11.

⁴² The principle of distinction is based on the premise that an individual is either a combatant or a civilian. Generally combatants are legitimate targets during an armed conflict whilst civilians are

A *The Basic Rule*

International humanitarian law governing non-international armed conflict contains far fewer provisions on the conduct of hostilities compared to international armed conflicts.⁴³ However, the most important rules and principles applicable to the conduct of hostilities in international armed conflict are today recognised as having obtained customary nature with regard to non-international armed conflict. The customary rule of distinction applicable to conflicts of a non-international character dictates that parties to the conflict must at all times distinguish between civilians and combatants. Accordingly, attacks may only to be directed against the latter.⁴⁴ Under non-international armed conflict the category of persons protected against direct attack includes peaceful civilians, medical and religious personnel, as well as persons *hors de combat*.⁴⁵ The category not entitled to immunity against direct attack includes members of the armed forces including: state armed forces and other organized groups – who are party to the conflict, civilians directly participating in hostilities and those deemed by military necessity as targets with regard to all the circumstances at the time.⁴⁶ Thus, when determining whether an individual constitutes a lawful military target within a non-international armed conflict, their status as a combatant or civilian must first be clarified.

B *Who May be Targeted?*

Can the majority of targets be categorised as combatants or, if not, can they be deemed civilians directly participating in hostilities? It should be noted from the outset that there is disagreement on the existence of ‘combatants’ within the context of non-international armed conflicts.⁴⁷ States have traditionally resisted recognition of the combatant’s privilege and the corresponding eligibility for prisoner of war (POW)

not (unless they are directly participating in hostilities, which is discussed in detail below). It is this category from which the legality of the means used in the targeted killing can be derived. However the rules of non-international armed conflict do not provide a definition of combatant. Furthermore, there is no agreed definition of direct participation in hostilities. Thus, in large part, the targeting of individuals for killing is left to the policy of the State carrying out the act. See Lubell, above n 25, 136-137.

⁴³ For a detailed analysis on the principle of distinction in relation to international armed conflict see n 24, 301-303.

⁴⁴ Jean-Marie Henckaerts & Louise Doswald Beck, *Customary International Humanitarian Law* (ICRC/CUP 2006) Rule 1 CLS; Melzer, above n 24, 311.

⁴⁵ Art 13 AP II; Art 8(2)(e)(i); Art 9(1) AP II; Rules 25 and 27 CLS; Art 7(1) AP II; Rule 47 CLS; Melzer, above n 24, 311-312.

⁴⁶ Members of armed forces, Art 13 AP II. For civilian directly participating in hostilities Art 51(3) AP I; Art 13(3) AP II; Rule 6 CLS; Melzer, above n 24, 312-313.

⁴⁷ International Committee of the Red Cross (ICRC) in its study of customary international humanitarian law states: ‘Combatant status... exists only in international armed conflicts’; see Henckaerts and Doswald-Beck, above n 41, 11.

status for non-state organised groups who take up arms to challenge the state. This unwillingness stems from a reluctance of the state to legitimise such conduct.⁴⁸

The status of combatant also accrues a key, and very important within the context of this analysis, detriment. Under the principle of distinction, a combatant lacks immunity from targeting, thus unlike a civilian, can be targeted without reference to whether he or she is directly participating in hostilities. Combatant status affords states tremendous benefits when implementing a targeted killing policy, allowing prospective targets to be engaged at all times. Furthermore, this enables a clear distinction to be drawn between combatants and the civilian population.

The key issue that comes to the fore is, should the constituent elements that comprise the concept of combatant – the combatant's privilege, eligibility for POW status, and lack of immunity from targeting – be disaggregated? Would this provide a more suitable answer to the categorisation of potential victims of targeted killing policies? The International Committee of the Red Cross (ICRC) calls for this approach to be taken within the context of non-international armed conflicts. The ICRC asserts that although no formal 'combatant status' exists within non-international armed conflict, certain individuals nonetheless may be treated as combatants for the purposes of distinction.⁴⁹ Kretzmer, on the other hand, argues that combatants exist within the concept of non-international armed conflicts and that they can be legitimately targeted. He contends that combatants include both members of the state forces and the organised armed group or non-state actor involved in that conflict. Both sets of individuals are valid targets and should be targeted in accordance with the principle of distinction.⁵⁰

The disaggregated view is to be preferred. As another proponent of this view, Melzer, contends, labelling all organized armed groups within a non-international armed conflict as civilians due to the non existence of combatant status is a 'misconception of major proportions', one that 'entails a distortion of the fundamental concepts of 'civilian', 'armed forces' and 'direct participation in hostilities' and, ultimately, leads to irreconcilable contradictions in the interpretation of these terms'.⁵¹ Disaggregation of the constituent elements that comprise the concept of combatant enables the law to better accommodate the complexities of modern warfare by giving greater flexibility in discerning parties to a conflict. The flow on effects of such a determination allow for greater regulation, such as the better application of the principle of distinction.

⁴⁸ Kretzmer explains 'states were, and still are, unwilling to grant status of combatants to insurgents and other non-state actors who take part in non-international armed conflicts, as doing so would not only afford them an element of legitimacy, but would mean that they enjoy the two 'privileges' of combatants – immunity for criminal liability for fighting, and prisoner of war status when apprehended'; Kretzmer, above n 33, 197.

⁴⁹ Henckaerts and Doswald-Beck, above n 41, 11.

⁵⁰ Kretzmer, above n 32, 197-198.

⁵¹ See Melzer, above n 24, 316. (Melzer argues that in almost any non-international armed conflict – be it in South East Asia in the 1960 and 1970s, in Central America in the 1980s, or in Colombia, Sri Lanka, Chechnya or the Sudan – it is sufficient to conclude that governmental armed forces do not hesitate to directly attack insurgents even when the latter are not engaged in military operations.)

Furthermore, this view offers greater certainty and therefore increases respect and adherence to international humanitarian law.

V DIRECT PARTICIPATION IN HOSTILITIES

Determining who qualifies as a lawful object of attack in the context of targeting killing within modern warfare is an increasingly onerous task. While it is self evident that only persons who qualify as combatants or civilians taking direct part in hostilities fall into this category, the increasing numbers of non-state actors and civilians in areas of conflict, has blurred the line between the status of civilians protected from deliberate attack and non-state actors or combatants subject to attack.⁵² This blurring can even be said to be a deliberate tactic employed by non-state actors as a strategic move to counter the military superiority of their nation state military opponents.⁵³ These types of asymmetric warfare tactics greatly increase the complexity of the target decision-making process. Targeted killing operations against non-state actors whose physical characteristics are indistinguishable from the civilian population require the utmost level of care, as the consequence of error results in an unacceptable strategic impact upon state military objectives. Errors in targeted killing missions also create unforeseen strategic losses completely disproportionate to the gains offered by the successful execution of an operation. An illustrative example is negative impacts on bilateral security alliances.⁵⁴ Secondly, and arguably more important, is the exacerbated risk of alienating the civilian population. Such alienation results in a fatal consequence inconsistent with the core tenet of counterinsurgency strategy - and most effective counter to the asymmetric threat posed by transnational non-state actors – protection of the local population.⁵⁵

⁵² See Solis, above n 30, 188 ('A combatant remains a combatant when he/she is not actually fighting.');

Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (2010) 33 ('Combatants fall into two categories: (i) Members of the armed forces of a belligerent Party... (ii) Any non-members of the armed forces who take an active part in the hostilities...').

⁵³ See Charles J. Dunlap, Jr., 'Lawfare Today: A Perspective' (2008) 3 *Yale Journal of International Affairs* 146, 148 (explains the use of modern media by insurgents to exploit civilian casualties and thus create a strategic impact on the long term efficacy of a conflict).

⁵⁴ See Scott Shane, 'Drone Strike Kills Qaeda Operative in Pakistan, U.S. Says', *The New York Times* (New York) 19 January 2012 (describes the strain on US/Pakistani relations after the American killing of Osama Bin Laden and an airstrike that killed two dozen Pakistani soldiers on the border).

⁵⁵ See Joint Chiefs of Staff, *Joint Pub 5-03.1: Joint Operation Planning and Execution System Volume I (Planning Policies and Procedures)* ch. 2, para. 8 (1993) (discussion of target identification and assessment at the strategic level in the larger context of the joint planning process); see also Department of the Army, FMI 3-07.22, *Counterinsurgency Operations*, para. 2-10 (2004) (highlighting the crucial need to protect the civilian population in order to achieve success in counterinsurgency operations); Indeed, this was highlighted in the Interpretive Guidance - Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) International Committee of the Red Cross <<http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>> at 18 August 2011 (analysing the

A *The Direct Participation in Hostilities Project*

In 2003 the ICRC launched a major research effort to explore the concept of direct participation by civilians in hostilities. The aim was to provide greater certainty governing loss of protection from immediate attack for civilians who involve themselves in armed conflict. Approximately forty eminent international law experts, including military officers, representatives of non-governmental organisations, academics and government attorneys participated in a series of workshops. In May 2009, the ICRC published the culmination of this process resulting in the ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ (Interpretive Guidance).⁵⁶ Originally planned as a consensus document, the proceedings proved highly contentious.⁵⁷ The ICRC took an unusual step in publishing the document without identifying the participants. It also included an express caveat identifying the Interpretive Guidance as ‘an expression solely of the ICRC’s views’.⁵⁸ This should not detract from the value the Interpretive Guidance has provided. It is a sophisticated work that clearly advances the general understanding of the complex notion of direct participation. Furthermore, it has brought the issue of direct participation to the forefront of international humanitarian law dialogue - a place it should enjoy in light of the complexities involved in 21st century conflict.

B *The Notion of Direct Participation in Hostilities Generally*

Parties to an armed conflict who use military violence must distinguish between combatants and civilians. The former are legitimate military targets, while the latter are immune from attack. Civilians, however, lose their immunity from attack ‘for such time as they directly participate in hostilities.’⁵⁹ Scholars and practitioners universally accept

problems presented by the increasing number of participants that do not adequately distinguish themselves from civilians).

⁵⁶ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) International Committee of the Red Cross <<http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>> at 18 August 2011.

⁵⁷ It is the author’s view that the normative paradigm set forth in the Interpretive Guidance is one that states that actually go to war cannot countenance. As Schmitt in ‘The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis’, (2010) 1 *Harvard National Security Journal* 6 states:

it [the Interpretive Guidance] must remain sensitive to the interest of states in conducting warfare efficiently, for no state likely to find itself on the battlefield would accept norms that place its military success, or its survival, at serious risk. As a result, international humanitarian law represents a very delicate balance between two principles: military necessity and humanity. It is in this regard that the Interpretive Guidance falters... On repeated occasions its interpretations skew the balance towards humanity. Unfortunately, such deviations from the generally accepted balance will likely cause states, which are ultimately responsible for application and enforcement of the law, to view the Interpretive Guidance sceptically.

⁵⁸ Ibid 6.

⁵⁹ 51(3) of Additional Protocol I to the Geneva Conventions (13(3) in Additional Protocol II).

the normative premise that civilians enjoy protection from attack under international humanitarian law and that they lose such protection when and while directly participating in hostilities. Nevertheless, the exact meaning of ‘directly participating’ in hostilities is yet to be clarified with any precision. There is no authoritative guidance as to which activities qualify as direct participation, or on the related issues of who qualifies as a civilian and the duration for which the loss of protection lasts. Analysis up until the current time has relied upon a certain instinctive case-by-case basis.⁶⁰ For instance, in the *Tadic* case, the International Criminal Tribunal for the Former Yugoslavia noted:

[It] is unnecessary to define exactly the line of dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual’s circumstances, that person was actively involved in hostilities at the relevant time.⁶¹

The challenge, in an absence of a universally accepted framework for determining direct participation determinations, has unsurprisingly caused a grey area in the law. Such ambiguity has forced states to ‘go it alone’ in determining policies, and more importantly rules of engagement, in relation to targeted killing. This, in the author’s view, is the single most decisive factor in creating an accountability vacuum within which objection to targeted killing is filled. Lack of an objective criterion for determining the status of non-state actors as enjoying civilian protection or loss thereof is critical to the accountability of any targeted killing program. The myopic view focusing solely on direct participation in hostilities as the criterion for targeting authority is counter to the principles of international humanitarian law and impractical for military decision makers amidst the friction and uncertainty created by war.

This article will now canvass the major grey areas in the body of law surrounding direct participation in hostilities. The Direct Participation in Hostilities Project will be used as the lens to examine the three main unresolved issues. These are as follows:

- 1) Who qualifies as a civilian in the context of direct participation;
- 2) What conduct amounts to direct participation; and
- 3) When is a civilian directly participating such that they lose their civilian status?

⁶⁰ For instance the U.K. Manual on the Law of Armed Conflict provides that ‘[w]hether civilians are taking direct part in hostilities is a question of fact.’ United Kingdom Ministry of Defence, *The Manual on The Law of Armed Conflict*, 5.3.2 (2004). Similarly the U.S. Commander’s Handbook on the Law of Naval Operations states that ‘[d]irect participation in hostilities must be judged on a case by case basis... Combatants must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person’s behavior, location, attire and other information at the time.’ Department of the Navy, *The Commander’s Notebook on the Law of Naval Operations*, NWP 1-14M, 8-2 (2007).

⁶¹ *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment of May 7 1997.

The current approach to targeting categorisation in non-international armed conflict is flawed. It should focus on hostilities between opposing armed groups whose members should be presumptive military objectives; not merely a mass body of civilians treated as individuals. The targeting paradigm in non-international armed conflict does not warrant a fundamentally different approach to that taken in conventional international armed conflicts.⁶² This approach differs to that taken by the Interpretive Guidance.⁶³ The integrity of the targeting legal framework depends on the recognition of opposing non-state groups.⁶⁴ Recognition facilitates the targeting decision-making process and aids in implementing the principle of distinction, achieved by establishing two distinct groups: those presumed hostile and therefore subject to immediate attack, and all others (civilians) presumed non-hostile and as a consequence protected from immediate attack.⁶⁵ The Interpretive Guidance's focus on conduct-based targeting to assess a non-state combatant's status is merely a permutation of traditional status recognition and should be treated as such. Organisational membership and subordination to command and control is the fundamental difference between non-state combatants and civilians in any armed conflict. The utility in the notion of direct participation in hostilities lies not in determining which individual civilians are taking a direct part in hostilities, but in determining when an individual appearing to be a civilian is in fact a combatant of a non-state organised armed group. This is best achieved through a status-based targeting approach concentrating on subordination to command and control.

C *The Concept of 'Civilian'*

The definition of 'civilian' is of vital importance as it determines the scope of persons protected against direct attack. According to the Interpretive Guidance, in an international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levee en masse* are entitled to protection against direct attack unless and for such a time as they take a direct part in hostilities.⁶⁶ Members of irregular armed forces (e.g. militia, volunteer corps, etc.) whose conduct is

⁶² AP I art. 51(2), (3) ('The civilian population as such, as well as individual civilians, shall not be the object of attack... unless and for such time as they take a direct part in hostilities').

⁶³ Melzer, above n 24, 76:

In practice, civilian direct participation in hostilities is likely to entail significant confusion and uncertainty in the implementation of the principle of distinction (a point on which this author agrees). In order to avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, it is therefore a particular importance that all feasible precautions be taken in determining whether a person is a civilian and, if so, whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be protected against direct attack.

⁶⁴ AP I, art. 48 ('in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants...').

⁶⁵ Geoffrey S Corn and Chris Jenks, 'Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts' (2011) 33 (2) *University of Pennsylvania Journal of International Law* 315.

⁶⁶ Melzer, above n 24, 26.

attributable to a state party to an armed conflict are considered part of its armed forces.⁶⁷

In non-international armed conflict it becomes more difficult to distinguish those who may validly be targeted and those who may not. Organised armed groups, who do not always wear a uniform or distinctive insignia, constitute parties to non-international armed conflicts. According to the Interpretive Guidance, identification or membership is determined through conduct. The decisive criterion for individual membership in an organised armed group is whether the person assumes a continuous function for the group involving direct participation in hostilities. This is referred to as the ‘continuous combat function’ (CCF) test.⁶⁸ The CCF test was an attempt to resolve the highly contentious ‘for such a time’ aspect of the direct participation rule.⁶⁹ Prior to the CCF test some experts worried that irregular forces were being provided greater protection than members of regular armed forces, who did not enjoy an analogous temporal limitation to attack.⁷⁰

The CCF arose out of concern that members of organised armed groups often failed to distinguish themselves from the civilian population and as a consequence increased the likelihood of attacks on civilians due to the complexity involved in the targeting process.⁷¹ As highlighted in the Interpretive Guidance, membership in irregularly constituted groups is not consistently expressed through uniforms, fixed distinctive signs or identification cards.⁷² Presented with this difficult challenge, the experts felt this membership may be limited through a conduct-centric approach. Members who were unambiguously acting within a capacity involving a combat function met the threshold required by the CCF test and therefore were valid military targets. Evidence of CCF, according to the Interpretive Guidance, may be determined:

⁶⁷ Membership in these irregular armed forces belonging to the conflict is determined based on the same functional criteria that apply to armed groups in non-international armed conflict.

⁶⁸ According to the Interpretive Guidance, CCF is synonymous with direct participation. Group members whose function is to engage in actions that would rise to the level of direct participation (discussed below) are subject to attack regardless of whether they are engaged in these activities at the time.

⁶⁹ Combatants could only be targeted whilst directly participating in hostilities and could not be targeted when they were not.

⁷⁰ Melzer, above n 24, 22:

It would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly, or to conduct their operations in accordance with the laws and customs of war.

⁷¹ Indeed the author believes that this is a conscious tactic used by members of organised armed groups.

⁷² Melzer, above n 24, 32-33:

In view of the wide variety of cultural, political, and military contexts in which organised armed groups operate, there may be various degrees of affiliation with such groups that do not necessarily amount to ‘membership’ within the meaning of international humanitarian law... In practice, the informal and clandestine structures of most organised armed groups and the elastic nature of membership render it particularly difficult to distinguish between a non-State Party to the conflict and its armed forces.

through the carrying of uniforms, distinctive signs, or certain weapons. Yet it may also be identified on the basis of conclusive behaviour, for example where a person has repeatedly directly participated in hostilities in support of an organised armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operations.⁷³

The resulting consequence is that members of an organised armed group who have a CCF may be attacked at any time, whereas those who do not, but who take part in sporadic or spontaneous acts, must be treated as civilians directly participating in hostilities and so are subject to attack only for the duration of that particular operation. It is difficult to imagine the efficacy of such an approach in practice. It is impractical to distinguish between the two categories. To illustrate, if an individual is identified as having engaged in hostilities in a past engagement, how can a state force know whether the participation was merely periodic when the same individual conducts a subsequent operation against the state force?⁷⁴ Consider the mention of an identity card. It is beyond all reason to think how the carrying of an identity card will assist an attacker in differentiating members who have a CCF and civilians. In reality, the majority of attacks will be carried out in a high stress, time-limited and civilian-saturated area where distinction based on function, arrived at by the analysing of conduct, will prove highly difficult. The conduct-focused approach of the Interpretive Guidance is of limited practical assistance to state armed forces and therefore, unfortunately, offers little chance of compliance.

Another criticism of the CCF criterion is the adverse distortion on the military necessity and humanitarian balance of international humanitarian law. The CCF approach precludes direct military attack against members of non-state armed groups who do not perform a CCF. In contrast, membership in a state's military offers no such protection even when that member performs no function that would amount to direct participation.⁷⁵ For example, a cook in the regular armed forces may be lawfully attacked at anytime; his or her counterpart in a non-state organised armed group may only be attacked if he or she either assumes a CCF or is directly participating in hostilities, and then only for such time as that participation occurs.⁷⁶ On balance, this is an illogical and unacceptable situation.

Although a diligent effort to clarify and increase protection of civilians in modern combat, the CCF will accomplish little. The basic tenet of characterising non-international armed conflict as involving hostilities between state forces and a mass of civilians directly participating in hostilities is fatally flawed. Such an approach distorts the fundamental lines of authority historically associated with armed conflict. Treating

⁷³ Ibid 35.

⁷⁴ Schmitt, above n 57, 23.

⁷⁵ Adam Roberts, 'The Equal Application of the Laws of War: A Principle Under Pressure', (2008) 90 *International Review of the Red Cross* 931 (discussing different legal regimes applicable on the battlefield).

⁷⁶ Ibid.

members of non-state armed groups as civilians directly participating in hostilities, even as members with a CCF, results in a dilution of state forces' ability to target these individuals. Furthermore, refusal to segregate the population into distinct combatant and civilian populations compromises and makes implementing the principle of distinction far too complex.⁷⁷ The conduct-centric approach is of little practical value and focus should be on traditional status-based recognition. Status-based targeting acknowledges the fundamental difference between non-state organised armed groups and civilians to an armed conflict – group subordination to command and control and not individual conduct.

D The Concept of Direct Participation

The concept of direct participation determines individual conduct that in turn leads to the suspension of a civilian's protection against direct attack by state forces. The notion of direct participation refers to those specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. It should be interpreted synonymously in situations of international armed conflict and non-international armed conflict.⁷⁸

There are three common elements outlined in the Interpretive Guidance that form the 'constitutive elements' of direct participation:⁷⁹

- 1) The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (*threshold of harm*);
- 2) There must be a direct causal link between the act and the harm likely to result either from that act or from a coordinated military operation of which that act constitutes an integral part (*direct causation*); and
- 3) The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*).

Applied in conjunction the three requirements, according to the Interpretive Guidance, permit a reliable distinction between activities amounting to direct participation in hostilities and activities which are not part of the conduct of hostilities and, therefore, do not entail a loss of protection against direct attack.⁸⁰

⁷⁷ Corn, Jenks, above n 65, 21.

⁷⁸ International Committee of the Red Cross, 'International Humanitarian Law and the challenges of contemporary armed conflicts' (paper presented at 31st International Conference of the Red Cross, Geneva, Switzerland, 1 December 2011) 43.

⁷⁹ Melzer, above n 24, 46.

⁸⁰ Melzer, above n 56, 44.

The first element considers the requisite degree of harm that must be suffered by the enemy or civilian as a result of the physical conduct of an individual. Difficulty lies in determining the nature and degree of harm justifying the loss of civilian status. This element protects those individuals whose conduct has a merely incidental or inconsequential effect upon the enemy.⁸¹ The Interpretive Guidance states that the ‘threshold of harm’ must either adversely affect the enemy or harm protected persons or objects. The Interpretive Guidance analysis of ‘threshold of harm’ is generally sound and no further critique is necessary.⁸²

The Interpretive Guidance’s formulation of ‘direct causation’ is more contentious. The Interpretive Guidance requires that the harm caused by the act ‘be brought about in one causal step.’⁸³ This constitutes an overly strict formulation of causation. Take for instance, a young man in the tribal areas of southwestern Pakistan performing reconnaissance for the local Pakistan-Taliban militia who are fighting against Pakistan and US government forces. He is tasked to gather intelligence on troop movements, enemy disposition and the types of weapons they are using. This information is then passed on to the militia for their use in operational planning. Under the Interpretive Guidance’s approach, this man is not participating in hostilities because his acts are deemed too remote. Nevertheless, his intelligence is a vital component of the militia’s operations.

It is reasonable to assert that such operational activities are sufficiently proximate to the resulting harm suffered by the enemy from the subsequent military operation, enhanced by the intelligence gathered, and should therefore be categorised as direct participation. Although the young man’s intelligence gathering does not inflict harm in one causal step, it constitutes an essential link in the chain immediately preceding the final harm caused. Acts of harm represent an apex of a pyramid built on the efforts of support personnel such as the young Pakistani man.⁸⁴ The resulting militia attack relies on the accuracy of that information.

An alternative that would better balance military necessity and the protection of civilians would be to include ‘operational activities that facilitate and are closely connected with the materialisation of harm’ into the test for causal proximity.⁸⁵ This enables state forces to target individuals who engage in precursor operational activities that make the ultimate infliction of harm a reality. For instance, this would allow forces in Afghanistan and Iraq to target Improvised Explosive Devices (IEDs) production

⁸¹ The classic example is the child who throws a rock at an armoured vehicle.

⁸² Michael N Schmitt, ‘Deconstructing Direct Participation in Hostilities: The Constitutive Elements’ (2010) 42 *New York University Journal of International Law and Politics*, 697, 712-724 (provides a detailed analysis of ‘threshold of harm’, although he concurs that the Interpretive Guidance is generally sound on this point).

⁸³ Melzer, above n 56, 55.

⁸⁴ Damien Van Der Toorn, ‘Direct Participation in Hostilities’: A legal and Practical Road Test of the International Committee of the Red Cross’s Guidance through Afghanistan’ (2010) 17 *Australian International Law Journal* 7.

⁸⁵ *Ibid* 24.

facilities before they are placed within the local community and amongst the civilian population. Caterers and support personnel such as mechanics, however, would not be subject to direct attack as their operational activities are not ‘closely connected to the materialisation of harm’.⁸⁶ This broader approach conforms better with the ICRC’s goal in protecting civilians and balancing military necessity and humanitarian concerns.

The third constitutive element - belligerent nexus - requires the act to in some way be tied to the armed conflict. This requirement excludes actions such as looting and civil unrest that merely exploit the lack of law and order inherent in conflict.⁸⁷ This applies even when a party to the conflict is the object of the attack, such as self-defence against a combatant acting criminally, for instance during a rape.⁸⁸ The Interpretive Guidance adopted an objective approach in determining whether the act in question is ‘specifically designed to directly cause the required threshold of harm’.⁸⁹ Therefore, civilians forced into fighting or child soldiers under the age of 15 can be treated as direct participants even though their participation is, at law, involuntary.⁹⁰ The objective action of the participant to harm the enemy determines his or her participation, not whether he or she intended to harm the enemy.

The only shortcoming in the constitutive element is that the act must be in ‘support of a party to the conflict and to the detriment of another.’⁹¹ Two problems can be identified with this approach. First, this definition focuses solely on harm as the defining factor. For instance, one party’s action to a conflict must cause physical detriment to the other. Direct participation can, however, also include acts that directly enhance the military capacity or operations of a party, without necessarily causing immediate harm to the enemy.⁹² Secondly, this implies that modern warfare is a zero-sum game in which one party solely benefits from the harm caused to the other. Modern warfare is a complex environment and it is possible for a group or individual to be opposed to both sides of a conflict. An illustrative example is the Shia militia in Iraq during the early days of the war, being opposed to the US military and Sunni militias.⁹³ Due to these factors the belligerent nexus would be better defined as acts ‘in support of a party to the conflict or to the detriment of another.’⁹⁴ This definition provides a more flexible approach that takes into account the many potential parties and individuals motivations to partake in modern conflict.

⁸⁶ Ibid.

⁸⁷ Schmitt, above n 82, 735.

⁸⁸ Ibid 735.

⁸⁹ Melzer, above n 56, 58-59.

⁹⁰ Schmitt, above n 82, 735.

⁹¹ Melzer, above n 56, 58.

⁹² Schmitt, above n 82, 736.

⁹³ Ibid 736.

⁹⁴ Ibid.

E Temporal Aspect of Direct Participation

Civilians enjoy protection against direct attack ‘unless and for such time as’ they take a direct part in hostilities.⁹⁵ The ICRC states that civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organised armed groups belonging to a non-state party to an armed conflict cease to be civilians and lose protection against direct attack for as long as they assume a CCF.⁹⁶ Two areas of controversy arise within the ICRC’s interpretation. First, the ‘for such time’ principle or more widely known as the ‘revolving door’ debate.⁹⁷ The second surrounds the precise moment at which direct participation begins and ends.

A logical reading of the phrase ‘unless and for such time’ implies that civilians lose and gain protection against direct attack in line with their actions or direct participation in hostilities (the so called ‘revolving door’ of protection). This has led some authors to argue that the ‘revolving door’ of civilian protection is not a ‘malfunction’ of international humanitarian law, but an integral and intended part of the law of hostilities.⁹⁸ According to the Interpretive Guidance, individuals who participate in hostilities on a recurrent basis regain protection from direct attack upon returning home and lose it again only when they launch the next attack.

Again, the ICRC has created a situation that state military forces are unable to countenance. Such an interpretation will degrade combatants’ respect for the law. The reason civilians lose their protection from direct attack is because they have consciously chosen to directly participate in hostilities; it is not because they necessarily represent a threat.⁹⁹ This interpretation will, in the longer term, reduce protection for civilians caught up in conflict:

If civilians could repeatedly opt in and out of hostilities, combatants victimised by their activities will quickly lose respect for the law, thereby exposing the civilian population as a whole to greater danger. [...] The best approach is therefore the only one that is practical in actual combat operations. Once an individual has opted into the hostilities, he or she remains a valid military objective until unambiguously opting out. This may occur through extended non-participation or an affirmative act of withdrawal. Further, since the individual who directly participated did not enjoy any privilege to engage in

⁹⁵ Art 51(3) AP I; 13(3) AP II.

⁹⁶ Melzer, above n 56, 44.

⁹⁷ Popularly symbolised by the farmer who works in his fields by day but becomes an insurgent fighter at night.

⁹⁸ Melzer, above n 24, 347. (However the author also notes that the speed at which the ‘door revolves’ and therefore its practical relevance as a legal mechanism for the conduct of hostilities depends on the temporal scope given to the notion of ‘direct participation in hostilities’; Melzer, above n 55, 70 (‘integral part, not a malfunction of international humanitarian law. It prevents attacks on civilians who do not, at the time, represent a military threat’).

⁹⁹ Schmitt, above n 57, 33.

hostilities, it is reasonable that he or she assume the risk that the other side is unaware of such withdrawal.¹⁰⁰

Furthermore, this approach is untenable from a military perspective. To illustrate, in asymmetrical warfare, individual insurgents typically mount hit and run attacks; or carry out attacks in creative ways whereby they do not have to face a conventionally superior force, as with an IED or landmine. Without an opportunity to identify insurgents in such situations the only plausible approach to combating this threat is to locate their caches or bomb-making facilities. According to the Interpretive Guidance, however, once the insurgents return from an attack, such as planting an IED, they are safe until such a time as they directly participate in hostilities again.¹⁰¹ It enables insurgents to attack at a time of their choosing and then melt back into the protection of the local civilian population. This engenders disrespect for international humanitarian law by state forces that feel the law provides unnecessary protection to non-state actors. Disrespect turns to non-compliance thereby endangering civilians further.¹⁰² Insurgents in fact will use their civilian status in between attacks to prepare and plan for their next operation.¹⁰³ There is a serious military necessity to humanitarian distortion present in the Interpretive Guidance's approach.

The second issue concerns the precise moment at which direct participation begins and ends. The Interpretive Guidance states that preparatory measures 'are of a specifically military nature and so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act.'¹⁰⁴ On the other hand, actions 'aiming to establish the general capacity to carry out unspecified hostile acts do not' rise to this level.¹⁰⁵ Deployment 'begins only once the deploying individual undertakes a physical displacement with a view to carrying out a specific operation', whereas 'return from the execution of a specific hostile act ends once the individual in question has physically separated from the operation'.¹⁰⁶ The issue turns on acts taking place

¹⁰⁰ Michael N. Schmitt, "Direct Participation in Hostilities" and 21st Century Armed Conflict', 510 in Fischer, *Crisis Management and Humanitarian Protection* (2004); See also Schmitt, above n 56, 38 (explaining the more logical approach being 'one whereby a civilian directly participates in hostilities remains a valid military objective until he or she unambiguously opts out of hostilities through extended non participation or an affirmative act of withdrawal'); See also *Al Gincó v. Obama*, 626 F. Supp. 2d 123 (Dist. Court, Dist of Columbia, 2009). (The US District Court for the District of Columbia addressed the question of status as a member of an organised armed group in relation to a Guantanamo detainee. At para 129 is a legal test to determine the question of extended non participation. The district court held that 'to determine whether a pre-existing relationship sufficiently eroded over a sustained period of time, the Court must, at a minimum, look to the following factors:

- (1) the nature of the relationship in the first instance;
- (2) the nature of the intervening events or conduct; and
- (3) the amount of time that has passed between the time of the pre-existing relationship and the point in time at which the detainee is taken into custody').

¹⁰¹ Melzer, above n 56, 70.

¹⁰² Van Der Toorn, above n 84, 25-26.

¹⁰³ Ibid 26.

¹⁰⁴ Melzer, above n 56, 51.

¹⁰⁵ Ibid 65.

¹⁰⁶ Ibid 67.

prior to or after a hostile action and whether they constitute a concrete component of an operation.

A hypothetical scenario best highlights the problem with the Interpretive Guidance's restrictive approach:

Three Afghani men, who are supportive of, but not integrated into, the Taliban, intend to place an IED on a road regularly used by International Security Assistance Force (ISAF) supply vehicles in southern Afghanistan. On the first day, they talk to some contacts to arrange the sourcing of the components for the device. On the second day, they receive the components and begin to assemble the device. On the third day, they visit the roadside to watch the movements of enemy supply vehicles in order to determine where best to place the device. On the fourth day, they finish assembly of the device. In between this conduct, they return to their vocation as farmers. On the fifth day, one of them prepares a hole in which to place the device. Finally, on the night of the sixth day, they place the device and fill in the hole. They wait on a nearby vantage point on the seventh day, watching for enemy vehicles to pass and remotely detonate the device destroying a vehicle and its operators.¹⁰⁷

Under the Interpretive Guidance's approach 'participation' is limited to the individual acts on each of the consecutive days. The intervening periods, where the three return to farming, are deemed to be peaceful activity. This is the case even though those periods of peaceful activity are minor interruptions in an organised and lethal operation against a conventional military force.

An alternative approach, supported by numerous scholars and commentators, is the chain of causation approach.¹⁰⁸ Each link in the chain must be closely connected with the next. The chain is severed when an individual demonstrably disengages from the series of acts. This approach encompasses the entire chain of subsequent acts and deems the whole period as direct participation in hostilities. The result is the scope for targeting better aligns with realities of modern warfare, garners greater support from state forces, and ultimately leads to greater respect of international humanitarian law and as a result increases protection of civilians in conflict.

VI CONCLUSION

Current international humanitarian law is adequate to regulate the practice of targeted killing. This is so even given the apparent grey areas surrounding the categories of recognised conflicts, the notion of combatant in non-international armed conflicts and the concept of direct participation in hostilities canvassed above. There are also more immediate and practical reasons for this to be so. The international framework to regulate states' use of force has been developed over hundreds of years and has wide reaching international support. Attempting to redraft or propose a new agreement in

¹⁰⁷ Van Der Toorn, above n 84, 21.

¹⁰⁸ See generally Yoram Dinstein, 'Distinction and the Loss of Civilian Protection in Armed Conflict' *in Israel Yearbook on Human Rights* (2008) 38, 189-90; Schmitt, above n 56, 36; Van Der Toorn, above n 82, 21.

relation to targeted killing and how it is regulated may be seen as taking a large step backwards.

Targeted killing is becoming more prolific and its use as a strategic policy by states to respond to the challenges of modern conflict will not abate. The current legal framework is adequately equipped to deal with targeted killing; however, further clarification is required. Grey areas surrounding categories of armed conflict, the notion of combatant in non-international armed conflicts and the notion of direct participation in hostilities, in particular, expose the shortcomings of the current legal framework. Without clarification, and the resulting certainty that brings, civilians and relations between states will continue to be exposed to unnecessary risk as states attempt to 'go it alone' in interpreting targets in line with their own strategic objectives. These individual state objectives will not always conform to the principles of international humanitarian law and are subject to the political considerations of the day.

The value of regulating targeting killing has already been recognised by prominent international legal scholars and commentators.¹⁰⁹ The agreement of a normative framework for targeted killing will mitigate the strategic and political fallouts that have marred targeted killing to date. As Melzer states:

The danger of targeted killing lies much less in the method as such than in the myths and misconceptions which surround it. In order to avoid an unjustified demonization of targeted killings and to put this method into its proper juridical perspective, it was indispensable to make an honest attempt at identifying and disentangling these misapprehensions in the service of the rule of law and, ultimately, of the inherently human values held by civilized societies.¹¹⁰

An international consensus defining the limits and use of targeted killing is necessary in order for states to be held accountable. The author recommends using the current international humanitarian framework. However, alternatives exist and could take the form of an international treaty or a consultation of experts similar to the ICRC's Direct Participation in Hostilities Project. At a minimum there must be the beginning of an international dialogue on the rules and limitations of targeted killing. It is crucial that whichever approach is taken, it must account for the complexities of modern warfare. Failure to do this will result in adherence to the chosen normative framework being lost in the friction and uncertainty of war.



¹⁰⁹ The author commends the efforts of Nils Melzer, Ben Saul, Noam Lubell, P. W. Singer.

¹¹⁰ Melzer, above n 24, 429.

A basic guide to taxing economic rent in Australia

JOHN PASSANT*

ABSTRACT

Taxing economic rent is one key element in tax reform in Australia and sets possible directions for the future. This paper introduces readers to the ideas of Adam Smith and David Ricardo and others on rent to aid understanding of the debates about economic rent today. The discussion also includes the Petroleum Resource Rent Tax, the Australia's Future Tax System Report and the Minerals Resource Rent Tax. The thinking of Smith and Ricardo was that rent was unearned gain. It is unearned because it arises as a consequence of the nature of the holding, an exclusive property right against the rest of the world. The amount of the rent is judged by comparison with the landholding that was just adequate enough to sustain profitable production. The rent is that difference on return. In a world of economic rent today these ideas retain their relevance. The political compromise that is the Minerals Resource Rent Tax is so far removed from these Smith and Ricardo benchmarks that taxing the unearned gains of the mining and other companies arising from the landed and other monopolies they hold remains, although warranted, a task for the future and for a government with the resolve to take on the rich and powerful. We can argue for the future by drawing on the past.

I INTRODUCTION

This paper is an introduction to the ideas of the classical political economists to help us understand the current debates about taxing economic rent in Australia. This debate and hence this paper includes the Australia's Future Tax System Report (*Henry Tax Review*)¹ and economic rent tax regimes such as the Petroleum Resource Rent Tax (*PRRT*) and the more recently introduced Minerals Resource Rent Tax (*MRRT*). Resource rent taxes and proposals to expand land tax, itself a tax which captures economic rent,² form a major part of the *Henry Tax Review* and its recommendations.³

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¹ Ken Henry et al, *Australia's Future Tax System Report to the Treasurer* (AGPS, 2010). There are 3 parts to the Report and they will in this paper have 3 distinct footnote references. 1 (a) Ken Henry et al, *Australia's Future Tax System Report to the Treasurer* (AGPS, 2010) Part One the Overview; 1 (b) Ken Henry et al, *Australia's Future Tax System Report to the Treasurer* (AGPS, 2010) Part Two Detailed Analysis Volume One and 1 (c) Ken Henry et al, *Australia's Future Tax System Report to the Treasurer* (AGPS, 2010) Part Two Detailed Analysis Volume Two. The link to the Final Report – all 3 sections plus other material - can be found here. <http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs_reports.htm>.

² Ken Henry et al, above n 1 (b), 249.

The aim of the paper is to help readers understand the drivers generally of current and possible future rent tax changes to Australia's tax system and the rationale for and specifics of those changes as they are, or may eventuate.

Part II of the paper looks at what economic rent is. This will also involve going back to the ideas of Adam Smith and David Ricardo on rent and modern approaches to rent. Part III examines some of the key economic rent tax recommendations of the Henry Tax Review, especially resource rent tax and land tax. It looks at the more or less settled and stable PRRT and the recently introduced and seemingly more volatile MRRT and the move in the Australian Capital Territory to more fully tax land rents.

Part IV concludes by arguing that understanding today's debates about economic rent is enriched by looking at the early political economists and their discussion of monopoly, private property and rent and that these ideas can be a benchmark for the future in taxing economic rent appropriately.

I hope this discussion offers one or more ways of helping understand the context of resource rent tax laws and the wider drivers in Australia specifically and the much wider discussions about taxing all economic rent.⁴ We cannot escape some attempt at understanding Smith and Ricardo on rent if we want to understand ultimately the PRRT, the MRRT, the Henry Tax Review rent tax recommendations and the Review's ruminations on various forms of economic rent. Let us start then by looking at what economic rent is and where the ideas came from.

II WHAT IS ECONOMIC RENT?

In essence economic rent is 'the excess payment received by a factor over the minimum required to induce it to do its work.'⁵ The return is above the level required to compensate labour and, more importantly, capital.⁶ Taxing that extra return, arguably even at levels close to 100 percent, will not change those investment and production decisions because the return is still above the level needed to reward capital.⁷ Here is how the Henry Tax Review describes it:

An economic rent is the excess of the return to a factor of production above the amount that is required to sustain the current use of the factor (or to entice the use of the factor).

³ Ibid. The resource rent tax recommendations can be found in Part One the Overview 89-90 and the land tax recommendations at 90. For a fuller discussion see Ken Hen Henry above n 1 (b) 217 and following pages.

⁴ For example John McLaren proposes looking at extending rent taxes to 'other resources such as timber, water, fish, hydro-electricity, geothermal electricity and industries such as airports, toll-roads and airlines.' John McLaren, 'Petroleum and Mineral Resource Rent Taxes: Could these taxation principles have a wider application?' (2012) 10 *Macquarie Law Journal* 69, 69,

⁵ W.H. Wessel, 'A Note on Economic Rent' (1967) 57(5) *American Economic Review* 1221, 1223.

⁶ Ken Henry et al, above n 1 (b), 171.

⁷ Ross Garnaut and Anthony Clunies Ross, *The Taxation of Mineral Rents* (Clarendon Press, 1983) 27.

For example, if a worker is paid \$100,000 but would still be willing to work at the same job if they were paid \$75,000, their economic rent would be \$25,000.⁸

Understanding this requires a look at the ideas of some of the classical political economists on rent. Put simply we cannot understand economic rent without also looking at the early debates on ground rent and its intertwining with concepts of and the reality of unearned gain. As Keiper puts it: ‘In the many twists and turns of economic thought, land-rent has been supplanted gradually by a more generalized notion of economic rent, an element that can appear in any and all income payments. But, like its earlier counterpart, economic rent describes an unearned gain, a reward in excess of that required to bring forth a desired effort or function.’⁹ Let us go back a little then to the era of the great political economists and the rise of capitalism to look at the first modern classical theories of rent.

A *What is Rent?*

The debates about rent gained real prominence with the development of capitalism and the destruction of feudal relations in Western Europe. Adam Smith described land rent in these terms: ‘The rent of land, therefore, considered as a price paid for the use of land, is naturally a monopoly price. It is not at all proportioned to what the landlord may have laid out upon the improvement of the land, or to what he can afford to take; but to what the farmer can afford to give.’¹⁰

It is this monopoly element which hints at future theories of economic rent, those returns over and above the average expected after the costs of labour and capital are taken into account. The central idea underlying this approach appears to be that wealth should arise from effort, either as labour or worked for capital and not arise from privilege, least of all feudal privilege. Unearned gain is anathema to capital and its ideology of hard work. Taxing unearned wealth – the taxation of economic rents generally but in Smith’s time rent from land and minerals – is the triumph of the idea of competition over the reality of bourgeois monopoly and in the case of land sometimes its triumph over feudal monopoly and its historical hangovers. The taxation of economic rent mimics the effect of competition by reducing to some extent the after tax returns to those receiving surplus-profit¹¹ and who for reasons of market monopoly or oligopoly or the monopoly that is private property in land are immune from the equalisation process applying to high profits that competition would reduce if it could operate in those markets.¹²

⁸ Ken Henry et al, above n 1 (b), 171.

⁹ Joseph S Keiper ‘Preface’ in Clifford D Clark, Joseph S Keiper, Ernest Kurnow, Raymond Moley and Harvey H Segal *Theory and Measurement of Rent* (Chilton Company, 1961) ix.

¹⁰ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations Volume One* (JM Dent and Sons, 1970) 131.

¹¹ Karl Marx, *Capital Volume III* (Foreign Language Press, 1959) 743.

¹² Ibid.

This may well explain why the idea that taxation should be imposed on economic rent in the form of resources and land is one of the key elements at the heart of the Henry Tax Review.¹³ Another justification is that the revenue contribution from mining has been falling while profits have been booming.¹⁴

The Henry Tax Review recommendations on taxing resources and land mean we are witnessing a return to the very essence of Smith and Ricardo on rent. As Clark et al put it: ‘Throughout a lengthy and sometimes contradictory treatment of land-rent, Smith consistently adheres to the proposition that rent is an unearned surplus which is appropriated by the landlords through the exercise of their monopoly power.’¹⁵

To some extent this view of unearned gain is explicable through the particular historical circumstances Smith and later Ricardo found themselves in. The incomplete bourgeois revolution in England¹⁶ swept aside many of the barriers to capitalist development there but rather than destroying the power of the landed aristocracy incorporated that class into the structures of bourgeois power. While Smith had a distaste for landlords,¹⁷ as David Harvey puts it: ‘The Ricardians depicted landlords as parasites, as useless and superfluous holdovers from the feudal era.’¹⁸

As to the specifics of rent Ricardo argued that ...’[r]ent is that portion of the produce of the earth which is paid to the landlord for the use of the original and indestructible powers of the soil.’¹⁹ Importantly Ricardo was careful to distinguish between payments to landlords and rent. While payments to landlords included rent, they also included interest and returns on capital.²⁰ Ricardo goes on to draw a nuanced distinction between rent as he defines it and the popular meaning of rent as payments to landlords. He says:

It is often, however, confounded with the interest and profit of capital, and, in popular language, the term is applied to whatever is annually paid by a farmer to his landlord. If, of two adjoining farms of the same extent, and of the same natural fertility, one had all the conveniences of farming buildings, and, besides, were properly drained and manured, and advantageously divided by hedges, fences and walls, while the other had none of these advantages, more remuneration would naturally be paid for the use of one, than for the use of the other; yet in both cases this remuneration would be called rent. But it is evident, that a portion only of the money annually to be paid for the improved farm, would be given for the original and indestructible powers of the soil; the other portion would be paid for the use of the capital which had been employed in

¹³ Ken Henry et al, above n 1 (a) xvii.

¹⁴ Ken Henry et al, above n 1(b), 226.

¹⁵ Clifford D Clark, Joseph S Keiper, Ernest Kurnow, Raymond Moley, Harvey H Segal, *Theory and Measurement of Rent* (Chilton Company, 1961) 13.

¹⁶ Perry Anderson ‘Origins of the Present Crisis’ in Perry Anderson, *English Questions* (1992, Verso).

¹⁷ Clark et al, above n 15, 25.

¹⁸ David Harvey, *The Limits to Capital* (University of Chicago Press, 1982) 331.

¹⁹ David Ricardo, *The Principles of Political Economy and Taxation* (J M Dent and Sons Ltd London 1973) 33.

²⁰ Ibid.

ameliorating the quality of the land, and in erecting such buildings as were necessary to secure and preserve the produce.²¹

In essence rent in Ricardo's eyes was the extra payment that went to fertile land compared to less fertile land. Here is how he put it:

If all land had the same properties, if it were unlimited in quantity, and uniform in quality, no charge could be made for its use, unless where it possessed peculiar advantages of situation. It is only, then, because land is not unlimited in quantity and uniform in quality, and because in the progress of population, land of an inferior quality, or less advantageously situated, is called into cultivation, that rent is ever paid for the use of it. When in the progress of society, land of the second degree of fertility is taken into cultivation, rent immediately commences on that of the first quality, and the amount of that rent will depend on the difference in the quality of these two portions of land.²²

It is thus the difference between the return on land which is just sustainable in terms of profitability and return on investment, what Garnaut and Clunies Ross describe as 'the proceeds of the least profitable [land] that will ever be in production,'²³ and the more productive land with its higher return as a consequence which is rent. This comparison and difference between a benchmark of adequate returns and greater returns – a form of unearned gain or reward 'on account of ownership and without any personal sacrifice'²⁴ - is at the heart of modern theories of economic rent.

Smith on occasion and Ricardo more rigorously regarded labour as the source of value. So how could land have intrinsic value if it contained no labour? For example Ricardo begins his great book on *The Principles of Political Economy and Taxation* by saying that '[t]he value of a commodity, or the quantity of any other commodity for which it will exchange, depends on the relative quantity of labour which is necessary for its production, and not on the greater or less compensation which is paid for that labour.'²⁵

This seems to sit uneasily with Ricardo's idea that rent is a payment for 'the use of the original and indestructible powers of the soil.'²⁶ Rather than create value what the monopoly that is private property does is appropriate already created value.²⁷ Thus Marx argues private property is at the centre of the agricultural capitalist's seemingly secure world.²⁸ This ownership, argues Marx, is monopoly. He says that '[l]anded property is based on the monopoly by certain person over definite portions of the globe, as exclusive spheres of their private will to the exclusion of all others. With this in

²¹ Ibid.

²² Ibid 34.

²³ Garnaut and Clunies Ross, above n 7, 4.

²⁴ Ibid.

²⁵ David Ricardo, above n 19, 5.

²⁶ Ibid 33.

²⁷ In Marx's thinking about rent this is one strand. Another strand has to do with the organic composition of capital and the exchange of goods above their prices of production, an analysis I will look at in more depth in a later article.

²⁸ Karl Marx, above n 11, 600-601.

mind, the problem is to ascertain the economic value, that is, the realisation of this monopoly on the basis of capitalist production.’²⁹

One point that Marx, following in the footsteps of Smith and Ricardo in this case, is making is that individual property contains within it its own monopoly – the exclusion of all others if necessary from productive activity on the particular piece of land. This is done for a payment that includes what Marx calls ground-rent, the amount ‘which is paid for the use of the land as such – be it in a natural or cultivated state.’³⁰ One view is that rent arises from monopoly. One of the consequences of the increasing monopolisation of the global and Australian economies³¹ may therefore be an increase in long term economic rent so taxing that makes both revenue and competitive sense³² to a bourgeois state.

Marx thought that in agriculture the ‘barriers to entry’ that are private property could be permanent. Thus he says that:

if capital meets an alien force which it can but partially, or not at all, overcome, and which limits its investment in certain spheres, admitting it only under conditions which wholly or partly exclude that general equalisation of surplus-value to an average profit, then it is evident that the excess of the value of commodities in such spheres of production over their price of production would give rise to a surplus-profit, which could be converted into rent and such made independent with respect to profit. Such an alien force and barrier are presented by landed property, when confronting capital in its endeavour to invest in land; such a force is the landlord vis-à-vis the capitalist.³³

Landed property – agriculture *and* mining – present that permanent barrier by the very nature of the fact they are a form of monopoly ownership. In this sense, because landed property undermines the process of competition and the trend to the equalisation of profit rates towards an ever changing average, ‘private property in land represents a barrier to the development of capitalism because the landowners only agree to its productive use after appropriating part of the mass of surplus value available for accumulation.’³⁴

This prefigures the views of Garnaut and Clunies Ross who argue similarly that economic rent is an expression of the monopoly that is private property.³⁵ They say that ‘[t]he ‘barrier to entry’ that gives rise to what might appear to be transfer rent is the institution of property rights itself. Exclusive property rights are necessary to the emergence of mineral rent in the same way as they are to land rent.’³⁶

²⁹ Ibid 601-602.

³⁰ Ibid 605.

³¹ Ken Henry et al, above n1 (b), 8.

³² The tax mimics the effects of competition by reducing super profits downwards towards the average profit rate.

³³ Marx, above n 11, 743.

³⁴ Daniel Gaido, *The Formative Period of American Capitalism: A Materialist Interpretation* (Routledge, 2006) 33-34.

³⁵ Ross Garnaut and Anthony Clunies Ross, above n 7, 33.

³⁶ Ibid 34.

It is the monopoly that is private property; the ownership or access and production rights to land, that creates resource rents and land rents. With this insight in mind let us now turn now to the Henry Tax Review and its two major economic rent proposals – the taxation of resource rents and a land tax - to try to understand how the ideas of Smith and Ricardo have been approached, adopted and adapted to the debates in a modern context.

III THE HENRY TAX REVIEW

The Henry Tax Review has a tax vision for Australia. That vision long term is in large part to move to the taxation of economic rent and away from the taxation of ordinary income or capital.³⁷ This flows from its discussion and thinking about increasing the tax on immobile factors of production or their returns to enable a decrease in tax on mobile factors, such as highly mobile investment capital.³⁸ Thus for example the Henry Tax Review recommended that the Government adopt a resource rent tax,³⁹ a land tax⁴⁰ and consider an allowance for corporate equity.⁴¹

Internationally recognised tax economist John Freebairn has commented that ‘[a]ll parties to the current debate have missed the logic [of the Henry Tax Review] and offered second or worst-best scenarios.’⁴² The logic of Henry, as Freebairn points out, is ‘shifting the tax mix from mobile to immobile factors of production.’⁴³ Those immobile factors of production include resources, land and monopoly rents.⁴⁴ Further, removing special business concessions (for example accelerated depreciation,) to fund a lower internationally competitive company tax rate would attract foreign investment, keep more savings in Australia, leading to increased investment here over time.⁴⁵ This company tax cut would, according to Freebairn, ‘lead to more capital and investment per worker, higher productivity and wages.’⁴⁶ This is the trickle-down theory of tax. Taxing capital less will evidently produce a capitalist nirvana.

The pressure from most major business commentators is for the Government to do something ‘serious’⁴⁷ about reforming the tax system, rather than just cherry picking

³⁷ Ken Henry et al, above n 1 (a), 25; John Freebairn ‘Tax reform is wanting’ *The Australian Financial Review* 19 March 2012, 54; John Passant and John McLaren (2011) ‘The “Review of Australia’s Future Tax System”: Implications for Local Government in Australia and recommendations’ (2012) 17 *Local Government Law Journal* 243, 255.

³⁸ Henry et al, above n 1 (a), xxi-xxii.

³⁹ Ibid 89.

⁴⁰ Ibid 90.

⁴¹ Ibid 42.

⁴² John Freebairn ‘Tax reform is wanting’ *The Australian Financial Review* 19 March 2012, 54.

⁴³ Ibid.

⁴⁴ Ibid. See also Ken Henry et al, above n 1 (a), xvii.

⁴⁵ John Freebairn, above n 42.

⁴⁶ Ibid.

⁴⁷ The Editor, *The Australian Financial Review*, ‘Go back to Henry on tax’ *The Australian Financial Review* 16 March 2012 50. This is just one of many *Financial Review* articles and editorials

bits and pieces of the Henry Tax Review.⁴⁸ Many commentators want governments to adopt a systemic approach to reform.⁴⁹ In fact that reform pressure will increase over time as the drivers for change that the Henry Tax Review identified – for example an ageing population, the mobility of capital, globalisation, technological change, the rise of Asia, the inefficiency of many of the current array of State and Territory and federal taxes⁵⁰ – all continue and place demands on Government and society to respond in a variety of ways to changing circumstances, including structural reforms to the tax system.

John Freebairn highlighted some of those implications for business tax reform and hence all of Australian society when he outlined some possible tax reform directions. They include:

- Broadening the company tax base and lowering the company tax rate;
- Replacing current state royalties on mining with an economic rent tax;⁵¹
- Shifting the tax mix away from taxes on mobile capital to immobile natural resources, land and monopoly rents;
- Symmetrical tax treatment of revenue losses and gains; and
- Removing stamp duties on property transfers and insurance.⁵²

As Freebairn makes clear, one of those thoroughgoing structural reforms is taxing economic rent, something the Henry Tax Review recommends in the form of a resources rent tax and more broad based and progressive land taxes in the States and Territories.⁵³ Both resources and land are immobile factors of production. The Henry Tax Review also suggested examining an allowance for corporate equity (*ACE*) which basically means allowing a notional percentage of capital, possibly at the long term government bond or company bond rate as a deduction against assessable income. This would result in taxing company income only above that certain return level (taxing only the ‘rent’ above that level),⁵⁴ and as a consequence possibly freeing hundreds of

arguing the same position of being bold and adopting fundamental and broad ranging tax reform along the lines that the Henry Tax Review recommended.

⁴⁸ Richard Dennis, ‘Choice on tax is simple’ *The Canberra Times* 17 March 2012, 23.

⁴⁹ *Ibid.* See also the editor, *Australian Financial Review*, above n 47.

⁵⁰ Ken Henry et al, above n 1 (a), 3. See also John Passant and John McLaren (2011) ‘The “Review of Australia’s Future Tax System”: Implications for Local Government in Australia and recommendations’ (2012) 17 *Local Government Law Journal* 243, 257.

⁵¹ The Minerals Resource Tent Tax gives a credit to companies for State and Territory royalties and will tempt mining States and the Northern Territory to increase royalties and their revenue at a cost to the Commonwealth, not the companies involved. This is very bad tax policy design which locks in these inefficient taxes. Not surprisingly New South Wales, Western Australia and Queensland have increased some royalties which because of the credit under the MRRT is effectively these States ‘bag snatching’ Commonwealth revenue.

⁵² John Freebairn, above n 42.

⁵³ Ken Henry et al, above n 1 (a), xvii.

⁵⁴ *Ibid.* 42.

thousands of companies from income tax.⁵⁵ The Business Tax Review Group, a group formed out of the Tax Forum,⁵⁶ recommended an ACE ‘should not be pursued in the short to medium term but may be worthy of further consideration and public debate in the longer term.’⁵⁷ This was because ‘the Working Group ... found there [was] a lack of agreement in the business community to make ... a trade-off’ between base broadening and company tax cuts.⁵⁸ This was despite its attractiveness to the Australian Council of Trade Unions and unions representing blue collar workers who see manufacturing industry as effectively earning low returns which would be below the tax threshold under an ACE regime. If an ACE were adopted the end result, according to John Freebairn, could be a company tax rate of 40% to 50% on banks and resource companies and other monopolist industries.⁵⁹

There is also in the Henry Tax Review some sort of commitment to the welfare state, reflected in the Review’s comments about ‘improving living standards, support for the needy, fairness, social advancement, security and protection of the environment.’⁶⁰ There is a stream of economic thought that believes that higher inequality leads to a less productive society,⁶¹ or even to economic crises.⁶² The Henry Tax Review’s commitment to equity appears shallow and more about words than reality. For example Neil Brooks says: ‘Somewhat surprisingly, Australia’s Future Tax System had almost nothing to say about the use of the tax system to achieve a more equitable distribution of income...’⁶³ There is much in the Review that a free market government could adopt. As the author has previously written in this *Review*:

The Henry Tax Review attempted to balance two competing views of the way forward for capitalism. The Final Report contains within it the seeds of both social democracy and neoliberalism, what I have called Keynesian neoliberalism. In fact much of the thrust of the Review is in designing a future tax system in which the burden of tax

⁵⁵ Peter Martin, ‘Zero tax proposed for most companies’ *The Age* 6 December 2011, 2 <<http://www.theage.com.au/business/zero-tax-proposed-for-most-companies-20111205-1ofk3.html>>.

⁵⁶ Wayne Swan, ‘Business Tax Working Group – Membership and Terms of Reference’ *Press Release* 12 October 2011 <<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/123.htm&pageID=003&min=wms&Year=&DocType=>>>.

⁵⁷ The Australian Government, the Business Tax Working Group, *Business Tax Working Group Final Report* (Commonwealth of Australia, 2012) v <<http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2012/BTWG%20Final%20Report/Downloads/PDF/BTWG-Final-Report.ashx>>.

⁵⁸ Ibid.

⁵⁹ Peter Martin above n 55.

⁶⁰ Henry et al, above n 1 (a), xvii.

⁶¹ See, for example, Francisco Rodríguez ‘Inequality, Economic Growth and Economic Performance A Background Note for the World Development Report 2000. He says ‘there is very little evidence that inequality is good for growth.’ <<http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/Background/rodriguez.pdf>>.

⁶² Mikael Feldbaum interviews Michael Kumhof, ‘IMF economist: Crisis begins with inequality’ *Eurozine* 9 March 2012 <<http://www.eurozine.com/articles/2012-03-09-kumhof-en.html>>.

⁶³ Neil Brooks ‘Taxing the wealthy’ in Chris Evans, Richard Krever and Peter Mellor, *Australia’s Future Tax System: The Prospects After Henry* (Thomson Reuters 2010) 197, 197.

moves further and further on to so called fixed assets, in the main labour.⁶⁴ [Footnotes omitted.]

The author argues that the Henry Tax Review is in fact about shifting further the burden of taxation on to labour from capital,⁶⁵ either directly or indirectly. If so then taxing economic rent is arguably part of that shift specifically and more generally part of the move away from social democracy to neoliberalism.⁶⁶ This is because the initial beneficiary of the Rudd Government's proposed Resource Super Profits Tax (*RSPT*) would have been all profitable incorporated businesses through company tax cuts.⁶⁷ In this light, taxing economic rent can then be seen as being about reinforcing and further encouraging the shift of wealth from labour to capital⁶⁸ as well as being part of the process of entrenching the results of that shift over the last 3 decades in Australia, ever since the election of the neoliberal Hawke Labor Government in 1983.⁶⁹

The first recommendation, the *grundnorm* if you like, of the Henry Tax Review was that:

Revenue raising should be concentrated on four robust and efficient broad-based taxes:

- personal income, assessed on a more comprehensive basis;
- business income, designed to support economic growth;
- rents on natural resources and land; and
- private consumption.⁷⁰

This appears to be the optimal tax differential tax agenda modified through the political reality of what is possible in tax reform today or into the future.⁷¹ Dot point three

⁶⁴ John Passant, 'Lessons from the recent resource rent tax experience in Australia' (2011) 10(2) *Canberra Law Review* 159, 174-176
<<http://www.canberra.edu.au/faculties/busgovlaw/attachments/pdf/CLR-2011-Vol.-10-2-Symposium-edition.pdf>>.

⁶⁵ Ibid 177.

⁶⁶ Ibid 174-176.

⁶⁷ Ibid.

⁶⁸ As Federal Labor MP Andrew Leigh points out on his blog, in an article called *Mind the Gap* 'work by the OECD reinforces the finding that the gap between rich and poor has widened in Australia over recent decades. True, the incomes of the poorest tenth of Australians have improved. But top incomes have increased faster still'.
<<http://www.andrewleigh.com/blog/?p=883>>. According to the ACTU Economic Bulletin Issue 3, 1 October 2010 1, 'the profit share of national income is now near the record highs it reached in 2008, while the wages share of income is the lowest since 1964.' See
<http://www.actu.org.au/Images/Dynamic/attachments/7126/Economic_Bulletin_Issue_3.pdf>.

⁶⁹ Tom Bramble and Rick Kuhn, *Labor's Conflict: Big business, workers and the politics of class* (Cambridge University Press 2011) 104 – 110.

⁷⁰ Ken Henry et al, above n 1(a), 80.

⁷¹ Another paper will explore the neoliberalisation of tax policy in Australia through the creeping influence and adoption of optimal tax theory. For a discussion of optimal tax theory and tax policy outcomes which explains both the theory and its slow long term adoption and application in tax reform thinking and practice see Robin Boadway, *From Optimal Tax Theory To Tax Policy: Retrospective and Prospective Views*, (Cambridge, Mass, MIT Press, 2012).

clearly has economic rent as its rationale.⁷² So too does dot point two in relation to proposals for examining taxing only the economic rent of companies, one version of which is the ACE, a proposal as mentioned above now abandoned.⁷³

Taxing economic rent in Australia is not new. Let us look briefly now at the history of resource rent tax in Australia and then the taxation of resource rents and the taxation of land proposed in the Henry Tax Review.

A Resource Rent Taxation

1 The Petroleum Resource Rent Tax

Australia has had a resource rent tax in operation for many years. The Petroleum Resource Rent Tax, legislated in 1987, but backdated to its announcement in 1984, applied to offshore petroleum. It is 'levied at a rate of 40% on the positive annual net cash flow of each petroleum project.'⁷⁴ It was a compromise after the Hawke Government failed to persuade Western Australia and Queensland to give up their inefficient royalties taxes for a share of the more efficient rent taxes imposed on resources. The compromise applied rent taxes to petroleum offshore - i.e. outside the jurisdiction of the States and Northern Territory but within the Commonwealth's jurisdiction, replacing in part a Commonwealth royalty regime on those projects. Changes made as part of the package to introduce the MRRT now mean that from 1 July 2012 the PRRT applies to offshore and onshore petroleum, 'including coal seam gas, tight gas and oil shale projects.'⁷⁵

After more than 25 years of operation all the relevant players appear satisfied with the PRRT.

2 From the Sublime to the Ridiculous

The Henry Tax Review proposed that State and Territory mining royalties be abolished and replaced with a Commonwealth resource rent tax.⁷⁶ The reasons for doing this are that they are the resources of the States and Territories, i.e. public property, the return to the community is inadequate because, many of the royalties being output based, they are by and large unresponsive to changes in profit, royalties are inefficient,⁷⁷ and the resources are finite.⁷⁸ Because of the non-renewable nature of resources, mining companies earn economic rent,⁷⁹ in other words a profit well above that needed for

⁷² John Passant, above n 64, 179.

⁷³ Ken Henry et al, above n 1 (a), 42-43.

⁷⁴ Ken Henry et al, above n 1 (b), 226-227

⁷⁵ Australian Taxation Office, 'Introduction to the extension of the petroleum resource rent tax' <<http://www.ato.gov.au/content/downloads/prrt00323910.pdf>>.

⁷⁶ Ken Henry et al, above n 1 (a), xxi and recommendations 45-50, pages 89-90.

⁷⁷ Ibid 47.

⁷⁸ Ken Henry et al, above n 1 (b), 217.

⁷⁹ Ibid.

investment and production in the mining industry to continue at what would be normal market levels.⁸⁰ The ghosts of Smith and Ricardo live on.

Ross Garnaut summarises the reasons for taxing resource rents in these terms:

There are therefore two reasons to expect Australian governments to seek to extract the economic rent as revenue: it has lower economic costs than other forms of taxation; and it represents the value of public property that is being transferred to private ownership. Many Australians would add a third reason: that the recovery of mineral rent from the companies to which rights to mine have been allocated for the community represents a move to more equitable distribution of income, in a way that has lower economic costs than other measures to promote distributional equity. However, we have a strong basis for efficient resource rent taxation without going into the distributional issues.⁸¹

The Rudd Government unveiled the Resource Super Profits Tax (*RSPT*) when it released the Henry Tax Review, a tax based to a large extent, but with some major modifications, on the Review's recommendations. The mining companies' backlash against the *RSPT* destroyed a Prime Minister⁸² and the new head of government, Julia Gillard, after negotiations with BHP, Xstrata and Rio Tinto,⁸³ introduced a much watered down tax, the Minerals Resource Rent Tax (*MRRT*).⁸⁴

The *MRRT* applies from 1 July 2012 to around 320 companies instead of the 2500 that would have been taxed under the *RSPT*.⁸⁵ It taxes only super profits⁸⁶ on coal and iron ore rather than almost all minerals that would have been caught by the proposed *RSPT*.⁸⁷ Despite estimates it would raise \$2 billion in its first year, itself a downgrade from the initial estimate of \$3.6 billion,⁸⁸ it collected only \$126 million in its first six months of operation.⁸⁹ This appears to be not because of market conditions as the Government argues⁹⁰ but because there are design faults in the tax, in particular the

⁸⁰ John Passant, above n 64, 162-163.

⁸¹ Ross Garnaut, 'The new Australian resource rent tax', *The Australian* 21 May 2010 <<http://www.theaustralian.com.au/business/the-new-australian-resource-rent-tax/story-e6frg8zx-1225869337321>>.

⁸² John Passant, above n 64, 172-173.

⁸³ They are the big 3 mining companies in Australia.

⁸⁴ See John Passant, above n 64, especially 169-176.

⁸⁵ Joe Kelly 'Prices boom hides mining tax shortfall after backdown over super-profits levy' *The Australian* 14 July 2010 <<http://www.theaustralian.com.au/politics/prices-boom-hides-mining-tax-shortfall-after-super-profits-levy-backdown/story-e6frgczf-1225891697261>>.

⁸⁶ Essentially those profits are 'the assessable receipts less deductible expenditure less the uplift carry forward losses. The uplift factor is the long term bond rate plus 7 percent.' John McLaren, 'Petroleum and Mineral Resource Rent Taxes: Could these taxation principles have a wider application?' (2012) 10 *Macquarie Law Journal* 69, 76.

⁸⁷ For a good, simple and understandable explanation of the workings of the tax, see John McLaren, 'Petroleum and Mineral Resource Rent Taxes: Could these taxation principles have a wider application?' (2012) 10 *Macquarie Law Journal* 69, 75-77.

⁸⁸ John McLaren, 'Petroleum and Mineral Resource Rent Taxes: Could these taxation principles have a wider application?' (2012) 10 *Macquarie Law Journal* 69.

⁸⁹ Sally Zou and Sunanda Creagh, 'Mining tax shortfall: the experts respond' *The Conversation* 8 February 2013 <<http://theconversation.edu.au/mining-tax-shortfall-the-experts-respond-12105>>.

⁹⁰ Wayne Swan, 'Minerals Resource Rent Tax revenue' *The Treasurer Media Release* 8 February 2013

credibility of State and Territory royalties, the choice companies can make of market value of mines rather than historical cost for the tax's starting base and the downstream of profits to avoid the application of the tax.⁹¹ Even that incorrect \$2 billion estimate was as much as \$10 billion less annually than would have been collected under the abandoned RSPT.⁹²

Advice to the Green Party from the Parliamentary Budget Office indicates that increasing the MRRT rate to 40%,⁹³ removing the market value starting base option and allowing royalties to be credited only at the rate they were on 1 July 2011 would bring in an extra \$26 billion over the 4 year forward estimates period.⁹⁴

Whatever the MRRT is, it is not a rent tax. It does not capture economic rent. The debacle that is the MRRT shows that the Henry Tax Review's vision of a shift to taxing resource rents as immobile factors of production more fully has suffered a major setback. Now it may be that the Review has planted the seeds for the future. Whether they sprout or not depends on the maturity of governments and Australian civil society to rise above petty politicking.⁹⁵ The failure of the Henry Tax Review resource rent tax proposal, the defeat of the RSPT as an option and the MRRT suggest this may be unlikely in the short to medium term. The author favours a full blown rent tax applying not just to all minerals but to all rents or super profits,⁹⁶ to use the large revenue from it for social democratic purposes⁹⁷ and thus improve the life of millions of Australians.⁹⁸

⁹¹ <<http://www.treasurer.gov.au/wmsDisplayDocs.aspx?doc=pressreleases/2013/019.htm&PageID=003&min=wms&Year=&DocType=0>>.
David Uren, 'Treasury exposes mining tax flaws as Martin Parkinson blames Labor's concessions' *The Australian*, 15 February 2013 <<http://www.theaustralian.com.au/national-affairs/treasury/treasury-exposes-mining-tax-flaws-as-martin-parkinson-blames-labors-concessions/story-fn59nsif-1226578314817>>. If the profit can be allocated against downstream activity after extraction it is, so the argument goes, not economic rent and hence not caught by the MRRT. Unsurprisingly mining companies have claimed a large amount of the profit they make comes from their downstream activities. There are two answers. Tax Office audits could establish if in fact the profit arises in the extraction (rent) stage or downstream; and second the economic rent of minerals arises in part because of their finite nature so including downstream profits in the bundle of economic rents is arguably appropriate in any event.

⁹² Senator Bob Brown 'Mining tax needs review to ensure revenue for Australia's future' *Greens Press Release* 19 March 2012 <<http://greensmps.org.au/content/media-releases/mining-tax-needs-review-ensure-revenue-australias-future>>.

⁹³ This was the proposed RSPT rate.

⁹⁴ Senator Christine Milne, 'Second Reading, Minerals Resource Rent Tax Amendment (Protecting Revenue) Bill 2012' *The Senate* 28 February 2013 <<http://www.openaustralia.org/senate/?id=2013-02-28.154.2>>

⁹⁵ Garnaut, above n 81.

⁹⁶ Banks and supermarkets come to mind. John McLaren suggests extending rent taxes to 'other resources such as timber, water, fish, hydro-electricity, geothermal electricity and industries such as airports, toll-roads and airlines.' John McLaren, above n 87, 69, 69.

⁹⁷ A Denticare scheme, addressing indigenous disadvantage, improving public health, education and transport, and addressing climate change through government owned renewable energy power stations are some options.

⁹⁸ John Passant, above n 64, 161-163. See also more generally Clive Hamilton on progressive taxation as one of the great legacies of social democracy. Clive Hamilton, 'What's Left? The

B Land Tax

Essentially the Henry Tax Review recommended that there be a progressive rate land tax to replace inefficient stamp duties on conveyances and help fund the revenue needs of the States and Territories.⁹⁹ It was to be broad based and eventually include all land, although low value land, e.g. agricultural holdings, would be subject to a zero rate.¹⁰⁰ Again this was part of the Henry Tax Review's vision of a shift in the tax base from mobile to immobile factors of production to be used then to cut company tax rates, abolish inefficient stamp duties, attract or keep mobile capital here and develop a secure tax base to meet future societal needs.¹⁰¹ The tax also has the potential to significantly improve GDP growth.¹⁰²

The current State and Territory land taxes are inefficient.¹⁰³ As the Henry Tax Review says '[t]he efficiency cost depends on whether people change their behaviour in response to the change in price.'¹⁰⁴ Inefficient taxes adversely affect activity. The Review uses an example of a labour tax. It says that 'the measure of the inefficiency of a labour tax is not how much it raises the wage cost to firms, but how many workers are not employed as a result.'¹⁰⁵ A broad based land tax imposed on unimproved capital values is efficient, because, as the Henry Tax Review says 'the tax reduces the price of land but does not affect how it is used, or how much is used.'¹⁰⁶ The Labor government rejected the land tax proposal, perhaps in part because any such tax imposed would have seen a fall in prices for current landowners when they sold their property, offset by any reduction or abolition of stamp duty on the sale.¹⁰⁷

Again, given the factors driving tax reform outlined previously, land tax is an issue which will not go away. In relation to land tax the Henry Tax Review may have planted the seeds for the future. In the Australian Capital Territory on 1 July 2012 the Government set in place a shift to taxing land more and away from taxing transactions. Essentially what it is doing is phasing out conveyance duty over time and abolishing insurance taxes. It will replace the revenue lost by making residential general rates (one form of land taxes) more progressive by introducing tax brackets and increasing marginal tax rates. The Residential Land Tax, which applies to private rental properties, will also be made more progressive.¹⁰⁸

Death of Social Democracy' in 4 Classic Quarterly Essays on Australian Politics (Black Inc 2007) 1.

⁹⁹ Ken Henry et al, above n 1(a) 90, recommendations 51 to 54.

¹⁰⁰ Ibid.

¹⁰¹ Ibid xv to xxvi.

¹⁰² Ken Henry et al, above n 1 (b), 247.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ ACT Treasury, *Tax Reform – A fairer, simpler and more efficient tax system* (Canberra 2012) <http://apps.treasury.act.gov.au/__data/assets/pdf_file/0008/399788/factsheet_Overview.pdf>.

The Henry Tax Review also recommended a land tax¹⁰⁹ because it had a strong commitment to taxing economic rent and taxing land taxes economic rent.¹¹⁰ It did not accept the idea of land as the basis for all wealth but rather saw the unimproved capital value of land in neo-Ricardian terms as the surplus over and above the costs of production and adequate returns on them. So it adopts the Ricardian idea of ground rent as surplus, but not the Henry George idea of land as the foundation for all wealth. That it does so in terms of economic rent becomes clear when it says:

Because land is immobile, it is 'fixed in supply' ...

The returns to the landowner tend to be made up of economic rent ... Changes in the price of land — that is, the annual rental return — do not change the supply of land. The demand for land sets the rental return from the land and the amount of economic rent accruing to the owner.

Economic rent is the return to the owner above that needed to keep the land in its current use. That is, it is the return once the owner has been compensated for the capital and labour they employ on the land. Economic rent therefore flows from the efforts of others, or simple luck. In particular, the economic rent of an owner's land increases as surrounding land increases in economic productivity (for example, from new roads built nearby), rather than the owner's investment in the productivity of their own land. Land rent is likely to increase in line with future population and economic growth, which increase demand for a fixed supply of land.¹¹¹

Clearly land tax as economic rent is an important element of the thinking of the Henry Tax Review. This economic rent in land arises, according to Henry Tax Review, from 'the effort of others, or simple luck.'¹¹² One example of the effort of others is urbanisation or as the Henry Tax Review puts it:

...the economic rent of an owner's land increases as surrounding land increases in economic productivity (for example from new roads built nearby), rather than the owners investment in the productivity of their own land.¹¹³

What the Henry Tax Review recognises is that human activity as a community changes the value of the land itself and that this indirect influence is reflected in increasing land values. However the idea that land has value separate from human activity is incorrect. Land is not the creator of value. Rather that value is produced in the process of production. As Marx put it: 'Landed property has nothing to do with the actual process of production. Its role is confined to transferring a proportion of the produced surplus value from the pockets of capital to its own.'¹¹⁴ The ownership of land is one element in the distribution of that surplus value, in this case in the form of ground rent.

¹⁰⁹ Ken Henry et al, above n 1 (a), 89-90.

¹¹⁰ H William Batt 'The Compatibility of Georgist Economics and Ecological Economics' 2003 *Wealth and Want in 21st Century America* <http://www.wealthandwant.com/docs/Batt_GEE.html>.

¹¹¹ Ken Henry et al, above n 1 (b), 249.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Karl Marx, above n 11, 800-801. See also David Harvey, above n 18, 359.

But the efficiency and other arguments made by the Henry Tax Review for a land tax, and the ongoing demand for a shift in the tax burden away from mobile factors like finance capital to immobile factors such as land, are not going to disappear. A broad based progressive land tax and the taxation of economic rent more generally, will remain, like a shelf company, ready for the plucking. As John Freebairn puts it the Henry Tax Review ‘provides a rich agenda of benchmark reform options.’¹¹⁵

C A Wider Rent Tax?

The concept of economic rent and its taxation is not confined to resources or land. The Henry Tax Review recommendations do so limit them. For example, was the Henry recommendation for ‘a uniform resource rent tax imposed and administered by the Australian government’¹¹⁶ a case of hastening slowly on Henry’s part, of sowing the seeds for an expansion of the taxation of resource rents at a later date into economic rent more generally? If so, then:

- the ferocious opposition to the Resource Super Profits Tax,
- the removal of the Prime Minister Kevin Rudd in response,
- the development of the suitably anaemic compromise¹¹⁷ - the Minerals Resource Rents Tax - limited to iron ore and coal and as a consequence reducing the number of companies affected from 2500 to 320,¹¹⁸
- the lack of revenue the MRRT collected,

have all set the imposition of an effective minerals resource rent tax back years. The idea of extending rent taxes to other areas of the economy or even other resources has been banished to the cupboard of cowardly politics for perhaps decades. Intellectually, drawing on the ideas of the early political economists that rent is unearned income arising from monopoly, taxing economic rent is attractive but the political impediments to that are great. The failure of the Labor Party government to prosecute the resource rent tax agenda in the face of the fierce but predictable opposition of the mining company rentiers highlights the decline of Labor’s role as the party of social democracy imposing solutions on capitalists for the benefit of capital.¹¹⁹

¹¹⁵ John Freebairn, ‘Overview of “Australia’s Future Tax System”’ in Chris Evans, Richard Krever and Peter Mellor, *Australia’s Future Tax System: The Prospects After Henry* (Thomson Reuters 2010) 57.

¹¹⁶ Ken Henry et al, above n 1 (a), 90.

¹¹⁷ For a fuller discussion of this, see John Passant, above n 64.

¹¹⁸ Prime Minister, Deputy Prime Minister and Treasurer, Minister for Resources and Energy, ‘Breakthrough agreement with industry on improvements to resources taxation’ Press Release 2 July 2010 <<http://www.pm.gov.au/press-office/breakthrough-agreement-industry-resources-taxation>>.

¹¹⁹ John Passant, above n 64, 174-176.

IV CONCLUSION

Resource rent taxes and the proposed land tax are pincers in the movement towards taxing economic rent. The systemic drivers for such taxes will not diminish over time. They will increase. This will put the taxation of economic rent for both social democratic rhetorical reasons and revenue and redistributive reasons within capital more and more on the agenda.

However as the progress, or rather lack of it, towards the effective taxation of resource rents in Australia recently shows, starting with the grand vision of the Henry Tax Review and ending with the dog's breakfast of the MRRT, vested interests and those whose mantra is the unthinking chant of 'no new taxes' have combined to postpone rent tax reform in Australia for some time. Given the economic and societal pressures for reform this may be a case of winning the battle but losing the war; a holding operation if you like to stave off the inevitable.

The early political economists argued that unearned income was an impediment to the growth of capitalism. They pointed out that resource and land rents arise from the ultimate monopoly that is private ownership of land. These rents exist where the return to the landholder or exploiter of the land or minerals under it is greater than the minimum return necessary for the relevant activity to occur. Taxing such unearned gain can provide a real base for social spending as well as arguably increase the efficiency of the system. The paper has I hope explained the background to the ideas of rent and economic rent to help readers understand current rent tax reform debates in Australia and argue for the future by drawing on the past.



COMPARING THE GAARS UNDER THE INCOME TAX AND GST SYSTEMS

LOUISA HUANG*

ABSTRACT

Roughly 20 years has passed between the introduction of Part IVA of the Income Tax Assessment Act 1936 and Division 165 of the A New Tax System (Goods and Services Tax) Act 1999, being the general anti-avoidance rules (GAARs) for the Australian income tax and GST systems respectively. A quick glance at the respective structures for the GAARs reveals some large differences, suggesting that the drafting of the GST GAAR has benefited from the system's experience with Part IVA. This paper examines these structural differences and analyses for substantive points of distinction, focusing on the central aspects of the purpose test (for income tax) and the principal effect test (for GST). Once it has been established that the principal effect test under the GST GAAR provides for a clearer scope compared with its income tax cousin, the paper goes on to consider the likely outcome in selected cases that applied Part IVA. This analysis takes on a greater significance in the context of the Commonwealth Treasury present review of the income tax system's anti-avoidance provisions with the recent introduction of the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 which proposes to counter the weakness surrounding the identification of a tax benefit. While the purpose test is not part of the present scope of that review, this does represent the first review of Part IVA since its introduction. Coupled with calls from the profession and other stakeholders, these circumstances give rise to the prospect that the subsequent formal review will be expanded in scope to consider all aspects of Part IVA. Such a review is likely to draw upon the experience with the GST GAAR in reforming Part IVA's provisions. This paper, then, will provide a preliminary assessment of that relationship.

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I INTRODUCTION

The general anti-avoidance rules (GAARs) have become of central importance to the operation of Australian taxation.¹ Tax avoidance occurs when, despite having followed the black letter of the law, a taxpayer minimises their tax liability in a way that is inconsistent with the intent of the main tax provisions.² As a result, it is recognised that there is a need for Parliament to legislate against unforeseen tax avoidance arrangements³ that ‘would otherwise not be caught’.⁴ Justice Sackville has expressed the view that ‘no Parliament, of whatever political complexion, can be expected to tolerate indefinitely the drain on revenue that flow from a widespread and successful use of blatant tax avoidance schemes’.⁵ As a result, the anti-avoidance measures aim to prevent this type of mischief and to provide a framework for a fairer tax system.

It is recognised that the GARRs are necessary to deter taxpayers from committing tax avoidance and in the context of Part IVA, the application of the GAAR depends on ‘the particular means adopted’ by the taxpayer⁶. Further, in an attempt to strike down tax avoidance the legislature has enacted specific and general anti-avoidance provisions. The GARRs are expressed in broad terms and will often cause frustration when attempting to determine the distinction between legitimate tax planning and illegitimate tax avoidance.⁷ This potential problem is exacerbated by the need to use the GAARs to reconcile competing taxpayer and revenue objectives.⁸

The role of the GAARs is to strike down tax avoidance arrangements when the primary provisions fail to achieve their intended purpose when properly interpreted and applied.⁹ As such, they are implemented to act as a supplement to the primary taxing provisions to ensure the effectiveness of the primary provisions when in the eyes of the law the primary provisions fail to achieve their purpose.¹⁰

¹ Justice Ronald Sackville, ‘Avoiding Tax Avoidance, The Primacy of Part IVA’ (2004) 39 *Taxation in Australia*, 298.

² G T Pagone, ‘Part IVA: The General Anti-Avoidance Provisions in Australian Taxation Law’ (2003) 27 *Melbourne University Law Review* 770, 771.

³ Graeme Cooper, ‘International Experience with General Anti-Avoidance Rules’ (2001) 54 *Southern Methodist University Law Review* 83, 83.

⁴ Pagone, above n 2, 771.

⁵ Sackville, above n 1, 298.

⁶ *FCT v Spotless Services Limited* (1996) 186 CLR 404, 423.

⁷ Stephen Barkoczy, ‘The GST General Anti-Avoidance Provisions – Part IVA with a GST Twist?’ (2000) 3 *Journal of Australian Taxation* 35, 37.

⁸ Maurice Cashmere, ‘Towards an Appropriate Interpretative approach to Australia’s General Tax Avoidance Rule – Part IVA’ (2006) 35 *Australian Tax Review* 231, 231.

⁹ G T Pagone, ‘Where are we with Part IVA? Current Issues Involving Part IVA’ (2007) *The Victorian Bar*
<<http://www.vicbar.com.au/GetFile.ashx?file=BarAssocTaxFiles%2FWhere+are+we+with+part+IVA+Web+site+version+27.03.07.doc>>.

¹⁰ G T Pagone, ‘Tax Planning or Tax Avoidance’ (2000) 29 *Australian Tax Review* 96, 96.

The outcome of a tax consequence is imperative when determining whether the GAARs will have any application. In every day ordinary commercial dealings, taxpayers are encouraged to ensure that the shape and form¹¹ of their transaction will not be caught by the GAARs. Although, the courts have recognised that based on revenue considerations, it is generally expected that taxpayers will choose one particular scheme over another.¹²

Approximately 20 years has passed since the introduction of Part IVA of the *Income Tax Assessment Act 1936* (ITTA 1936) and Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). It is therefore now a ripe time for a comparison between the two parts. This paper will examine the structural differences between the two parts while focusing on the central components of the purpose test in the ITTA 1936 and the principal effect test in the GST Act.

The first section will provide a discussion of the predecessor to Part IVA, namely s 260 (ITAA 1936) and an overview of the introduction of both Part IVA and Division 165. It will then proceed to provide an analysis of a dominant purpose and the principal effect test and then consider in detail how each part should be determined. Following this analysis is an assessment of the eight comparable factors contained in each part and an emphasis is placed on the similarities and differences. Finally, an evaluation of the likely outcome in selected cases that have applied Part IVA is discussed.

II GENERAL ANTI-AVOIDANCE RULES IN AUSTRALIAN TAXATION

A Section 260

The predecessor to Part IVA is s 260¹³ and evolved for almost 50 years. The application of the then anti avoidance provision was not a discretionary election by the Commissioner but was instead self-executing.¹⁴ The application of the provision aimed to apply to every contract, agreement or arrangement to the extent that it had, or purported to have specific tax purposes. In *Newton v Federal Commissioner of Taxation* ('*Newton's Case*'),¹⁵ the Privy Council explained that the arrangement was to be looked at by the overt acts through which the transaction was implemented. The determining focus was whether it was implemented in such a way as to avoid tax.¹⁶ This came to

¹¹ Justice Graham Hill, 'GST Anti-Avoidance – Division 165' (1999) 4 *Journal of Australian Taxation* 295, 296.

¹² *FCT v Spotless Services* (1996) 186 CLR 404, 416 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

¹³ *Income Tax Assessment Act 1936* (Cth).

¹⁴ Barbara Smith, 'Part IVA – A Tiger, or Toothless?' (1994) 4 *Revenue Law Journal* 6, 165.

¹⁵ *Newton v FCT* (1958) 98 CLR 1.

¹⁶ *Newton v FCT* (1958) 98 CLR 1, 8-9 (Viscount Simonds, Lord Tucker, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning).

mean that the test would not apply to transactions that were purported to be ordinary, such as business or family dealings.¹⁷

It was in this case that Lord Denning MR endorsed the predication doctrine.¹⁸ The predication test involved a consideration of the objective purpose of a particular transaction to ascertain objectively the purpose of that transaction. It did not involve a consideration of the actual motive or purpose of the participants to an arrangement. A further doctrine that the courts endorsed in the application of s 260 was the choice principle.¹⁹ This principle allowed a taxpayer to choose freely any form of transaction that was subject to the literal reading of the legislation so that it would not contravene s 260.²⁰

Section 260 was ultimately rendered ineffective as it posed significant difficulties for an effective and efficient application of the provision to tax avoidance arrangements. This was largely due to the fact that the section was read down by the courts and given a narrow interpretation. In particular, the difficulty lay in the application of the predication test and the choice principle. In addition, it was also troubled by the fact that if the section was to be construed literally it would have been applicable to almost every transaction. The transactions that it sought to apply to included those that reduced the income of a taxpayer, irrespective of whether they had entered into the arrangement voluntarily or for value.²¹ Ultimately, Kitto J expressed the view that s 260 was ‘long overdue for reform’.²²

Having suffered much criticism and difficulty in construing a proper meaning to the terms in s 260 the section was replaced with Part IVA which was introduced to overcome the weakness of the predication test. In effect, the legislature used the predication test in *Newton’s Case* as a model for Part IVA although unlike s 260, Part IVA was developed so that it would not be self executing and instead, discretionary. The adoption of the predication test in *Newton’s Case* was expressed in the Explanatory Memorandum²³ and it was explained ‘the test in s. 177D effectuates a position to counter tax avoidance akin to that in the decision of *Newton*’. It is for this reason that the predication test is still relevant in the Australian tax system today.²⁴

B Part IVA and Division 165

Parliament has enacted Part IVA and Division 165 to combat arrangements that are of a tax avoidance nature. The provisions are specifically designed to apply to transactions

¹⁷ *Hancock v FCT* (1961) 108 CLR 258.

¹⁸ *Newton v FCT* (1958) 98 CLR 1, 8.

¹⁹ *WP Keighery Pty Ltd v FCT* (1957) 100 CLR 66.

²⁰ *Slutzkin v FCT* (1977) 140 CLR 314, 319 (Barwick CJ).

²¹ *FCT v Purcell* (1920) 29 CLR 464, 466 (Knox CJ).

²² *Newton v FCT* (1958) 98 CLR 1 (Kitto J).

²³ Explanatory Memorandum, Income Tax Laws Amendment Bill (No.2) 1981 (Cth), 9553.

²⁴ G T Pagone, *Tax Avoidance in Australia* (Federation Press, 2010), 128.

that may not have been contemplated at the time of enacting the provisions. It is the requirement of assessing the relevant ‘purpose’²⁵ as determined by an evaluation of specific factors that creates uncertainty and unpredictability in the application of either of the GAARs.²⁶ This in turn has produced an enormous amount of doubt on taxpayers, advisers and the Commissioner when deciding whether the provisions should apply to the tax arrangements. Consequently, it is inimical to taxpayers in the planning of their business and private transactions²⁷.

As compared to s 260, Part IVA has been given a broad operation so that it is capable of allowing the Commissioner to strike down any transaction that purports to provide a tax benefit. Part IVA is not however subject to the same limitations as s 260. This was demonstrated in *Federal Commissioner of Taxation v Spotless Services Ltd* (‘*Spotless Services*’),²⁸ as the High Court specifically explained that Part IVA would be ‘construed and applied according to its terms, not under the influence of muffled echoes of old arguments concerning other legislation’.²⁹

The Explanatory Memorandum³⁰ makes it clear that Part IVA will not apply where a taxpayer has entered into a transaction for the purpose of a family business or normal business. In the Treasurer’s Second Reading Speech³¹ the policy of Part IVA was described to strike down ‘blatant, artificial and contrived’ arrangements. This is comparable to Division 165, although s 165-1, GST Act specifically enshrines the policy objective that the provision ‘is aimed at artificial or contrived schemes’.

Since Part IVA was enacted in 1981, it has been known as a provision of last resort.³² The provision is only applicable where under the other provisions of the ITAA 1936 a taxpayer’s arrangement is found to be soundly based, that is, the intended legal effect of the arrangement is on its face, effective.³³ As a result, Part IVA serves to confer upon the Commissioner a wide discretion to cancel or reconstruct³⁴ a taxpayer’s tax arrangement so that it may be ‘fair and reasonable’³⁵. This occurs if the obtaining of a tax benefit is established as the dominant purpose of the transaction. In addition, s 177C(2), ITAA 1936 also recognises that taxpayers are entitled to and should take advantage of any tax benefits that can be obtained by the provisions in the tax

²⁵ Grame Cooper, ‘The Emerging High Court Jurisprudence on Part IVA’ (2006) 9 *The Tax Specialist* 234, 241.

²⁶ G T Pagone, ‘Anti-avoidance Provisions and Tax Reform’ (2001) 30(2), *Australian Tax Review* 80, 82.

²⁷ *Ibid.*

²⁸ *FCT v Spotless Services Limited* (1996) 186 CLR 404.

²⁹ *Ibid.* 414.

³⁰ Explanatory Memorandum, Income Tax Laws Amendment Bill (No 2) 1981 (Cth), 9553.

³¹ Second Reading Speech, Income Tax Laws Amendment Bill (No 2) 1981 (Cth), 2648.

³² See Keith Kendall, ‘The Structural Approach to Tax Avoidance in Australia’ (2006) 9 *The Tax Specialist* 290, 291.

³³ *Ibid.* 290.

³⁴ *Income Tax Assessment Act 1997* (Cth) s 177F.

³⁵ G Hart and J Sekhon, *Barrett & Green’s Principles of Income Taxation* (Law Book Company, 5th ed, 1996).

legislation. This is primarily because taxpayers are able to enter into transactions as provided by the elections³⁶.

An application of Part IVA requires the Commissioner to exercise his discretion³⁷ by making a determination to apply Part IVA in order to reverse or cancel a tax benefit. Before Part IVA will apply, three pre-conditions must be established. There must be a scheme³⁸ entered into, commenced or carried out after 27 May 1981, a tax benefit that has or would but for s 177D be obtained by the taxpayer in connection with the scheme³⁹ and the scheme must have been entered into for the dominant purpose of enabling a taxpayer to obtain a tax benefit.⁴⁰ Whether or not there was a dominant purpose is determined according to the specific eight factors as listed in s 177D(b)⁴¹, ITAA 1936. It is the need to establish a dominant purpose through an evaluation of findings of fact against the eight objective matters that requires a judgmental decision and creates a range of different views.⁴²

Division 165 was part of the original legislation implementing the GST and is designed to combat arrangements that produce tax consequences. This includes for example, an increase in input tax credits, the creation of a variation in the time in which GST should be paid or when refunds should be due and transactions that are shaped in a way to reduce a taxpayer's GST.

As Part IVA has been used as a model for Division 165,⁴³ these provisions bear many similarities to those in Part IVA,⁴⁴ however there are some differences. Of significance is the similarity in the need for three pre-conditions to be satisfied by the Commissioner when exercising his discretion.⁴⁵ These are, the existence of a scheme,⁴⁶ the taxpayer must have obtained a GST benefit in connection with the scheme⁴⁷ and that there is a conclusion of either the sole or dominant purpose of an entity obtaining the GST benefit

³⁶ *Income Tax Assessment Act 1997* (Cth) 177C(2).

³⁷ *Income Tax Assessment Act 1997* (Cth) s 177F.

³⁸ *Ibid* s 177A.

³⁹ *Ibid* s 177C(1). Whether a tax benefit has been obtained has been analysed before determining whether there is a dominant purpose. See *Commissioner of Taxation v Futuris Corporation Limited* [2012] FCAFC 32. Cf *Macquarie Bank Limited v Commissioner of Taxation* [2011] FCA 1076 and the Commissioner's appeal was dismissed by the Full Federal Court, see *Commissioner of Taxation v Macquarie Bank Limited* [2013] FCAFC 13. The recent introduction of the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013* (Cth) proposes to ensure that the assessment of tax benefit and dominant purpose are assessed together, thus preventing an analysis of tax benefit as a gateway to assessing dominant purpose.

⁴⁰ *Ibid* s 177A(5).

⁴¹ *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 226.

⁴² Richard Edmonds, 'Part IVA & Anti-Avoidance – Where are we now?' (2003) 6 *The Tax Specialist* 96, 96.

⁴³ Barkoczy, above n 7, 35.

⁴⁴ *Ibid*.

⁴⁵ Hill, above n 11, 301.

⁴⁶ *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-10(2).

⁴⁷ *Ibid* s 165-10(1)(a)-(d).

from entering into the scheme or part of the scheme or that the principal effect of the scheme or part of it is a GST benefit.⁴⁸

Comparable to s 177D(b), ITAA 1936 is the requirement to take into account a list of factors⁴⁹ so that it is reasonable to conclude that there is a conclusion of a dominant purpose or principle effect for the obtaining of the GST benefit. In Division 165, though, instead of eight specific criteria there are twelve. This is one of the most apparent differences between Part IVA and Division 165 as the list of factors includes a consideration of ‘the GST Act and other provisions’,⁵⁰ ‘any other relevant circumstances’,⁵¹ and ‘the circumstances surrounding the scheme’.⁵² The last two factors are defined rather broadly and potentially extend beyond the eight factors contained in s 177D(b), ITAA 1936 to include a range of other considerations. Another apparent difference is that the evaluation of a conclusion of dominant purpose can in the alternative be a conclusion as to the principal effect⁵³.

Section 165-12(2), GST Act corresponds with s 177A(5), ITTA 1936 in that the matters operate with part of the scheme in the same manner that they apply to a scheme. In both Part IVA and Division 165, if the three pre-conditions are satisfied, the Commissioner may choose to negate the benefits, make compensatory adjustments and impose penalties.⁵⁴

III A DOMINANT PURPOSE OR PRINCIPAL EFFECT

A Part IVA

Once the first two pre-conditions in Part IVA⁵⁵ are established, the critical issue is to determine whether there was the relevant dominant purpose, subject to the matters listed in s 177D(b), ITAA 1936 and the particular circumstances of the case. While s 177D(b), ITAA 1936 is similar to the predication test in *Newton’s Case*⁵⁶ the requisite focus is not on the transaction itself but on the dominant purpose of a taxpayer having entered into the scheme.

It has been recognised by the High Court in *Spotless Services*⁵⁷ that the conclusion of a dominant purpose is the lynchpin of Part IVA. The court expressed the view that ‘the

⁴⁸ Ibid s 165-5(1)(c).

⁴⁹ Ibid s 165-15(1)(b).

⁵⁰ Ibid s 165-15(1)(c).

⁵¹ Ibid s 165-15(1)(k).

⁵² Ibid s 165-15(1)(l).

⁵³ Hill, above n 11, 305.

⁵⁴ *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 164-40, s 164-45; *Taxation Administration Act 1953* (Cth) Subdivision 284-C, Schedule 1; *Income Tax Assessment Act 1997* (Cth) s 177F(1) and (3).

⁵⁵ *Income Tax Assessment Act 1997* (Cth), ss 177A and 177C.

⁵⁶ Pagone, above n 2, 779.

⁵⁷ *FCT v Spotless Services Limited* (1996) 186 CLR 404.

making of such a determination is the pivot upon which the operation of Part IVA turns'.⁵⁸

B Division 165

The conclusion to be drawn as to the taxpayer's purpose under Division 165 includes the dominant purpose test and is extended to include the principal effect test, which has no equivalent in Part IVA. As the dominant purpose test and the principal effect test are alternatives, it is sufficient if only one of these is satisfied. It is still possible and acceptable, though, if they both apply. Both the dominant purpose test and the principal effect test are applied in Division 165 cases and are evaluated in turn.

Section 165-5(1)(c)(i), GST Act states that the conclusion as to purpose is that an entity, alone or with others, entered into or carried out the scheme, or a part of it, with the *sole or dominant purpose* of itself or another entity obtaining a GST benefit from the scheme⁵⁹. This test is similar to s 177D(b), ITAA 1936 as it requires an assessment of the purpose of the participants to the scheme with a dominant purpose of securing a tax benefit.

Alternatively, s 165-5(1)(c)(ii), GST Act provides that the conclusion reached can also be the principal effect of the scheme or part of the scheme so that an entity receives the GST benefit from the scheme or part thereof, either directly or indirectly. Reaching a conclusion for the principal effect test must also be determined by reference to a reasonable conclusion drawn from a consideration of the twelve factors contained in s 165-15(1), GST Act.

While the Explanatory Memorandum explained that the test for principal effect was the dominant effect and not merely the incidental effect,⁶⁰ it failed to explain the exact difference between dominant purpose and principal effect. It did, however, explain that the principal effect test was different to the dominant purpose test. This was to the extent that it specifically applied to the taxpayer and the GST benefit that was obtained by a taxpayer. In order to gain a better understanding of what the difference may be, the Commissioner has issued a Practice Statement⁶¹ which has identified that the principal effect test is based on the result of a scheme and the consequence of the transaction.⁶²

For this reason, the principal effect test is different from the conclusion for dominant purpose as it does not require a conclusion of the objective purpose of the participants

⁵⁸ Ibid 413.

⁵⁹ The definition of entity can be found in *Income Tax Assessment Act 1997* (Cth) s 184-1 which defines 'entity' to include individuals, corporations, partnerships, unincorporated associations, trusts and superannuation funds.

⁶⁰ Explanatory Memorandum, A New Tax System (Tax Administration) Bill (No 2) 2000 (Cth), [1.95].

⁶¹ Australian Tax Office, Practice Statement Law Administration, PS LA 2005/24. 'Tax Avoidance Conclusion, paragraph 165-5(1)(c) and section 165-15 of the GST Act'.

⁶² Ibid, 177.

to the scheme. To that end, when referring back to the predication test that was enunciated in *Newton's Case* where the Privy Council described the purpose of an arrangement as 'the effect which it is sought to achieve'.⁶³ It appears that the current test of the principal effect is most similar to what was required by s 260.⁶⁴

In the context of s 260, Williams J stated in *Newton's Case*⁶⁵ that 'purpose or effect' were alternatives, however, they did not appear to have any real difference in meaning. On appeal, the Privy Council expressed the view that purpose and effect were not similar, although it was explained that 'effect' indicated the end that was accomplished or achieved. A similar explanation was given which suggested that purpose was the result aimed at and effect was the result achieved.⁶⁶ In considering both of these views, it has been expressed that there may well be a difference between the purpose and effect of the scheme.⁶⁷

In the view of the AAT in *Case 3/2010*,⁶⁸ it was considered that the enquiry into the principal effect of the scheme or part of the scheme involved a consideration of 'from whose perspective is the effect measured' and 'what is the effect that is to be measured'.⁶⁹ Encompassing the view expressed in the Explanatory Memorandum and s 165-5 and s 165-15, GST Act, the AAT embraced the view that the focus would be on the participants who implemented the scheme. This is primarily if the participants attracted the GST liability or would have attracted the GST liability but for the scheme. It clearly rejected the need to conduct the principal effect test 'from the perspective of the representative taxpayer'.⁷⁰

On this basis, the tribunal lay down the view that not all of the twelve factors as set out in s 165-5(1), GST Act were relevant for consideration of the principal effect test. It was found that factors concerning the manner in which the scheme was entered into,⁷¹ the purpose of the GST Act,⁷² the timing and period of the scheme,⁷³ the nature of the connection between the taxpayer and other parties to the scheme,⁷⁴ any other relevant circumstance⁷⁵ and other circumstances surrounding the scheme⁷⁶ did not provide for an assessment of the effect of the scheme.

⁶³ *Newton v Commissioner of Taxation* (1958) 98 CLR 1.

⁶⁴ Barkoczy, above n 7, 40.

⁶⁵ *Newton v Commissioner of Taxation* (1958) 98 CLR 1 (Williams J).

⁶⁶ *Insomnia (No 2) Pty Ltd v FCT; Insomnia (No 3) Pty Ltd v FCT* (1986) 84 FLR 278, 290 (Murphy J).

⁶⁷ Barkoczy, above n 7, 49.

⁶⁸ *Case 3/2010* (2010) 76 ATR 917, 953 [149].

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, 954 [151].

⁷¹ *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-5(1)(a).

⁷² *Ibid* s 165-5(1)(c).

⁷³ *Ibid* s 165-5(1)(d)(e).

⁷⁴ *Ibid* s 165-5(1)(j).

⁷⁵ *Ibid* s 165-5(1)(k).

⁷⁶ *Ibid* s 165-5(1)(l).

At the other end, the effect of the scheme could be considered in light of the form and substance of the scheme,⁷⁷ any change in the taxpayer's position,⁷⁸ whether or not there was a GST benefit⁷⁹ and the change in the financial position of connected entities⁸⁰ as these factors touched on the effect of the scheme. In considering these factors, the AAT explained that the conclusions that were reached in considering the dominant purpose of a scheme were equally applicable under the principal effect test. Once the relevant matters were evaluated and the effect of the scheme was measured, a conclusion as to whether Division 165 applied could be determined.

IV DETERMINING A DOMINANT PURPOSE OR PRINCIPAL EFFECT CONCLUSION

When Part IVA and Division 165 were respectively enacted, the legislature did not explain how the factors should be construed in order to ascertain a conclusion as to dominant purpose or principal effect. It also did not provide an explanation on what the required standard was for a conclusion of dominant purpose or principal effect.⁸¹

A comparison of the established propositions dealing with the proper construction and application of dominant purpose as enunciated by the courts in regards to Part IVA is relevant and necessary for the interpretation of s 165-15(1)(b).⁸² In *Re VCE and Federal Commissioner of Taxation* ('*Re VCE*'),⁸³ SA Forgie embraced the view that where the provisions are comparable, then to that extent the provisions in Division 165 are to be considered in the same way as Part IVA.

A *Standard of Conclusion*

Section 177D(b) requires that 'it would be concluded' that the dominant purpose of a person who entered into or carried out the scheme did so to enable a taxpayer to obtain a tax benefit. The use of the word 'would' rather than 'could' or 'might reasonably' appears to set a high standard of satisfaction. It does not need to be shown that the taxpayer who obtained the tax benefit had a subjective purpose or that the relevant purpose was involved in the whole scheme, it only needs to be found that there was 'a tax benefit'.⁸⁴

It is through an objective consideration of the eight relevant matters that the determining factor is not in fact the actual purpose of a taxpayer, but rather, how that

⁷⁷ Ibid s 165-5(1)(b).

⁷⁸ Ibid s 165-5(1)(g).

⁷⁹ Ibid s 165-5(1)(f).

⁸⁰ Ibid s 165-5(1)(h).

⁸¹ Hill, above n 11, 301.

⁸² Barkoczy, above n 7, 49.

⁸³ (2006) 63 ATR 1249, 1290 [153].

⁸⁴ *Income Tax Assessment Act 1997* (Cth) s 177D.

purpose was achieved.⁸⁵ This was explained by the court in *Spotless Services*⁸⁶ that in relation to the dominant purpose of a person or one of the persons who carried out the scheme or any part of it, the conclusion is that of ‘a reasonable person’. In the context of Division 165, the relevant standard for the conclusion to be reached must be what is ‘reasonable to conclude’. This suggests that the required conclusion should be assessed objectively and not subjectively.

In the context of Part IVA, the relevant conclusion is ‘of a reasonable person’⁸⁷ and in the context of Division 165 the legislation spells out ‘a reasonable person’⁸⁸. It has been pointed out that it appears that this slight difference in wording has no practical effect⁸⁹.

B Having Regard to the Eight/ Twelve Factors Inclusive

The interpretation or application of Part IVA concerns only an application according to its own terms,⁹⁰ that is, there is no basis whatsoever to introduce any additional factors other than what has already been described in s 177D(b), ITAA 1936; the reason being that these factors are intended to be exhaustive.

Gummow and Hayne JJ have explained that the question posed by s 177D(b), ITAA 1936 is whether ‘having regard to all’ of the eight factors, it is reasonable to conclude that any of the persons who entered into or carried out the scheme, or any part of the scheme, did so for the sole or dominant purpose of enabling the relevant taxpayer to obtain a tax benefit.⁹¹ This proposition is also applicable in the context of Division 165.⁹²

C Timing of the Dominant Purpose/ Principal effect

In both Part IVA and Division 165 ‘the time for testing the dominant purpose must be the time at which the scheme was entered into or carried out and by reference to the law as it then stood’.⁹³ On the same point, the objective test of dominant purpose should be assessed at the time in which the taxpayer entered into or carried out the scheme or part of the scheme.⁹⁴

⁸⁵ G T Pagone, ‘Part IVA – The Voyage Continues’ (2006) 10 *The Tax Specialist* 36, 37.

⁸⁶ *FCT v Spotless Services Limited* (1996) 186 CLR 404.

⁸⁷ *Ibid* 422 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

⁸⁸ *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-5(1)(c).

⁸⁹ Pagone, above n 25, 150.

⁹⁰ *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 239 (Gummow and Hayne JJ).

⁹¹ *Ibid* 252.

⁹² *Case 3/2010* (2010) 76 ATR 917, 947 [115].

⁹³ *CPH Property Pty Ltd v Commissioner of Taxation* (1998) 88 FCR 21, 42.

⁹⁴ *Commissioner of Taxation v Mochkin* (2003) 127 FCR 185, 199; *Vincent v Commissioner of Taxation* (2002) 124 FCR 350, 372; *CPH Property Pty Ltd v Commissioner of Taxation* (1998) 88 FCR 21, 42.

D An Objective Focus

In the context of Part IVA it has been established that the enquiry into a taxpayer's purpose is to be objectively ascertained by the factors listed in s 177D(b), ITAA 1936⁹⁵ and not an enquiry into the purpose of the scheme itself.⁹⁶

A taxpayer's actual subjective purpose or motivation is also irrelevant as it is not one of the eight matters specified.⁹⁷ The objective analysis identifies the scheme in which Part IVA may eventually apply and considers the conclusion that a person would reach if they directed their attention to the eight matters as set out in the s 177D(b).⁹⁸ In any case, this provision will still be applied even if it is found that a taxpayer had no actual purpose of tax avoidance.⁹⁹

What is relevant in determining the dominant purpose is an objective assessment of the eight factors as listed in s 177D(b) to draw out a conclusion that will impute or attribute that a taxpayer entered into the arrangement to obtain a tax benefit. In the joint judgment of *Spotless Services*¹⁰⁰ it was made clear that the eight factors are posited as objective facts¹⁰¹.

Subsequent cases have supported the requirement of ascertaining an objective purpose and not a subjective purpose. The issue that was to be determined in these cases was whether it was necessary to have regard to the subjective purpose of a taxpayer when contemplating s 177D(b). A clear illustration of this is in *Eastern Nitrogen v Federal Commissioner of Taxation* (2001) ('*Eastern Nitrogen*')¹⁰² where Drummond J was considered to have taken subjective purpose into account and this was found to be incorrect by the Full Federal Court.¹⁰³ In further cases such as *Federal Commissioner of Taxation v Metal Manufactures* (2001) ('*Metal Manufactures*'),¹⁰⁴ *Commissioner of Taxation v Consolidated Press Holdings* (2001) ('*Consolidated Press Holdings*')¹⁰⁵ and *Commissioner of Taxation v Sleight* (2004) ('*Sleight*')¹⁰⁶ the courts accepted that that the actual subjective purpose of a taxpayer was irrelevant and the conclusion depended only on the objective factors.

⁹⁵ *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 263.

⁹⁶ *FCT v Spotless Services Limited* (1996) 186 CLR 404, 406.

⁹⁷ *Ibid* 409; *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 243 (Gummow and Hayne JJ); *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235; *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 229 (Hill J).

⁹⁸ Pagone, above n 2, 82.

⁹⁹ *Peabody v FCT* (1993) 40 FCR 531, 543; *FCT v Spotless Services Limited* (1996) 186 CLR 404, 421-422 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

¹⁰⁰ *Commissioner of Taxation v Spotless Services Limited* (1996) 186 CLR 404.

¹⁰¹ *Ibid* 421.

¹⁰² *Eastern Nitrogen v FCT* (2001) 108 FCR 27.

¹⁰³ *Ibid* 44.

¹⁰⁴ *FCT v Metal Manufactures* (2001) 108 FCR 150, 162.

¹⁰⁵ *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 263 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

¹⁰⁶ *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 253 (Carr J).

This proposition is also applicable to Division 165 and was applied in *Case 3/2010*.¹⁰⁷ The AAT recognised that based on the principles expressed by Gummow and Hayne JJ¹⁰⁸ the relevant enquiry was whether having regard to the twelve factors set out in s 165-15(1)(b), GST Act, it would be reasonable to conclude a sole or dominant purpose of the obtaining of a tax benefit by one of the persons¹⁰⁹. Thus, the conclusion reached in *Case 3/2010*¹¹⁰ was that s 165-15(1)(b), GST Act required a consideration of the twelve matters in relation to the taxpayers or any other person who entered into or carried out the scheme. In addition, in applying *Commissioner of Taxation v Hart* (2004) ('*Hart*')¹¹¹, the AAT found that it 'does not require or even permit, any inquiry into the subjective motives'.¹¹²

Based on the authorities, the fact that the subjective purpose under s 165-15(1)(b), GST Act of a taxpayer is irrelevant appears prima facie to be the case.¹¹³ However, in considering Division 165, another view has been expressed that subjective purpose could be brought in through the 'back door'.¹¹⁴ This is particularly if it can be assumed that the subjective state of mind is a 'circumstance'.¹¹⁵ With this in mind, if the subjective purpose were indeed GST avoidance then it would be difficult to reach a conclusion that was not consistent with that actual purpose.

It has been recognised that the 'difference between the actual purpose of a taxpayer...and the purpose which is to be imputed to the taxpayer based upon an exclusive set of criteria...is not without subtlety and has been misunderstood before'.¹¹⁶ On this issue, in *Commissioner of Taxation v News Australia Holdings Pty Ltd* [2010] ('*News Australia Holding*'),¹¹⁷ the Commissioner put forward the argument that the Tribunal had erred in its acceptance of evidence from various witnesses. This was in relation to the restructuring of the 'no tax, no tax risk' and it was argued that as a result the Tribunal impermissibly took subjective purpose into account. The Full Federal Court found against the submission that the Tribunal had failed to apply the relevant legal principle correctly, explaining that the Tribunal had done so on the 'basis of objectively ascertainable evidence'.¹¹⁸ The consideration was undertaken by the evaluation of the manner in which the scheme was entered into or carried out¹¹⁹ and this was an objective factor as required by the Act.¹²⁰

¹⁰⁷ *Case 3/2010* (2010) 76 ATR 917, 948 [115].

¹⁰⁸ *Commissioner of Taxation v Hart* (2004) 217 CLR 216 (Gummow and Hayne JJ).

¹⁰⁹ *Case 3/2010* (2010) 76 ATR 917, 947 [115].

¹¹⁰ *Ibid.*

¹¹¹ *Commissioner of Taxation v Hart* (2004) 217 CLR 216.

¹¹² *Ibid* 243 (Gummow and Hayne JJ).

¹¹³ Barkoczy, above n 7, 49.

¹¹⁴ Hill, above n 11, 304.

¹¹⁵ *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-15(1)(k)(l).

¹¹⁶ *Commissioner of Taxation v Zoffanies Pty Ltd* (2003) 132 FCR 523, 545.

¹¹⁷ *Commissioner of Taxation v News Australia Holdings Pty Ltd* (2010) 79 ATR 461.

¹¹⁸ *Ibid* 470.

¹¹⁹ *Income Tax Assessment Act 1997* (Cth) s 177D(b)(i).

¹²⁰ *Commissioner of Taxation v News Australia Holdings Pty Ltd* (2010) 79 ATR 461, 473.

E A Wide Commercial Goal

The mere fact that a scheme is carried out with an overall commercial gain of securing a profit, that the GST benefit has a non-tax commercial outcome or that the arrangement is an ordinary business transaction and tax driven does not save a taxpayer from the application of Part IVA or Division 165.¹²¹ As such, it will not be artificial and inappropriate to draw a conclusion as to a purpose of securing a tax benefit.¹²²

Both Part IVA and Division 165 are applicable if there is an overall commercial objective of the entire transaction as explicable by the scheme or part of the scheme.¹²³ In *Hart*,¹²⁴ it was made clear that the commercial goal of the transaction would be dominant if the arrangement that was pursued by a taxpayer to obtain a tax benefit was significantly artificial or contrived; or if the transaction had ‘no other explanation other than the fiscal consequences contrived by the particular form of the transaction.’¹²⁵

In *Spotless Services Ltd*,¹²⁶ the taxpayer put forward that a ‘rational commercial decision’ which shaped the transaction could not bear the finding of a dominant purpose. However, the joint judgment found that irrespective of the reason underlying the investment, Part IVA would apply to a commercially rational decision.¹²⁷ This was due to that fact it is generally undeniable that tax considerations lie at the heart of every business decision and that the form of transactions can and often will take many forms. As a result, tax considerations can influence a taxpayer’s decision to choose one type of transaction over another so that it is tax driven and a rational commercial decision. The court made it clear that an assessment of the ‘particular means’ adopted by the taxpayer to secure the commercial objective was necessary.¹²⁸ On the same point, Brennan CJ also recognised that ‘the mere presence of commerciality would not oust the operation of Part IVA’.¹²⁹

This finding was further supported and well demonstrated by the High Court in *Hart*¹³⁰ as significantly important. What was important in *Hart* was the difference in findings reached in the Full Federal Court and the High Court. In the Full Federal Court,¹³¹ it was found that the borrowing of the funds by the taxpayers to refinance one property and acquire another was to secure the borrowing and therefore had a wider commercial

¹²¹ *FCT v Spotless Services Limited* (1996) 186 CLR 404, 417; *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 243; *Case 3/2010* [2010] 76 ATR 917, 947 [114].

¹²² *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 264 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

¹²³ *Ibid.*

¹²⁴ *Commissioner of Taxation v Hart* (2004) 217 CLR 216.

¹²⁵ *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 228 (Gleeson CJ and McHugh J).

¹²⁶ *FCT v Spotless Services Limited* (1996) 186 CLR 404.

¹²⁷ *Ibid* 416 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 227-228.

¹³¹ *Hart v Commissioner of Taxation* (2002) 121 FCR 206.

objective.¹³² This meant that the court could not reach a conclusion that the dominant purpose was for a tax benefit.¹³³ When the matter was heard in the High Court, the decision in the Full Federal court was overturned. Their Honours explained the same kind of proposition, that seeking a wider commercial objective is not the antithesis of a purpose of seeking a tax benefit.¹³⁴ Justices Gummow and Hayne indicated that in that particular case the elements comprising the scheme could only be explicable by the tax consequences obtained by the taxpayers.¹³⁵

The divergence between the findings in the Full Federal Court and the High Court highlights the need to analyse the particular means that are adopted by a taxpayer to achieve a commercial objective. It is the steps of the scheme in the transaction with which the evaluation is concerned. If it is found that there are steps involved in the scheme that have no other commercial explanation other than a tax benefit, the conclusion reached is more likely to be directed towards a dominant purpose. However, if a taxpayer pays less tax through the implementation of one transaction over another, it will not indicate a dominant purpose conclusion.¹³⁶

In *Macquarie Finance Ltd v Federal Commissioner of Taxation* (2005) (*Macquarie Finance*)¹³⁷ a case heard after *Hart*, Hely J expressed the view that it was inappropriate to point to the commercial end of a scheme in answering the question posed by s 177D, ITAA 1936. However, it was important to consider commercial considerations in relation to the factor of ‘consequences for the taxpayer’¹³⁸ as contained in the eight objective factors.

F Global Assessment

Both s 177D(b), ITAA 1936 and s 165-15(1), GST Act do not identify how the eight and twelve factors respectively should be weighed against each other nor do they explain the possible effect of a conclusion that should be made. The reason why each of the eight (and twelve) factors must be considered is to identify and evaluate the particular purpose from the scheme which ultimately needs to be discerned.¹³⁹

Part IVA and Division 165 call for a global assessment of the eight factors¹⁴⁰ although each of the factors must be taken into account.¹⁴¹ It will not always be the case where each and every one of the factors point to a dominant purpose of a tax benefit and this particular point has been acknowledged by Hill J in *Peabody v Federal Commissioner*

¹³² Ibid 227-228.

¹³³ Ibid.

¹³⁴ *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 227.

¹³⁵ Ibid 245.

¹³⁶ *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 227 (Gleeson and McHugh JJ).

¹³⁷ *Macquarie Finance Ltd v FCT* (2005) 146 FCR 77, 132.

¹³⁸ *Income Tax Assessment Act 1997* (Cth) s 177D(b)(viii).

¹³⁹ Pagone, above n 25, 84

¹⁴⁰ *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 263-264 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

¹⁴¹ *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 229-230.

of Taxation.¹⁴² His Honour explained that in some cases the factors will point in one direction and the others in the opposite direction, what is necessary is ‘an evaluation of the matters alone or in combination’ in order to reach a conclusion based on s 177D, ITAA 1936.¹⁴³ Further it has been stated that the factors need not all point in the one direction for the provisions to be applied.¹⁴⁴

In other words, while each of the eight individual factors needs to be evaluated,¹⁴⁵ the fact that one or more of the factors may indicate an uninformative or unequivocal finding does not preclude a determination of dominant purpose and instead that factor will be regarded as neutral or irrelevant.¹⁴⁶ It is, therefore, an evaluation of these matters that will determine the requisite conclusion for dominant purpose.¹⁴⁷ The court in *Consolidated Press Holdings*¹⁴⁸ emphasised this point by explaining that when the Commissioner or court on appeal considers these matters, the manner in which it does so must have full regard to each and every one of the eight matters.¹⁴⁹

This approach has been adopted in *Citigroup Pty Ltd v Commissioner of Taxation* (2010) (*Citigroup Pty Ltd*),¹⁵⁰ where Edmonds J made it clear that any of the considerations of the factors that did not fall within the scope of the eight criteria could not be taken into account in drawing a conclusion. As a result, his Honour proceeded to analyse only five of the eight factors as the other three were not relevant but were instead regarded as neutral.¹⁵¹ Nevertheless, there will still be cases where each of the matters unequivocally point to tax avoidance.¹⁵²

In *Futuris Corporation Ltd v FCT* (2010) (*Futuris*),¹⁵³ the court assessed each of the eight factors contained in s 177D(b), ITAA 1936 and then proceeded to form a global assessment of the eight factors in order to draw out a conclusion as to whether or not there was a dominant purpose of securing a tax benefit by the applicant. Although Besanko J did not need to go through dominant purpose as he was not satisfied that a tax benefit was obtained in connection to the scheme. On this point, he expressed the view that had both of the first two pre-conditions been established, he would have found the first two factors contained in s 177D(b), ITAA 1936 of most relevance.¹⁵⁴

¹⁴² *Peabody v FCT* (1993) 181 CLR 359.

¹⁴³ *Ibid* 543.

¹⁴⁴ *Calder v FCT* (2005) 61 ATR 267, 292.

¹⁴⁵ *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 244 (Gummow and Hayne JJ); *Re VCE and FCT* [2006] AATA 821, 1275 [40] (SA Forgie).

¹⁴⁶ *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 244-245 (Gummow and Hayne JJ).

¹⁴⁷ *Metal Manufacturers Ltd v FCT* (1999) 43 ATR 375, 432 (Emmett J).

¹⁴⁸ *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235.

¹⁴⁹ *Ibid* 263-264.

¹⁵⁰ *Citigroup Pty Ltd v Commissioner of Taxation* (2010) 81 ATR 412. The decision of Edmonds J was upheld by the Full Federal Court. See *Commissioner of Taxation v Citigroup Pty Ltd* [2011] FCAFC 61.

¹⁵¹ *Ibid* 423.

¹⁵² *CC (New South Wales) Pty Ltd (in liq) v FCT* (1997) 34 ATR 604, 630.

¹⁵³ *Futuris Corporation Ltd v Commissioner of Taxation* (2010) 80 ATR 330.

¹⁵⁴ *Ibid* 364.

G A Sole or Dominant Purpose/ Principal Effect

Purpose is stated in s 177D and this has been clarified in *Spotless Services*¹⁵⁵ that application of Part IVA requires that a person entered into the scheme or carried out the scheme or any part of the scheme for the ‘sole or dominant purpose’ of obtaining a tax benefit in connection with the scheme.

The High Court¹⁵⁶ explained that the dominant purpose conclusion to be reached is ‘the ruling, prevailing, or most influential purpose’.¹⁵⁷ As a result, where an arrangement produces a number of purposes or effects, then the assessment will focus primarily on the most principal and significant purpose or effect.¹⁵⁸

In the context of Division 165, in *Case 3/2010*¹⁵⁹ the AAT also adopted and applied this proposition and presumably this can also apply in reaching a conclusion as to principal effect.¹⁶⁰

H The Counterfactual

The court has recognized that when assessing dominant purpose, a comparison of the scheme that was entered into and an alternative postulate should be considered to determine what ‘other possibilities existed’.¹⁶¹ In effect, this requires a consideration of other ways in which the scheme could have been entered into in order to obtain the same commercial objective that the taxpayer received. This allows for an investigation into the scheme itself and whether there are certain elements within the scheme that are solely for the purpose of securing a tax benefit.

This point was identified in *Federal Commissioner of Taxation v Peabody* (1994) (*Peabody*).¹⁶² The court explained that any prediction of an alternative manner in which the scheme could have been carried out must be, at the least, more than just a possibility and should be ‘sufficiently reliable for it to be regarded as reasonable’.¹⁶³

In *Hart*¹⁶⁴ it was explained by the court that to draw a conclusion of dominant purpose required an inquiry into the eight factors in connection with the scheme¹⁶⁵ and a consideration of what other possibilities may have existed. Their Honours applied the words of Hill J¹⁶⁶ that ‘the manner in which the scheme was formulated and thus

¹⁵⁵ *Federal Commission of Taxation v Spotless Services Limited* (1996) 186 CLR 404, 425.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid* 416.

¹⁵⁸ *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 223 [39].

¹⁵⁹ *Case 3/2010* (2010) 76 ATR 917, 948 [115].

¹⁶⁰ Barkoczy, above n 7, 49.

¹⁶¹ *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 243 (Gummow and Hayne JJ).

¹⁶² *FCT v Peabody* (1994) 181 CLR 359.

¹⁶³ *Ibid* 385.

¹⁶⁴ *Commissioner of Taxation v Hart* (2004) 217 CLR 216.

¹⁶⁵ *Ibid* 232.

¹⁶⁶ *Ibid* 241.

entered into or carried out is certainly explicable only by the taxation consequences'.¹⁶⁷ It is evident that a comparison between what was done and the other options in which it could have been done should be evaluated to determine whether the manner in which the scheme was entered into was explicable only by tax effects. As such, if it is found that a scheme that was entered into or carried out with has no other possible outcomes other than a fiscal one, then a dominant purpose may potentially be concluded.

Based on this assessment, Gummow and Hayne JJ came to the conclusion that Part IVA did apply to the arrangement. This was due to the fact that the other ways in which the money could have been borrowed would only have produced an outcome that was only explicable by the taxation consequences.

Although in *Pridecraft v Federal Commissioner of Taxation*,¹⁶⁸ Sackville J did not adopt the same approach as Gummow and Hayne JJ and Callinan J in *Hart*. While his Honour identified the counterfactual he did not evaluate what other possibilities could have existed. This could have potentially meant that he thought that they were both the same requirement or instead he overlooked the need to assess what other possibilities that may have existed.¹⁶⁹

The need to assess the counterfactual is also relevant in the context of Division 165. In *Case 3/2010*,¹⁷⁰ the AAT considered the manner in which the scheme was entered into or carried out by having specific regard to the counterfactual. As a result the tribunal considered the determination of what other types of possibilities could have existed as one of relevance.

I Purpose of Persons

Part IVA provides that the relevant purpose can be drawn from an observed inference of a person other than the taxpayer. In s 177D, ITAA 1936 it is stated that purpose is of relevance to persons 'who entered into or carried out the scheme or any part of the scheme'¹⁷¹ and this indicates that the relevant taxpayer can be any person involved. An enquiry into the possible individuals that may come within the scope of a scheme is based on the evidence and decided as a question of fact.¹⁷²

The person may be, but need not need to be the taxpayer¹⁷³ and where corporations are involved, it has been recognised that the activities of the agents, employees, directors,

¹⁶⁷ Ibid.

¹⁶⁸ *Pridecraft v FCT* (2004) 58 ATR 210.

¹⁶⁹ Domenic Carbone and John Tretolta 'FCT v Hart: An Analysis of the Impact of the High Court Decision on the Application of Pt IVA' (2005) 34 *Australian Tax Review* 196, 214. Cf *Noza Holdings Pty Ltd v Commissioner of Taxation* [2011] FCA 46 where the Commissioner's counterfactuals were taken into consideration by Gordon J.

¹⁷⁰ *Case 3/2010* (2010) 76 ATR 917, 948 [117].

¹⁷¹ *Income Tax Assessment Act 1997* (Cth) s 177D.

¹⁷² Pagone, above n 86, 37.

¹⁷³ *FCT v Hart* (2004) 217 CLR 216, 257; *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 229 (Hill J).

officers and board of directors may be necessary¹⁷⁴. It is also possible for the purpose of an adviser or promoter of a scheme¹⁷⁵ to be inquired into and this is regardless of the fact of whether they have followed instructions or are in breach of their duties to a taxpayer.¹⁷⁶

This proposition is well illustrated in *Consolidated Press Holdings*¹⁷⁷ where the issue concerned the treatment of advisers. The High Court¹⁷⁸ upheld the decision of Hill J at first instance and explained that in determining the purpose of a relevant participant to the scheme, it was both possible and appropriate to attribute the purpose of a professional adviser to one or more of the corporate parties involved.¹⁷⁹ In essence, this also avoided any consideration of the subjective fiscal awareness of the taxpayer.

In *Vincent v Commissioner of Taxation* (2002) ('*Vincent*'),¹⁸⁰ the court focused on the High Court's language in *Consolidated Press Holdings* and expressed the view that a determination could be made by any person who was either the taxpayer, promoter of a scheme, legal adviser or accounting adviser who had entered into or carried out the scheme or any part of it.¹⁸¹

On this point, it appears that the AAT has taken a different view as to who may be considered to be a relevant taxpayer in considering cases concerning Division 165. In *Case 3/2010*,¹⁸² the AAT adopted the approach in *Eastern Nitrogen*.¹⁸³ Deputy President PE Hack SC explained that the mere fact that the scheme may have been brought in by an external specialist GST adviser did not enliven the application of Division 165 even though 'it would not otherwise be caught by Division 165'.¹⁸⁴ Although, one of the reasons as to why the court provided little weight to this proposition was due to the fact that the taxpayer had not proceeded to adopt the earlier proposals and instead had adopted the particular one in question.

J Potential overlap

In s 177D(b) there are certain factors that will often overlap and need to be considered together. In the context of Part IVA, the potential overlap has been emphasised in *Spotless Services*.¹⁸⁵ The High Court identified that in considering the time and

¹⁷⁴ *FCT v Spotless Services Limited* (1996) 186 CLR 404, 421; *FCT v Consolidated Press Holdings* (2001) 207 CLR 235, 4 [4347]. See also *Macquarie Finance Ltd v FCT* (2004) 57 ATR 115, 103.

¹⁷⁵ *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 264. See also *Vincent v Commissioner of Taxation* (2002) 124 FCR 350; *Commissioner of Taxation v Sleight* (2004) 136 FCR 211; *Calder v FCT* (2005) 59 ATR 655.

¹⁷⁶ *De Simone & Anor v FCT* (2009) 77 ATR 936, 944 (Sundberg, Stone and Edmonds JJ).

¹⁷⁷ *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235.

¹⁷⁸ *Ibid* 263-264.

¹⁷⁹ *Ibid* 264 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

¹⁸⁰ *Vincent v Commissioner of Taxation* (2002) 50 ATR 20.

¹⁸¹ *Ibid* 53 [122].

¹⁸² *Case 3/2010* (2010) 76 ATR 917.

¹⁸³ *Eastern Nitrogen Ltd v Commissioner of Taxation* (2003) 131 FCR 203 (Hill J).

¹⁸⁴ *Case 3/2010* (2010) 76 ATR 917, 948 [119].

¹⁸⁵ *FCT v Spotless Services Ltd* (1996) 186 CLR 404, 420.

duration of a scheme of when it was entered into or carried out, it would also *throw light* on the factors concerning the form and substance of the scheme and the manner in which the scheme was entered into or carried out.

Another potential overlap is the consideration of changes in the financial positions¹⁸⁶. The changes can be caused to other persons¹⁸⁷ and entities¹⁸⁸ that may be affected by the scheme and this falls within the form and substance factor.

V AN ASSESSMENT OF THE EIGHT COMPARABLE FACTORS

A consideration of the eight corresponding factors as set out in both in s 177D(b)(i), ITAA 1936 and s 165-15(1)(b), GST Act is necessary to determine the similarities and differences in relation to the relevant considerations for the dominant purpose test. It has been explained by SA Forgie in *Re VCE*¹⁸⁹ that jurisprudence concerning s 177D(b), ITAA 1936 factors are to be considered in the same way as s 165-15(1)(b), GST Act factors, to the extent that they correspond with each other. An outline of the similarities and differences between the eight and twelve factors is provided in the table in the Appendix.

A Manner in which the scheme was entered into or carried out: s 177D(b)(i) and s 165-15(1)(a)

Both Part IVA and Division 165 contemplate this factor and the following interpretation of the manner in which the scheme should be entered into or carried out applies equally to both provisions. That is, the manner in which the scheme was entered into or carried out is a consideration of the *particular way* or *procedure* in which the scheme was implemented and established.¹⁹⁰ The High Court also emphasised the point that the words ‘manner’ and ‘entered into’ are not to be given a restricted meaning.¹⁹¹ The relevant considerations under this factor include the degree of unnecessary complexity and the extent of the taxpayer’s involvement.

This particular factor encompasses the predication test that was enunciated in *Newton’s Case*¹⁹² requiring a consideration of the overt acts in which the arrangement was

¹⁸⁶ *Income Tax Assessment Act 1997* (Cth); *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

¹⁸⁷ *Income Tax Assessment Act 1997* (Cth) s 177D(b)(v); *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-5(1)(g).

¹⁸⁸ *Income Tax Assessment Act 1997* (Cth) s 177D(b)(vi); *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-5(1)(h).

¹⁸⁹ *Re VCE and FCT* [2006] AATA 821, 1272 [80].

¹⁹⁰ *FCT v Spotless Services Limited* (1996) 186 CLR 404, 420; *Futuris Corporation Ltd v FCT* (2010) 80 ATR 330, 360.

¹⁹¹ *Ibid.*

¹⁹² *Newton v FCT* (1958) 98 CLR 1, 9 (Viscount Simonds, Lord Tucker, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning).

entered into. Ultimately, to determine whether it was done in such a way as to avoid tax.

In *Futuris*,¹⁹³ the taxpayer argued that the transactions that were entered into were implemented in a manner to achieve commercial purposes and were also described as routine commercial transactions. Besanko J found that the scheme could be explained to have a dominant tax purpose because through Division 19A¹⁹⁴ the manner in which the transaction was designed and carried out was so that the applicant could achieve a maximum saving on capital gains tax in that particular tax year. Therefore, based on the maximum saving by the taxpayer, the court explained that it was neither inappropriate nor artificial in reaching a dominant purpose conclusion.

In a case concerning foreign tax credits in Australia,¹⁹⁵ the structure of the scheme was implemented based on a Guideline issued by HKIRD on bond transactions of the kind exemplified by the HKBTs¹⁹⁶ however the choice of participants in the structure was not dictated by the Guidelines¹⁹⁷. The court found that the choice of the taxpayer in selecting partners to the structure may have provided a conclusion that was “explicable solely on the basis of the foreign tax credit regime in Australia”¹⁹⁸ and could potentially draw a conclusion as to dominant purpose.

In *Case 3/2010*,¹⁹⁹ the AAT recognised that in order to come to a conclusion as to whether the steps involved had a commercial and non-tax or tax considerations required an analysis of the twelve factors against other possibilities that existed.²⁰⁰ The taxpayer in this case put forward that the dominant purpose was asset protection against unknown litigants or a class of litigants. Based on this, the AAT considered other possible ways that asset protection could have been achieved. The AAT considered the Part IVA case of *Hart*, and it was contrasted to the scheme involved in the present case. The manner of the scheme in *Hart* was compared to the manner of the scheme involved in the present case. In the present case in examining the manner and execution of the scheme in contrast with the counterfactual a GST perspective was taken. On this focus, the AAT found that the manner of the scheme was not one that could have been explained only by reference to GST benefits and on that note also reaching the same conclusion for the counterfactual. In coming to this conclusion, the AAT considered that it was not relevant whether the taxpayer had brought the concept of the sale to the group and that Division 165 would not be triggered by the mere fact that external

¹⁹³ *Futuris Corporation Ltd v FCT* (2010) 80 ATR 330. The matter was heard by the Full Court of the Federal Court. Kenny, Stone and Logan JJ confirmed that the taxpayer did not obtain a tax benefit and therefore did not examine dominant purpose. See *Commissioner of Taxation v Futuris Corporation Ltd* [2012] FCAFC 32.

¹⁹⁴ *Income Tax Assessment Act 1936* (Cth) Division 19A, Part III dealt with the former value shifting provisions.

¹⁹⁵ *Citigroup Pty Ltd v Commissioner of Taxation* (2010) 81 ATR 412.

¹⁹⁶ *Ibid* 424-425.

¹⁹⁷ *Ibid* 445.

¹⁹⁸ *Ibid*.

¹⁹⁹ *Case 3/2010* (2010) 76 ATR 917.

²⁰⁰ *Ibid* 948 [117].

advisers were involved.²⁰¹ It was also considered that the arrangement took the form of an ordinary business transaction that a taxpayer would have been expected to adopt in sales that were of arms length.²⁰² To that end, the court provided minimal weight to this factor.

B The form and substance of the scheme: s 177D(b)(ii) and s 165-15(1)(b)

The form and substance of the scheme includes the legal rights and obligations involved in the scheme and the economic and commercial substance of the scheme. Section 165-15(1)(b) is comparable to s 177D(b)(ii). It provides a mechanism to assess the form, rights, substance and commercial consequences²⁰³ of the arrangement by looking at the extent to which the form matches the tax consequences that have been achieved.

It has been explained by Toohey J that this may also require a consideration of whether artificiality was predominant in the form and substance of the scheme.²⁰⁴ In the context of Part IVA, it has been identified²⁰⁵ that the legal form of a transaction may very well determine its substance. Nevertheless, where form and substance conflict the conclusion may point more towards a dominant purpose of tax avoidance. In *Clough Engineering Ltd v FCT*,²⁰⁶ it was taken into account by the court that the commercial consequence that was obtained by the taxpayers could have been achieved in an easier way and therefore the transactions were illusory and lacked any substance.²⁰⁷

Based on the observations made by Hill J in *Sleight*,²⁰⁸ it was submitted by the taxpayer in *Futuris*²⁰⁹ that if the form and substance of the scheme was consistent then this factor could not point to a conclusion of a dominant tax purpose. That argument was rejected²¹⁰ and the court explained that while a difference in form and substance was a significant matter in determining the relevant conclusion, Hill J did not put forward the principle that a difference in form and substance indicated a conclusion against dominant purpose.

This proposition is further supported in the context of Division 165. In *Re VCE*,²¹¹ it was suggested that a dominant purpose or principal effect could be more readily established if the scheme that was used was not similar in its legal form as compared to its economic substance.

²⁰¹ Ibid 948 [119].

²⁰² Ibid.

²⁰³ Pagone, above n 24, 86.

²⁰⁴ *FCT v Spotless Services Limited* (1996) 186 CLR 404, 420-421.

²⁰⁵ *Eastern Nitrogen v FCT* (2001) 108 FCR 27, 47.

²⁰⁶ *Clough Engineering Ltd v FCT* (1997) 35 ATR 1164, 1197-1198.

²⁰⁷ Ibid. See also Dr Justin Dabner 'The Spin of a Coin – In Search of a Workable GAAR' [2000] 3 *Journal of Australian Taxation* 5.

²⁰⁸ *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 233.

²⁰⁹ *Futuris Corporation Ltd v FCT* (2010) 80 ATR 330, 361.

²¹⁰ Ibid (Besanko J).

²¹¹ *Re VCE and FCT* [2006] AATA 821, 1279 [106].

C The timing of the scheme and the period over which it is entered into or carried out – s 177D(b)(iii) and s 165-15(d) and (e)

The timing of the scheme is a necessary factor to be considered in both Part IVA and Division 165. The Commissioner has expressed the view that the factors in s 165-15(1)(d) and (e), GST Act correspond with s 177D(b)(iii), ITAA 1936.²¹² The reference to timing is directed to the question of when the particular scheme was entered into or carried out. While s 165-15(1)(d), GST Act identifies that the time is ‘the timing of the scheme’,²¹³ Part IVA identifies that the relevant time is ‘the time at which the scheme was entered into or carried out’.²¹⁴

It is generally important to consider whether the scheme was implemented at the start or end of a tax period²¹⁵ and also whether the transaction was carried out within a short period of time as compared to the duration that it would take to be completed in an ordinary transaction of the same nature. Where a scheme is carried out for only a short period of time, it is more likely a tax avoidance conclusion will be reached. Whether the steps were carried out in a ‘flurry of activity’²¹⁶ was applied in *Futuris*.²¹⁷ Due to the fact that the transactions were carried out and completed within minutes of each other, a dominant tax purpose was concluded. On the other hand, in *Case 3/2010*,²¹⁸ asset protection was argued by the taxpayer to be the dominant purpose. The AAT found that the delay in the implementation of the scheme resulted in a delay in asset protection and instead produced a greater GST benefit.²¹⁹

In the cases of *Sleight*²²⁰ and *Vincent*,²²¹ the courts considered whether there was a connection between the timing and the flow of funds by the scheme. It was recognised that if the timing and flow of funds of the scheme are needed for a tax benefit to be produced then the conclusion of a dominant purpose is more likely to be ascertained.

The timing that is relevant for Division 165 is stated in a much wider and broader sense than that of Part IVA. As compared with s 177D(b)(iii) ITAA 1936, it potentially includes both the time in which the individual steps of the transaction were carried out and the time that the scheme was implemented.²²² On the other hand, s 177D(b)(iii), ITAA 1936 appears to include only a consideration of circumstances and external events of when the scheme was implemented. However, the same consideration as to

²¹² Australian Taxation Office Practice Statement Law Administration: 2005/24, ‘Division 165 of the GST- Act – GST’ [184].

²¹³ *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-15(d)(e).

²¹⁴ *Income Tax Assessment Act 1997* (Cth) s 177D(b)(iii).

²¹⁵ *WD & HO Wills (Australia) Pty Ltd v FCT* (1996) 65 FCR 298; *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 233-234.

²¹⁶ *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 233.

²¹⁷ *Futuris Corporation Ltd v FCT* (2010) 80 ATR 330, 362.

²¹⁸ *Case 3/2010* (2010) 76 ATR 917, 951 [132].

²¹⁹ *Ibid.*

²²⁰ *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 222.

²²¹ *Vincent v Commissioner of Taxation* (2002) 124 FCR 350, 372.

²²² *Re VCE and FCT* [2006] AATA 821, 50 [107] (SA Forgie).

the circumstances and external events of when the scheme was implemented is more likely to be considered in the factor concerning ‘the period over which the scheme was entered into and carried out’²²³ or alternatively in the factor relevant to ‘the circumstances surrounding the scheme’.²²⁴

**D Result/ effect achieved by the scheme but for Part IVA/ Division
165: s 177D(b)(iv) and s 165-15(1)(f)**

This factor requires a consideration of the result that would be achieved by the scheme without the application of s 177D(b)(iv), ITAA 1936 or s 165-15(1)(g), GST Act, that is, the effect of the legislation without the application of the GAAR. In effect, this allows for an evaluation of the requisite conclusion of a dominant purpose through considering the availability, amount and significance of the tax benefit that was received by a taxpayer.²²⁵

In applying this factor, even if the alleged tax benefit was the result of another scheme, it will not preclude the fact that it could be the same result that was achieved by the scheme in question.²²⁶ Without the application of Part IVA, where there is found to be a significant reduction in the tax liability of a taxpayer and if it is argued as it were in *Futuris*²²⁷ that the tax benefit secured was not part of the scheme or an alternative scheme it will also not preclude a finding of a dominant purpose. This is because the factor is wide enough to include a finding not in the taxpayer’s favour even if a tax benefit would not have been obtained or was instead sufficiently remote.²²⁸

Division 165 requires an evaluation of the GST benefit that was secured in determining a dominant purpose or principal effect conclusion. In *Case 3/2010*,²²⁹ it was explained by the AAT that even if a taxpayer received a tax consequence from a transaction it would not infer a dominant purpose²³⁰ and would not operate in favour of a taxpayer.

**E Change in financial position of the taxpayer – s 177D(b)(v) and s
165-15(1)(g)**

An assessment of the financial position of a taxpayer in connection with the scheme is necessary. Both s 177D(b), ITAA 1936 and s 165-15(1)(b), GST Act require an evaluation of the tax benefit and is determined by evaluating the economic significance

²²³ *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-15(1)(k).

²²⁴ *Ibid* s 165-15(1)(e).

²²⁵ Pagone, above n 24, 87.

²²⁶ *Futuris Corporation Ltd v FCT* (2010) 80 ATR 330, 362-363.

²²⁷ *Ibid*.

²²⁸ *Commissioner of Taxation v News Australia Holdings Pty Limited* (2010) 79 ATR 461, 473.

²²⁹ *Case 3/2010* (2010) 76 ATR 917, 34 [160].

²³⁰ *Ibid*.

of a taxpayer's position. Where a scheme has no commercial benefit and only a tax benefit, there will be no real change in the financial position of a taxpayer.²³¹

The High Court has established²³² that the beneficial change in a taxpayer's financial position is wholly dependent on the tax benefit that was obtained and changes in other financial benefits or the securing of fees of a taxpayer.²³³

Relevant to both Part IVA and Division 165 is that when viewed globally if a taxpayer's financial position is changed solely based on the tax benefit received, then a finding of tax avoidance is more likely to be discerned.²³⁴

F Change in financial position of person connected with taxpayer that will result or may be reasonably expected to result from the scheme: s 177D(b)(vi) and s 165-15(1)(h)

This factor also requires an enquiry of the financial position but to that of a relative or related entity connected with a taxpayer. It is applicable to a taxpayer's business, family or any other connections that a taxpayer may have. If the financial position of another person is improved, this is likely to suggest against the taxpayer having pursued the arrangement for the dominant purpose of obtaining a tax benefit.²³⁵ Instead, the conclusion reached is more likely to be dominant purpose for a commercial objective for a group or family dealing.

In considering this factor, *Case 3/2010*²³⁶ identified that it overlaps with the considerations and conclusions reached in relation to the change in the taxpayer's position²³⁷. In addition, the conclusions that are applied under that factor should also be applied under s 165-15(1)(h), GST Act.

G Any other consequence for taxpayer or other person connected with taxpayer: s 177D(b)(vii) and s 165-15(1)(i)

Both s 177D(b), ITAA 1936 and s 165-15(1)(i), GST Act require a consideration of any other types of consequences for the taxpayer, entities and related parties. This takes into consideration the objective circumstances beyond the realm of tax and financial consequences of the scheme.²³⁸

²³¹ Hill, above n 11, 308.

²³² *Commissioner of Taxation v Hart* (2004) 217 CLR 216.

²³³ *Ibid.*

²³⁴ *Ibid.*, 241 [60]; See also *Case 3/2010* (2010) 76 ATR 917, 953 [143]; *Futuris Corporation Ltd v FCT* (2010) 80 ATR 330, 363.

²³⁵ Pagone, above n 24, 87.

²³⁶ *Case 3/2010* (2010) 76 ATR 917, 33 [159].

²³⁷ *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-15(1)(g).

²³⁸ Pagone, above n 24, 87.

Consequences can include whether or not a taxpayer's cost base has been reduced to nil.²³⁹ Although in some cases this factor will provide no relevant criteria that need to be addressed.²⁴⁰

H *Nature of the connection between taxpayer and other person: s 177D(b)(viii) and s 165-15(1)(j)*

The final factor contained in s 177D(b), ITAA 1936 requires a consideration of the nature of the connection between the taxpayer and other persons or entities, such as other persons that the taxpayer was connected with.

More specifically, s 165-15(1)(j), GST Act makes it clear that this factor aims to assess whether the dealing was carried out between the parties at arms length. Generally, parties that are not related to one another will deal with each other at arms length and where that does occur, 'a GST avoidance conclusion will more easily be drawn'.²⁴¹ Where in a case the parties have not dealt with each other at arms length, it is possible that there was no dominant purpose in obtaining a tax benefit by the taxpayer. Instead there may be another explanation such that it may be inferred that the dominant purpose was in fact, a gift to a family member.

VI THE ADDITIONAL FOUR FACTORS IN DIVISION 165

There are four additional factors that need to be considered in the application of the GST GAAR. Of the four extra factors, only s 165-15(1)(e), GST Act, which considers the period over which the scheme was entered into and carried out, is similar to what is required in s 177D(b)(iii), ITAA 1936 concerning the time in which the scheme was entered into and the length of period during which the scheme was carried out. The other three factors have no equivalent in Part IVA.

A *Specific Consideration of the Purpose of the GST Act, its Provisions and Other Provisions Relevant in the GST Act: s 165-15(1)(c)*

This factor is the third contained in s 165-15(1), GST Act and involves an assessment of the purpose or object of the GST Act, the provisions contained within the Division and any other relevant provisions in the GST Act.

In determining the relevant conclusion to be reached, it has been found that a consideration of the broad policy objectives concerning the GST Act is relevant.²⁴² Although Hill J has expressed that it is unclear whether this factor has any real

²³⁹ *Futuris Corporation Ltd v FCT* (2010) 80 ATR 330, 363.

²⁴⁰ *Case 3/2010* (2010) 76 ATR 917, 953 [145].

²⁴¹ Hill, above n 11, 304.

²⁴² *Re VCE and FCT* [2006] AATA 821, 1286 [136] (SA Forgie).

significance.²⁴³ On this point, his Honour has suggested that this factor may potentially consider the enshrined policy objective of Division 165 concerning whether the scheme was artificial or contrived and other broader policy objectives.²⁴⁴

B The Period Over Which the Scheme was Entered into and Carried Out: s 165-15(1)(e)

The Commissioner²⁴⁵ has explained that ss 165-15(1)(d) and (e), GST Act²⁴⁶ correspond to s 177D(b)(iii), ITAA 1936.²⁴⁷ It appears more likely than not²⁴⁸ that this factor ties in with reaching a conclusion for the factor of timing as per s 165-15(1)(c), GST Act and s 177D(b)(iii), ITAA 1936 and this view is supported by the analysis conducted in *Case 3/2010*.²⁴⁹

In the case of *Re VCE*,²⁵⁰ SA Forgie explained that it was unclear how this requirement would point to a conclusion of tax avoidance. In particular, whether or not attention is to be directed to the period in which the scheme was implemented, its duration or the external events and circumstances of the period in which the scheme was implemented.²⁵¹

C The Circumstances Surrounding the Scheme: s 165-15(1)(k) and Any Other Relevant Circumstances: s 165-15(1)(l)

Consideration must also be given to ‘the circumstances surrounding the scheme’ and ‘any other relevant circumstances’ as set out in ss 165-15(1)(k) and (l) GST Act respectively. While it is of utmost importance that the relevant circumstances that are considered are directed towards a conclusion of either purpose or principal effect because ss 165-15(1)(l) and (k), GST Act are expressed in such broad terms, it is difficult to determine the extent of other relevant circumstances that can be considered.²⁵²

The Commissioner has recognised in Practice Statement PSLA 2005/24²⁵³ that these two factors may possibly allow regard to be had to the prevailing economic conditions or industry practices that are relevant to the scheme.

²⁴³ Hill, above n 11, 304.

²⁴⁴ Hill, above n 11, 303.

²⁴⁵ Australian Tax Office, Practice Statement Law Administration, PS LA 2005/24, ‘Tax Avoidance Conclusion, paragraph 165-5(1)(e) and section 165-15 of the GST Act’ [184].

²⁴⁶ A New Tax System (Goods and Services Tax) Act 1999 s 165-15(d) and (e).

²⁴⁷ *Income Tax Assessment Act 1997* (Cth) 177D(b)(iii).

²⁴⁸ Hill, above n 11, 303.

²⁴⁹ *Case 3/2010* (2010) 76 ATR 917, 954 [154].

²⁵⁰ *Re VCE and FCT* [2006] AATA 821, 1280 [111].

²⁵¹ *Ibid.*

²⁵² Pagone, above n 24, 156.

²⁵³ Australian Tax Office, Practice Statement Law Administration, PS LA 2005/24, ‘Tax Avoidance Conclusion, paragraph 165-5(1)(c) and section 165-15 of the GST Act’ [177].

When taking these two factors into consideration, it is clear that the factors allow for transactions to be seen in a new light. Due to the fact that these two factors are expressed in rather broad terms, SA Forgie has expressed the view that they may potentially include the subjective purposes, motives and intentions of the participating entities or subsequent reasons for explanations.²⁵⁴ However considering the view that s 260 and Part IVA itself were specifically designed to prevent any consideration of the ‘fiscal awareness of a taxpayer’,²⁵⁵ it is unlikely that this provision was inserted to allow for an assessment of a taxpayer’s subjective motives. Although, it has been pointed out that in considering s 165-15(k), GST Act it is possible that the ‘subjective matters were intended to be taken into account in reaching an objective reasonable conclusion about purpose’.²⁵⁶

VII AN EVALUATION OF SECTION 177D(B) AND SECTION 165-15(1)

Based on the analysis of the jurisprudence concerning Part IVA and Division 165, it is apparent that there has been a continuous incremental development in the interpretation of the GAARs and that the corresponding eight factors in s 177D(b), ITAA 1936 and s 165-15(1), GST Act have been considered by the courts and tribunals in a very similar manner. With the exception that s 165-15(1)(j) in Division 165 specifically asks the question whether the avoider and connected entity dealt with each other at arms length and the corresponding provision of s 177D(b)(viii) in Part IVA does not.

In interpreting and applying Division 165, the courts have used Part IVA cases to assist in drawing a conclusion as a dominant purpose.²⁵⁷ To that extent, where it has been of relevance, many of the important propositions relevant to s 177D(b), ITAA 1936 that were initially transferred and applied to s 165-15(1), GST Act continue to be applied and followed by the courts and tribunals.

Division 165 has been cast in much wider terms as compared to what is generally considered to apply in the operation of Part IVA²⁵⁸ and therefore in contrasting s 177D(b) ITAA 1936 and s 165-15(1) GST Act, Division 165 should be interpreted in its own context. There are indeed several differences between the provisions that in effect provide Division 165 with further efficacy and predictability. The differences that have been included in Division 165 to which Part IVA has no equivalent are the principal effect test and the additional factors contained in s 165-15(1). These include, the specific consideration of the purpose of the GST Act, its provisions and other

²⁵⁴ *Re VCE and FCT* [2006] AATA 821, 1286 [137].

²⁵⁵ *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 264 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

²⁵⁶ Pagone, above n 24, 156.

²⁵⁷ Barkoczy, above n 7, 50.

²⁵⁸ *Ibid.*

provisions relevant in the GST Act,²⁵⁹ the circumstances surrounding the scheme²⁶⁰ and any other relevant circumstances.²⁶¹

When Part IVA replaced s 260, it was the ineffectiveness and deficiencies of s 260 that provided the legislature with guidance on how Part IVA should have been implemented to overcome these weaknesses.²⁶² The same approach of using Part IVA, the GAAR that had existed and was interpreted and applied by the courts for almost 18 years before the enactment of Division 165, has been adopted by the legislature. Justice Hill has explained that Division 165 was designed with much ‘forethought’ and that the ‘the legislature has attempted to subtly address a number of limitations that have confronted Part IVA’.²⁶³

A The Principal Effect Test

The differences between the principal effect test and the dominant purpose test have been examined and are well illustrated in *Case 3/2010*.²⁶⁴ In that case, the conclusion made by the AAT in relation to the principal effect test after having considered the six factors that were of relevance to the effect of the scheme, was that the principal effect of the scheme was to secure a GST benefit. The conclusion for both transactions was found to be the same as what was concluded under the dominant purpose test. The AAT specifically determined the relevant factors by transferring the considerations and conclusions drawn from the factors as considered in light of the dominant purpose test to the principal effect test.²⁶⁵ However, instead of applying those factors to the objective purpose of a taxpayer, the focus was on the scheme itself in connection with the participants who implemented the scheme or would have attracted the GST benefit but for the scheme. This particular focus is similar to the predication test as endorsed in *Newton’s Case*, however it is not limited by the scope of s 260 and instead is considered in the context of Division 165.

Since the enactment of Part IVA, the policy objective has been to strike down transactions of a tax avoidance nature and to provide for certainty and predictability.²⁶⁶ It is clear that both s 260 was and Part IVA is neither certain nor predictable. In order to overcome this frustration, by implementing a second limb, Division 165 has provided greater certainty and predictability as both tests can be utilised when determining the possible tax consequences of a transaction and whether the GAAR will apply. This has been demonstrated in *Case 3/2010*²⁶⁷ and, although the outcome concerning the

²⁵⁹ *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-15(1)(c).

²⁶⁰ *Ibid* s 165-15(1)(k).

²⁶¹ *Ibid* s 165-15(1)(l).

²⁶² Christopher Bevan, ‘Proposal to Amend Anti-Avoidance Rule: Part IVA’ (2000) 4 *The Tax Specialist* 24, 24.

²⁶³ Hill, above n 11, 54.

²⁶⁴ *Case 3/2010* (2010) 76 ATR 917.

²⁶⁵ *Ibid* 954 [153].

²⁶⁶ Pagone, above n 24, 22.

²⁶⁷ *Case 3/2010* (2010) 76 ATR 917.

principal effect test and the dominant purpose test was in the end the same, there will be instances where this is not the case.

The ability to use two tests to evaluate a conclusion as to dominant purpose has proven to be effective as the test provides a separate analysis of an arrangement that can be tested against the transaction to determine whether or not there was a dominant purpose of a tax benefit as obtained by a taxpayer. As the High Court in *Spotless Services Ltd*,²⁶⁸ has pointed out, the determination of dominant purpose is the ‘pivot upon which Part IVA turns’ and by implementing a second limb, the principal effect test provides greater certainty to this fundamental enquiry.

B Specific Consideration of the Purpose of the GST Act, its Provisions and Other Provisions Relevant in the GST Act

In the context of Part IVA, the court has specifically acknowledged that the broader policy objectives as expressed in the Explanatory Memorandum such as whether the arrangement is ‘blatant, artificial and contrived’ should be considered.²⁶⁹ The main difference with this policy objective for Part IVA is that it has been expressly included into Division 165 and more specifically is directly evaluated in s 165-15(1)(c), GST Act.

A consideration of broader policy objectives concerning the GAARs is important as it is the policy objectives that dictate and guide the underlying reasons as to why the anti-avoidance provisions have been enacted and more importantly articulate the role and objectives of the provisions.

The implementation of this specific factor to s 165-15(1), GST Act has provided greater clarity and predictability to Division 165 as it effectively makes it clear that the policy objectives concerning the anti-avoidance legislation are to be taken into account.

The approach of using the policy objectives contained in the Explanatory Memorandum in assisting the courts in reaching a conclusion as to dominant purpose has already been adopted. For instance, in *Consolidated Press Holdings*,²⁷⁰ the High Court identified that it would not be artificial to draw a conclusion as to purpose of securing a tax benefit in specific circumstances. In *Hart*,²⁷¹ the court made it clear that a dominant purpose could be drawn if the transaction appeared to be artificial or contrived. It is therefore evident that, the High Court has acknowledged the concepts of artificiality as embraced in the policy objectives of Part IVA. If this factor was expressly recognised in s 177D(1)(b), ITAA 1936, it would create certainty and predictability as those attempting to apply the GAAR would be aware of this specific consideration.

²⁶⁸ *FCT v Spotless Services Limited* (1996) 186 CLR 404, 413.

²⁶⁹ Explanatory Memorandum, Income Tax Laws Amendment Bill (No.2) 1981 (Cth), 9552.

²⁷⁰ *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 264.

²⁷¹ *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 254 [86].

C The Circumstances Surrounding the Scheme and any Other Relevant Circumstances

The two factors contained in s 165-15(1), GST Act have stirred up much debate as to whether subjective purpose may be taken into account as a ‘circumstance’. SA Forgie²⁷² has expressed the view in *Re VCE* that the subjective purposes, motives and intentions of the participating entities or subsequent reasons for explanations²⁷³ could potentially be considered.

It has been illustrated²⁷⁴ that the actual fiscal awareness and subjective intentions of a taxpayer are in fact irrelevant, therefore, it is possibly the case that one of the intended purposes of these two factors is to take subjective matters into account in reaching an objective conclusion as to a taxpayer’s purpose.²⁷⁵

This is similar to the view expressed by the court in *News Australia Holdings*. In this case concerning Part IVA, the Commissioner submitted that the Tribunal had erred in its decision. It was recognised by the Tribunal that subjective purpose was irrelevant, the Tribunal proceeded to assess the taxpayer’s ‘no risk, no tax’ policy as it considered that this matter should have been addressed.

In considering this issue, the Full Federal Court, emphasised the point that the Tribunal did not err in its decision to take this matter into account. It identified that the matter was a significant one and instead, it was explained that the Tribunal had considered this matter, although a subjective one, in the context of the objective factors contained in s 177D(b), ITAA 1936. More to the point, their Honours clearly recognised that it would not be surprising if the objective intention of a taxpayer accorded with the taxpayer’s subjective intention as ‘if subjective intention is reflected in objective evidence, no error is made by taking that evidence into account albeit that it is consistent with the person’s subjective intention’.²⁷⁶ Thus, the Commissioner failed on this particular submission on its appeal to the Full Federal Court.

Based on this explanation by the Full Federal Court, it appears to be the case that by taking a taxpayer’s subjective intention into account as reflected in an assessment of the objective factors is similar to the circumstance’s that would be considered in s 165-15(1)(k) and (l), GST Act.

If these two factors were inserted into Part IVA, there would most likely have been no basis for the Commissioner to appeal on that specific finding by the Tribunal. This is

²⁷² *Re VCE and FCT* (2006) 63 ATR 1249, 1274-1275.

²⁷³ *Ibid.*

²⁷⁴ *FCT v Spotless Services Limited* (1996) 186 CLR 404. *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 243 (Gummow and Hayne JJ); *Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235, 264; *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 253 (Hill J).

²⁷⁵ Pagone, above n 24, 157.

²⁷⁶ *Commissioner of Taxation v News Australia Holdings Pty Limited* (2010) 79 ATR 461, 472.

because it would have been acknowledged that the evaluation of the subjective intention to discern the objective intention of a taxpayer would have been a relevant consideration contained in Part IVA. Presumably, this would have provided the Commissioner with greater predictability and certainty before appealing to the Full Federal Court on this issue.

VIII CONCLUSION

The inclusion in Division 165 of the principal effect test and the three additional factors contained in s 165-15(1) GST Act as compared with s 177D(b) ITAA 1936 has cast new light on the general anti-avoidance provisions in Australia. The lack of certainty and predictability of Part IVA has continued to remain a significant problem and has caused confusion to those who attempt to enforce the provision and those who try to fight against it.

When taking into consideration that Division 165 was designed to address a number of the limitations that had confronted Part IVA, an amendment to Part IVA to reflect Division 165 would provide taxpayers, advisers, the courts and the Commissioner with further predictability when seeking to determine whether the GAARs would apply to a particular transaction and whether or not 'tax avoidance' has been committed.

An attempt to reconstruct s 177D(b), ITAA 1936 to achieve a similar effect to that of s 165-5(1), GST Act would not affect the competing interests of the taxpayer and the revenue objectives of Government but it would, as Division 165 has proved, pave the way forward for achieving greater certainty of the general anti-avoidance provision in Australian taxation.



Appendix			
Division 165		Part IVA	
s 165-15(1)(a)	Manner in which the scheme was entered into or carried out	s 177D(b)(i)	The manner in which the scheme was entered into or carried out
s 165-15(1)(b)	Form and substance of the scheme (including legal rights and obligations involved in the scheme and economic and commercial substance of the scheme)	s 177D(b)(ii)	Form and substance of the scheme
s 165-15(1)(c)	Specific consideration of the purpose of the GST Act, its provisions and other provisions relevant in the GST Act		
s 165-15(1)(d)	Timing of the scheme	s 177D(b)(iii)	Time in which the scheme was entered into and the length of period during which the scheme was carried out
s 165-15(1)(e)	Period over which the scheme was entered into and carried out		
s 165-15(1)(f)	The effect that this Act would have in relation to the scheme apart from this Division	s 177D(b)(iv)	The result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme
s 165-15(1)(g)	Any change in the avoider's financial position that has resulted, or may be expected to result, from the scheme	s 177D(b)(v)	Any change in the financial position of the taxpayer has resulted, will result, or may reasonably be expected to result, from the scheme
s 165-15(1)(h)	Any change or may be reasonably expected to result from the scheme in the financial position of an entity (a connected entity) that has or had a connection or dealing with the avoider, whether the connection or dealing is or was a family, business or other nature	s 177D(b)(vi)	Any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme;
s 165-15(1)(i)	Any other consequences for the avoider or a connected entity of the scheme having been entered into or carried out	s 177D(b)(vii)	Any other consequence for the relevant taxpayer, or for any person referred to in subparagraph (vi), of the scheme having been entered into or carried out; and
s 165-15(1)(j)	The nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arms length	s 177D(b)(viii)	The nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in subparagraph (vi);
s 165-15(1)(k)	The circumstances surrounding the scheme		
s 165-15(1)(l)	Any other relevant circumstances		

The power of the Commonwealth Executive to contract, post *Williams v Commonwealth of Australia*

ROBERT MACLEAN*

ABSTRACT

The Williams case afforded the High Court the opportunity to review the basis on which the Federal Executive commits the Commonwealth to contracts, especially where those contracts are entered into without parliamentary debate or scrutiny. It was also an opportunity for the state attorney generals to challenge the continued encroachment of Commonwealth contracts, into areas not expressly identified in the Federal Constitution.

I INTRODUCTION

The limits to the capacity of the Commonwealth, and specifically the executive, to enter into contracts had not previously been the subject of a definitive statement by the High Court.¹ In the recent case *Williams v. Commonwealth of Australia (Williams)* [2012] HCA 23, the plaintiff asked the High Court to rule on the legitimacy of the federally funded National Schools Chaplaincy Program (NSCP). It was a function of the plaintiff's argument in *Williams*, that the plaintiff had to disprove any possible basis for the contractual validity of the Funding Agreement. As such, the case provided the High Court an opportunity to rule on the limits of the executive power of the Commonwealth.

The plaintiff's initial submission was made on the basis of an orthodox view of s61 of the Constitution. However during the hearing, the High Court signalled that it was considering a departure from settled law and the following grounds for the invalidity of the NSCP were to be considered in legal arguments:

- 1) there is no valid appropriation;
- 2) even if there was a valid appropriation and no violation of s116, then the Funding Agreement and payments under it were beyond the executive power of the Commonwealth because:

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¹ Nicholas Seddon, *Government Contracts — Federal, State and Local* (Federation Press, 4th ed, 2009) [2.2].

- a) they involved actions not authorized by legislation;
 - b) they were not referable to any part of the executive power which is the residue of the sovereign prerogative powers (e.g. powers to declare war or make treaties etc);
 - c) they were not referable to that part of the executive power labeled as the ‘implied nationhood power’ (*Pape v Commissioner of Taxation*² and *Davis v Commonwealth*³); and
 - d) they were not contracts ‘incidental to the ordinary and well recognized functions of Government’ or ‘in the ordinary course of administering a recognized part of government’ (from *New South Wales v Bardolph*⁴); and
- 3) even if it involves a valid exercise of Commonwealth executive power, the definition of ‘school chaplain’ under the NSCP Guidelines involves the imposition of a religious test as a qualification for an officer under the Commonwealth, contrary to s116 of the Constitution.

In June 2012, the High Court announced its decision.⁵ In a 6-1 decision (Heydon J dissenting), the High Court found that the NSCP funding agreement was ‘beyond the executive power of the Commonwealth under s61 of the Constitution’. Legal commentators immediately saw this as a redefinition of the boundaries of Federalism and considered that the ruling potentially invalidated numerous Commonwealth government programs.⁶ The Federal Government announced legislation to legitimize the NSCP,⁷ which the plaintiff announced he planned to challenge on constitutional grounds.

II BACKGROUND OF *WILLIAMS V COMMONWEALTH OF AUSTRALIA*

The Federal Government announced the NSCP in October 2006. Under the NSCP, the Commonwealth promised to invest up to \$30 million annually for 3 years for the provision of chaplaincy services in schools, to a maximum of \$20,000 per school per year. Subsequently this was extended with additional funding of \$42 million for the school years 2010 and 2011. The NSCP is administered by the Department of Education, Employment and Work Place Relations (DEEWR), through a series of funding agreements and the NSCP Guidelines. Participation in the scheme is voluntary for both schools and students. In this case, money is paid from DEEWR to the Scripture Union of Queensland under a funding agreement.

² *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

³ *Davis v Commonwealth* (1988) 166 CLR 79

⁴ *New South Wales v Bardolph* (1934) 52 CLR 455 (*Bardolph*).

⁵ <http://www.austlii.edu.au/au/cases/cth/HCA/2012/23.html>.

⁶ <http://www.theaustralian.com.au/national-affairs/ruling-on-chaplains-leaves-federal-funding-in-disarray/story-fn59niix-1226403576617>.

⁷ <http://www.theaustralian.com.au/national-affairs/urgent-move-to-close-loophole-and-keep-chaplains-in-schools/story-fn59niix-1226408342822>.

Ron Williams has six children who attend the Darling Heights State School in Toowoomba. Mr Williams wished his children to attend a secular school; one that is neutral when it comes to organized religion. In an interview with the ABC, Ron Williams expressed his motivation as follows:⁸

RON WILLIAMS: The case of our son, we'd asked that he be excluded from religious instruction, and so other children, or a couple of other children, probably zealous kids, had told him that he'd go to hell because he wasn't doing RI. ...

TRACY BOWDEN: Are you driven by the fact that you're anti-religion?

RON WILLIAMS: Oh, no, ... I'm not anti-religion at all. I am a fervent believer in the constitutional separation of church and state. I do believe that our state schools should be secular spaces for our children.

In response, Williams launched a High Court action claiming that the NSCP breached the Australian Constitution. In addition to Mr Williams', the Commonwealth government's, the Minister for School Education, Early Childhood and Youth's, the Minister for Finance and Deregulation's and the Scripture Union of Queensland's involvement in the case, each of the State Governments and the Churches Commission on Education sought (and were granted leave) to intervene.

III THE ELEMENTS OF *WILLIAMS*

A *Element 1 : No Valid Appropriation*

Ultimately the High Court found that it was not required to determine whether the NSCP was funded under a valid appropriation. However in discussing the appropriation question, the High Court provided some future guidance. Hayne J, rejected the broad proposition put forward by the Commonwealth 'that the Executive's power to spend money lawfully appropriated is unlimited'.⁹ Similarly Gummow and Bell JJ, endorsed by French CJ, refuted the Commonwealth proposition that 'the executive power extends to entry into contracts and the spending of money without any legislative authority beyond an appropriation'.¹⁰

B *Element 2a : Actions Not Authorised by Legislation*

Where Parliament passes constitutionally valid legislation and that legislation confers a specific contract making power on the executive, the source of that power to contract lies in the statute. The NSCP was not created by statute; as such the DEEWR funding agreements

⁸ 'Campaign against chaplaincy program reaches the High Court', *The 7.30 Report*, 10 August 2011, <<http://www.abc.net.au/7.30/content/2011/s3290571.htm>> accessed 29th March 2013.

⁹ *Williams v Commonwealth of Australia* [2012] HCA 23, [253].

¹⁰ *Williams v Commonwealth of Australia* [2012] HCA 23, [138].

cannot derive their contractual validity, from executive power via an underlying statute.¹¹ The Commonwealth accepted this as a true statement of fact in its submission.¹²

C Element 2b : No Violation of S116

Section 116 of the *Constitution* provides, in part, that ‘no religious test shall be required as a qualification for any office or public trust under the Commonwealth’. The plaintiff argued that due to the criteria for selecting chaplains under the NSCP guidelines, NSCP chaplains hold an office under the Commonwealth. The justification for an ‘office under the Commonwealth’ supposedly arose from the prescriptive contract terms applied by DEEWR in the funding agreement, which effectively granted the Commonwealth control over the chaplains.

The Commonwealth argued that the ‘control’ obligations in the DEEWR funding agreement related to the provision of uniform national standards, rather than conferring power over the hiring or firing of individual chaplains. The view upheld by Gummow and Bell JJ at [107-110¹³] and agreed by French CJ, Crennan, Kiefel, Heydon and Hayne JJ, was that Commonwealth sourced funding is not sufficient, without immediate control and direction, to constitute an office under the Crown.¹⁴

D Reworked Element 2b : The Residue of the Sovereign Prerogative Powers

Prerogative powers source their power in royal authority historically exercised, by custom or necessity. Those powers are recognised by the common law and by the Australian courts.¹⁵ The plaintiff argued that the power of the sovereign to enter into a contract should be considered that of a natural person, rather than a prerogative power of a sovereign but that if such a prerogative power had ever existed for the Commonwealth, that power had been specifically abrogated by the limiting effects of the Constitution. French CJ confirmed that neither the funding agreement, nor the expenditure funded under it, constituted an exercise of the prerogative aspect of executive power.¹⁶

If the unfettered prerogative power to enter into a contract had been extinguished, was there still an express power to enter into contracts, derived from the Sovereign? In *New South Wales v Bardolph*¹⁷ (*Bardolph*), Evatt J stated that:

¹¹ Ronald Williams, ‘Plaintiff’s further amended submission’, Submission in *Williams V Commonwealth*, S307, 29 July 2011, [6].

¹² Commonwealth of Australia, Minister for School Education, Early Childhood & Youth and Minister for Finance & Deregulation, ‘First to third respondents amended submission’, Submission in *Williams V Commonwealth*, S307, 23 July 2011[4].

¹³ *Williams v Commonwealth of Australia* [2012] HCA 23 [107-110].

¹⁴ *Williams v Commonwealth of Australia* [2012] HCA 23, [109].

¹⁵ *Ruddock v Vadarlis* (2001) 66 ALD 25.

¹⁶ *Williams v Commonwealth of Australia* [2012] HCA 23, [83].

¹⁷ *New South Wales v Bardolph* (1934) 52 CLR 455, [474-475].

No doubt the king has special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being less powerful to enter into contracts than one of his subject.

At [5875]¹⁸ Gummow J sought to draw the distinction between the Commonwealth contracting as a ‘natural person’ and as an ‘artificial legal entity’. The Solicitor General of the Commonwealth accepted that the Commonwealth contracts as a ‘artificial legal entity’ and at [5930]¹⁹ accepted that the powers of a natural person are, in the Commonwealth’s case, fettered by the provisions of the Constitution and by the responsibilities of the executive to the Parliament. However in subsequent submissions the Commonwealth tried to revive the proposition, that executive power supports executive action dealing at least with matters within the enumerated heads of Commonwealth legislative power.²⁰

In the plaintiff’s submission it was considered that the Commonwealth’s power to enter into contracts was constrained by the ambit of its legislative power, drawing on the reasoning from *Attorney General (Vic) v Commonwealth*²¹ (*Clothing Factory Case*), in which regard was had to s 51(vi) of the *Constitution* in order to determine the extent to which the Commonwealth could engage in a commercial enterprise.

Heynes J²² specifically focused on equating executive powers to those of a natural person. His view was that equating the natural person with the Executive, ignores that it is public money being spent and that a complex system of checks and balances has evolved and is reflected in the Constitution over the raising and expenditure of public monies. As such ‘neither the Executive nor the polity itself can be assumed to have the same powers (or capacities) to contract and spend as a natural person’.²³

Separately, French CJ confirms that ‘[T]he Commonwealth is not just another legal person like a private corporation or a natural person with contractual capacity’.²⁴ French CJ approves the reasoning of Professor Winterton,²⁵ where Winterton seeks to limit the power of the executive, as follows:

Important governmental powers, such as the power to make contracts, may be attributed to this source [power as natural person], but the general principle must not be pressed too far. It can be applied only when the executive and private actions are identical, but this will rarely be so,

¹⁸ Transcript of Proceedings *Williams v Commonwealth of Australia & Ors* (High Court of Australia, S307, French CJ, Gummow, Dell, Hayne, Heydon, Kiefel & Crennan JJ, 9 August 2011, [5875].

¹⁹ Transcript of Proceedings *Williams v Commonwealth of Australia & Ors* (High Court of Australia, S307, French CJ, Gummow, Dell, Hayne, Heydon, Kiefel & Crennan JJ, 9 August 2011, [5930].

²⁰ *Williams v Commonwealth of Australia* [2012] HCA, [26] (French CJ).

²¹ *Attorney General (Vic) v Commonwealth* (1935) 39 CLR 1.

²² *Williams v Commonwealth of Australia* [2012] HCA 23, [15-217].

²³ *Williams v Commonwealth of Australia* [2012] HCA 23, [217].

²⁴ *Williams v Commonwealth of Australia* [2012] HCA 23, [38].

²⁵ George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press 1983)

because governmental action is inherently different from private action. Governmental action inevitably has a far greater impact on individual liberties, and this affects its character.²⁶

As a result of the judgments, the view that the Executive has the same power to contract of a natural person is generally refuted, with potential applications severely limited by the test proposed by Winterton.

E Reworked Element 2b : Implied Nationhood Power

In *Victoria v Commonwealth and Hayden*²⁷ (AAP Case) Mason J considered that the Commonwealth executive should have ‘a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation’²⁸ (‘the implied nationhood power’), even when these enterprises and activities do not fall within a legitimate head of power under the Constitution. Mason J considered that this power was sourced in s51(xxxix), coupled with s61 and that it permitted the Parliament to authorise the expenditure of money on such matters as the Commonwealth saw fit and to legislate on prerogative matters. Subsequently in *Davis v Commonwealth*²⁹, the scope of the power was expanded with the requirement for national exclusivity falling away. Post *Williams* the scope of the ‘implied nationhood power’ has decreased, with the limitation on the executive power to enter a contract proposed by Crennan J being:

the fact that an initiative, enterprise or activity can be ‘conveniently formulated and administered by the national government’,³⁰ or that it ostensibly does not interfere with State powers, is not sufficient to render it one of ‘truly national endeavour’³¹ or ‘pre-eminently the business and the concern of the Commonwealth as the national government’.³²

F Reworked Element 2b : Ordinary Course of Administering a Recognised Part of Government

The legislative powers of the Commonwealth are mainly to be found in Part V, Chapter I of the Constitution. Section 61 of the Constitution is the source of executive power for the Federal Parliament and provides that:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

²⁶ George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press 1983), [121].

²⁷ *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338.

²⁸ *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, [397].

²⁹ *Davis v Commonwealth* (1988) 166 CLR 79.

³⁰ *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, [398] (Mason J).

³¹ *The Commonwealth v Tasmania* (1983) 158 CLR 1, [253] (Deane J).

³² *Davis v Commonwealth* (1988) 166 CLR 79, [94] (Mason CJ, Deane and Gaudron JJ).

In 1922, the High Court, in *Commonwealth v Colonial Combing, Spinning & Weaving Co*³³ (the *Wooltops* case) considered the capacity of the executive to enter into contracts without the approval of Parliament. The Court took a narrow view of section 61, deciding that the executive could not enter contracts without Parliament's prior approval:

apart from any authority conferred by an Act of Parliament of the Commonwealth or by regulations thereunder, the Executive Government of the Commonwealth had no power to make or ratify any of the agreements.

Four years later in *The Commonwealth v Australian Commonwealth Shipping Board*³⁴, the High Court again took a narrow view. Knox CJ, Gavan Duffy, Rich and Starke JJ confirmed that the Federal Parliament only has such power 'as is expressly or by necessary implication vested in it by the Constitution'.³⁵ Neither Parliament nor the Executive Government had constitutional power to set up a manufacturing business for general commercial purposes.³⁶ The Commonwealth's executive power did not enable the Government to engage in an activity otherwise 'unwarranted in express terms by the Constitution'.³⁷

The scope for Commonwealth contracts was subsequently expanded in *Attorney General (Vic) v Commonwealth*³⁸ where it was held by a majority, that a business which had been established to make military clothing was incidental to the s51(vi) defence power and was lawful. The key argument was that maintenance of a defence capability in peacetime may require defence factories to undertake non-defence work. A similar argument was raised in *Re KL Tractors Ltd.*³⁹

In 1934 the High Court returned to the issue of the Commonwealth's power to contract in *Bardolph's* case.⁴⁰ Here, on behalf of the Labor Government, a contract was entered into for weekly insertions of Tourist Bureau advertisements in the plaintiff's newspaper. When the new State Government came into power it sought to overturn the contract, on the basis that there was no statutory authority or authority by Order in Council or Executive Minute. In his decision, Dixon J said:⁴¹

No statutory power to make a contract in the ordinary course of administering a recognized part of the government of the State appears to me to be necessary in order that, if made by the appropriate servant of the Crown, it should become the contract of the Crown, and subject to the provision of funds to answer it, binding on the Crown.

The two elements arising from the principle in *Bardolph's* case were that the contract:

³³ *Commonwealth v Colonial, Spinning and Weaving Co* (1921-1922) 31 CLR 421.

³⁴ *The Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR.

³⁵ *The Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1, 9.

³⁶ *The Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1, 9.

³⁷ *The Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1, 10.

³⁸ *Attorney General (Vic) v Commonwealth* (1935) 52 CLR 533.

³⁹ *Re KL Tractors Ltd* (1961) 106 CLR 318.

⁴⁰ *New South Wales v Bardolph* (1934) 52 CLR 455.

⁴¹ *New South Wales v Bardolph* (1934) 52 CLR 455.

- a) must be ‘in the ordinary course of administering a recognised part of the government of the state’, otherwise the contract will be *ultra vires* and void; and
- b) must be made by an ‘appropriate servant of the Crown’.

IV WILLIAM’S CONCLUSION

A *Distinguishing Bardolph and Williams*

French CJ states that *Bardolph* erred in extending a decision on contracting and spending powers in a unitary constitution (that of NSW) to the arena of state and Commonwealth relations, under the federal Constitution.⁴² *Bardolph* did not consider the relationship between the executive power conferred by s61 of the Constitution and the administration of departments of State of the Commonwealth for which s64 of the Constitution provides.⁴³ Specifically French CJ comments upon the applicability of the opinion by Viscount Haldane in *Kidman v The Commonwealth*,⁴⁴ and the observation by Aickin J (with which Barwick CJ agreed) in *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth*⁴⁵ and considers that neither case had the federal dimensions, or the context of *Williams*, and can be distinguished.

Crennan J seeks to distinguish *Williams* from *Bardolph* by looking at the source of funding. As part of their submissions, the Commonwealth relied on *Bardolph* and the proposition that the NSCP involved spending on the ordinary annual services of government. But Crennan J held, that as the NSCP hadn’t been subject to the parliamentary processes of scrutiny and debate and at the time of entry into the Funding Agreement, the NSCP was not (by reason of an appropriation in the previous year) a recognised part of Commonwealth government administration in the sense explained in *Bardolph*, and hence *Williams* can be distinguished from *Bardolph*.⁴⁶

B *The Right of the Commonwealth to Enter into Contracts Post Williams.*

Synthesizing the majority judgments, the following sources of power to contract can be substantiated post *Williams*:

- a) contracts arising out statute (assuming such a statute was constitutionally valid);
- b) contracts arising out of the administration of a department of State, in the sense used in s64 of the Constitution;

⁴² *Williams v Commonwealth of Australia* [2012] HCA 23, [79] (French CJ).

⁴³ *Williams v Commonwealth of Australia* [2012] HCA 23, [79] (French CJ).

⁴⁴ *Kidman v The Commonwealth* [1926] ALR 1.

⁴⁵ *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54, [113], Barwick CJ agreeing, [61]; [1977] HCA 71.

⁴⁶ *Williams v Commonwealth of Australia* [2012] HCA 23, [529] (Crennan J).

- c) contracts arising out of the existence of an existing prerogative power (whether previously identified or not);
- d) contracts arising from the exercise of a statutory power, or arising from executive action to give effect to a statute;⁴⁷ and
- e) contracts arising out of the implied nationhood power, where such contracts involve a ‘truly national endeavour’⁴⁸ or are ‘pre-eminently the business and the concern of the Commonwealth as the national government’⁴⁹ or where for reasons of emergency, such contracts need to be delivered through Commonwealth means.⁵⁰

C *The Legislature’s Response*

In response to *Williams*, the Commonwealth Attorney General introduced the Financial Framework Legislation Amendment Bill (No. 3) 2012 on the 26th of June 2012. Schedule 1 of the bill inserts a new section 32B into the *Financial Management and Accountability Act 1997* (Cth) (FMA Act), to provide the requisite statutory authority for Commonwealth spending, where no other legislative authority exists. It empowers the executive to make, vary or administer arrangements or grants under which public money is, or may become, payable, if the arrangements or grants or programs are specified in regulations. Schedule 1 also clarifies that the proposed amendments will not, by implication, narrow the executive power of the Commonwealth. The stated intent of the bill was to ensure continuity of function for 427 grants and programs (including the NSCP) by ensuring that these grants and programs had specific legislative authority over and above the appropriation acts⁵¹.

D *Conclusion*

Given that the executive can legitimize programs (and their underlying contracts) by amending the delegated legislation component of the proposed bill, the proposed legislation fails the public debate test that Crennan J proposes. Likewise if the executive can add new programs, without those programs having been expressly authorized by the legislature, the express prohibition (on the executive using contracts to expand its powers) by Kiefel J potentially may be ignored.

⁴⁷ As distinct from category a), in that an authority created by statute, can have a wider scope of contracting authority, than that expressed in a single bill for a specific purpose or policy.

⁴⁸ *The Commonwealth v Tasmania* (1983) 158 CLR 1, [253] (Deane J).

⁴⁹ *Davis v Commonwealth* (1988) 166 CLR 79, [94] (Mason CJ, Deane and Gaudron JJ).

⁵⁰ *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

⁵¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2012, (Nicola Roxon, Federal Attorney General), First reading speech for the Financial Framework Legislation Amendment Bill (No. 3) 2012;

<<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2Fb9c79f46-7f3a-4739-acb9-ec8d676c1b6b%2F0130;query=Id%3A%22chamber%2Fhansardr%2Fb9c79f46-7f3a-4739-acb9-ec8d676c1b6b%2F0000%22>> accessed 29th March 2013.

The Commonwealth's amendment to section 32B of the FMA Act, is contrary to the ratio from *Williams*, that the Commonwealth's executive power is not coextensive with the scope of its legislative power, and that Commonwealth policies and projects must be supported by legislation, actually enacted by the Federal Parliament.

Immediately after the amendment of the *FMA Act*, Ron Williams stated his intent to re-challenge the National Schools Chaplaincy Program. While the 'National School Chaplaincy and School Welfare Program' is now listed at 407.013 in the *Financial Management and Accountability Regulations 1997* (Cth), based on their *Williams* judgments, Crennan and Kiefel JJ would consider that the listing fails to legislatively legitimize the NSCP. With two subsequent changes to the composition of the High Court (including the departure of the single dissenting judge) and French CJ's pro-federalist statement that:

the character of the Commonwealth Government as a national government does not entitle it, as a general proposition, to enter into any field of activity by executive action alone⁵²,

it seems likely that a subsequent challenge to the National Schools Chaplaincy Program will succeed⁵³.



⁵² *Williams v Commonwealth of Australia* [2012] HCA 23, [83] (French CJ).

⁵³ Ron William's challenge may be frustrated by Commonwealth legislative action, as the Public Governance, Performance and Accountability Bill 2013 (Cth) was tabled in the House of Representatives on the 16th of May 2013. If enacted, the Public Governance, Performance and Accountability Bill 2013 (Cth) will repeal the *Financial Management and Accountability Act 1997* (Cth).

COPYRIGHT EXCEPTIONS

BEYOND THE *COPYRIGHT ACT 1968* (CTH)

Professor Brian Fitzgerald, Cheryl Foong
and Professor Anne Fitzgerald*.

I INTRODUCTION

Exceptions are an important part of the Australian copyright law landscape due to the role they play in delineating the extent of the rights held by copyright owners and, correspondingly, the permitted activities of users of copyright materials. The nature and scope of copyright exceptions has been examined in several reviews of copyright law¹ and are again being considered by the Australian Law Reform Commission (ALRC) as part of the ‘Copyright and the Digital Economy’ review which is currently underway. The ALRC’s terms of reference require it to examine, inter alia, ‘whether the exceptions and statutory licences in the *Copyright Act 1968* are adequate and appropriate in the digital environment.’² While the ALRC inquiry focuses on exceptions provided under the *Copyright Act 1968* (Cth) (*Copyright Act*), there are several copyright exceptions in other Commonwealth statutes which are of relevance and which should not be overlooked.

II COPYRIGHT EXCEPTIONS

The best-known of the copyright exceptions are the fair dealing provisions in the *Copyright Act*. They provide that a fair dealing with a Part III work or adaptation, or a Part IV audio-visual item (sound recording, film, sound broadcast or television broadcast), will not infringe copyright if it is done for the following purposes:

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¹ See for e.g. Copyright Law Review Committee (CLRC), *Simplification of the Copyright Act: Part 1 – Exceptions to the Exclusive Rights of Copyright Owners* (1998); CLRC, *Copyright and Contract* (2002); CLRC, *Crown Copyright* (2005); Australian Government Attorney-General's Department, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age*, Issues Paper (2005).

² Australian Law Reform Commission, ‘Copyright and the Digital Economy: Terms of Reference’, at <http://www.alrc.gov.au/inquiries/copyright/terms-reference> (accessed on 26 February 2013).

- research or study (ss 40 and 103C);
- criticism or review (ss 41 and 103A);
- parody or satire (ss 41A and 103AA);
- reporting of news (ss 42 and 103B); or
- judicial proceedings or the giving of professional legal advice (ss 43 and 104).

The *Copyright Act* also contains numerous specific exceptions to infringement, such as s 182A which permits one copy of a statutory instrument to be made by ‘reprographic reproduction’. Relatively recent additions to the *Copyright Act* are the format-shifting exceptions, which allow the owner of an article embodying copyright material (e.g. a book, photograph or film) to make a copy of the material in a different form for private and domestic use³ and s 200AB which permits libraries, archives and educational institutions to use copyright materials in limited circumstances not covered by other specific exceptions.

Copyright exceptions outside the *Copyright Act*

A point that has not been raised in the ALRC’s terms of reference, the *Issues Paper* and the submissions to the inquiry is that, in addition to the exceptions contained in the *Copyright Act*, there are also copyright exceptions provided for in other Commonwealth statutes. Four examples of such copyright exceptions are discussed in this paper.

Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)

The *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)* sets up a system for regulating petroleum exploration and recovery, and the injection and storage of greenhouse gas substances in offshore areas. Section 720 is a copyright exception which permits documents and reports containing information relating to petroleum to be used in administering the system. It provides that:

The copyright in a literary or artistic work contained in an applicable document is not infringed by anything done:

- (a) by, or with the authority of, the Titles Administrator or the responsible Commonwealth Minister; and
- (b) for the purpose of the exercise of any of the powers of the Titles Administrator or Minister under this Part.

‘Applicable document’ is defined as including a document accompanying an application made to the Titles Administrator under Chapter 2 (which regulates matters such as petroleum exploration permits, petroleum retention leases, petroleum production licences).⁴ Section 743 of the Act provides an identical copyright exception for information relating to greenhouse gas.

³ *Copyright Act 1968 (Cth)*, ss 43C, 47J, 110AA.

⁴ *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)*, s 711.

Veterans' Entitlements Act 1968 (Cth)

The *Veterans' Entitlements Act 1968* (Cth), which provides for the provision of pension payments, medical treatment and other benefits to veterans, establishes the Repatriation Medical Authority and Specialist Medical Review Council and their respective powers of investigation. Sections 196H(1) and 196ZC(1) of the Act respectively provide that these bodies are not the owner of any copyright material which is submitted to it for the purposes of investigations.⁵ However, subsection 2 of each provision also states that:

In spite of the *Copyright Act 1968*, the Authority [or Review Council] does not infringe any copyright subsisting in submitted material if, in performing its functions or exercising its powers, the Authority [or Council] does an act comprised in the copyright without the licence of the owner of the copyright.⁶

These provisions are phrased in very broad terms, allowing the Authority to do 'an act compromised in the copyright', that is, exercise any one of the copyright owner's exclusive rights. The only limitation appears to be that the act must be part of the performance of the Authority's functions or exercise of its powers.

Commonwealth Electoral Act 1918 (Cth) and Referendum (Machinery Provisions) Act 1984 (Cth)

The *Commonwealth Electoral Act 1918* (Cth)⁷ and the *Referendum (Machinery Provisions) Act 1984* (Cth)⁸ respectively authorise the reproduction of application forms for a postal vote. Both contain identical provisions which provide that 'for the purposes of the *Copyright Act 1968*, if a person other than the owner of the copyright in the application form for a postal vote reproduces the application form, the person is not taken to have infringed the copyright in the application form'.

Patents Act 1990 (Cth)

The *Patents Act 1990* (Cth) contains a copyright exception relating to patent specifications which are submitted to IP Australia and made available for public inspection. Prior to 2012, s 226 of the *Patents Act 1990* (Cth) provided that 'the reproduction in 2 dimensions of the whole or part of a provisional or complete specification that is open to public inspection does not constitute an infringement of any copyright subsisting under the *Copyright Act 1968* (Cth) in any literary or artistic work'.⁹ The exception merely authorised the two dimensional 'reproduction' of a patent specification, but did not permit the document to be communicated to the public.

Given that patent specifications are meant to be open to public inspection¹⁰ and that communication through the online medium is the most instantaneous and efficient way to convey patent specifications, this provision was clearly in need of revision. In 2012, the

⁵ *Veterans' Entitlements Act 1968* (Cth), ss 196H(1), 196ZC(1).

⁶ *Veterans' Entitlements Act 1968* (Cth), ss 196H(2), 196ZC(2).

⁷ *Commonwealth Electoral Act 1918* (Cth), s 184AA(2).

⁸ *Referendum (Machinery Provisions) Act 1984* (Cth), s 56(2).

⁹ *Patents Act 1990* (Cth) (Act No. 83 of 1990 as amended), s 226.

¹⁰ See *Patents Act 1990* (Cth), s 55.

exception was amended to permit ‘communicating (within the meaning of the [Copyright] Act) the document to the public’.¹¹ As explained in the Explanatory Memorandum, this amendment would allow IP Australia to make most documents in patent application case files available to the public on the internet.¹²

III RECOMMENDATIONS FOR REVIEW

A preliminary investigation reveals the existence of several copyright exceptions in statutes other than the *Copyright Act*.¹³ A notable characteristic of many of these exceptions is that they relate to government. A typical example is where a third party submits copyright material to a government body as part of an application for a privilege (for instance a licence or entitlement of some description) and the relevant Act specifies how this material can be dealt with once it has been submitted. These exceptions relate to matters of public administration, where use of this information is essential for the functioning of government and the performance of its responsibilities to the public.

The ALRC and the Government should have regard to these exceptions and consider how they could be better utilised. We suggest that, first, effort needs to be invested in identifying these exceptions and listing them in a catalogue. Secondly, these exceptions should be reviewed, and if necessary, updated to ensure that they remain relevant in the digital age. Thirdly, the individual exceptions could be consolidated within a broader exception under the *Copyright Act*. Some recommendations are made at the end of this paper about the form such a broader exception could take.

1 *Identify and Catalogue other Exceptions*

These copyright exceptions, though of operational significance for the government agencies whose activities they regulate, are located in relatively obscure provisions in various Commonwealth Acts that regulate areas of activity which are not typically associated with copyright law. As a consequence, their existence is not particularly obvious to legal practitioners, government officers and the general public.

Further research is needed to identify similar provisions in other Commonwealth legislation and to catalogue them in a central location or repository. Cataloguing these provisions would provide a clearer picture of the purpose/s they serve and the rationale for their enactment. In the process, we should consider whether to introduce an exception in the *Copyright Act* which covers the activities exempted from copyright infringement under these miscellaneous

¹¹ See *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth), No. 35, 2012, Schedule 6, item 87.

¹² Explanatory Memorandum, *Intellectual Property Laws Amendment (Raising the Bar) Bill 2011* (Cth), 140.

¹³ Note that in addition to the exceptions discussed, there are other miscellaneous exceptions relating, for example, to electronic transactions, Freedom of Information publication schemes and insignia: see *Electronic Transactions Act 1999* (Cth), s 11(6); *Freedom of Information Act 1982* (Cth), s 90; *Olympic Insignia Protection Act 1987* (Cth), s 5(2)(b). See also two repealed Acts, *Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act 2005* (Cth), s 11; *Sydney 2000 Games (Indicia and Images) Protection Act 1996* (Cth).

legislative provisions (this is discussed further below under ‘(3) Consolidate miscellaneous exceptions’.

2 Update Copyright Exceptions

Certain exceptions may now be outdated in the internet age and require revision. An example of a copyright exception that has been updated to reflect technological change is s 226 of the *Patents Act 1990* (Cth), which has recently been extended to authorise the communication of patent specifications online. Enabling government registries or authorities to publish certain material online brings about efficiency/productivity gains. They are able to save the time and resource costs of both the public who need to request the information and the authority which has to deal with such requests.¹⁴

3 Consolidate Miscellaneous Exceptions

Currently, these miscellaneous copyright exceptions are scattered across the entire statute book. In order to update these provisions, it would be necessary to locate and amend each individual Act (as has occurred with the *Patents Act*). Consolidation of these various provisions would mean that only one provision in the *Copyright Act*, as opposed to a multitude of exceptions in a range of Acts, would have to be amended. Such an approach would be more efficient for legislators and would enhance consistency across federal legislation. The forms in which a consolidating provision could take, ranging from a relatively specific exception to the introduction of a broader fair use exception, are discussed below.

(a) Material on public registers

A seemingly straightforward step would be to introduce an exception into the Australian *Copyright Act* to permit the reproduction and communication to the public of information that has been entered into a government register.¹⁵ In the United Kingdom, s 47 of the *Copyright, Designs and Patents Act 1988* (UK) (*UK Act*) provides an exception for material open to public inspection or on an official register (under the ‘Public Administration’ part of the Act). New Zealand has introduced a similar exception in s 61 of the *Copyright Act 1994* (NZ).

Section 47 of the UK Act provides:

(1)Where material is open to public inspection pursuant to a statutory requirement, or is on a statutory register, any copyright in the material as a literary work is not infringed by the copying of so much of the material as contains factual information of any description, by or with the authority of the appropriate person, for a purpose which does not involve the issuing of copies to the public.

(2)Where material is open to public inspection pursuant to a statutory requirement, copyright is not infringed by the copying or issuing to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of enabling the material to be

¹⁴ See UK Intellectual Property Office (IPO), *Use of works for public administration and reporting* (Impact Assessment (IA) No. BIS0309), 3-5, available at <http://www.ipo.gov.uk/consult-ia-bis0309.pdf> (accessed on 23 April 2012).

¹⁵ See John S Gilchrist, ‘The Government as Proprietor, Preserver and User of Copyright Material under the *Copyright Act 1968* (Cth), PhD thesis, Queensland University of Technology, 2012.

inspected at a more convenient time or place or otherwise facilitating the exercise of any right for the purpose of which the requirement is imposed.

(3) Where material which is open to public inspection pursuant to a statutory requirement, or which is on a statutory register, contains information about matters of general scientific, technical, commercial or economic interest, copyright is not infringed by the copying or issuing to the public of copies of the material, by or with the authority of the appropriate person, for the purpose of disseminating that information.¹⁶

By contrast with the specific exception in the Australian *Patents Act 1990*, the public register exceptions in the UK and NZ legislation apply generally and are not limited in their operation to a particular register or subject matter.

In enacting similar provisions into the *Copyright Act* it would be necessary to ensure that they are drafted in terms that are sufficiently broad to reflect the realities of the administration of public registers in the ‘Government 2.0’ era. In the UK, it has been suggested that, whereas the s 47 exceptions permit the making and distribution of physical copies of material on public registers, they do not extend to material available on the internet.¹⁷ The limited applicability of the s 47 exceptions has been acknowledged by the UK Intellectual Property Office which has observed that the ‘current exceptions applying to public bodies unduly restrict activity that would be beneficial to society and could be widened without negative impact on copyright owners.’¹⁸

(b) ‘Catch all’ exception for acts done under statutory authority

Another approach would be to introduce a ‘catch all’ exception for ‘acts done under statutory authority’. Again, this approach is found in the United Kingdom and New Zealand Copyright Acts, both of which contain a provision exempting from copyright infringement acts that are done pursuant to a specific statutory authorisation.¹⁹ The UK Act states:

(1) Where the doing of a particular act is specifically authorised by an Act of Parliament, whenever passed, then, unless the Act provides otherwise, the doing of that act does not infringe copyright.

Incorporating a broader provision of this kind into the Australian *Copyright Act* would have the advantage of excluding other government activities from copyright infringement which go beyond the use of material on public registers, but are nevertheless necessary for public administration.

¹⁶ See also s 47(6) of the UK Act, which states that ‘In this section—
“appropriate person” means the person required to make the material open to public inspection or, as the case may be, the person maintaining the register...’

¹⁷ See HM Government (UK), Intellectual Property Office, *Consultation on Copyright* (2011) 108: ‘These exceptions cover uses by Parliament or the Courts, by Royal Commissions and statutory inquiries, for public records, official registers, and other public business. In general they only relate to the making of copies and distributing physical copies, and do not permit the making available of materials on the internet’, available at <http://www.ipo.gov.uk/consult-2011-copyright.pdf> (accessed on 8 March 2013).

¹⁸ UK Intellectual Property Office (IPO), *Use of works for public administration and reporting* (Impact Assessment (IA) No. BIS0309), 3, available at <http://www.ipo.gov.uk/consult-ia-bis0309.pdf> (accessed on 8 March 2013).

¹⁹ *Copyright, Designs and Patents Act 1988* (UK), s 50; *Copyright Act 1994* (NZ), s 66.

(c) *Fair use*

A question which inevitably arises when the scope of exceptions is discussed is whether the various statutory exceptions outside the *Copyright Act* would more appropriately be dealt with under an ‘open ended’ model of fair dealing that more closely approximates the fair use provisions of US Copyright law.²⁰ The fair use doctrine has the potential to flexibly accommodate novel situations which may arise in the future. The need to constantly review the miscellaneous copyright exceptions (including the limited categories of the fair dealing exceptions) could perhaps be avoided. Therefore, the government and the ALRC should consider the positive impact an open-ended fair use exception may have on consolidating the various exceptions that exist in legislative provisions outside the *Copyright Act*.

IV CONCLUSION

The legislative copyright exceptions outside the *Copyright Act* identified and discussed in this paper should not be regarded as exhaustive, and further research is likely to reveal additional miscellaneous exceptions of this kind. Nevertheless, this exercise has served to highlight the fact that there are significant, though generally overlooked, copyright exceptions existing outside the *Copyright Act*. The key role of these exceptions in facilitating government administration – and even more so in the digital era – requires that they be taken into account in the current copyright law review and reform process. In the ‘Copyright and the Digital Economy’ review, the ALRC and the Australian Government have an opportunity to understand the role of these exceptions and consider their consolidation in provisions of the *Copyright Act* which ensure their continued relevance. When viewed in the context of the current review’s overarching objectives of further shaping Australian copyright law for the digital economy, this is an important step and one which should now be taken.



²⁰ See 17 USC § 107. Note that the Copyright Law Review Committee recommended an open-ended model: CLRC, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [2.03].

PPSA and Construction Projects

MICHAEL MCCAGH

I INTRODUCTION

The *Personal Properties Securities Act 2009* (Cth) (PPSA) is an important new initiative affecting all Australian commercial law¹ through its regulation of security interests over personal property via an online register.² By the end of 2012, there were already over 7 million interests registered and over 1.5 million online searches conducted.³ The register's commencement on 30 January 2012⁴ has meant the PPSA has largely replaced the common law with regard to:⁵

- what constitutes a security interest;⁶
- the priorities between competing security interests;
- the enforcement of security interests; and
- the extinguishment of security interests.

It strongly affects the interests of principals, contractors, sub-contractors, financiers, architects, engineers and superintendents of most construction projects in numerous ways. The PPSA is largely based on New Zealand⁷ and Canadian equivalents,⁸ and Papua New Guinea has since enacted a similar regime. Nevertheless, this broad amendment of regulation has brought an inevitable unfamiliarity.

¹ Kriss Will, 'Practicalities of PPS Act' (2012) 34(3) *Bulletin* 32, 32. See also Craig Wappett, *Essential Personal Property Securities in Australia*, (2012), xxvi; Brendan Edgeworth, Christopher Rossiter, Margaret Stone and Pamela O'Connor, *Sackville & Neave: Australian Property Law*, (2013), 1056.

² Mieke Dixon, Nigel Oram and Matthew Walsh, 'Personal Property Securities Act' (2012) 96 *Legal Briefing* 1, 1.

³ Personal Property Securities Register, PPSR, *Statistics: October to December 2012*, (2012), <http://www.ppsr.gov.au/AbouttheRegister/Statistics/Pages/StatisticsOctobertoDecember2012.aspx>, viewed 2 April 2013.

⁴ *Personal Property Securities Act 2009* (Cth) s 304; Anthony Duggan, 'A PPSA Registration Primer' (2011) 35(3) *Melbourne University Law Review* 865, 865; Brendan Edgeworth, Christopher Rossiter, Margaret Stone and Pamela O'Connor, *Sackville & Neave: Australian Property Law*, (2013), 1056.

⁵ Naomi Moore and Jeffery Black, 'Australian Secured Creditor and Insolvency Law: Sweeping Changes Under New Personal Property Securities Regime' (2011) 1 *ABI Journal* 54, 54.

⁶ John Stumbles, 'The 'PPSA': the Extended Reach of the Definition of the 'PPSA' Security Interest' (2011) 34(2) *The University of New South Wales Law Journal* 448, 449.

⁷ Lang Thai, 'Charges Over Book Debts in the United Kingdom and Australia: the Way Forward' (2007) 4 *Macquarie Journal of Business Law* 267; Craig Wappett, *Essential Personal Property Securities in Australia*, (2012), xxvii; Berna Collier, Paul Von Nessen and Alan Collier, 'The PPSA: Continuing the Reconceptualization of Retention of Title (Romalpa) Security' (2011) 34(2) *University of New South Wales Law Journal* 567, 579.

⁸ Anthony Duggan, 'A PPSA Registration Primer' (2011) 35(3) *Melbourne University Law Review* 865, 865; Craig Wappett, *Essential Personal Property Securities in Australia*, (2012), xxvii; Personal Property Securities Register, PPSR, *About PPS Reform*, (2012), <http://www.ppsr.gov.au/AbouttheRegister/AboutPPSreform/Pages/default.aspx>, viewed 2 April 2013.

This article will outline those rules of the PPSA that are of particular relevance to actors within construction projects. Attention will be paid to the definition of security interest, the priority rules between security interests and the insolvency provisions. The article will then examine common ways in which construction contracts create security interests in personal property for the purposes of the PPSA, and the consequences for relevant parties where registration is not executed. Focus will be placed on arrangements that are common to both standard form contracts and contracts drafted from scratch,⁹ as well as small scale and larger scale construction projects alike, namely arrangements constituting:

- a) Romalpa clauses;
- b) payment for goods that remain offsite;
- c) step-in rights;
- d) temporary works;
- e) equipment leases; and
- f) retention money.

II PPSA

In addition to broad questions that the PPSA presents the entire legal industry, many questions specific to construction contracts have been posed since a contract clause can create a security interest.¹⁰

First, the PPSA has posited new rules over what constitutes a security interest,¹¹ which this article would suggest may cause confusion amongst practitioners. The PPSA defines a security interest to be ‘an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation’.¹² Specific examples are provided.¹³ Once a security interest is identified, the PPSA will apply to it provided the security interest is in relation to ‘personal property’ for the purposes of the PPSA¹⁴ and none of the specified exceptions apply.¹⁵

Secondly, the PPSA has legislated new priority rules, which are technical, though formulaic. The imposition of such rules means the common law is inapplicable where the PPSA applies. The most important principle is that perfected interests take priority over unperfected

⁹ Both of these forms of contract are commonly used in construction projects: Lolita Mohyla, *Construction Law in Australia: Law and Project Delivery*, (1996), 15, 223.

¹⁰ Mieke Dixon, Nigel Oram and Matthew Walsh, ‘Personal Property Securities Act’ (2012) 96 *Legal Briefing* 1, 2.

¹¹ See Jamie Glister, ‘The Role of Trusts in the PPSA’ (2011) 34(2) *The University of New South Wales Law Journal* 628, 628.

¹² *Personal Property Securities Act 2009* (Cth) s 12(1).

¹³ *Personal Property Securities Act 2009* (Cth) ss 12(2)-(6).

¹⁴ Craig Wappett, *Essential Personal Property Securities in Australia*, (2012), xxvii; Bruce Whittaker, ‘The Scope of ‘Rights in the Collateral’ in section 19(2) of the PPSA – can bare possession support attachment of a security interest’ (2011) *The University of New South Wales Law Journal* 524, 525.

¹⁵ *Personal Property Securities Act 2009* (Cth) s 8(1).

interests.¹⁶ An interest may be perfected by registration or possession.¹⁷ Registration involves registering the interest on the online register, and ensures the holder priority over money raised when the buyer resells the collateral.¹⁸ Possession is defined in section 24 of the PPSA. The right to possession can constitute a security interest,¹⁹ and an interest can be perfected by possession²⁰ if that possession is enforceable against third parties.²¹ However, possession is not enough to secure third party interests,²² such as the security interests of a financier. Another important part of the PPSA involves the inclusion of a Purchase-Money Security Interest (*PMSI*), which is ‘a security interest taken in collateral, to the extent that it secures all or part of its purchase price’.²³ PMSIs generally receive priority over non-PMSI security interests irrelevant of time.²⁴ The PMSI definition excludes an interest in collateral whereby the grantor intends to use it for predominantly personal or domestic purposes,²⁵ unless²⁶ that collateral is a motor vehicle,²⁷ aircraft,²⁸ watercraft²⁹ or intangible property.³⁰ The PPSA, as a final measure to prioritise security interests, provides that where the interests are otherwise equal, the earliest in time will prevail.³¹ The PPSA assists the knowledge of priorities of a case by allowing searches of the register to be conclusive.³²

Thirdly, the PPSA regulates the effects that insolvency has on security interests.³³ Any provision that purports to exclude or modify the operation of a provision of an agreement that gives rise to the security interest upon insolvency or termination of the agreement will be void.³⁴ In many construction contracts, termination clauses upon insolvency are common,³⁵ however they should now be included and relied upon with care. The insolvency rules differs

¹⁶ *Personal Property Securities Act 2009* (Cth) s 55(3).

¹⁷ *Personal Property Securities Act 2009* (Cth) s 21.

¹⁸ *Personal Property Securities Act 2009* (Cth) s 62.

¹⁹ *Gray v Royal Bank of Canada* (1997) 143 DLR (4th) 179; Bruce Whittaker, ‘The Scope of “Rights in the Collateral” in section 19(2) of the PPSA – Can Bare Possession Support Attachment of a Security Interest’ (2011) *The University of New South Wales Law Journal* 524, 544.

²⁰ *Personal Property Securities Act 2009* (Cth) s 21(2)(b). This is also the case in New Zealand: *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528; *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629.

²¹ *Personal Property Securities Act 2009* (Cth) s 21(1)(b)(ii).

²² As in New Zealand: *JS Brooksbank and Company (Australasia) Ltd v EXFTX Ltd (rec apptd & in liq)* [2009] NZCA 122; *Rabobank New Zealand Ltd v McAnulty (February Syndicate)* [2011] NZCA 212.

²³ *Personal Property Securities Act 2009* (Cth) s 14(1)(a).

²⁴ *Personal Property Securities Act 2009* (Cth) s 62(2).

²⁵ *Personal Property Securities Act 2009* (Cth) s 14(2)(c).

²⁶ *Personal Property Securities Act 2009* (Cth) s 14(2A)(c) states that collateral that the exception does not apply where the collateral is required by the regulations to have a serial number.

²⁷ *Personal Property Securities Regulations 2010* (Cth) reg 2.2(1)(a)(iii).

²⁸ *Personal Property Securities Regulations 2010* (Cth) reg 2.2(1)(a)(i).

²⁹ *Personal Property Securities Regulations 2010* (Cth) reg 2.2(1)(a)(iv).

³⁰ *Personal Property Securities Regulations 2010* (Cth) reg 2.2(1)(a)(ii).

³¹ *Personal Property Securities Act 2009* (Cth) s 55(4).

³² Robert Burrell and Michael Handler, ‘The “PPSA” and Registered Trademarks: When Bureaucratic Systems Collide’ (2011) 34(2) *The University of New South Wales Law Journal* 600, 600.

³³ John Stumbles, ‘The “PPSA”: the Extended Reach of the Definition of the “PPSA” Security Interest’ (2011) 34(2) *The University of New South Wales Law Journal* 448, 457.

³⁴ *Bankruptcy Act 1966* (Cth) s 301(1).

³⁵ Nicholas Dennys, Mark Raeside and Robert Clay, *Hudson’s Building and Engineering Contracts*, (2010), 1474.

depending on which party becomes insolvent. In the event that the grantor of a security interest becomes insolvent, the party possessing the interest cannot enforce interests that have not already been registered under the PPSA.³⁶ Therefore, unregistered interests may be effectively lost upon the insolvency of another party. The importance of registration was seen in *Carson, in the matter of Hastie Group Ltd (No 3)*.³⁷ In that case, interests that remained unregistered were lost due to the inability of the administrators to find those who had security in relevant personal property. Yates J ordered for the auction of the property,³⁸ thus the security holders lost their interest. This further highlights the need for parties to register registrable security interests when they arise.

A distinct scenario arises where it is the secured party that becomes insolvent. In such a situation, the insolvent party may still enforce its security interests, though the enforcement is to be within 14 days of appointing an administrator.³⁹ Where the interest is granted after the entity became insolvent, the interest is deemed to have arisen before the insolvency.⁴⁰ The fact that the PPSA's insolvency provisions are markedly different to the corresponding principles under the previous law⁴¹ means that parties to construction projects may not immediately recognise the importance of immediate registration to preclude such loss of security interests, and they may fail to react to the relevant provisions upon the drafting of construction contracts.

III SPECIFIC ISSUES FOR THE CONSTRUCTION INDUSTRY

The existence of numerous security interests within every construction project means the changes posited by the PPSA must be considered carefully. This article will now analyse the above principles of the PPSA with regard to six common scenarios of construction projects.

A *Romalpa* Clauses

Romalpa clauses, also known as retention of title clauses, provide that the seller is to retain legal title to a certain asset until the buyer pays in full.⁴² They are a clear example of a clause

³⁶ *Corporations Act 2001* (Cth) s 440B; *Autodom Ltd (Administrators Appointed) (Receivers and Managers Appointed) in the matter of Autodom Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2012] FCA 1393, [38] (McKerracher J).

³⁷ [2012] FCA 719

³⁸ [2012] FCA 719, [18] (Yates J). See also, *Carson, in the matter of Hastie Group Ltd (No 2)* [2012] FCA 717, [12] (Emmett J); *Carson, in the matter of Hastie Group Ltd* [2012] FCA 626, (Emmett J).

³⁹ *Corporations Act 2001* (Cth) s 441A.

⁴⁰ *Personal Property Securities Act 2009* (Cth) s 267(2).

⁴¹ John Stumbles, 'The "PPSA": The Extended Reach of the Definition of the "PPSA" Security Interest' (2011) 34(2) *The University of New South Wales Law Journal* 448, 457.

⁴² *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552; Duncan Sheehan, *The Principles of Personal Property Law*, (2011), 296; Craig Wappett and David Allan, *Securities over Personal Property*, (1999), 16; Berna Collier, Paul Von Nessen and Alan Collier, 'The PPSA: Continuing the Reconceptualization of Retention of Title (Romalpa) Security' (2011) 34(2) *University of New South Wales Law Journal* 567, 569.

that creates security interests⁴³ provided that the property subject to the clause meets certain criteria. Property is ‘PPSA retention of title property’ if it is personal property, the possessor of the property does not have title to it, and a PPSA security interest is attached to it.⁴⁴ Other situations produce results similar to that of a Romalpa clause. For example, a subcontractor will have a lien on goods where value has been added, though consideration has not been paid.⁴⁵

The PPSA does not apply to a security interest of a seller created by a negotiable bill of lading unless the parties demonstrate an intention to create an interest in the goods.⁴⁶ It must be suggested that a Romalpa clause would provide evidence of such an intention, thereby ensuring that the PPSA would apply to such a circumstance. In such a circumstance, it may be recommended that a seller incorporate a Romalpa clause.

It is common for construction contracts to contain a Romalpa clause. By way of example,⁴⁷ clause 42.4 Alternative 2 of AS2124-1992 provides:

The contractor may claim payment for unfixed plant or materials after establishing certain matters to the satisfaction of the Principal, including that ownership will pass to the Principal on payment and that the items are properly stored and labelled.

They will also be included in many contracts that are not based on standard form contracts as it is a way of ensuring interests in unpaid property are protected.⁴⁸

Many parties to construction projects may not understand the interaction of such interests under the PPSA since basic Romalpa clauses could not be registered under the previous regime.⁴⁹ The PPSA changes the previous registration system,⁵⁰ and actually takes Romalpa clauses a step further. Romalpa clauses ensure that until the personal property in question is fixed to the construction project, they will remain the property of the contractor.⁵¹ Once the collateral becomes part of the construction project, the PPSA refers to it as ‘an accession’.

⁴³ *Personal Property Securities Act 2009* (Cth) s 12(2)(d); John De Lacy, *The Reform of UK Personal Property Security Law: Comparative Perspectives*, (2010), 399; Kriss Will, ‘Practicalities of PPS Act’ (2012) 34(3) *Bulletin* 32, 32. It was defined as a security interest prior to the PPSA also: *General Motors Acceptance Corporation Australia v Southbank Traders Pty Ltd* (2007) 227 CLR 305; Jamie Glistler, ‘The role of trusts in the PPSA’ (2011) 34(2) *The University of New South Wales Law Journal* 628, 644.

⁴⁴ *Corporations Act 2001* (Cth) s 51F(1).

⁴⁵ *Groutco (Aust) Pty Ltd v Prince Constructions Pty Ltd* (1986) 3 BCL 372.

⁴⁶ *Personal Property Securities Act 2009* (Cth) s 8(1)(a).

⁴⁷ Clauses of similar effect can be found in AS4000-1997 clause 37.3, ABIC MW-1 2003 clause N4.2 point 3 and PC-1 1998 clause 12.10. AS2124 is a widely used contract in construction projects: Lolita Mohyla, *Construction Law in Australia: Law and Project Delivery*, (1996), 120.

⁴⁸ *North Western Shipping and Towage Company Pty Ltd v Commonwealth Bank of Australia Ltd & GL Machine and Steel Construction Pty Ltd (in liq)* (1993) 118 ALR 453.

⁴⁹ Anthony Duggan, ‘Romalpa Clauses Post-PPSA’ (2011) 33(4) *Sydney Law Review* 645, 646; John Stumbles, ‘The ‘PPSA’: the Extended Reach of the Definition of the ‘PPSA’ Security Interest’ (2011) 34(2) *The University of New South Wales Law Journal* 448, 449. See *Corporations Act 2001* (Cth) s 262 (repealed).

⁵⁰ John Stumbles, ‘The “PPSA”: the Extended Reach of the Definition of the “PPSA” Security Interest’ (2011) 34(2) *The University of New South Wales Law Journal* 448, 449.

⁵¹ *R J Grills Pty Ltd v Dellios* [1988] VR 136, 139; Ian Bailey and Matthew Bell, *Understanding Australian Construction Contracts*, (2008), 135; S Pyman, ‘Effect of Building Services Authority Act 1991 in Queensland’ (1993) 9 *Building and Construction Law* 235.

Registered security interests continue into the project as the collateral becomes and an accession.⁵² Interests in an accession will take a higher priority than the interests in the larger project.⁵³ This is a significant principle, as it gives Romalpa clauses more force and provides incentive for sellers to include Romalpa clauses in contracts. Also important to the priority rules is the fact that Romalpa clauses create PMSIs,⁵⁴ thereby granting the secured party a super-priority over other registered interests.⁵⁵

If goods are provided that are not yet paid for, the interest must be registered in favour of person supplying the goods. Registration is important for numerous reasons:

- There is a risk that the clause may be construed as a charge that may be invalid against receivers and liquidators where it is not registered.⁵⁶
- Registration also gives the holder priority over money raised when the buyer resells the collateral.⁵⁷
- In addition to the need to register interests it is also important to register the interest immediately since first registered security interest has priority where they are otherwise equal.⁵⁸

Insolvency is a key issue with regard to Romalpa clauses. If the contractor becomes insolvent before being paid, the contractor will retain title to the property.⁵⁹ This is reinforced by the PPSA. Upon the insolvency of the contractor, while the principal would lose priority to financiers, who may have a PMSI, it may prove important that the principal registers any interest so as to ensure it is then entitled to override any unregistered interests.

B Payment for Goods that Remain Offsite

Security interests are created when a principal pays for goods that remain offsite, which is a common occurrence within the construction industry.⁶⁰ A buyer has a security interest over the goods⁶¹ and may be entitled to take possession of them.⁶² This situation is similar to that

⁵² *Personal Property Securities Act 2009* (Cth) s 88; Andrew Boxall, 'Personal Property Securities Act 2009 (Cth): Some Consequences for Buyers of Personal Property' (2011) 25(1) *Commercial Law Quarterly: The Journal of the Commercial Law Association of Australia* 15, 21.

⁵³ *Personal Property Securities Act 2009* (Cth) s 89.

⁵⁴ *Personal Property Securities Act 2009* (Cth) ss 14(1)(a), (b), (d); Del Cseti and Jason Harris, *Understanding Personal Property Securities Law*, (2010), 131.

⁵⁵ *Personal Property Securities Act 2009* (Cth) s 62(2)(b).

⁵⁶ See *Re Bond Worth* [1979] 3 All ER 919; *Clough Mill v Martin* [1984] 3 All ER 982; *Armour v Thyssen Edelstahlwerke* [1991] 2 AC 339.

⁵⁷ *Personal Property Securities Act 2009* (Cth) s 62.

⁵⁸ *Personal Property Securities Act 2009* (Cth) s 55(4).

⁵⁹ *Crafter v Singh* (1990) 2 ACSR 1; *Aristoc Industries Pty Ltd v R A Wenham (Builders) Pty Ltd* [1965] NSW 581.

⁶⁰ Sidney Levy, *Project Management in Construction, sixth edition*, (2012), 60; Lawrence Bennett, *The Management of Construction: A Project Life Cycle Approach*, (2003), 62.

⁶¹ *Personal Property Securities Act 2009* (Cth) s 12(1). See also *Hewitt v Court* (1983) 149 CLR 639 (Wilson and Dawson JJ); Damien Cremean, Toby Schnookal and Michael Whitten, *Brooking on Building Contracts*, (2004), 261.

⁶² *Otis Elevator Co Pty Ltd v Girvan (Qld) Pty Ltd* (1990) 9 Aust Cons LR 107, 109.

of a Romalpa clause since it is concerned with ensuring that the exchange of title occurs at the same time as the principle makes payment. The difference is that the primary interest is in favour of the principal rather than the contractor, as payment is before delivery rather than after. Accordingly, the clauses listed above that provide for retention of title security interests will also provide for an interest where payment is made for goods that remain offsite.⁶³

It is important to register these security interests for several reasons. The primary reason being that if the contractor, or any other party, registers any security interest in the goods and the principal does not, then the contractor's interest will have priority.⁶⁴ Furthermore, it is important in this context for the principal to register their interest in the goods immediately so that they have priority where the interests are otherwise equal.⁶⁵ Other security interests that may have arisen, which will therefore be in competition, include where a financier has funded the purchase of those goods, thereby having a charge over them.⁶⁶

C Step in Rights

'Step-in rights' are the rights created where a principal is able to dismiss a contractor from certain works in the event of a serious breach in order to complete the works themselves or by utilising another contractor.⁶⁷ Disputes surrounding the costs associated with step-in rights and the related rectification are a commonplace.⁶⁸ A provision that provides for step-in rights will be upheld.⁶⁹ Most construction contracts will contain a clause providing for step-in rights where certain breaches of contract occur.⁷⁰ By way of specific example,⁷¹ clause 30.3 of AS 2124-1992 provides:

The superintendent may direct the contractor to remove material, demolish work, reconstruct or correct material or work where he or she discovers that the material or work is not in accordance with the Contract. This may include directions as to when such action is to be taken. If the contractor fails to comply with the direction within the time specified then, provided seven days' notice is given, the Principal may have the work carried out by others and any cost incurred will be a debt due from the Contractor to the Principal.

⁶³ See AS2124-1992 clause 42.4; AS4000-1997 clause 37.3, ABIC MW-1 2003 clause E12 and PC-1 1998 clause 12.10.

⁶⁴ *Personal Property Securities Act 2009* (Cth) s 55(3).

⁶⁵ *Personal Property Securities Act 2009* (Cth) s 55.

⁶⁶ This would fit within the definition within *Personal Property Securities Act 2009* (Cth) s 12(1). It may also constitute a PMSI under *Personal Property Securities Act 2009* (Cth) s 14(1).

⁶⁷ Sidney Levy, *Project Management in Construction*, sixth edition, (2012), 63.

⁶⁸ See *Ruxley Electronics and Construction Ltc v Forsyth* [1993] 1 WLR 650; *Bellgrove v Eldridge* (1954) 90 CLR 613; *Hasell v Bagot, Shakes and Lewis* (1911) 13 CLR 374; *Alcoa Minerals of Jamaica Inc v Herbert Broderick* [2000] BLR 279; *Hoening v Issacs* [1952] 2 All ER 176.

⁶⁹ *Sacher v African Canvas and Jute Industries Ltd* [1952] 3 SALR 31; *Sumpter v Hedges* [1898] 1 QB 673; *Whitaker v Dunn* (1887) 3 TLR 602; *Munro v Butt* (1858) EL & BL 738.

⁷⁰ Nicholas Dennys, Mark Raeside and Robert Clay, *Hudson's Building and Engineering Contracts*, (2010), 722.

⁷¹ See clauses of similar effect in AS 4000-1997 clause 29.3 and ABIC MW-1 2003 clause M14.

Many of Australia's larger law firms have expressed views that step-in rights create a security interest for the purposes of the PPSA.⁷² The interest of the principal is within the definition of a PPSA security interest because it is used to secure performance from the contractor.⁷³ Therefore, such clauses are subject to the PPSA.

Where a principal has step-in rights in a construction contract, it would be prudent to register such interests so as to ensure priority. Without registration, priority is not ensured since the right to possession of the works, or any part of the works, may be overridden by the registered security interests of the contractor. Examples include those that may have arisen pursuant to any of the other sections of this article.

However, step-in rights are subject to several potential problems. As step-in rights do not secure the purchase price, they are not PMSIs.⁷⁴ Therefore, any PMSIs that are registered by other parties, such as those held by financiers, will take priority.⁷⁵ Furthermore, the rules regarding accessions mean that where a party has a secured right in a specific part of the works, it will take priority over the step-in rights.⁷⁶

D Temporary Works

In a construction project, the contractor has a responsibility to care for temporary works.⁷⁷ 'Temporary works' includes electrical facilities, utility services,⁷⁸ shoring, coffer dams, sheet piling, planking, strutting, scaffolding and supports, which are required for construction though do not remain on the final product.⁷⁹ It is commonplace for construction contracts to contain provisions that confirm liability and ownership of temporary facilities.⁸⁰

The presence of temporary works creates a security interest for the purposes of the PPSA because the provision of temporary works is required to complete the works, and thus they act to secure payment from the principal. Whether mere possession can constitute a security interest is doubtful. Therefore, although the temporary works are affixed to the works, which are owned by the principal, the principal does not have a PPSA security interest, and neither

⁷² For example, see Allens: <http://www.allens.com.au/pubs/pps/fopps10aug10.htm>; Ashurst: www.ashursts.com/doc.aspx?id_Content=6949; Maddocks: <http://www.maddocks.com.au/pps-reform/ppsa-for-construction-infrastructure>; Holding Redlich: <http://www.holdingredlich.com.au/construction-infrastructure/the-effect-of-the-personal-property-securities-act-2009-cth-on-the-construction-industry>;

⁷³ See the definition in *Personal Property Securities Act 2009* (Cth) s 12(1).

⁷⁴ *Personal Property Securities Act 2009* (Cth) s 14(1).

⁷⁵ *Personal Property Securities Act 2009* (Cth) s 62(2)(b).

⁷⁶ See *Personal Property Securities Act 2009* (Cth) s 89.

⁷⁷ Ian Bailey, *Construction Law in Australia, second edition*, (1998), 224; Greg Goldfayl, *Construction Contract Administration, second edition*, (2004), 25.

⁷⁸ Edward Fisk and Wayne Reynolds, *Construction Project Administration, eighth edition*, (2006), 197.

⁷⁹ Greg Goldfayl, *Construction Contract Administration, second edition*, (2004), 75.

⁸⁰ Edward Fisk and Wayne Reynolds, *Construction Project Administration, eighth edition*, (2006), 196.

does the principal's financier. Therefore, the general law applies, and the contractor's proprietary interest would take priority.⁸¹

The owner of any temporary works that are used in a construction project should register their interests to ensure their proprietary interest remains as priority in case another security interest does arise in an individual circumstance. This also ensures that the insolvency of the principal will not affect their right to the temporary works.

Security interests are also present in the situation where the temporary works are owned by a third party.⁸² Where the third party has leased the temporary works to the contractor, it is recommended that the third party register their interests.⁸³ Such a case would fall under a lease arrangement, which is described below.

E Equipment Leases

It is common in construction contracts for a third party to lease equipment to a contractor of a project. In the case of such equipment lease, the PPSA expressly provides that the lessor has a security interest.⁸⁴ The PPSA provides that a security interest in relation to a lease arrangement is a PMSI,⁸⁵ provided it is not a sale and lease back to the seller,⁸⁶ thus taking priority over non-PMSI registered security interests.⁸⁷

All leases provide a lessee with a registrable interest.⁸⁸ On the other hand, the lessor only has a registrable security interest if it is a Personal Property Securities Lease (*PPS lease*).⁸⁹ To be a PPS lease under the PPSA, the lease must be either:⁹⁰

- for more than a year in temporal length;
- for an indefinite period of time;
- for less than a year though is automatically renewable;
- actually turns out to be more than a year; or

⁸¹ Robert Chambers, *An Introduction to Property Law in Australia, second edition*, (2008), 413. An earlier right to possession of the contractor will trump the later actual possession of the principal: *Gollan v Nugent* (1988) 166 CLR 18; *Flack v National Crime Authority* (1998) 156 ALR 501; *Costello v Derbyshire Constabulary* [2001] 3 All ER 150. The exception would be if the project lasted long enough that possession of the principal had been over 6 years: *Limitation Act 2005* (WA) s 13; *Limitation Act 1985* (ACT) s 11; *Limitation of Actions Act 1958* (Vic) s 5; *Limitation Act 1969* (NSW) s 14; *Limitation of Actions Act 1974* (Qld) s 10; *Limitations of Actions Act 1936* (SA) s 35; *Limitation Act 1974* (Tas) s 4. *Kallis Hire Pty Ltd v Consulere Design and Construction Pty Ltd* (1990) 10 Aust Cons LR 73.

⁸² *Personal Property Securities Act 2009* (Cth) s 12(3)(c).

⁸³ *Personal Property Security Act 2009* (Cth) s 12(3)(c).

⁸⁴ *Personal Property Securities Act 2009* (Cth) s 14(1)(c).

⁸⁵ *Personal Property Securities Act 2009* (Cth) s 14(2)(a).

⁸⁶ *Personal Property Securities Act 2009* (Cth) s 62(2).

⁸⁷ *Personal Property Securities Act 2009* (Cth) s 12(2)(i).

⁸⁸ *Personal Property Securities Act 2009* (Cth) s 12(3)(c).

⁸⁹ *Personal Property Securities Act 2009* (Cth) s 13(1); *Gibson v Stockco Ltd* [2011] NZCCLR29, [13] (White J); Del Cseti and Jason Harris, *Understanding Personal Property Securities Law*, (2010), 34.

- If the goods can be described by serial number then it is a term of 90 days that renders it registrable. However, for this element to be satisfied the lessor must be in the business of leasing goods.⁹¹

It appears that in most construction projects, though not all, the last requirement will apply, meaning that the lessor's interest is registrable. However, determining whether a lease arrangement will constitute a PPS lease must be determined on a case-by-case basis.

Further reasons for immediate registration exist. For example, title is not enough to secure one's interest, as a person with a registered possessory interest can override proprietary interests.⁹² Furthermore, it has been specifically noted that unregistered lessor will not have priority over a registered charge holder.⁹³ Lastly, registration by the lessee ensures priority from the lessor's financiers.

F Retention Money

Most construction contracts make provision for retention,⁹⁴ which allows the principal to hold money until certain obligations are fulfilled.⁹⁵ The right to retention money fulfils the PPSA definition of security interest since it secures performance of the contractual obligation.⁹⁶ Either or both parties to the construction contract may hold such rights.

Clauses providing for the retention of moneys are quite common in construction contracts. For example,⁹⁷ clause 42.11 of AS 2124-1992 provides:

Where either party fails to pay the other amounts due, the other may have recourse to retention moneys and if insufficient any security provided.

Both principal and contractor should register their interests in the retention money to ensure it is protected. Of larger concern is ensuring that they receive the money over creditors upon

⁹¹ *Personal Property Securities Act 2009* (Cth) s 13(2)(a); 'Ordinary course of business' has been defined in the context of the PPSA to require identification of the business of the seller, and whether the lease was in the ordinary course of that business: *Tubbs v Ruby 2005 Ltd* [2010] NZCA 353; *Autodom Ltd (Administrators Appointed) (Receivers and Managers Appointed) in the matter of Autodom Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2012] FCA 1393, [134] (McKerracher J).

⁹² Sheelagh McCracken, 'Conceptualising the Rights of a Lessee Under the Personal Property Securities Regime: the Challenge of "New Learning" for Australian Lawyers' (2011) 34(2) *University of New South Wales Law Journal* 547, 548.

⁹³ Craig Wappett, Bruce Whittaker, Steve Edwards and Jacqueline Browning, *Personal Property Securities in Australia*, (2010), [4.3.50]. This principle is the same in other PPSA jurisdictions: *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528; *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629; *International Harvester Credit Corp of Canada Ltd v Touche Ross* (1986) 61 CBR (NS) 193; *Re Giffen* [1998] 1 SCR 91.

⁹⁴ Richard Lambeck and John Eschemuller, *Urban Construction Project Management*, (2009), 200; Thomas Uher and Philip Davenport, *Fundamentals of Building Contract Management*, (2009), 249.

⁹⁵ Greg Goldfayl, *Construction Contract Administration, second edition*, (2004), 223.

⁹⁶ See *Personal Property Securities Act 2009* (Cth) s 12(1).

⁹⁷ See clauses of similar effect in AS4000 1997 clause 5.1, ABIC MW-1 2003 clause C1 and PC-1 1998 clause 4.1.

insolvency of the other party. Both the contractor and financier will have PMSIs over the retention money, therefore the priority will be determined by the time of registration.⁹⁸ Where the interest in retention money is not registered under the PPSA, it may not be enforceable under the PPSA.⁹⁹ Therefore, it is highly recommended to register such an interest in a timely manner.

IV CONCLUSION

This article has highlighted the important new rules provided by the PPSA through its definition of a security interest, provision of new priority rules, and the way in which it deals with securities upon insolvency of a party. However, the most important notion that this article has highlighted is that registration is vital in many situations commonly faced in construction contracts.

All of the following common construction project rights present security interests for the purposes of the PPSA that should be considered for registration:

- a) Romalpa clauses;
- b) payment for goods that remain offsite;
- c) step in rights;
- d) temporary works;
- e) equipment leases; and
- f) retention money.

The PPSA's largest effects are on the Romalpa clause.¹⁰⁰ However, this article has demonstrated that they can all cause heartache to parties who are not entirely aware of the PPSA regime and do not register their interests when they arise.



⁹⁸ *Personal Property Securities Act 2009* (Cth) s 63(b).

⁹⁹ *Corporations Act 2001* (Cth) s 440B.

¹⁰⁰ Berna Collier, Paul Von Nessen and Alan Collier, 'The PPSA: Continuing the Reconceptualization of Retention of Title (Romalpa) Security' (2011) 34(2) *University of New South Wales Law Journal* 567, 567.