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Student Advisors:

Professor Maree Sainsbury
John Passant

Student Editors:

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Foreword

Welcome to the third edition of the Canberra Law Review for 2011. I think it is a fantastic reflection on this Law Review that has attracted enough high quality research for three editions.

This edition contains articles which cover a range of current legal and academic issues and promote thinking about legal history. It is good to see the broader discussion of issues that impact on legal academics, such as the article on journal ranking and the discussion of assessment in law subjects. Both of these will guide legal academics in their decisions on publishing and teaching.

Of topical and local interest is the article on the abolition of judge only trials in the ACT for serious offences. At a Federal level, we have a discussion of the role of the Commonwealth in disaster response and the GST and the sale of residential property's being used for commercial purposes. Internationally, there is an article on corporate governance in China. Finally, we have an historic perspective on copyright law on the origins of the Crown prerogative.

We have also continued the Canberra Corner, which aims to focus on issues relevant to Canberra and the region. In this edition, Shane Rattenbury MLA, the ACT Greens Attorney General spokesperson, discusses sentencing laws in the ACT, in particular the need for a review of these laws.

Thank you to the student editors for this edition, Marcus Ap and Rachel Kelly. They came to this task without any previous editing experience and performed like experts. Thanks also to all the academics who gave up their time to referee contributions. I would also like to thank Mr John Passant, who was the student advisor for this edition for the majority of the semester.

Professor Maree Sainsbury
Dean and Student Advisor
Faculty of Law

TRUISMS ABOUT THE AUSTRALIAN PUBLISHING CLIMATE FOR LAW JOURNAL ARTICLES, AND SOME STRATEGIES TO COPE; OR ‘A FEMINIST PERSPECTIVE ON THE HUMAN RIGHTS OF VEGETARIAN CHILD-SOLDIERS IN OUTER SPACE’

DAN JERKER B. SVANTESSON*

ABSTRACT

The Australian Research Council’s now abolished ranking of journals provided a tool to decide where an author should publish her/his journal articles. This article aims to provide some further, more balanced, guidance on journal article publishing for Australian authors.

The articles can be divided into two parts. First, I highlight some truisms on matters to be considered in the context of legal writing and publishing of journal articles. I then present some findings from my research into the consequences of the ARC’s ranking system and related matters. The controversial ranking system has now been abolished. However, some important lessons can be

* Associate Professor, Faculty of Law Bond University, Gold Coast Queensland 4229 Australia, Ph: +61 7 5595 1418, E-mail: Dan_Svantesson@bond.edu.au, (www.svantesson.org). The author wishes to thank Paul White and Michael Coccetti for their research assistance. The author also thanks Ross Buckley, Jim Corkery, John Farrar, Rosa Riedl and William Van Caenegem for their valuable feedback on this article. Finally, the author thanks the helpful editors at the *Canberra Law Review* as well as the two anonymous reviewers.

learned from it so as to avoid the same mistakes being made again in the future.

I INTRODUCTION

Legal research and writing is typically a rather personal experience and can be carried out in many different ways, consciously or unconsciously, utilising a variety of methods. In his insightful 1997 article, *Legal scholarship for new law teachers*, Ross Buckley outlines five reasons why legal scholarship is written:

1. For enjoyment;
2. For advancement of one's career;
3. As a self-education tool;
4. To contribute to the development of the law; and
5. To contribute to others' understanding of the law.¹

To this could be added that many articles may be written as a result of research being a requirement for academic staff; that is, academics not seeking promotion are required to produce legal scholarship just to meet their duties.

Regardless of the motivation behind the article, some articles are written due to the author having been specifically invited to address a particular topic by a journal. Further, some authors write their articles with a particular journal in mind. However, more frequently (at least for junior academics), articles are written with the author only deciding where to submit the article once it has been written.

In this latter case, and were the author's article does not get accepted by an intended journal, authors are faced with the sometimes daunting task of trying to decide which journal is the most appropriate one to submit to.

From 2010, authors in Australia were provided with one tool to decide where to publish. I am here referring to the Australian Research Council's (ARC's) controversial, and now abolished, ranking of journals. This article aims to provide some further, more balanced, guidance on journal article publishing for Australian authors, particularly those who fall into the category of junior academics.

The articles can be divided into two parts. First, I will highlight some truisms on matters to be considered in the context of legal writing and publishing. While mainly stating the obvious, I hope that, in particular, junior academics will find the collection of advice useful. In the second part I present some findings from my research into the

¹ Ross P. Buckley, 'Note: Legal scholarship for new law teacher's' (1997) 8(2) *Legal Education Review* 181-212.

consequences of the ARC's ranking system and related matters. In more detail, I analyse what areas of research were favoured through the ranking scheme and what areas of research are negatively affected by the ARC's approach. My conclusions in that part prompted the alternative title for this article, and important lessons can be learned from the fundamentally flawed ranking exercise.

Both parts serve two distinct purposes. Most obviously, both parts contain useful information for those who publish or intend to publish in Australian law journals. Second, the article amounts to a commentary on the publishing landscape for Australian law journal articles.

II SOME THOUGHTS ON STRATEGIES FOR LEGAL RESEARCHERS

In this part of the article, I outline some more or less obvious issues to consider in legal research and journal article publishing and provide some advice on how to approach those issues.

A Take care in deciding what you spend your time writing on

One of the most important, and most difficult, things to do when planning your research strategy is to decide what to write about. Should you focus your writing in one area, or should you try to show mastery over a range of areas by having a diverse publication record? Should you only research your specific areas of interest or should you seek out those topics you think will be most interesting to your peers?

The short answer to this matrix of issues is probably that you need to take a balanced approached. Writing only in your area of interest may not be fruitful if it is so narrow that no one else is remotely interested in your findings no matter how interesting you personally find them. On the other hand, it is my view that a researcher who has a genuine interest in a specific area will find it easier to research that area than will someone who has no interest in that area. Furthermore, it is of course much more enjoyable to research something one finds interesting.

In light of this, every researcher must carefully balance *interest* and *impact*. In most cases, it should be possible to find a reasonable compromise between the two by finding a research angle with impact on a topic of interest. That may mean either broadening your focus or making it narrower. In other cases, it may require a slight change of direction for the research angle as such.

Similarly, there needs to be a balance between adopting a focused research strategy and striving for diversity. That is, over a researcher's career, there may be periods of great research focus, and other periods of a diverse research output. A strict research focus has the advantage of increasing the author's chance of becoming recognised as an expert in that particular field. It can also be used, and indeed be necessary, to achieve a particular goal such as law reform in relation to a specific area of law.

The risk with a strict research focus is that you are placing all the colloquial eggs in the same basket. First, you will typically only ever reach a very small audience. Second, if your area of research-focus gains limited attention, your status as expert in that field may be of limited value.

As to the goal of diversity, it must be noted that law has become such a large discipline that no one these days is a true generalist; the age of the generalists is over, and we are now in the age of specialists.² This means that all researchers must specialise to some degree. That is, however, not to say that a diverse approach to research is impossible or discouraged. In fact, researching one area will doubtlessly help with your understanding of other areas as you start making comparisons and noticing differences. Furthermore, diversity means exposure to a broader audience, and as correctly pointed out by Buckley ‘a degree of diversity is desirable and often essential if one is to discover the areas in which one loves to write’.³

Combining what has been said above, it is my view that a researcher benefits from a balance between periods of research diversity and periods of research focus on a handful of topics, where each publication contains a research angle with impact on a topic of interest. In addition, it is obviously of great value for an author to be able to look forward and identify topics coming up, or about to come up, on the horizon; that is, the ability to be ‘one step ahead’ sometimes separates a great article from just another good article.

Finally, when it comes to choosing a topic for your research, you may wish to have a look at the second part of this article where I present some findings as to the publishing culture in Australia. I show that certain categories of topics are more likely to be accepted for publication than others. Further, I highlight that the Australian government’s Excellence in Research for Australia (ERA) journal ranking created an inequality between various areas of research so that the ERA made it easier to publish in highly ranked journals in some areas than in others.

B Doctrinal research v ‘trendy’ research

The trends, contra-trends and recycling of the fashion world are well documented. But a similar modus operandi can also be seen in legal research, be as it may that the trends change less rapidly.

These trends in legal research are often identifiable by reference to buzzwords such as ‘multi-disciplinary’ and ‘socio-legal’ research, and there are trends in both research topics and research methodologies.⁴ The question for researchers is whether or not we adapt to these trends or simply let them run their course and pass into history.

² Susan Bartie, ‘The Lingering Core of Legal Scholarship’ (2010) 30(3) *Legal Studies* 345, 345.

³ Buckley, above n 1, 191.

⁴ See, eg, Martin Partington, ‘Back to the Future: The Success and Challenge of Socio-Legal Scholarship’ (2008) 40(1) *Bracton Law Journal* 27, 27; Richard Posner, ‘Legal Scholarship Today’

In making that decision, it may be useful to bear in mind that the choice to ignore the trends may have severe implications for the likelihood of getting your work published, and even your prospect of promotion. For example, these days, pure doctrinal legal research is commonly met with peer-reviewers commenting that the paper is ‘merely descriptive’ with the result that it is not accepted for publication. The unfortunate truth is that doctrinal research, no matter how crucial it is for the legal community, seems to be frowned upon by many legal academics. This is somewhat ironic considering that anecdotal evidence suggests that the majority of journal articles referred to by Australian courts – arguably the ultimate sign of a useful article – are doctrinal in nature.⁵

This places researchers in a difficult situation; if you write something doctrinal, it is less likely to get accepted for publication. Further, the article itself is less likely to be held in high esteem by colleagues and promotions committees. At the same time, should it be published, it is more likely to be referred to by the courts and thereby generate the type of indirect ‘social impact’ valued by the ARC, the academic community and promotions committees.

If I allow myself to speculate as to the forces behind the current focus on multi-disciplinary and quantitative research methodologies in law, I suspect that their main attraction is that they are comparatively more expensive. As bizarre as this seems at first glance, the simple truth is that we as researchers are largely assessed by reference to our ability to spend money.

One of the measurements applied by the ERA scheme is the amount of external research funding an institution has attracted.⁶ By focusing on research income, it is the obtaining of funds that is of importance – not how well the money is utilised, or indeed, the production of (quality) research. Thus, we are in a sense encouraged to structure our research in an as expensive manner as possible, and it is typically rather difficult to come up with suitable expenses for doctrinal research.

It is, of course, true that the funding bodies generally are seeking to get the best value for their money. However, the simple truth is that, where a project can be carried out without external funding (ie in the manner with the least impact on the funding country’s economy), or with minimal additional resources (making it inefficient or impossible to seek external funding), that project is not as favourable to the host

(2002) 115(5) *Harvard Law Review* 1314, 1317; Albert Brecht, 'Changes in Legal Scholarship and Their Impact on Law School Library Reference Services' (1984 - 1985) 77 *Law Library Journal* 157, 158.

⁵ For an interesting general discussion of the impact legal scholarship has on judges, See Edward Rubin, 'Seduction, Integration and Conceptual Frameworks: The Influence of Legal Scholarship on Judges' (2010) 29(1) *University of Queensland Law Journal* 101, 105.

⁶ See Dan Svantesson, Paul White 'Entering an era of research ranking - will innovation and diversity survive?' (2009) 21(3) *Bond Law Review* 173, 175.

institution as if the same research was produced in a more expensive manner justifying an external grant.

In the end, it may be difficult for junior academics to resist the pressure to adopt a trendy, and expansive, research methodology or pursue a trendy research question. Personally, every time I write something untrendy such as a doctrinal law journal article, I take some comfort in the fact that the trends will change, and until then, at least my writing is likely to be useful to the legal profession.

C To collaborate or not to collaborate?

Legal research can be a lonely undertaking and the option to collaborate may be tempting. Collaboration may also be a necessity where the research task lies outside your area of expertise, and in the current climate multi-disciplinary research is, as noted above, strongly encouraged both by the Government and by university research offices.⁷

However, collaboration is associated with several risks. For example:

- The collaborators may have different agendas;
- The collaborators may have different ideas about their respective responsibilities; and
- The collaborators may have strongly opposing views.

Therefore it is crucial to be very selective in choosing whom to collaborate with.

Having said that, collaborations can be very rewarding and may give a junior researcher great assistance in the pursuit of research grants and in the pursuit of having their work accepted for publication. Further, as Buckley points out, academics 'often have interesting ideas without the time to pursue them'.⁸ Thus, a junior academic teaming up with a senior academic to pursue projects the latter does not have time to pursue on her/his own, can be a very worthwhile endeavour for both parties involved.

D Seek feedback

As law students we were used to getting feedback on our work whether we asked for it or not. I wonder how many law students actually realise how valuable such

⁷ Australian Government, Department of Innovation, Industry, Science and Research, *Powering Ideas: An Innovation Agenda for the 21st Century* (12 May 2009)

<<http://www.innovation.gov.au/Innovation/Policy/Pages/PoweringIdeas.aspx>>.

⁸ Buckley, above n 1, 187.

feedback is. Those who start their academic path by writing a PhD or SJD thesis continue to get feedback, in particular from their supervisors.

However, when people take the step from being doctoral candidates to being an early career academic, the automatic flow of feedback typically stops. At that stage, it is very important to consciously seek out feedback, from colleagues at work or specialists or friends at other faculties.

Where given carefully, such feedback will not only improve the quality of the particular piece of writing you get feedback on, but your writing and research skills will develop where you take the feedback on board.

Having said that, not everyone is well suited to provide feedback for young academics. And it may be the case that not all advice is to be acted upon, but at least the feedback will bring attention to matters you can consider. And unlike students and PhD candidates, you have virtually complete control over your work and what aspects of given feedback you adopt.

Furthermore, you obviously also have control over who you approach for feedback, and you can chose people who you respect or even look up to. After all, as noted by Napoleon Bonaparte: ‘It is easier to put up with unpleasantness [and sometimes feedback, eg where it identifies the need for major rewrites, can be unpleasant indeed] from a man of one’s own way of thinking than from one who takes an entirely different point of view.’⁹ That is, of course, not to say that one should only seek feedback from those likely to agree with your approach.

Finally on the topic of feedback, it is common to acknowledge the feedback one receives in a footnote. Not only is this good form, but in some cases it may actually be beneficial for the article’s prospects of getting published. After all, feedback having been provided by a skilled colleague works as a quality assurance for the article as such.

E Publish broadly

When it comes to choosing where to publish, my advice would be to publish broadly in both books¹⁰ and academic journals, as well as in practitioner journals – each form of publication has its specific audience and for most academics it is valuable to reach the broadest audience possible.¹¹

⁹ Elizabeth Knowles (ed), *The Oxford Dictionary of Quotations* (Oxford University Press, 5th ed, 1999) 538.

¹⁰ Including the now much underrated textbook.

¹¹ Neil Sargent, ‘The Possibilities and Perils of Legal Studies’ (1991) 6 *Canadian Journal of Law and Society* 1, 1.

I acknowledge that promotions committees and the like may undervalue, or even question, an author's decision to publish in eg a non-ranked practitioner journal.¹² Further, it seems to have been common place for Australian universities to encourage their staff to publish only in highly ranked journals and bonus schemes etc may have been linked to the ARC's journal ranking system. As noted by Senator Carr:

There is clear and consistent evidence that the rankings were being deployed inappropriately within some quarters of the sector, in ways that could produce harmful outcomes, and based on a poor understanding of the actual role of the rankings. One common example was the setting of targets for publication in A and A* journals by institutional research managers.¹³

It may be seen as worrying that this 'inappropriate' use of the ERA journal ranking was not foreseeable to the decision-makers. After all, it can hardly come as a surprise that actors in a highly competitive marketplace adjust their behaviour according to the criteria by which their performance is being judged. Thus, it is arguable that the decision-makers who put the ranking in place are as much to blame for the harmful outcomes it produced as are those research managers who all too willingly embraced the ranking exercise.

Returning to the broader question of whether one should publish broadly or not, my personal thinking is, however, that useful publications will be rewarded in the end, at least indirectly in the form of industry recognition and societal impact of your research.

A related question is how long a journal article should be. The answer is that it depends on several factors, not least the topic. One important thing to consider in this context is that Australian law journals, unlike for example their US counterparts, typically do not accept lengthy journal articles.

To provide some assistance in finding a journal that accepts the nature, and length, of article you have written, I asked a research assistant, Paul White, to construct the following table:

Table 1

Title	Topics	Previous Ranking	Article Length	Comments / Notes	Book Reviews	Stated time frame for review	Issues per year
Adelaide Law	General	B		Yes	Yes		2

¹² See also Bartie, above n 2, 351.

¹³ Senator Kim Carr, 'Ministerial statement to the Senate Economics Legislation Committee Improvements to Excellence in Research for Australia (ERA)' (Media Statement, 30 May 2011) <<http://minister.innovation.gov.au/carr/mediareleases/pages/improvementstoexcellenceinresearchforaustralia.aspx>>.

Review							
Alternative Law Journal	Public Policy / Politics and the Law	B	4000	Yes	Yes		4
Asia Pacific Journal of Environmental Law	Environment, Natural Resources and Land Use / Asian law	C	8000-10000	Yes	Yes		2
Australasian Journal of Natural Resources Law and Policy	Environment, Natural Resources and Land Use	B		Yes	Yes		1 to 2
Australian Administrative Law Bulletin	Administrative Law	B		Yes	Yes		12
Australian and New Zealand Sports Law Journal	Sports Law	C	5000-12000	Yes			1
Australian Animal Protection Law Journal	Animal Law	Not ranked					1 to 2
Australian Bar Review	Legal doctrine and procedure	C		Yes	Yes		3
Australian Business Law Review	Commercial Law	B	10000	Yes	Yes		6
Australian Civil Liability	Torts	C	1200 - 3000	Yes	Yes		10
Australian Indigenous Law Review	Indigenous Legal Issues / Native Title	C	5000 - 15000	Yes			2
Australian Intellectual Property Journal	Intellectual Property	B	10000	Yes	Yes		4
Australian International Law Journal	International law	C	6000 - 12000	Yes	Yes		1
Australian Journal of Administrative Law	Administrative Law	B	15000	Yes	Yes		4
Australian Journal of Asian Law	International Law	B	8000 - 12000	Yes	Yes		2
Australian Journal of Corporate Law	Corporations and Associations	B		Yes	Yes		3
Australian Journal of Human Rights	Human Rights / International	A	6000 - 8000	Yes	Yes	6 weeks	2

	Law						
Australian Journal of Labour Law	Employment	A	10000	Yes	Yes		3
Australian Journal of Maritime and Ocean Affairs	Maritime Law / Law of the Sea	Not ranked	5000 - 7000	Yes	Yes		4
Australian Law Journal	General	B	10000	Yes	Yes		12
Australian Law Librarian	Research Writing and Libraries	C		Yes	Yes		4
Australian Property Law Journal	Property Law	B		Yes			3
Australian Resources and Energy Law Journal	Energy and Resources Law	C	3000 - 10000	Yes	Yes		2
Australian Superannuation Law Bulletin	Superannuation	C		Yes			10
Australian Tax Forum: a journal of taxation policy, law and reform	Tax	A					4
Australian Tax Review	Tax Law	B	15000	Yes	Yes		4
Australian Yearbook of International Law	International Law	C		Yes	Yes		1
Bond Law Review	General	C					2
Building and Construction Law Journal	Commercial Law	C	10000	Yes	Yes		6
Canberra Law Review	General	C	5000 - 10000	Yes	Yes		1 to 2
Commercial Law Journal	Commercial Law	C	4000 - 6000	Yes	Yes		3
Company and Securities Law Journal	Corporations and Associations	B	15000	Yes	Yes		8
Competition and Consumer Law Journal	Commercial Law	B		Yes	Yes		3
Corporate Governance eJournal	Corporate Governance	C					Online
Criminal Law Journal	Criminal Law	A	10000	Yes	Yes		6

Deakin Law Review	General	C	1000 - 12000	Yes	Yes		2
ELaw Journal	General	C	4000 - 10000	Yes	Yes		2
Elder Law Review	Elder Law / Tax / Superannuation	C			Yes		
Environmental and Planning Law Journal	Environment / Natural Resources and Land Use	B	15000	Yes	Yes		6
Family Law Review	Family Law	C	4000 - 8000	Yes	Yes		4
Federal Law Review	Constitutional Law / Public Policy, Politics and the Law	A*		Yes	Yes		3
Flinders Journal of Law Reform	Public Policy, Politics and the Law	B		Yes	Yes		2
Griffith Law Review	General	A*	10000		Yes	4 weeks	2
Indigenous Law Bulletin	Minority, Race and Ethnic Issues	C	600-2800	Yes	Yes		6
Insolvency Law Journal	Bankruptcy	B	15000	Yes	Yes		4
Insurance Law Journal	Insurance	C		Yes	Yes		3
James Cook University Law Review	General	C	5000 - 8000	Yes	Yes		1
Journal of Contract Law	Commercial Law	A		Yes	Yes		3
Journal of Equity	Civil Litigation and Dispute Resolution / Estates and Trusts	A		Yes	Yes		3
Journal of Law and Medicine	Health / Medicine / Psychology and Psychiatry	A	10000	Yes	Yes		4
Law in Context	Socio-legal	B	8000-12000	Yes	Yes		1 to 2
Local Government Law Journal	Governmental Law	B	15000	Yes	Yes		3

Macquarie Journal of Business Law	Commercial Law / International Law / International Trade	C	8000	Yes	Yes		1
Macquarie Journal of International and Comparative Environmental Law	Comparative Law / International Law / Environment Natural Resources and Land Use	C	8000		Yes	4 - 6 weeks	2
Macquarie Law Journal	General	C	10000	Yes	Yes	6 weeks	1
Media and Arts Law Review	Communications Law Media and Journalism	B	4000 - 15000	Yes	Yes		4
Melbourne Journal of International Law	International law	B	10000-18000	Yes	Yes		2
Melbourne University Law Review	General	A*	8000 - 12000	Yes	Yes		3
Monash University Law Review	General	A	6000 - 15000	Yes	Yes		2
Public Law Review	Public Policy / Politics and the Law	A*	8000 - 10000	Yes	Yes		4
Queensland Lawyer	General	C	10000	Yes	Yes		4
Queensland University of Technology Law and Justice Journal	Public Policy / Politics and the Law	C	4000 - 8000	Yes	Yes		2
Revenue Law Journal	Taxation	B			Yes		1
Southern Cross University Law Review	General	C	3000-6000	Yes	Yes		1
Sports Law eJournal	Sports Law	C				Online	
Telecommunications Journal of Australia	Communications Law	C	5000	Yes	Yes		4
The Sydney Law Review	General	A*	8000 - 12000	Yes	Yes	4 - 12 weeks	4
Tort Law Review	Torts	B	10000	Yes	Yes		3
Torts Law Journal	Torts	B		Yes	Yes		3

University of New South Wales Law Journal	General	A*	10000	Yes	Yes	8 - 12 weeks	3
University of Notre Dame Australia Law Review	General	C	12000	Yes	Yes		1
University of Tasmania Law Review	General	B		Yes	Yes		2
University of Western Australia Law Review	General	B	7000 - 10000		Yes		2
University of Western Sydney Law Review	General	C		Yes	Yes		1

F Publish internationally or only domestically?

One important question to consider is whether to focus one's publications domestically, or whether to pursue publication in international journals. The topic one writes on may, of course, be of central importance for the answer to this question. Furthermore, to some degree, this choice may be decided by reference to the length of the article one has written. As seen in the table above, Australian law journal do not accept particularly lengthy articles. In contrast many US journals accept articles up to 35,000 words.¹⁴ An additional benefit of seeking publication in US law journals is that they typically consider articles submitted to multiple journals simultaneously.

Where the length of the article is not an issue, the question remains whether to publish in domestic journals or international journals. The first thing to note in this context is that, most 'international' journals are in fact more correctly described as being domestic to a foreign jurisdiction. Thus, what we really are considering is whether to publish in Australia or in other jurisdictions.

I acknowledge that this article here reaches its most subjective part, but allow me to make two observations from the perspective of a non-native Australian. It seems to me that Australian's are (1) too easily impressed by some foreign content, and, at the same time, (2) too quick to dismiss other foreign content.

These two observations are based solely on personal experiences and anecdotal evidence, but they are clearly backed-up by the results reached in the ERA's ranking

¹⁴ See, eg, The Georgetown Law Journal, *Articles* <<http://www.georgetownlawjournal.com/submissions/articles/>>. However, the trend in the US seems to go towards somewhat shorter articles. For example, recently 12 leading US law journals adopted a policy 'to play an active role in moderating the length of law review articles'.

of law journals.¹⁵ It highlighted that Australians have a great, not to say exaggerated, respect for US and English journals. Further it highlighted that other foreign journals, particularly those in another language than English, are under-valued or more commonly simply ignored.

It is, for example, simply staggering that journals focused on domestic US law, such as the *George Washington Law Review*¹⁶, *Washington Law Review*¹⁷ and *the Supreme Court Review* were ranked *A*, while a journal like *Juridisk Tidskrift*¹⁸, that is fundamental to the entire Swedish legal community, was unranked – publications relating to the domestic law of one country are thus held in high regard, while publications relating to the domestic law of another country are ignored.

G Broad or narrow scope for the articles?

One question authors have to consider in relation to each and every journal article they write is whether to write on a narrow topic with great depth, or whether to write on a broader topic with less depth. For example, one option is to write with great depth on a narrow topic such as whether software can be classed as ‘goods’ for the purpose of the Sale of Goods Acts. A broader option would be, for example, to write an assessment of how well the *Trade Practices Act* protected consumers, seeking to identify gaps in the approach taken in that piece of legislation.

Unfortunately, articles painting a broad-brushed picture providing an overview of a legal question are typically not favoured by law journal editors. They are often met by calls from the reviewer(s) for more details on each issue raised in the article. This has some logic; after all, there will, of course, be more that could be said on each topic discussed, and thus, the picture painted is not complete.

The problem, which many reviewers seem to overlook, is that law journals impose word limits on the articles they accept. As Australian journals, as illustrated above, only accept rather short articles (ie up to 15,000 words), the consequence is that one simply cannot write articles providing an overview of a legal question which meets the requirements put in place by that type of misguided and overambitious reviewer; academic rigour is confused with an exhaustive treatment of each issue raised. Yet articles providing an overview of a broad topic, rather than a detailed study of a narrow topic, require as much academic rigour and can be immensely valuable.¹⁹

¹⁵ Refer to: Australian Research Council, *ERA Ranked Journal List* (30 May 2011) Australian Government <http://arc.gov.au/era/era_2010/archive/era_journal_list.htm>.

¹⁶ ‘We publish articles that are national in scope’, (*George Washington Law Review, Manuscript Submissions*, <<http://groups.law.gwu.edu/LR/Pages/Submissions.aspx>>).

¹⁷ ‘The Law Review publishes Articles and Comments of national and regional interest’ (*Washington Law Review, Home* <<http://www.law.washington.edu/wlr/>>).

¹⁸ *Juridisk Tidskrift* <<http://www.jt.se/>>.

¹⁹ The situation is similar for legal textbooks. Many textbooks make tremendous contributions to the systematisation and organisation of the law. But as they cannot go into as much depth as ‘scholarly’ monographs, they are not even viewed as research at all. See further the ill-advised HERDC system

Long term, if this attitude amongst Australian law journals continues, the law will doubtless suffer since significant opportunities for law reform can be identified through the type of broad topic overview articles discussed here.

H Make the most of your research

A researcher would typically invest a considerable amount of time in the research required to write a good quality law journal article. One approach to ensure maximum value is to use the research for more than one article. That is, instead of following the natural inclination to want to move to a new area of research once an article has been written and submitted, it is useful to write a second or even third article on the same topic, taking a different angle and aimed at a different audience.

Thus, most articles suitable for submission in Australian university law journals contain elements that can be brought out and refocused so as to form the basis for a short practitioner-oriented article.

In writing the related articles one must, of course, take care to avoid repetition and must ensure that the second or third article actually adds to the research findings of the first article.

I Dealing with rejections

Rejections are a part of academic life. Our applications for promotion may be rejected; as can our great ideas for a new course or our book proposals. The publishing of journal articles is no different and most, if not all, academics experience their articles being rejected from time to time.

Particularly for junior academics such rejections may cause us to doubt ourselves. However, it is important to remember that a rejection merely signals that one or a small number of people are unwilling to let the article in question be published. It does not necessarily mean that no journal will publish the article:

Rejection does not mean an article is worthless. It may mean the next issue of the journal is full, or the topic does not suit the intended future profile of the journal, or the journal has published too much in that field recently, or simply that one editor or one referee did not like either what you have written or how you have written it.²⁰

(Department of Innovation, Industry, Science and Research, *Higher Education Research Data Collection 2011* <<http://www.innovation.gov.au/Research/ResearchBlockGrants/Documents/2011HERDCSpecification.pdf>>).

²⁰ Buckley, above n 1, 210.

Consequently, where an article is rejected the two main alternatives may be to either (1) re-submit to the same journal taking account of the feedback provided, or (2) submit the article to a different journal. After all, re-submitting an already written article takes much less time than writing a completely new article, even where one needs to adjust the focus of the already written article somewhat.

In any case, it is important to make use of the feedback typically received through the peer-review system used by most Australian law journals.

Finally, it is important to remember that academics today are spoilt for choice as to which journal they submit to. First, modern communications technologies, primarily the Internet, make it possible to communicate with foreign journals with ease. Second, looking domestically, there is much choice. For example Table 1 above contains more than 70 Australian law journals.

This is an astonishing number when contrasted with how many law journals Australia used to have: ‘It has been calculated that there were eight law journals in Australia in 1960, nine in 1970, fourteen in 1980 and about 50 in 1994’.²¹

III THE AUSTRALIAN PUBLISHING CLIMATE FOR LAW JOURNAL ARTICLES POST ERA’S JOURNAL RANKING

For the 2010 ERA exercise, the ARC officially launched its ranking of journals, including law journals. Looking at the ranking scheme, one has to wonder whether it, if carried out in a different setting, would not be considered as being anti-competitive, if not under the law, at least in spirit.

Elsewhere²² I have raised further concerns about the ERA’s journal ranking. My main concerns were as follows:

- The ranking was highly subjective and lacked transparency – it is, for example, utterly unclear how *Griffith Law Review* managed the journey from being ranked B in the CALD draft ranking to its A* ranking in the final ERA version;
- The ranking represented a self-fulfilling prophecy as authors will target journals with high ranking *regardless of how* well regarded those journals were prior to the ranking exercise;
- It is not possible to compare general journals and specialist journals;

²¹ Buckley, above n 1, 207 referring to J Gava, ‘Scholarship and Community’ (1995) 16 *Sydney Law Review* 443, at 459. The numbers referred to in the quote are of course derived at through a more scientific method. However, the point that the number of Australian law journal has increased in recent years cannot be disputed.

²² Dan Svantesson, ‘International ranking of law journals – can it be done, and at what cost?’ (2009) 29(4) *Legal Studies* 678-691.

- The journal ranking was incomplete; and
- The ERA ranking was overstating the comparative importance of several Australian, British and American journals compared to their overseas counterparts (particularly those from non-English speaking countries).

In addition to these serious issues, obvious mistakes were made in the construction of the final ranking. For example, in the draft ranking the *Computer Law and Security Review* was ranked ‘A’. However, in the final version that journal was not even included. Instead, reference was made to the journal’s earlier name, *Computer Law and Security Report* which gained a ‘B’ ranking.

While this is bizarre on several levels, it is interesting to consider the impact it has on individual researchers. In effect, it means that every single researcher who has published in that journal has her/his research regarded as being a little bit less valuable than it was under the draft ranking. That is, the same authors and the same research output lose part of their prestige at the stroke of a pen without the actual research output having been examined. An unscientific approach indeed.

Furthermore, the now abolished and discredited ERA ranking was also causing an uneven playing field between various legal sub-disciplines., Where the journals of one specialist area are all highly ranked, research in that area is automatically more highly valued than research in another area where the relevant journals are given a lower ranking.

A ERA’s ranking caused an uneven playing field

As this consequence of the ERA ranking indirectly impacted on the career prospects of, particularly junior, academics, and affected the research strategies outlined above, I have conducted some research into just how serious the impact of the ERA’s ranking was.

The aim of my research in this regard was to statistically prove that in certain research fields it is easier to get published in highly ranked journals as the journals in those fields have on average gained a higher ranking than the journals in another category. And then it is an easy step to show what areas they are.

To achieve this, I used the categorisation system adopted by the well-known Washington & Lee list of law journal ranking.²³ I asked two research assistants, Paul White and Michael Coccetti, to match the ERA ranking to the journals in the various journal categories used by the Washington & Lee list. In more detail, they were asked

²³ Washington and Lee University School of Law, *Law Journals: Submissions and Rankings* <<http://lawlib.wlu.edu/lj/index.aspx>>.

to look up the ERA ranking of all the journals of each category of law journals in the Washington & Lee list.

The table below shows:

1. the number of journals in each of the Washington & Lee list categories
2. how many of them are ranked A* (expressed both as number and percentage);
3. how many of them are ranked A (expressed both as number and percentage);
4. how many of them are ranked B (expressed both as number and percentage);
5. how many of them are ranked C (expressed both as number and percentage);
6. how many of them are not ranked for ERA purposes (expressed both as number and percentage).

Table 2²⁴

Category	Total	A*	A* %	A	A%	B	B%	C	C%	Not Ranked	Not Ranked %
Administrative Law	15	1	7%	4	27%	2	13%	5	33%	3	20%
African Law	27	0	0%	1	4%	2	7%	8	30%	16	59%
Agriculture	5	0	0%	0	0%	0	0%	3	60%	2	40%
Air and Space	4	0	0%	2	50%	1	25%	1	25%	0	0%
Animals	5	0	0%	0	0%	0	0%	1	20%	4	80%
Arts, Entertainment and Sports	35	0	0%	3	9%	3	9%	8	23%	21	60%
Asian Law	54	0	0%	1	2%	4	7%	11	20%	38	70%
Banking and Finance	15	0	0%	0	0%	1	7%	6	40%	8	53%
Bankruptcy	12	0	0%	1	8%	2	17%	0	0%	9	75%
Civil Litigation and Dispute Resolution	47	1	2%	6	13%	4	9%	8	17%	28	60%
Civil Rights	16	1	6%	0	0%	3	19%	3	19%	9	56%
Commercial Law	137	2	1%	9	7%	12	9%	39	28%	75	55%
Communications	20	0	0%	1	5%	4	20%	4	20%	11	55%
Comparative Law	39	1	3%	1	3%	10	26%	13	33%	14	36%
Constitutional Law	36	2	6%	6	17%	7	19%	7	19%	14	39%
Corporations and	32	0	0%	3	9%	5	16%	7	22%	17	53%

²⁴ This Table is currently in draft form only with some refinement of the figures needed. However, such refinements will not alter the general picture it paints.

Associations											
Criminal Law and Procedure	59	0	0%	6	10%	5	8%	15	25%	33	56%
Criminology	63	1	2%	5	8%	9	14%	20	32%	28	44%
Economics	42	0	0%	8	19%	8	19%	6	14%	20	48%
Education Law	13	0	0%	1	8%	3	23%	5	38%	4	31%
Elder Law	4	0	0%	0	0%	0	0%	2	50%	2	50%
Employment	20	0	0%	2	10%	2	10%	6	30%	10	50%
Energy Law	17	0	0%	0	0%	2	12%	2	12%	13	76%
Environment, Natural Resources and Land Use	89	0	0%	4	4%	9	10%	23	26%	53	60%
Estates and Trusts	14	0	0%	1	7%	1	7%	0	0%	12	86%
Ethics	17	1	6%	3	18%	2	12%	1	6%	10	59%
European Law	60	1	2%	5	8%	6	10%	14	23%	34	57%
Evidence	2	0	0%	0	0%	0	0%	1	50%	1	50%
Family Law	30	0	0%	5	17%	6	20%	5	17%	14	47%
Gender, Woman and Sexuality	31	0	0%	7	23%	12	39%	2	6%	10	32%
General	386	24	6%	15	4%	58	15%	144	37%	145	38%
Government	10	0	0%	0	0%	1	10%	0	0%	9	90%
Health, Medicine and Psychology	71	0	0%	6	8%	7	10%	19	27%	39	55%
Human Rights	46	1	2%	7	15%	6	13%	9	20%	23	50%
Insurance Law	5	0	0%	0	0%	0	0%	3	60%	2	40%
Intellectual Property	76	0	0%	1	1%	8	11%	22	29%	45	59%
International Law	208	6	3%	27	13%	31	15%	57	27%	87	42%
International Trade	33	1	3%	3	9%	1	3%	13	39%	15	45%
Jurisprudence and Legal Theory	37	3	8%	13	35%	2	5%	5	14%	14	38%
Legal History	17	0	0%	2	12%	0	0%	7	41%	8	47%
Legal Profession and Legal Education	28	2	7%	3	11%	2	7%	6	21%	15	54%
Legislation	5	0	0%	0	0%	2	40%	0	0%	3	60%
Maritime Law	15	1	7%	1	7%	4	27%	3	20%	6	40%
Minority, Race and Ethnic Issues	47	0	0%	1	2%	3	6%	13	28%	30	64%
Property Law	10	0	0%	0	0%	2	20%	2	20%	6	60%
Public Policy, Politics and the Law	140	6	4%	13	9%	17	12%	19	14%	85	61%
Research, Writing and Libraries	6	0	0%	1	17%	1	17%	3	50%	1	17%

Religion	11	0	0%	0	0%	1	9%	2	18%	8	73%
Religious Legal Systems	10	0	0%	0	0%	0	0%	6	60%	4	40%
Science, Technology and Computing	68	0	0%	3	4.41%	12	17.65%	20	29.41%	33	48.53%
Social Sciences	25	0	0%	6	24%	4	16%	3	12%	12	48%
Torts	7	0	0%	0	0%	3	43%	0	0%	4	57%
Taxation	52	2	4%	3	6%	7	13%	12	23%	28	54%
Transportation	2	0	0%	0	0%	0	0%	1	50%	1	50%
War, Conflicts and the Military	9	0	0%	0	0%	1	11%	3	33%	5	56%

Several observations can be made from these statistics. For example, about 78% of the 68 journals categorised as *Science, Technology and Computing* are either not ranked or ranked C, leaving merely 22% ranked B, A or A*. In contrast, of the 37 journals falling within the category of *Jurisprudence and Legal Theory*, no less than 43% are either A* or A ranked. The conclusion that it is easier to publish in highly ranked journals if you write on legal theory than if you write on Internet law is inescapable.

Other categories that are particularly favoured by the ARC ranking include *Administrative Law, Air and Space, Civil Litigation and Dispute Resolution, Constitutional Law, Economics, Ethics, Family Law, Gender, Woman and Sexuality, Human Rights, International Law, Legal Profession and Legal Education, Research, Writing and Libraries*, and finally *Social Sciences*. Focusing your research on these categories is thus helpful should you desire to publish mainly in highly ranked journals.

The main ‘losers’ include researchers in the fields of *African Law, Agriculture, Animals, Asian Law, Banking and Finance, Communications, Comparative Law, Elder Law, Energy Law, Environment, Natural Resources and Land Use, Evidence, Government, Insurance Law, Intellectual Property, Legislation, Minority, Race and Ethnic Issues, Property Law, Religion, Religious Legal Systems, Torts, Transportation, War, Conflicts and the Military*, and as noted above *Science, Technology and Computing*. If publishing in these fields, you will struggle to publish in highly ranked journals.

If this is a conscious decision by the ARC, it should have been disclosed and debated, and if it is an unanticipated consequence, the whole ERA ranking system could be called into question for this reason alone.²⁵

²⁵ It is, of course, possible to argue that the average quality of journals in particular field is higher than the average quality of journals in another field. However, such a comparison is complex and requires open and transparent discussions.

It is also interesting to note that, of the more than 2,000 journals included in the Washington & Lee list of journal ranking about 50% are unranked in the ERA scheme. This is a staggering number when one considers the fact that articles published in unranked journals count for nothing under the ERA scheme; these publications do not even count towards the data collection at all, no matter how perfectly good the peer review process is and how academic and important the article is. The already severe consequences of this are made all the more serious when one considers that the Washington & Lee list of journal ranking is by no means a complete list of all the law journals available around the world. First, new journals are created on a regular basis, and more importantly, the Washington & Lee list of journal ranking contains only a small percentage of the non-English language journals that exist.

Either way, it seems that the ERA ranking encouraged rational researchers to consider angling their articles in such a manner as to make them publishable in more favoured fields. For instance, if you write on legal theory in relation to Internet regulation, you would be far better off, from an ERA ranking perspective, aiming the article at the legal theory sector than the IT and the law sector. That is, if you were in the unfortunate situation of having to take the ERA ranking seriously.

B What do “top” ranked journals publish?

Many of the top ranked Australian law journals are generalist journals, and another interesting set of statistics can be gained if we examine the type of articles those journals favour.

With that aim in mind, I asked the same research assistants to examine all the articles published in 2008, 2009 and 2010 by A* ranked Australian generalist journals²⁶, and assess which of the categories of law each article fits within. Such an assessment is obviously subjective in part, and the statistics presented here can thus merely be seen to give some indication of the publishing habits of the A* ranked Australian generalist journals (that is, Griffith Law Review, Melbourne University Law Review, Sydney Law Review and University of New South Wales Law Review).

Further, it is to be noted that, the total number of articles listed in this table does not necessarily match the total number of journal articles actually published. This is so because some articles fit within more than one category, and in such cases have been included in both categories they fit within. Thus, for example, an article addressing Danish administrative law would be listed both in the category of ‘European Law’ and in the category of ‘Administrative Law’.

²⁶ As the ANU’s Federal Law Review “specialises in matters of federal law” (See *About Us* ANU College of Law <http://www.federallawreview.com.au/about_us.htm>) it has not been considered.

Finally, by way of introducing this table, some journals combine general issues, open to a variety of topics, with specialist or thematic issues focused on a particular area of law. Such specialist issues skew the table below. Yet as they are also of importance for signalling the focus of the various journals, they have been included nevertheless. To provide transparency, the topics of the relevant specialist issues are outlined in a separate table (Table 4) below.

Table 3

Category	MUL R	GU	Syd	UNSW	Totals
Administrative Law	6	0	0	6	12
African Law	0	1	0	1	2
Agriculture	0	0	0	0	0
Air and Space	0	0	0	0	0
Animals	0	2	0	2	4
Arts, Entertainment and Sports	0	0	0	0	0
Asian Law	1	0	0	1	2
Banking and Finance	2	8	0	10	20
Bankruptcy	0	0	0	0	0
Civil Litigation and Dispute Resolution	2	0	1	3	6
Civil Rights	0	0	0	0	0
Commercial Law	8	0	2	10	20
Communications	0	0	0	0	0
Comparative Law	0	0	0	0	0
Consumer and Competition Law	1	0	0	1	2
Conflict of laws	1	0	0	1	2
Constitutional Law	4	2	8	14	28
Contract Law	4	0	0	4	8
Corporations and Associations	3	2	2	7	14
Criminal Law	9	7	4	20	40
Criminology	0	1	0	1	2
Economics	0	0	0	0	0
Education Law	0	0	0	0	0
Elder Law	0	0	0	0	0
Employment	0	1	4	5	10
Energy Law	0	0	0	0	0
Environment, Natural Resources and Land Use	2	1	2	5	10
Estates and Trusts	1	0	1	2	4
Equity	2	0	0	2	4
Ethics	0	1	0	1	2
European Law	0	0	1	1	2

Evidence	1	0	2	3	6
Family Law	1	0	1	2	4
Gender, Woman and Sexuality	0	3	0	3	6
General	0	0	0	0	0
Government	3	1	3	7	14
Health, Medicine and Psychology	0	2	1	3	6
Human Rights	4	5	5	14	28
Insurance Law	0	0	0	0	0
Intellectual Property	2	1	3	6	12
International Law	2	2	2	6	12
International Trade	0	0	3	3	6
Jurisprudence and Legal Theory	2	8	4	14	28
Legal History	0	0	0	0	0
Legal Education	1	6	1	8	16
Legal Profession	1	2	4	7	14
Legislation	0	0	0	0	0
Maritime Law	1	0	0	1	2
Minority, Race and Ethnic Issues	3	6	1	10	20
Property Law	2	1	2	5	10
Public Policy, Politics and the Law	0	2	1	3	6
Research, Writing and Libraries	1	1	0	2	4
Religion	0	2	0	2	4
Religious Legal Systems	0	0	0	0	0
Science, Technology and Computing	0	0	0	0	0
Social Sciences	0	0	1	1	2
TaxationTorts	3	0	2	5	10
Torts	1	0	5	6	12
Transportation	1	1	0	2	4
War, Conflicts and the Military	4	0	0	4	8

Here we see that these journals show a particular interest in articles dealing with topics such as *Banking and Finance*, *Commercial Law*, *Constitutional Law*, *Corporations and Associations*, *Criminal Law and Procedure*, *Government*, *Human Rights*, *International Law*, *Jurisprudence and Legal Theory*, *Legal Profession and Legal Education*, and *Minority, Race and Ethnic Issues*.

Consequently, authors in these fields enjoy a reasonably strong prospect of publishing in highly ranked generalist journals also where that field's specialist journals have

received low rankings. Unfortunately, however, this still leaves a substantial number of research fields without reasonable access to highly ranked publications outlets.

As promised above, here is a table of the specialist/thematic issues published by the Australian generalist A* journals during 2008, 2009 and 2010.²⁷

Table 4

Journal	2008	2009	2010
Griffith Law Review	Invisible Laws, Visible Cities	Fitzgerald Report Twenty Years On	The Future Of Financial Regulation: Lessons From The Global Financial Crisis
Melbourne University Law Review	0	0	0
Sydney Law Review	Special Issue Constitutional law	0	0
University of New South Wales Law Review	Australian Federalism	Saving the System? Law and Regulation after the Credit Crunch	The Future of Human Rights in Australia

C Who do “top” ranked journals publish?

Before concluding this examination of the publishing culture amongst Australia’s highest ranked generalist law journals, it is interesting to make some observations as to what types of authors are favoured by these journals. The table below, research for which was carried out by the mentioned research assistants, based on the published articles for 2008-2010, paints an interesting picture.

Table 5

Category	Griffith Law Review	Melbourne University Law Review	Sydney Law Review	University of New South Wales Law Review
Australian Academic (Assoc. Professor or Professor)	25	36	26	41

²⁷ Note that some journals include special forums/symposiums in their general issues. This table is, however, focused on specialist/thematic issues only and does not include such forums/symposiums contained in general issues.

Australian Academic (Below Assoc. Professor)	39	50	34	39
Non-Australian Academic (Assoc. Professor or Professor)	9	7	4	5
Non-Australian Academic (Below Assoc. Professor)	12	3	3	8
Judges	2	4	3	4
Practitioners	1	0	5	39
Others	0	0	0	4

From the above, it is clear that, as can be expected, the clear majority of articles are written by Australian academics, with the legal profession and foreign academics accounting for only a small portion of the total number of articles published.²⁸

The study resulting in the Table above also revealed a strong tendency for these top-ranked journals to favour articles written by academics employed by their host institutions.²⁹ Thus, of the total number of authors published over the studied three year period 30.68% of authors published in the *Griffith Law Review* were staff members at Griffith University. Similarly, 21% of authors published in the *Melbourne University Law Review* were staff members at Melbourne University, and 19.29% of the authors published in the *University of New South Wales Law Review* were staff members at University of New South Wales. Finally, no less than 32% of the authors published in the *Sydney Law Review* were staff members at Sydney University. The seriousness of the picture emerging from the above increases further if one focuses on the same figures relevant for academic authors only.

Perhaps it is not too bold an assertion to make, to conclude that one's prospect of publishing in a highly ranked journal under the ERA ranking scheme was not exactly hurt by being employed at the university that publishes that journal.³⁰ The potential impact this conclusion may have on the validity of the ARC's ERA ranking goes beyond the scope of this article.

²⁸ However, it seems UNSW Law Review attracts and/or favours articles by practitioners to a considerably greater extent than do the other Australian A* ranked generalist journals.

²⁹ It is possible that a similar trend can be seen in relation also to those university journals that obtained a lower ranking. That has however not been studied here.

³⁰ It is to be acknowledged that the same may be true for all law journals. However, the impact of C ranked journals favouring authors from the host institution is, of course, much less significant.

IV CONCLUDING REMARKS

In this article I have sought to share some thoughts on research strategies that hopefully are of interest, at least, to legal academics at the start of their career. Much of what I have said is stating the obvious. However, perhaps this article can be a useful way to collect those common wisdoms I have included.

Having said that, I am not suggesting that I have expressed only commonly shared views; this article represents my view on the matters discussed, and others are likely to disagree on some of the views I have expressed.

The second part of the article may be of interest also to those who have already had a long life in academia as it presents some new statistics of broad relevance.

I have shown that the ERA's ranking exercise created an uneven playing field in which researchers in some areas of law were placed in an advantageous position while others would only ever be able to publish in a highly ranked journal if they manage to overcome the significant hurdle associated with trying to squeeze a specialist article into a generalist journal. I hope we have learnt something from the fundamentally flawed ranking exercise.

Finally, if I was to summarise my key recommendations in three bullet points, they would be as follows:

- Find a research area you are passionate about – your work will be more enjoyable, and likely, of higher quality;
- Work hard – there are no shortcuts; and

Be lucky – much of what brings your career forward, such as meeting the right people and being cited in the right context, is based on pure luck.

INSPIRING OR UNDERMINING CONFIDENCE? AMENDMENTS TO THE RIGHT TO JUDGE ALONE TRIALS IN THE ACT

JODIE O'LEARY*

I INTRODUCTION

On 23 June 1964, a patent was granted for the Hula Hoop.¹ The same date in 2011 saw another full circle, this time by the Australian Capital Territory ('ACT') Parliament. This day marked the passage of legislation in the ACT which removed the right to trial by judge alone in the Territory for those charged with particular serious offences, returning instead to a requirement for jury trials.² Discussing the Criminal Proceedings Legislation Amendment Bill 2011 (ACT) ('the Bill'), the Attorney General of the ACT Simon Corbell expressed the Government's belief that 'criminal justice can only be further strengthened by reaffirming the importance of jury trials for serious criminal matters'.³ The advantages of the jury trial in re-establishing confidence in the judicial system was explained in a submission to the Standing Committee on Justice and Community Safety, which was tasked with scrutinising the Bill. The submission noted:

A number of cases in the ACT Supreme Court involving homicide and other serious offences have raised community concern about the prevalence of judge alone trials. While we cannot say that any of the outcomes in these cases would have been different had a jury been involved, the degree of public confidence in the courts' decision-making would arguably have been greater... The involvement of juries in the criminal justice

* Assistant Professor, Bond University. The author would like to thank Lesley Brown, who provided research assistance for this article.

¹ Mary Bellis, *June Calendar – Events in Science and Invention History and June Birthdays* (2011) About.com <<http://inventors.about.com/od/todayinhistory/a/june.htm>>.

² *The Criminal Proceedings Legislation Amendment Act 2011* (ACT).

³ Attorney General's Department, 'Reform to Judge-alone Trials' (Media Release, 12 February 2011) <<http://www.chiefminister.act.gov.au/media.php?v=10450>> .

system is ... a key platform for building community confidence in the fair administration of justice.⁴

However, this legislation, by its nature, does not compensate for the grey areas that often arise in these serious criminal matters. That is, for example, some of these cases attract substantial media attention. Such attention could include prejudicial material that may influence jurors, affecting their ability to act impartially. Nevertheless, these matters must proceed before a jury. As such, the legislation may be subject to challenge in the future on the basis that it is incompatible with human rights. Such a concern was raised by Chief Justice Higgins, among others, prior to the passage of the amending legislation,⁵ and may be in danger of being borne out, especially if the experience of relevant foreign jurisdictions is instructive.

This article considers the development of the law surrounding judge alone trials in the ACT, which culminated in the passage of the *Criminal Proceedings Legislation Amendment Act 2011* (ACT). It proposes that the amended legislation, despite assertions to the contrary in the compatibility and explanatory statements,⁶ is incompatible with the right to a fair trial by an independent, impartial tribunal articulated in the *Human Rights Act 2004* (ACT) ('*HRA*').⁷ In doing so it canvasses judicial pronouncements in Canada, where the requirement to proceed with a jury trial in the face of significant publicity was contested against the *Canadian Charter of Rights and Freedoms*⁸ and, on at least one occasion, found to be contrary to the right to an independent and impartial tribunal.⁹ It also considers the approach taken in the United Kingdom, where a similar provision in the *European Convention on Human Rights*¹⁰ incorporating an impartiality requirement was explained to necessitate the exclusion of any 'legitimate doubt' as to possible prejudice.¹¹ The article argues that the possibility that a person charged with an excluded offence that has achieved notoriety may be subject to irredeemable prejudice if required to front a jury cannot be excluded. Further, it asserts that the impact of the amendments in limiting the right to a fair trial is unreasonable, as the amendments do not respond to a pressing social need and are disproportionate, as evidenced by the less restrictive approaches taken in other Australian jurisdictions. It concludes that a tempered approach must be considered by the ACT legislature to avoid running afoul of the *HRA* and moreover to inspire, rather than undermine, confidence in the legal system.

⁴ Gregor Urbas and Robyn Holder, Australian National University, Submission to the Standing Committee on Justice and Community Safety, Legislative Assembly for the ACT, *Criminal Proceedings Legislation Amendment Bill 2011 (ACT)*, 8 April 2011, 5-6.

⁵ Chief Justice Higgins, 'Reform to Judge-Alone Trials' (March 2011) *Bar Bulletin: Newsletter of the Australian Capital Territory Bar Association* 5.

⁶ Compatibility Statement, Criminal Proceedings Legislation Amendment Bill 2011 (ACT); Revised Explanatory Statement, Criminal Proceedings Legislation Amendment Bill 2011 (ACT) 3.

⁷ *Human Rights Act 2004* (ACT) s 21.

⁸ *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

⁹ *R v McGregor* [1999] 43 OR (3d).

¹⁰ Specifically the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 6 ('*European Convention on Human Rights*').

¹¹ *Pullar v United Kingdom* [1996] III Eur Court HR [30].

II DEVELOPING THE JUDGE ALONE LEGISLATION

The ACT was the third Australian jurisdiction to introduce the possibility of judge alone trials for indictable criminal matters.¹² As of 1993, section 68B of the *Supreme Court Act 1933* (ACT) allowed an accused person charged with an indictable offence to elect a trial by judge alone as of right.¹³ Provided an accused person fulfilled a number of procedural requirements they could choose to be tried without a jury and this choice was generally not reviewable by the courts or the prosecution.¹⁴ When introducing the Supreme Court (Amendment) Bill 1993 (ACT) into Parliament, with the option for an accused to elect a judge alone trial, the then-Attorney General recognised there would be cases for which an accused person might prefer to be tried by a judge alone. Those included matters subject to extensive pre-trial publicity and those involving a mass of technical evidence that may prove difficult for jurors to comprehend.¹⁵ The model chosen reflected the South Australian approach, endowing the accused with complete discretion to make a judge alone trial election without any requirement to disclose the reason/s for that choice. This differed from the New South Wales approach which initially required prosecution consent before a judge alone trial could eventuate.¹⁶

Subsequent to the introduction of these legislative provisions in the ACT, other Australian jurisdictions legislated for the use of judge alone trials for indictable matters. Western Australia initially required Crown consent,¹⁷ but, following a review by the Law Reform Commission of Western Australia, provided the court with a gate keeping role. Upon the application of the accused or the prosecution (provided the accused consents) for a judge alone trial, the court has to be satisfied that this mode of trial is appropriate in the ‘interests of justice’.¹⁸ Examples of matters that may and may not be appropriate for judge alone trial were included in the legislation. The main category of cases considered suitable would be long or complex matters, likely to unreasonably burden the jury.¹⁹ Unsuitable cases would be those requiring the ‘application of objective community standards’ to the facts.²⁰ This format has

¹² It followed South Australia in 1984: see *Juries Act 1927* (SA), and New South Wales in 1991: See *Criminal Law and Procedure Act 1986* (NSW) s 132; this was recently amended by the *Courts and Criminal Legislation Further Amendment Act 2010* (NSW) sch 12.2.

¹³ The amendments to the *Supreme Court Act 1933* (ACT) introducing s 68B were by virtue of the *Supreme Court (Amendment) Act 1993* (ACT).

¹⁴ The procedural requirements included that the election is to be made in writing and the accused must have sought and received advice from a legal practitioner as to the election. An exception as to when a trial by judge alone would not be permitted was if the trial involved co-accused who did not make a corresponding election.

¹⁵ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 17 June 1993, 2216 (Terry Connolly, Attorney General).

¹⁶ *Criminal Law and Procedure Act 1986* (NSW) s 132(3) as amended by the *Courts and Criminal Legislation Further Amendment Act 2010* (NSW) sch 12.2.

¹⁷ *Criminal Code 1913* (WA) s 651A(5).

¹⁸ *Criminal Procedure Act 2004* (WA) s 118(4).

¹⁹ *Criminal Procedure Act 2004* (WA) s 118(5)(a).

²⁰ *Criminal Procedure Act 2004* (WA) s 118(6).

become the preferred choice for the majority of Australian jurisdictions that permit judge alone trials (with the addition in Queensland of matters subjected to significant pre-trial publicity as being potentially apposite for this mode of trial),²¹ leaving South Australia and the ACT in the minority. This distinction perhaps goes someway to explaining why the percentage of judge alone trials in the ACT and South Australia exceed those in the other Australian jurisdictions.²²

The fact that the ACT had the ‘highest proportion of matters proceeding by judge alone trials in Australia at 56 percent’²³ provided much of the impetus for the presentation of the Bill to the Legislative Assembly in February this year. In his second reading speech, the Attorney General also noted that the rates of election were particularly high for accused persons charged with sex offences and offences involving death of a person.²⁴ Further, he alluded to the rates of conviction in judge alone trials for those offences being low, noting that judges presiding over judge alone trials had failed to convict anyone of murder in the four years preceding 30 June 2008 and only nine percent of judge alone trials for sex offences had resulted in conviction.²⁵ However, he did not provide any comparison statistics of convictions for those offences heard before juries in the same period.

The Bill proposed to exclude certain offences (specifically murder, manslaughter and culpable driving occasioning death, as well as sexual offences outlined in the *Crimes Act 1900* (ACT))²⁶ from the purview of judge alone trials. An offender charged with these excluded offences would no longer have the option of electing a judge alone trial. To further justify targeting these offences for exclusion, the Attorney General stressed their seriousness and stated that they often required ‘decisions and findings of fact to be made involving the application and assessment of community standards.’²⁷ On 23 June 2011, the Legislative Assembly for the ACT voted in favour of the Bill,

²¹ In addition to Western Australia, this format has been adopted by Queensland: *Criminal Code 1899* (Qld) s 615 and has recently been introduced in New South Wales following a review by the Standing Committee on Law and Justice, Parliament of New South Wales, *Inquiry into Judge Alone Trials under s 132 of the Criminal Procedure Act 1986*, Report No 44 (November 2010) resulting in amendments to the *Criminal Law and Procedure Act 1986* (NSW) s 132 that commenced in January 2011. Note however the significant difference in NSW that this process is not mandatory if both the prosecution and the accused consent to this mode of trial.

²² In Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 17 February 2011, 256 (Simon Corbell, Attorney General) it was noted that the next closest jurisdiction to the ACT is ‘the South Australian Supreme Court, at 15 per cent and then Western Australia at 2.7 per cent.’

²³ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 17 February 2011, 256 (Simon Corbell, Attorney General).

²⁴ Ibid.

²⁵ Ibid. Note that these comments should be considered in light of the low numbers of murder trials (and it can be assumed even lower number of judge alone trials) in that period, see Manu Jaireth, ‘Proposed Reforms to Judge-Alone Trials in the Australian Capital Territory’ (2010) 10 *Canberra Law Review* 251, 259.

²⁶ For the full list of now excluded offences see *Supreme Court Act 1933* (ACT) sch 2 pt 2.2.

²⁷ ACT, above n 22, 257.

although not without controversy.²⁸ For example, the selection of offences for exclusion was labelled as random and the effect as arbitrary.²⁹ The amended provisions took effect in July.³⁰

III COMPATABILITY WITH HUMAN RIGHTS

Mirroring part of Article 14 of the *International Covenant on Civil and Political Rights* ('ICCPR'),³¹ the *HRA* s 21(1) enshrines the right to a fair trial in the ACT, specifically the right to have criminal charges 'decided by a competent, independent and impartial court or tribunal after a fair and public hearing.' This right can be subject to reasonable limits.³²

The *HRA* scaffolds a number of protections, broadly reflecting separation of powers values, to ensure that human rights are afforded to Territorians. First, the Attorney General is required to provide a statement as to whether, in his/her opinion, any proposed legislation is consistent or inconsistent with human rights.³³ Secondly, the proposed legislation must be scrutinised by the relevant standing committee, which is required to report to the Legislative Assembly on any human rights issues raised.³⁴ Thirdly, the judiciary is required to interpret, as far as it is possible to do so consistently with its purpose, legislation consistently with human rights,³⁵ and where a law cannot be interpreted in such a manner the Supreme Court may declare the law incompatible with human rights.³⁶ However, the court does not have the power to

²⁸ The Assembly voted Ayes 11 and Noes 6, Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 June 2011, 2529.

²⁹ See, eg, Anne Wallace, Lorana Bartels and Anthony Hopkins, University of Canberra, Submission to the Standing Committee on Justice and Community Safety, Legislative Assembly for the ACT, *Criminal Proceedings Legislation Amendment Bill 2011 (ACT)*, 8 April 2011, 2; Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 June 2011, 2505 (Mrs Dunne) and 2514 and 2517 (Mr Seselja); Chief Justice Higgins, above n 5, 5. Note also reference to comments by the Human Rights Commissioner that '[t]he bill may be arbitrary' in Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 June 2011, 2522 (Mrs Dunne). Concerns have also been raised about the resource implications of the amendments: see Manu Jaireth, above n 25. However these criticisms of efficiency are outside the scope of this article.

³⁰ See *Supreme Court Act 1933 (ACT)* s 68B, as amended by *Criminal Proceedings Legislation 2011 (ACT)* pt 3.

³¹ Specifically *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(1).

³² *Human Rights Act 2004 (ACT)* s 28.

³³ *Human Rights Act 2004 (ACT)* s 37. It was reported last year that as yet the Attorney General has not made a statement acknowledging that an Bill is incompatible with human rights: Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004 (ACT)*: Insights for Human Rights Protection in Australia' (2010) 33(1) *UNSW Law Journal* 136, 142.

³⁴ *Human Rights Act 2004 (ACT)* s 38.

³⁵ *Human Rights Act 2004 (ACT)* s 30. Although this provision is not limited to the judiciary, it also encompasses other decision makers.

³⁶ *Human Rights Act 2004 (ACT)* s 32. For further discussion of these and two other protective mechanisms, the role of the Human Rights Commissioner and the duty on public authorities, see Watchirs and McKinnon, above n 33, 139-140.

invalidate legislation; instead the approach in the ACT, similar to that in Victoria and in the United Kingdom,³⁷ retains ‘parliamentary supremacy, placing the responsibility for amending the law upon the legislature.’³⁸ Further, these provisions do not create legally enforceable rights.³⁹ In the recent High Court decision of *Momcilovic v The Queen*,⁴⁰ which considered similar provisions of the Victorian *Charter of Human Rights and Responsibilities Act 2006*, French CJ confirmed this approach, stating that ‘[t]he declaration ... has no legal effect upon the validity of the statutory provision which is its subject. It has statutory consequences of a procedural character.’⁴¹

The Bill amending the right to judge alone trials in the ACT did follow the procedure outlined in the first and second steps. The Attorney General’s compatibility statement suggested that the Bill was consistent with the *HRA*.⁴² The reasons were articulated in the Bill’s explanatory statement, stipulating that the right to a fair trial is not limited as ‘a person indicted on an excluded offence will have a fair trial provided for by existing jury trial provisions and further supported by appeal provisions.’⁴³

Nevertheless, the Standing Committee on Justice and Community Safety scrutinised the Bill and discussed its possible implications, especially on the right to a fair trial. The Committee referred to the possibility articulated by Chief Justice Higgins that removing the right to a judge alone trial may result in prejudice, occasioned by publicity and/or the nature of the offence, infringing an accused’s ability to be heard by an independent and impartial court.⁴⁴ Further, the Committee questioned whether a less restrictive approach was available.⁴⁵

³⁷ Although parliamentary supremacy is arguably less valued in the United Kingdom where the interpretive approach taken in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 found Parliament’s intent can be departed from in achieving consistency with human rights, giving the Human Rights Act ‘quasi-constitutional status’: Jeremy Gans, Terese Henning, Jill Hunter and Kate Warner, *Criminal Process and Human Rights* (The Federation Press, 2011) 14.

³⁸ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 3rd ed, 2010) 126. Specifically, the Attorney General, upon receiving a declaration of incompatibility, must present it to the Legislative Assembly: *Human Rights Act 2004* (ACT) s 30.

³⁹ *R v Fearnside* (2009) 193 A Crim R 128, [77] and [80]. Note specifically that failure to comply with the process outlined in ss 37-38 ‘does not affect the validity, operation or enforcement of any Territory law’: *Human Rights Act 2004* (ACT) s 39. However, cf *Human Rights Act 2004* (ACT) Pt 5A, which does create a direct right of action against public authorities who fail to consider human rights in decision making or act in a way incompatible with a human right. Note that public authority expressly excludes a court and the Legislatively Assembly, unless they are acting in an administrative capacity: *Human Rights Act 2004* (ACT) s 40(2).

⁴⁰ *Momcilovic v The Queen* [2011] HCA 34.

⁴¹ *Ibid* [89]. French was supported by the majority on this point, however note that Gummow, Hayne and Heydon JJ found the provision invalid as it ‘attempted a significant change to the constitutional relationship between the arms of government with respect to the interpretation and application of statute law’: per Gummow at [183].

⁴² Compatibility Statement, Criminal Proceedings Legislation Amendment Bill 2011 (ACT).

⁴³ Revised Explanatory Statement, Criminal Proceedings Legislation Amendment Bill 2011 (ACT) 2.

⁴⁴ Standing Committee on Justice and Community Safety, Parliament of the Australian Capital Territory, *Scrutiny Report No. 36* (29 April 2011) 4 referring to Chief Justice Higgins, above n 5, 5.

⁴⁵ *Ibid* 7, referring to the option raised in Anne Wallace, Lorana Bartels and Anthony Hopkins, University of Canberra, Submission to the Standing Committee on Justice and Community Safety,

The Human Rights Act 2004 (ACT): The First Five Years of Operation, a report to the ACT Department of Justice and Community Safety completed in May 2009, determined that the HRA's most significant impact was at the policy-making level, with human rights being considered in development of new laws and policies.⁴⁶ In this respect, it echoed the results of the 12 month review of the HRA.⁴⁷ Although the comments of the Scrutiny Committee,⁴⁸ raising human rights concerns, were cited by the Opposition in debate and in recommending amendments to the Bill,⁴⁹ ultimately the amendments were rejected.⁵⁰ This followed a rather cursory response from the Attorney General referring again to the original reasons provided in the explanatory statement.⁵¹ Before proceeding further it must be considered whether the right to a fair trial has been limited and, if so, whether that limitation is justifiable.

IV IS A HRA PROTECTED HUMAN RIGHT LIMITED?

In *R v Fearnside*,⁵² Besanko J (with whom Gray P and Penfold J agreed) opined that the consequence of removing the right to elect a judge alone trial, necessitating a trial by jury, would not raise issues with the right to a fair trial in s 21:

It would be a surprising conclusion that a trial by jury would not secure to all accused persons a fair hearing by a competent, independent and impartial court having regard to the facts that before the *Supreme Court (Amendment) Act 1993* (ACT) all charges of serious criminal offences were tried by jury, that in some other jurisdictions in Australia a trial must be by jury and there is no right in an accused person to elect for trial by judge alone and in the case of Commonwealth offences trial by jury is prescribed by s 80 of the Constitution.... [S]ubject to the usual safeguards and rules ... a jury is a competent, independent and impartial body for the purpose of the trial of criminal charges [and] there are a number of discretions designed to protect the position of an accused person ... to ensure, among other things, that the trial is fair.⁵³

Legislative Assembly for the ACT, *Criminal Proceedings Legislation Amendment Bill 2011 (ACT)*, 8 April 2011, 2.

⁴⁶ Watchirs and McKinnon, above n 33, 169.

⁴⁷ The ACT Human Rights Act Research Project, 'The Human Rights Act 2004 (ACT): The First Five Years of Operation' A Report to the ACT Department of Justice and Community Safety (May 2009) 6. The results of the 12 month review in ACT Department of Justice and Community Safety (JACS), 'Human Rights Act 2004 Twelve Month Review Report' (2006) were also referred to in The ACT Human Rights Act Research Project Report (May 2009) 14.

⁴⁸ Here the Standing Committee on Justice and Community Safety.

⁴⁹ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 June 2011, 2504 (Mrs Dunne) and 2516 (Mr Seselja).

⁵⁰ This is unlike amendments proposed to the Health Legislation Amendment Bill 2006 (No 2) which were successful following reference to the Scrutiny Committee: see Watchirs and McKinnon, above n 33, 144.

⁵¹ As reported in Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 June 2011, 2516 (Mr Seselja).

⁵² *R v Fearnside* (2009) 193 A Crim R 128.

⁵³ *R v Fearnside* (2009) 193 A Crim R 128, [100]-[101] per Besanko J.

Such a statement is consistent with findings in the United States of America. There, under the *Federal Rules of Criminal Procedure*, an accused person can waive their right to a jury (and instead proceed by judge alone or bench trial) if they have the consent of the government and the court.⁵⁴ In *Singer v United States*,⁵⁵ the Supreme Court confirmed that the right in the *United States Constitution* art III, § 2 and the Sixth Amendment to a trial by jury did not confer or recognise a corresponding right to a trial by judge alone.⁵⁶ As such, asserting many of the same ideas that Besanko J later relied on, the Court held that jury trials are:

surrounded with safeguards to make [them] as fair as possible ...[and] [i]n light of the Constitution's emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury.⁵⁷

However, the comments in the United States must be read in their context. That is, the comments discussed the Constitutional provision and the Sixth Amendment mentioned above, which are specifically directed to jury trials⁵⁸ and are not only provided for the benefit of the accused but also for the public in general.⁵⁹ This can be contrasted with the provisions in the ACT which more broadly discuss the right to a fair trial before an independent or impartial court or tribunal, specifically choosing not to restrict the right to a jury trial only,⁶⁰ and which were established to protect individual interests, as opposed to any collective community interest.

As discussed below, the Canadian experience, with provisions that provide personal guarantees, albeit to a greater extent given the entrenchment of rights in the *Canadian Charter of Rights and Freedoms*, correlates more closely to the ACT. If the ACT judiciary considers the judgments of Canadian courts it may, conversely to the logic in *Fearnside*, indeed find that the right to a fair trial is limited.

⁵⁴ 18 USCA FRCRP Rule 23. This is also echoed in many of the States: see, eg, AL R RCP Rule 18.1; DC Code § 16-705; ID ST § 19-3911; KY ST RCRP Rule 9.26; NV ST 175.011. Although note that there are some differences in the procedural requirements.

⁵⁵ *Singer v United States*, 380 US 24 (1965).

⁵⁶ Ibid 26. This was earlier decided in *Adams v United States ex rel. McCann*, 317 US 269 (1942).

⁵⁷ *Singer v United States*, 380 US 24 (1965) 35.

⁵⁸ The Sixth Amendment states that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...' and article III, § 2(3) of the *United States Constitution* provides '[t]he Trial of all Crimes, except in cases of impeachment, shall be by Jury'.

⁵⁹ See discussion in *R v Turpin* [1989] 1 SCR 1296, 24-27.

⁶⁰ See discussion about earlier attempts to include the right to a trial by jury in a Bill of Rights for the ACT Standing Committee on Justice and Community Safety, Parliament of the Australian Capital Territory, *Scrutiny Report No. 32* (10 February 2011) 2-3.

A The Canadian Experience

The *Canadian Charter of Rights and Freedoms* s 11(d) has similar wording to the *HRA* and guarantees the right to ‘a fair and public hearing by an independent and impartial tribunal.’⁶¹ Canada allows for judge alone trials in its *Criminal Code*,⁶² with provisions most similar to the amendments to the judge alone provisions in the ACT. Generally, like the ACT, an accused person can choose a judge alone trial.⁶³ Also like the ACT, particular offences, including murder (but not sexual offences or other offences involving death), are excluded from the ambit of an automatic right of election.⁶⁴ However, and this is where the two jurisdictions markedly diverge, in Canada, even excluded offences may be tried by judge alone if both the accused and the Attorney General consent.⁶⁵ A refusal of consent by the Attorney General can only be reviewed if an abuse of process is demonstrated.⁶⁶ It is in this context that the Canadian courts have had cause to consider whether requiring an accused person to have a jury trial may breach their right to a fair trial.

The accused in *R v Turpin*⁶⁷ had been acquitted of murder at first instance following a trial by judge alone. The trial judge allowed this mode of trial, accepting the accused’s arguments that the provisions in the *Criminal Code* preventing the accused from choosing this mode as of right breached the *Canadian Charter of Rights and Freedoms*. The Crown successfully appealed the acquittal on the grounds that the trial judge did not have jurisdiction to proceed in that manner. The Supreme Court then confirmed that the *Canadian Charter of Rights and Freedoms* s 11(f) guaranteeing a right to a trial by jury did not correspond to a right to a judge alone trial where this was excluded by the *Criminal Code*. Such a finding meant that, as the case was argued, the accused’s rights had not been infringed and, as such, the accused was not entitled to a declaration under s 24 of the *Canadian Charter of Rights and Freedoms*. Subsequent to that decision, lawyers for accused persons faced with the prospect of a mandatory jury trial, following the Attorney General’s refusal of consent to trial by judge alone, turned to an argument that an abuse of process existed as *other* constitutional considerations were engaged, that is, the accused’s right under s 11(d) guaranteeing a fair and impartial trial was being infringed. In *R v McGregor*,⁶⁸ the Ontario Court of Appeal accepted this argument. The Court supported the trial judge’s decision to grant a judge alone trial, over the Attorney General’s refusal of consent, where there was evidence that the effects of the enormous media attention were still being felt one year on from the offence, and taking into consideration expert evidence that in notorious cases it is ‘more difficult to identify prospective jurors who lack the

⁶¹ *Canada Act 1982* (UK) c 11, sch B pt I s 11(d).

⁶² *Criminal Code*, CRC c 46, pt XIX.

⁶³ *Ibid* s 558.

⁶⁴ The other offences listed in *Criminal Code*, CRC c 46, XIX, s 469 include offences such as piracy and sedition.

⁶⁵ *Criminal Code*, CRC c 46, Pt XIX, s 473.

⁶⁶ *R v Wright* [2011] ABQB 145, [22].

⁶⁷ *R v Turpin* [1989] 1 SCR 1296.

⁶⁸ *R v McGregor* [1999] 43 OR (3d).

necessary impartiality.⁶⁹ This decision has been confined to its ‘unique circumstances’,⁷⁰ and subsequent cases have refused to find that unfairness is the necessary result of publicity or other perceived prejudice,⁷¹ relying instead on other ‘time-honoured statutory and common law procedures designed to preserve and protect the right of every accused to a fair trial by an impartial tribunal.’⁷² However, *McGregor* demonstrates that it is possible, in some instances, for courts to find that these other procedures provide insufficient protection.

Certainly the offences chosen for exclusion from judge alone trials in the ACT arguably include those that would attract the greatest notoriety and prejudicial publicity or raise other prejudice in the mind of potential jurors.⁷³ In all jurisdictions that offer a judge alone mode of trial, offenders charged with sex offences and offences involving the death of a person are the most likely to proceed or seek to proceed via that mode.⁷⁴ In those jurisdictions that require disclosure of reasons for seeking judge alone trials, assertions of potential prejudice have featured as one of the main justifications for seeking this mode of trial.⁷⁵

Concern about prejudice arising from publicity is particularly pertinent in the ACT,⁷⁶ a small jurisdiction where other protections, such as transfer of proceedings, are unlikely to be an effective means of combating the anticipated prejudice.⁷⁷ The Supreme Court, with jurisdiction over these serious matters, is situated in Canberra and even crimes committed on the furthest borders of the ACT have occurred no more than 80 kilometres away, a short distance for journalists to travel to report on these matters. It has been noted that jurors’ recollection of pre-trial publicity is greater for crimes that occur in their community and that ‘partial’ changes of venue to a place where publicity about the offence is still readily available will have little impact on the influence of prejudicial publicity.⁷⁸ Arguably, the ACT, given its size, is one big community within which jurors will recall notorious matters more easily. Further, the advent of the internet and increase in the use of social media where prejudicial

⁶⁹ *R v JS-R* [2008] CanLii 54305 (ON SC) [6]-[7].

⁷⁰ *R v Ng* [2003] ABCA 1, [59].

⁷¹ Such as *R v Choy* [2008] ABQB 626.

⁷² *R v Khan* [2007] OJ No 4383 (CA) [15]-[16].

⁷³ Anne Wallace, Lorana Bartels and Anthony Hopkins, University of Canberra, Submission to the Standing Committee on Justice and Community Safety, Legislative Assembly for the ACT, *Criminal Proceedings Legislation Amendment Bill 2011 (ACT)*, 8 April 2011, 2.

⁷⁴ Jodie O’Leary, ‘Twelve Angry Peers or One Angry Judge: An Analysis of Judge Alone Trials in Australia’ (2011) 35 *Criminal Law Journal* 154, 165.

⁷⁵ This includes prejudice due to pre-trial publicity and other prejudice: see *ibid*, 164-165.

⁷⁶ Anne Wallace, Lorana Bartels and Anthony Hopkins, University of Canberra, Submission to the Standing Committee on Justice and Community Safety, Legislative Assembly for the ACT, *Criminal Proceedings Legislation Amendment Bill 2011 (ACT)*, 8 April 2011, 2.

⁷⁷ See comments in ACT Law Society, Submission to Attorney General, *Criminal Proceedings Legislation Amendment Bill 2011 (ACT)*, 17 June 2011, 3 and Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 June 2011, 2524 (Mrs Dunne).

⁷⁸ Janet Chan, Shelley Hampton and Michael Chesterman, ‘Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales’ (University of New South Wales and the Law and Justice Foundation’s Research Centre, 2001) 206 [521]-[522].

material can remain available on an archive to be accessed with a few keystrokes, the click of a mouse or the touch of a screen,⁷⁹ has decreased the usefulness of other remedies such as adjournments, designed to allow any prejudice to abate in potential jurors' minds. Chief Justice Spigelman confirmed this in 2004:

the ability of a stay or adjournment to ensure a fair trial has been substantially attenuated by the immediate accessibility of information on the internet with an efficiency that overrides the practical obscurity of the past. This accessibility poses significant challenges for the administration of criminal justice.⁸⁰

The effectiveness of judicial directions to disregard extraneous material, the most favoured method of combating any pre-trial publicity and attempting to ensure a trial before an impartial tribunal, is also questionable, particularly given recent research in England and New South Wales.⁸¹ In England, in 2010, Thomas detailed survey results that 26% of jurors reported that they came across publicity on the internet during the trial of high profile cases.⁸² Research in Australia too has indicated that jurors do make their own inquiries despite judges directing them to the contrary.⁸³ But are assertions of potential unfairness, given the unlikely effectiveness of other provisions, enough? To answer this question, judicial musings about the situation in the United Kingdom are relevant.

B The Experience in the United Kingdom

In *Fearnside*, Besanko J cites decisions from the European Court of Human Rights, including *Pullar v United Kingdom*,⁸⁴ as support for his view that 'a jury is a competent, independent and impartial body.'⁸⁵ In *Pullar*, the Court considered whether the presence on a jury of a work colleague of a key prosecution witness breached the accused's right under the *European Convention on Human Rights* article 6(1) 'to a fair and public hearing ... by an independent and impartial tribunal established by law.' In that decision, the Court articulated that impartiality had two limbs, one subjective,

⁷⁹ The ease of searching the internet was noted in *News Digital Media Pty Ltd v Mokbel* [2010] VSCA 51, [79].

⁸⁰ *John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors* (2004) 61 NSWLR 344, 360 [64].

⁸¹ For further discussion of the inadequacy of judicial directions see Elizabeth Greene and Jodie O'Leary, 'Ensuring a Fair Trial for an Accused in a Digital Era: Lessons for Australia' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds) *Courts and the Media in the Digital Era* (forthcoming with Federation Press, 2011).

⁸² Cheryl Thomas, *Are Juries Fair?* Ministry of Justice Research Series 1/10 (February 2010) 50.

⁸³ See, eg, New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (December 2008) [5.9] and [5.23]-[5.24] referring to results from Jill Hunter, Dorne Boniface and Don Thomason, *What Jurors Search for and What They Don't Get. Pilot Study: Juror Comprehension and Obedience to Judicial Directions Against Juror Investigation*, Centre for Interdisciplinary Studies of Law, University of NSW, funded by the Law and Justice Foundation of NSW (2010).

⁸⁴ *Pullar v United Kingdom* [1996] III Eur Court HR [30].

⁸⁵ *R v Fearnside* (2009) 193 A Crim R 128, [100]-[101] per Besanko J.

that is, no member of the tribunal should hold any personal prejudice or bias [and]...Secondly, the tribunal must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.⁸⁶

This second limb is an important protection, given the court's comments that jury determinations in themselves are not in contravention of article 6(1) purely because they inevitably provide an absence of reasons.⁸⁷ But it is not the fact that persons charged with the excluded offences in the ACT are necessarily going to be heard in front of a jury that affords the reason for the suggestion that this provision breaches the *HRA*. It is not contended that all, or even most trials before a jury, fall short of the requirements of fairness and impartiality outlined. Rather, it is argued that in some instances, and the possibility is more acute for these excluded offences, regular safeguards will be insufficient to ensure that a prosecution before a jury is fair from an objective viewpoint. That is, in some instances, legitimate doubts will exist about whether the jury can be or was impartial or, '[p]utting the matter in another way, a jury ... would not be a tribunal which would inspire the necessary confidence in the public and the accused.'⁸⁸ This was the case in the recent New South Wales District Court decision of *R v GSR(3)*,⁸⁹ in which Woods J ordered a judge alone trial for indecent assault charges predominantly because the accused had been subject to 'poisonous, inflammatory' and 'very nasty' pre-trial publicity, which represented 'a continuing and serious risk to the integrity' of the trial.⁹⁰

Courts in the United Kingdom have had cause to consider whether there is a difference between prospective and retrospective determinations of impartiality and fairness. For example, in *Transco Plc v Her Majesty's Advocate*,⁹¹ there was agreement that a prospective determination would only result in a finding of unfairness where the proceedings would necessarily breach Convention rights or inevitably result in proceedings being unfair.⁹² Lord Hamilton cited earlier comments of Lord Craighead to further express that pre-trial determinations of unfairness are only possible in rare and isolated cases.⁹³

Such an approach replicates that taken by Australian courts in pre-trial applications for permanent stays on grounds of unfairness (especially on the grounds of prejudicial

⁸⁶ *Pullar v United Kingdom* [1996] III Eur Court HR [30]. Similar statements were made in New Zealand, in consideration of s 25(a) of the *New Zealand Bill of Rights Act* (1990) in *Deborah Gordon-Smith v The Queen* [2009] NZSC 20, [73]: 'The fair trial right will be breached if ... [there are] reasonable grounds for apprehension by a well-informed observer that the jury is not impartial.' This same test has been confirmed in Australia in *Webb v R* (1994) 181 CLR 41 and in the House of Lords in *R v Abdroikof* [2007] UKHL 37.

⁸⁷ *Refick Saric v Denmark* (European Court of Human Rights, Application No. 31913/96) cited in *Transco Plc v Her Majesty's Advocate*, Appeal Court, High Court of Justiciary, 16 September 2004.

⁸⁸ *Transco Plc v Her Majesty's Advocate* [2004] HCJAC 68, per Lord Osborne at [23].

⁸⁹ *R v GSR(3)* [2011] NSWDC 17.

⁹⁰ *Ibid* [28].

⁹¹ *Transco Plc v Her Majesty's Advocate*, [2004] HCJAC 68.

⁹² *Ibid* [7] per Lord MacLean, [21]-[24] per Lord Osborne and [42]-[45] per Lord Hamilton.

⁹³ *Ibid* per Lord Hamilton, [44].

publicity).⁹⁴ This approach suggests that arguments that a fair trial before an impartial jury will not be had will be difficult to sustain, instead such arguments will be more likely successful retrospectively, taking into account the proceedings as a whole. Following a trial it may be asserted that the accused did not receive a fair trial and this may be linked to allegations of partiality of jurors, jurors that had to be involved due to the inability to hold a judge alone trial. This appeared to have occurred in the Queensland case of *R v Fardon*.⁹⁵ Fardon, charged with rape, applied for a judge alone trial. In the application it was argued that due to Fardon's notoriety the jury's deliberations would be affected and the usual safeguards would not ensure a fair trial. The request was denied; the Judge expressed confidence that the regular protections afforded by the nature of jury trials, the ability to give directions and the threat of prosecution for jurors who conduct their own inquiries would be adequate to ensure a true verdict. Fardon was found guilty and successfully appealed. The Court of Appeal found that the jury verdict was unreasonable and unsupportable on the evidence, with Chesterman J commenting that perhaps 'on this occasion the [Judge's] confidence was misplaced.'⁹⁶

This foregoing analysis is supportive of Higgins' extra curial statements and contrary to those made by the Attorney General. The amended provisions do indeed limit the right to an impartial or independent tribunal, an integral aspect of the *HRA* protected right to a fair trial. However, to constitute a breach of the *HRA* such a limitation must not be justifiable.

V IS ANY LIMIT JUSTIFIABLE?

As previously stated, human rights protected by the *HRA* may be subjected to reasonable limits. In determining reasonableness, one of the relevant factors outlined in the *HRA* is 'whether any less restrictive means are reasonably available to achieve the purpose the limitation seeks to achieve'.⁹⁷ In short, it needs to be considered whether the reasons cited for limiting the right to a fair trial are legitimate and proportionate to the consequence. Such reasons for limitation are often based on competing rights or other public policy interests. The Court in *Blundell v Sentence Administration Board of the ACT*⁹⁸ cited authority from the European Court of Human Rights that to be legitimate the limitation has to correspond relevantly and sufficiently to a pressing social need.⁹⁹ Further, to be proportionate the means used must be no more than is necessary, requiring a balance between individuals' rights and those of the community.¹⁰⁰

⁹⁴ See for example *Dupas v The Queen* (2010) 241 CLR 237, 247.

⁹⁵ *R v Fardon* [2010] QCA 317, [30].

⁹⁶ *R v Fardon* [2011] QCA 317, [75].

⁹⁷ *Human Rights Act 2004* (ACT) s 28(2)(e).

⁹⁸ *Blundell v Sentence Administration Board of the ACT* [2010] ACTSC 151, [181].

⁹⁹ *Sunday Times v United Kingdom* (1970-80) 2 EHRR 245, [62].

¹⁰⁰ *Blundell v Sentence Administration Board of the Australian Capital Territory, The Australian Capital Territory and the Chief Executive of the Department of Justice and Community Safety* [2010]

The purpose of the limitation here is, as stated earlier, to reduce the number of judge alone trials, to re-affirm the value of jury trials (especially in matters involving the application of community standards) and, arguably, to increase the number of convictions, with the broader objective of re-establishing the community's confidence in the legal system. The problem with this purpose is that it is not 'demonstrably justified' as required in the *HRA*.¹⁰¹ To be so, cogent and persuasive evidence¹⁰² would need to be provided of the need to inspire community confidence. As noted in the submission of the Australian National University, it is unknown whether the rate of convictions would have been greater if juries had been involved.¹⁰³ And even if they were, would such an increase inspire confidence in the administration of justice in the ACT? One of the reasons that some accused who proceed by judge alone may choose that mode of trial is because of concern that they will be convicted on the basis of pre-judgment if they are faced with a jury. In those circumstances, an increased number of convictions may in fact be *cause* for concern.

As the author has argued elsewhere, a judge alone trial may be one of the only ways to ensure confidence in the courts.¹⁰⁴ Without the ability to hold a judge alone trial some notorious accused may attract levels of publicity that inevitably preclude any fair trial before a jury; the Court's only remaining option a permanent stay. Such a result would not be popular with the community and so resort to a judge alone trial may be the only way to ensure such accused face trial.¹⁰⁵

Needless to say that confidence in the system may still be undermined even with jury involvement.¹⁰⁶ For example, in Western Australia, an accused person's conviction in a notorious matter subjected to a jury trial after an unsuccessful application to proceed by way of judge alone was said to destabilize community perceptions of the justice system, even following a successful appeal.¹⁰⁷

This is assuming, of course, that it can be shown that there is a community confidence problem in the first place and, given the lack of persuasive evidence, it seems unlikely

¹⁰¹ ACTSC 151 (2 December 2010) [182] citing *Huang v Secretary for State for the Home Department* [2007] 2 AC 167, [19].

¹⁰² *Human Rights Act 2004* (ACT) s 28(1).

¹⁰³ *R v Momcilovic* (2010) 265 ALR 751, [143]-[144] citing *R v Oakes* [1986] 1 SCR 103 with approval.

¹⁰⁴ Gregor Urbas and Robyn Holder, Australian National University, Submission to the Standing Committee on Justice and Community Safety, Legislative Assembly for the ACT, *Criminal Proceedings Legislation Amendment Bill 2011* (ACT), 8 April 2011, 5-6.

¹⁰⁵ See Greene and O'Leary, above n 81.

¹⁰⁶ This was discussed in *ibid*, using the example of *R v Ferguson* [2009] QDC 049, a high profile matter that proceeded by judge alone and resulted in an appropriate acquittal and in O'Leary, above n 74, 168.

¹⁰⁷ See O'Leary, above n 74, 168.

¹⁰⁸ Malcolm McCusker, 'Bad Press: Does the Jury Deserve It?' Paper presented at the 36th *Australian Legal Convention* (September 2009) – discussing the case of *Martinez v Western Australia* (2007) 172 A Crim R 389.

that this is a pressing social need. Even if it is, though, the approach of the amendments is heavy handed.

In the Canadian case of *R v Oakes*,¹⁰⁸ Dickson CJ noted that an important component of proportionality is whether the measures adopted to fulfil the purpose are ‘arbitrary, unfair or based on irrational considerations’.¹⁰⁹ As previously noted, the arbitrariness of the amendments to the ACT legislation has been criticised.¹¹⁰ Although the Attorney General alluded to the seriousness of offences as justification for their selection for exclusion, questions have been raised as to why particular offences have not also been included or why some offences have been tarred with the ‘serious’ brush.¹¹¹

One of the arguments proposed as justification was that these matters often require application of objective community standards.¹¹² However, as Chief Justice Higgins noted, this does not explain why other offences, that also require consideration of community standards, such as dishonesty, are not excluded.¹¹³ Further, the inclusion of the word ‘often’ in the above statement should be carefully analysed. It is true that in some instances, trials of serious offences will require the application of objective standards, for example where issues of self-defence and provocation are raised in murder matters.¹¹⁴ Yet in other instances of the offences subject to exclusion, it may well be clear that the conduct is wrong (not raising any community standard); instead the question the court will focus on is whether the accused committed the act.¹¹⁵ If the exclusion of murder from the ambit of automatic rights of election can be considered non-controversial (after all, similar provisions exist, for example, in Canada),¹¹⁶ the same cannot be said for sex offences or other offences involving death. Moreover, even in Canada the ability to proceed by judge alone is not completely excluded for those accused of murder, with the capacity to seek the Attorney General’s consent to proceed in that manner.¹¹⁷ The Canadian approach demonstrates that there are means available that are less restrictive.

Having the Attorney General/prosecutor, or the court, act as a threshold has proved effective in keeping the numbers of judge alone trials to a lower rate in other

¹⁰⁸ *R v Oakes* [1986] 1 SCR 103.

¹⁰⁹ Ibid 139.

¹¹⁰ See above n 29.

¹¹¹ See, eg, ACT, above n 51, 2515.

¹¹² ACT, above n 23, 257

¹¹³ Higgins, above n 5, 5.

¹¹⁴ This was noted by White J, the Judge presiding over one of the first trials by judge alone in Australia: *R v Marshall* (1986) 43 SASAR 448, 497.

¹¹⁵ This was raised in relation to homicide in *Arthurs v Western Australia* [2007] WASC 182, [65]. For an example of a case involving sex offences where permission was given for trial by judge alone, despite provisions in the legislation allowing judges to refuse applications for judge alone that would necessitate the contemplation of community standards, as there was no question that the conduct was indecent see, *R v Ferguson* [2009] QDC158.

¹¹⁶ *Criminal Code*, CRC c 46, Pt XIX, s 469.

¹¹⁷ Ibid s 473.

Australian States, at a maximum of five percent, achieving an appropriate balance between the rights of accused and that of the community in retaining jury trials.¹¹⁸ In New South Wales, where the Court has recently been tasked with permitting judge alone trials over the prosecutorial objection (if it would be in the interests of justice), there were reports of a sharp increase in the incidence of judge alone trials.¹¹⁹ However, any rise in the number of judge alone trials in this jurisdiction cannot be described as alarming with statistics showing a projected increase since the introduction of these provisions of only 14 trials.¹²⁰ Such examples support the contention that the current ACT approach is disproportionate.

VI IMPLICATIONS

The only protection that remains available, under the *HRA*, for this breach of its provisions is by way of the judiciary. It is unlikely, however, that the interpretive provisions of the *HRA* will provide any protection.¹²¹ The amended section 68B is drafted as follows:

(1) A criminal proceeding against an accused person for an offence other than an excluded offence must be tried by a judge alone if—

- (a) the person elects in writing to be tried by a judge alone; and
- ... [certain other procedural requirements are met]

(4) In this section:

"excluded offence" means an offence against a provision mentioned in an item in schedule 2 (Trial by judge alone—excluded offences), part 2.2, column 3 of an Act mentioned in the item, column 2.

It is clear in this provision that courts do not retain any discretion. The provision removes the right of election to judge alone trials for particular offences, with no judicial oversight, so courts at first instance or on appeal will not find themselves in a position to interpret the legislation. Indeed, in the past, the only aspect of the judge alone provisions that has been subject to the interpretive provisions of the *HRA* relate to the time at which an election could have been made.¹²² Even if, by some ingenious stroke of advocate creativity, the matter did come before the court for interpretation, the requirement in s 30 to interpret the law consistently with its purpose, coupled with the lack of ambiguity in the purpose of this legislation (as explained in the Explanatory Statement the amendments specify 'a class of offences where an election

¹¹⁸ See O'Leary, above n 74, 167-168 (fn 126) which references various sources for the rates of judge alone trials in other jurisdictions. The range in South Australia (where the accused has a right to a judge alone trial) was, at various times, between 3%-15%, in New South Wales the rate was approximately 5%, in Western Australia between 1% and Corbell's source of 2.7% (mentioned in ACT, n 22) and in Queensland at 0.5%.

¹¹⁹ Lisa Davies, 'Jury Out on Judge Trials' *Sydney Daily Telegraph* (1 August 2011) 1.

¹²⁰ Mark Ierace SC, 'Trials in NSW by Judge Alone: Recent Legislative Changes' Paper presented at *AIJA Conference: Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration* (September 2011).

¹²¹ That is, *Human Rights Act 2004* (ACT) s 30.

¹²² See, *R v Fearnside* (2009) 193 A Crim R 128.

to be tried by judge alone cannot be made')¹²³ leaves the court little room to divert from Parliament's intention, without the prospect of being labelled as judicial activists. Like the cases before the courts in Victoria,¹²⁴ and subsequently in the High Court where French CJ noted that 'if the words of a statute are clear, so too is the task of the Court in interpreting the statute with fidelity to the Court's constitutional function',¹²⁵ the approach in the ACT to date has certainly been cautious. The courts have acknowledged their role under the *HRA* as subordinate to the legislature¹²⁶ and have shied away from the latitude taken by courts in the United Kingdom.¹²⁷

Therefore the only remaining option is a declaration of incompatibility. Although this provision has existed since the introduction of the *HRA*, such a declaration has proved to be a last resort and has only been made on one occasion in the ACT.¹²⁸ The lack of use of the provision has been attributed to the apparent toothlessness of this remedy, given that it does not automatically invalidate the law.¹²⁹ As such, it has little appeal, especially for those who may not have the funds to support further litigation, and where, for example, 'a person could still be convicted of an offence, even though a declaration of incompatibility has been made to the effect that the legislation under which the conviction has been entered is incompatible with human rights'.¹³⁰

To date, declarations have been sought but not made in three cases.¹³¹ In all of these cases the court found it unnecessary to consider such a declaration as either: the legislation was not found to breach a human right or, if it did, such a limitation on rights was justifiable,¹³² or; interpreted the provision in a way that would not be inconsistent with human rights.¹³³ However, *In the Matter of an Application for Bail*

¹²³ Revised Explanatory Statement, Criminal Proceedings Legislation Amendment Bill 2011 (ACT) 2.

¹²⁴ See, eg, *R v Momcilovic* (2010) 265 ALR 751.

¹²⁵ *Momcilovic v The Queen* [2011] HCA 34, [39].

¹²⁶ *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010) [56] and [59].

¹²⁷ The United Kingdom approach is outlined in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, although see comments in *Hansen v The Queen* [2007] 3 NZLR 1, [152] that the 'balance may have swung back a little', referring to *R (on the application of Wilkinson) v Inland Revenue Commissioners* [2006] 1 All ER 529. For ACT examples of caution see *R v Fearnside* (2009) 193 A Crim R 128 and *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010).

¹²⁸ *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147.

¹²⁹ Watchirs and McKinnon, above n 33, 160.

¹³⁰ *R v AM* [2010] ACTSC 149 (15 November 2010) [59].

¹³¹ *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125, *R v AM* [2010] ACTSC 149 (15 November 2010) and *Blundell v Sentence Administration Board of the Australian Capital Territory, The Australian Capital Territory and the Chief Executive of the Department of Justice and Community Safety* [2010] ACTSC 151 (2 December 2010).

¹³² In accordance with *Human Rights Act 2004* (ACT) s 28. This was the case in *R v AM* [2010] ACTSC 149 (15 November 2010).

¹³³ *Blundell v Sentence Administration Board of the Australian Capital Territory, The Australian Capital Territory and the Chief Executive of the Department of Justice and Community Safety* [2010] ACTSC 151 (2 December 2010) and *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125. For further discussion of *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125, see Gabrielle McKinnon, 'An Opportunity Missed? Comment on SI BHNF CC v KS BHNF IS [2005] ACTSC 125' (2006) 9 *Canberra Law Review* 21.

by Isa Islam,¹³⁴ Penfold J declared that s 9C of the *Bail Act 1992* (ACT) was incompatible with the *HRA*.¹³⁵ Nevertheless, in his required presentation of the declaration to the Legislative Assembly, the Attorney General noted that he was appealing this decision, expressing his disagreement with the Court.¹³⁶ The provision has remained unchanged at the time of writing.¹³⁷ Given the continued assertions by the Attorney General ‘that the right to elect a judge-alone trial is not an element of the right to a fair trial’,¹³⁸ it seems unlikely that any declaration that the amended s 68B *Supreme Court Act 1933* (ACT) is incompatible with the *HRA* would have any practical impact. Further, it is arguable whether the court would make such a declaration; the High Court’s voice in *Momcilovic v The Queen*¹³⁹ severely impeding any future reliance on declaration protection for criminal matters. Three of the High Court judges held that the comparable declaratory provision in the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) were invalid, and two of the majority who found these provisions valid noted that ‘[i]t may be that, in the context of a criminal trial proceeding, a declaration of inconsistency will rarely be appropriate...[and] in the sphere of criminal law, prudence dictates that a declaration be withheld.’¹⁴⁰

VII SUGGESTED ALTERNATIVES

The preceding analysis confirms that the recently enacted ACT provisions, excluding specified offences from the domain of judge alone trials, do potentially breach an accused’s right to a fair trial before an independent and impartial court under the *HRA*. Certainly in some instances, where there is significant prejudice occasioned, for example by pre-trial publicity, and where other remedies have or will prove inadequate to combat its impact, a jury trial may not inspire the necessary confidence in the accused or the community. Additionally, while it is questionable whether the Attorney General would be able to demonstrate that a lack of community confidence is a pressing social need, there is no avoiding the fact that there are less restrictive

¹³⁴ *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147.

¹³⁵ In this instance *Human Rights Act 2004* (ACT) s 18(5).

¹³⁶ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 15 February 2011, 71 (Simon Corbell, Attorney General).

¹³⁷ Note that the Attorney General presented his response in June this year: see, Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 28 June 2011, 2677 (Simon Corbell, Attorney General) but at the time of writing this matter had not been debated. If the Legislative Assembly refuses to take action arguably the only available oversight is through resort to the United Nations Human Rights Committee in their role monitoring compliance with the *ICCPR*. Such recourse is, however, not necessarily effective as, even if the Committee finds that Australia has breached the Convention, action may not be taken by the Government. As noted in Watchirs and McKinnon, above n 33, 161 – this situation may be different to the United Kingdom experience ‘where the government may be called to account before European Court of Human Rights [which may] provide greater incentive to respond positively to such declarations.’ Note also that there is no published judgment in relation to the Attorney’s assertion of appeal in this matter.

¹³⁸ As reported in ACT, above n 51, 2516.

¹³⁹ *Momcilovic v The Queen* [2011] HCA 34.

¹⁴⁰ *Ibid* [605].

ways to resolve this issue. Nevertheless, the protections outlined in the *HRA* have not proved adequate at ensuring this right so far, nor are any of the judicial protections likely to prove of use. Even assuming that a declaration of incompatibility is possible, such a remedy is inadequate for those faced with a jury trial despite concerns of impartiality, even with the ability to appeal.¹⁴¹ Also, permanent stays of proceedings, which remain the only remedy currently available in such situations, have the potential to further undermine community confidence in the judicial system. The Attorney General's efforts then may achieve the opposite result to that intended.

Of course Parliament does not have to jump through the *HRA* hoops to reignite the discussion as to appropriate human rights compliant amendments to the ability to have a judge alone trial, which would avoid breaching human rights, while ensuring those charged with serious offences face trial. Such amendments might include those suggested by the Opposition in the original debate of the Bill, which would give the court the power to allow a trial by judge alone if it is in the interests of justice to do so.¹⁴² This method would allow the courts to consider the *HRA* right to a fair trial in the exercise of their discretion. However, if concerns remain about this alternative,¹⁴³ the other option of requiring the consent of the Attorney General/prosecutor to proceed by judge alone would still be preferable to the present situation. Such decisions could be subjected to judicial scrutiny and provide a remedy of 'appropriate relief' by virtue of s 40C of the *HRA*.¹⁴⁴ Arguably, such a remedy could include a judge alone trial, similar to the remedy in *R v McGregor* [1999] 43 OR (3d), in a situation which might otherwise have had to be permanently stayed because impartiality could not be guaranteed.

There is nothing preventing members of Parliament from regenerating the human rights conversation around judge alone trials themselves. In fact, if they want to inspire confidence in the accused and the community alike that justice is not only done but is seen to be done, this should happen sooner rather than later.

¹⁴¹ For example, this will inevitably further extend proceedings and it has been argued that any retrial following a successful appeal may be susceptible to unfairness due to exacerbated public interest in Greene and O'Leary, above n 94. Further, the secrecy surrounding jury's deliberations may mean that the impact of any prejudice is not readily apparent.

¹⁴² Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 June 2011, 2556 (Mrs Dunne). This would be similar to the preferred method that now exists in Queensland, Western Australia and New South Wales.

¹⁴³ Such as the concerns raised in Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 June 2011, 2519 (Simon Corbell, Attorney General).

¹⁴⁴ Note that this argument relies on a determination that the Attorney General/prosecutors are public authorities. Such an assertion has been contested in the High Court by the Victorian Chief Crown Prosecutor: Gans et al, above n 37, 89, referring to *Momcillovic v The Queen* [2011] HCATrans 16.

A DIALOGUE CONCERNING THE MERITS OF THE 100% FINAL EXAMINATION IN THE ASSESSMENT OF LAW STUDENTS

NICK JAMES^{*} and DARRYN JENSEN^f

ABSTRACT

Law schools in Australia and elsewhere traditionally made extensive use of the '100% final examination' as a summative assessment method. Since the late 1980s, law schools have moved away from this traditional assessment method in favour of the greater use of interim assessment and of alternative forms of assessment. This has been partly the result of a more considered approach to teaching by individual law teachers, and partly the result of school and university assessment policies imposing ceilings upon the weighting that can be given to any single piece of assessment.

Recent claims that increasing class sizes and marking loads have lead to the over-burdening of academics and that many students are now time-poor and over-assessed have prompted this consideration of whether the use of the 100% final examination should re-evaluated. In this paper, two fictional law teachers conduct a dialogue about the merits of the 100% final examination for legal education. They explore the arguments in favour of and opposed to the use of final examinations, and draw upon the results of a recent pilot study conducted at the University of Queensland that examined the impact upon law students and academics of the use of 100% final examinations in conjunction with optional assessment items.

^{*} Associate Professor, TC Beirne School of Law, The University of Queensland. Nick James has been teaching law at the University of Queensland since 1996. He presently teaches law and society to law students and business law to business students. He is the author of two textbooks as well as numerous articles and papers in the areas of legal education and critical thinking.

^f Senior Lecturer, TC Beirne School of Law, The University of Queensland. Darryn Jensen joined the academic staff at the University of Queensland Law School in 1996. He has taught mainly in the areas of equity and trusts and private law remedies. His published research includes scholarly articles on the law of trusts and fiduciary obligations, private law theory and legal issues relating to religious institutions.

Two law teachers - one, GORMSBY, dressed conservatively and the other, KEATING, dressed casually - are having morning tea together in the staff common room.¹

KEATING:

Have you seen the latest teaching survey results for the law school?

GORMSBY:

I must have accidentally deleted that particular email. Why? Is there anything of note?

KEATING:

There are the usual complaints about the lack of lecture recording, inflexibility in timetabling, and too much reading, but I do find it interesting that the most common complaint by the students – as usual – is about not being given enough feedback.

GORMSBY:

What is so interesting about that?

KEATING:

Well, one of the more frequently voiced complaints by our *colleagues* is the amount of marking we are doing these days: long gone are the days when all of our marking was done over a couple of weeks at the end of each year.² Now, it seems that we are marking something every week or so. But isn't assessment a way of providing students with feedback? If today's students are being given so much more assessment, shouldn't they at least be saying that they get enough feedback?

GORMSBY:

Actually, that is rather interesting. After all, feedback involves telling the student where they went wrong, which is what we do when we assess their work.

KEATING:

Actually, when I talk about feedback I mean what I tell my students about the quality of their learning and whether or not they are making appropriate progress towards achieving the learning objectives I have set for my subject. It's more than simply identifying errors when I am marking my students' work; it's about diagnosing problems with their understanding and ability.³⁴ I see feedback as an absolutely essential element of the learning process.⁵ It's only by receiving feedback about their

¹ Gormsby is named after the character of the same name in the television series *Seven Periods with Mr Gormsby* (Television New Zealand, 2005-2006) and Keating is named after the character of the same name in the movie *Dead Poets' Society* (Touchstone Pictures, 1989).

² See Susan J Lea and Lynne Callaghan, 'Lecturers on Teaching within the 'Supercomplexity' of Higher Education' (2008) 55(2) *Higher Education* 171.

⁴ This is sometimes referred to as the 'forensic' role of feedback: D Royce Sadler, 'Formative Assessment and the Design of Instructional Systems' (1989) 18(2) *Instructional Science* 119.

⁵ Terri LeClercq, 'Principle 4: Good Practice Gives Prompt Feedback' (1999) 49 *Journal of Legal Education* 418, 418. LeClercq insists that "[k]nowing what you know and don't know focuses

progress that my students can identify the concepts that they do not understand correctly or the skills that they have not yet fully developed.⁶

That feedback often takes the form of assessment but, of course, I don't believe that feedback must necessarily be in the form of assessment. Any time I tell my students, individually or collectively, about the quality of their work and their progress towards achieving the learning objectives, I am providing them with feedback. Feedback can be in the form of a student's results for a class test, or it can be in the form of my verbal comments about the quality of a student's response to a question I have asked them in class.⁷ I may be commenting about the written work of a particular student, or about the overall quality of learning by the entire class: it's all feedback.

GORMSBY:

Well, that may be what you understand by 'feedback', but I suspect that what our students often understand by 'feedback' is a satisfactory explanation of why they received a mark with which they do not agree. Many of our law students are accustomed to being high achievers and they have a very high opinion of their abilities. Accordingly, they are not always receptive of what we would regard as *bona fide* explanation of the shortcomings of their work. They remain convinced that they should have received a mark higher than the one they in fact received, so they are, of course, going to complain about a lack of 'satisfactory' (i.e. convincing) feedback.⁸

KEATING:

I think you may be right, which suggests that we need to do more to communicate to students what we mean by 'feedback'. We should explain to our students the various forms that feedback can take: not only marks and written comments on the work they submit, but also general feedback about the quality of student performance as a whole, verbal feedback provided to individual students about their work in tutorials, and so on. Perhaps if students understood better what we mean by feedback, they might realise that they actually receive more feedback from us than they think.

While assessment and feedback are not the same thing, feedback is an essential part of the assessment process. The education scholars tell us that 'assessment is not an end

learning" and that "[w]ithout feedback, none of us could know whether we clearly understood what we thought we understood".

⁶ This is a function of feedback sometimes referred to as 'mirroring': Kristin B Gerdy, 'Teacher, Coach, Cheerleader, and Judge: Promoting Learning through Learner-Centered Assessment' (2002) 94 *Law Library Journal* 59, 79.

⁷ John Hattie and Helen Timperley, 'The Power of Feedback' (2007) 77(1) *Review of Educational Research* 81.

⁸ Regarding student use of feedback generally, see Berry O'Donovan, Margaret Price and Chris Rust, 'The Student Experience of Criterion-Referenced Assessment (through the Introduction of a Common Criteria Assessment Grid)' (2001) 38(1) *Innovations in Education and Teaching International* 74; Margaret Price et al, 'Feedback: All That Effort, but What Is the Effect?' (2010) 35(3) *Assessment and Evaluation in Higher Education* 277.

in itself but a vehicle for educational improvement,⁹ and students will find it difficult to use assessment to improve their understanding if we don't give them effective feedback.

GORMSBY:

But assessment is not just about the student. It's often the case that when we assess our students and mark their work our goal is not to provide them with feedback about their progress but simply to give them a mark. I agree that we use assessment to determine whether students are learning what we intend them to learn,¹⁰ but in my opinion this is done not to benefit the student but to satisfy our institutional obligation to rank our students and to determine whether or not they have achieved the requisite standard to be awarded with a particular grade.

KEATING:

You are not alone in holding that view. Kissam, for example, insists that

the immediate function of law school grading practices is to establish a highly disaggregated class ranking system. This system is an efficient device, or at least a rational one, for sorting students in ways that serve the hiring purposes of many law firms.¹¹

GORMSBY:

That's right. We assess our students to create an accurate record of our students' progress.

KEATING:

But when we treat assessment as an end in itself, and the determination of final grades as the ultimate goal of a subject, we overlook the potential for our assessment to provide our students with useful feedback and contribute to their learning.

When students receive a bare mark for a particular item of assessment, that mark doesn't by itself provide students with feedback about what they understand correctly and what they misunderstand. Even when the mark is accompanied by comments, those comments are frequently insufficiently detailed for feedback purposes, or they are unclear and themselves misunderstood by the students.¹² And even when the students take the time to meet with the marker to try to obtain clearer or more detailed feedback, they often leave unsatisfied, partly due to their ignorance of the appropriate

⁹ Alexander W Astin et al, '9 Principles of Good Practice for Assessing Student Learning' (1996) <http://www.aahe.org/assessment/principles.htm>.

¹⁰ Paul E Newton, 'Clarifying the Purposes of Educational Assessment' (2007) 14(2) *Assessment in Education: Principles, Policy and Practice* 149; Roy Stuckey, *Best Practices for Legal Education: A Vision and a Roadmap* (Clinical Legal Education Association, 2007) 235.

¹¹ Philip C Kissam, 'Law School Examinations' (1989) 42(2) *Vanderbilt Law Review* 433, 435.

¹² Graham Gibbs and Claire Simpson, 'Conditions under Which Assessment Supports Students' Learning' (2004) (1) *Learning and Teaching in Higher Education* 3.

questions to ask,¹³ but also due to the marker's frequent unwillingness or inability to take the time to provide feedback in the desired level of detail. We have to take the time to give useful feedback, focussing upon improving our students' understanding.

GORMSBY:

I hardly think we can be blamed for any such lack of 'useful' feedback. Leaving aside the fact that many students don't even bother reading the feedback we do provide,¹⁴ there are many reasons why we cannot always give as much feedback as we would perhaps like to. Like many law schools, we have an appallingly low staff-student ratio, and it is getting worse as enrolment numbers increase.¹⁵ Many of our subjects – particularly the compulsory ones – now have hundreds of students enrolled. Meeting with students individually or writing detailed comments on every student's work takes up an awful lot of time. It is simply not practical, or even possible, for us to provide every student with as much individual feedback as they want. And we are under a lot of pressure from the University to publish research in good quality journals and apply for research grants.¹⁶ Marking large quantities of assessment and providing detailed individualised feedback can distract us from our research for weeks at a time.

Perhaps if we set fewer items of assessment in our subjects, we would be able to do a better job of providing useful feedback.¹⁷

KEATING:

Well, as I'm sure you recall, it wasn't that long ago that most law students were only required to complete a single item of assessment in each law subject: the dreaded '100% final exam'. That was the standard for law school assessment in Australia – and in fact in most law schools around the world – for decades.¹⁸ But it hasn't been the standard for some time now.

¹³ Heather Zuber, 'Furthering Law Schools' Progress on Improving Students' Academic Experience: Providing Students with Meaningful Feedback and Ways to Implement the Feedback to Improve Their Skills' (2010) <<http://ssrn.com/abstract=1584879>>.

¹⁴ Dai Hounsell (ed), *Essay Writing and the Quality of Feedback*, Student Learning: Research in Education and Cognitive Psychology (Open University Press and Society for Research into Higher Education, 1987).

¹⁵ Graeme Hugo, 'Some Emerging Demographic Issues on Australia's Teaching Academic Workforce' (2011) 18(3) *Higher Education Policy* 207; Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (Australian Universities Teaching Committee, 2003) 328-331.

¹⁶ James Allan, 'Down under Exceptionalism' (2010) 29(1) *University of Queensland Law Journal* 143; Christopher Arup, 'Research Assessment and Legal Scholarship' (2008) 18(1/2) *Legal Education Review* 31.

¹⁷ For support for the view that academics can afford to mark often or give feedback often but cannot afford to do both, see Graham Gibbs and Harriet Dunbat-Goddet, 'The Effects of Programme Assessment Environments on Student Learning' (Oxford Learning Institute, 2007)

<http://hca.ltsn.ac.uk/assets/documents/research/gibbs_0506.pdf>.

¹⁸ Kissam, above n 10; Johnstone and Vignaendra, above n 3, 364.

In Australia, law schools began to move away from 100% final examinations in the late 1980s,¹⁹ some voluntarily as a result of conscientious revision of their teaching practices and many as a result of changes in school and university assessment policies.²⁰ It was increasingly recognised that in order to be pedagogically effective, assessment should be ‘multiple, varied and fair’:²¹ ‘multiple’ in that there should be more than one assessment item per subject per semester, ‘varied’ in that there should be different types of assessment, and ‘fair’ in that the assessment should measure whether the learning goals are reached, students should be provided with clear grading criteria before the assessment, and students should be provided with feedback and practice before they complete the assessment.²²

Johnstone and Vignaendra note that it is now well accepted within Australian legal education that assessment is one of the most important elements of subject design, and that very few law schools still offer subjects with 100% final examinations.²³ In fact, many universities now prohibit the setting of 100% final exams. At the University of Queensland, for example, university policy dictates that at least two forms of assessment be set for each subject, and that no single piece of assessment be worth more than 70% of the total assessment.²⁴ It is therefore no longer possible to set a single item of assessment worth 100%. Other law schools around Australia have adopted similar assessment polices that oblige academics to set some form of interim assessment, or at least two assessment tasks per subject.²⁵ This is entirely consistent with good teaching practice, and is, in my view at least, a good thing.²⁶

¹⁹ Craig McInnis and Simon Marginson, *Australian Law Schools after the 1987 Pearce Report* (Australian Government Publishing Service, 1994) 167.

²⁰ Johnstone and Vignaendra, above n 14, 364-367. Barnes, writing in 1990 about approaches to assessment at the time in Australian law schools, claimed that ‘as is commonly observed, law teachers tend to repeat the methods of instruction that are familiar to them from their assessment days’, and referenced studies showing that many academics at the time saw assessment in terms of an incentive to make students work and enable their intellectual abilities to be measured: Jeffrey W Barnes, ‘The Functions of Assessment: A Re-Examination’ (1990-1991) 2(2) *Legal Education Review* 177, 179. Possible explanations offered by Barnes for academic ignorance of the educational possibilities of assessment included the influence of the legal profession on teaching, teacher apathy, lack of incentives, external constraints such as scarce resources, and a lack of training in and knowledge of educational theory: *Ibid*.

²¹ Gerald F Hess and Steven Friedland, *Techniques for Teaching Law* (Carolina Academic Press, 1999), 289.

²² *Ibid* 289-290.

²³ Johnstone and Vignaendra, above n 14, 363-367.

²⁴ University of Queensland, *Policy and Procedures Library – 3.10.02 Assessment* (2011) <https://ppl.app.uq.edu.au/content/3.10.02-assessment>, - 5.3 Forms of Assessment.

²⁵ See e.g. University of New England, *Assessment Policy* (2008) <www.une.edu.au/secretariat/Academic_Board/policies/assessmentpolicy.pdf>, 8.4, in which it is stated that a single assessment task for a unit ‘would place undue emphasis on a single event in time and therefore increase the risk of assessment inadequately reflecting the totality of a student’s accomplishments in this unit’. See generally Johnstone and Vignaendra, above n 14, 364-367.

²⁶ Regarding the pedagogical benefits of multiple items of assessment see e.g. Gibbs and Simpson, above n 11; Royce D Sadler, ‘Formative Assessment: Revisiting the Territory’ (1998) 5(1) *Assessment in Education* 77; Sadler, above n 3; Arthur W Chickering, and Zelda F Gamson, *Seven Principles to Good Practice in Undergraduate Education* (Johnson Foundation Inc, 1987).

GORMSBY:

Well I think that it has gone too far. All this extra assessment means more marking for academics, and with class sizes getting bigger and staff-student ratios getting smaller, something has to change.

It is a problem for the students as well: in my view they are now given *too much* assessment. These days my students seem to be on ‘a constant treadmill of assessment’ from around the third week of each semester.²⁷ There is no longer sufficient time for students to reflect deeply about what they are studying. Law students should be spending a lot of their time reading cases and thinking about what they are reading, but few of them have time to read anything other than what they absolutely need to read to complete the assessment. They spend so much time working on assessment that they no longer have time to learn for the sake of learning during the semester.²⁸ They are rarely prepared for tutorials (unless such preparation is assessed as well) and tutorial attendance drops off when assignments are due.²⁹ I am sure that if students had the time to do the prescribed reading and prepare for tutorials, they would soon work out what they understand and what they don’t understand, and they wouldn’t complain about receiving insufficient feedback.

Perhaps it is time to return to the ‘good old days’ of the 100% final examination.³⁰ When I was at law school we all sat for 100% final examinations and it certainly didn’t do us any harm.

KEATING:

Well, I don’t know about that. And while I acknowledge your concerns about student and academic workloads, I don’t think returning to a single item of assessment is the answer. There are many good reasons why we moved away from 100% final examinations. Improved learning outcomes for the students for a start ...

GORMSBY:

But does compelling law teachers to set multiple items rather than a single item of assessment necessarily lead to better learning outcomes for the students? Variation in assessment should not be valued for its own sake.

KEATING:

Ideally, an assessment program should be consistent and cohesive. The various items of assessment should be aligned not only with the subject objectives and the subject

²⁷ Johnstone and Vignaendra, above n 14, 367.

²⁸ Elena Marchetti, ‘The Influence of Assessment in a Law Program on the Adoption of a Deep Approach to Learning’ (1997) 15(2) *Journal of Professional Legal Education* 203.

²⁹ See the finding that students focus upon subjects with assessment due at the expense of other subjects in Gibbs and Dunbat-Goddet, above n 16.

³⁰ Johnstone and Vignaendra, above n 14, 367.

content,³¹ but also with each other: students should be able to act on the feedback they receive for assessment items submitted earlier in the semester ('interim assessment'), remedy any misunderstandings and mistakes, and apply what they have learned in completing the assessment at the end of the semester ('final assessment').³²

GORMSBY:

Well, it seems to me that many academics in seeking to comply with university policy choose to set completely different items of assessment covering separate parts of the subject. And where different assessment methods are used at interim and final stages of a subject, the feedback provided on the interim assessment will be irrelevant to preparing for the final assessment. Students are not given any sense of building their capabilities, so the feedback on interim assessment is a wasted exercise.³³

KEATING:

I don't agree: some feedback is better than no feedback at all. Even if they can't use feedback on interim assessment in preparing for the final assessment, that feedback is still an important element of learning about that part of the subject to which the interim assessment relates.

If you do as you suggest and return to 100% final examinations, your students won't even get that feedback. If there is only a single item of summative assessment at the end of the subject, there will be no opportunity for your students to obtain feedback on their progress. You will not be giving your students 'help in figuring out what they don't know'.³⁴ Law students need to be given opportunities to practise writing about issues before the final examination.³⁵ With a 100% final examination, they would be effectively going into their single assessment task unprepared.³⁶

GORMSBY:

Not necessarily. You have already made the point that assessment and feedback are not the same thing. There are many ways of providing my students with feedback that do not necessarily involve summative assessment. I could provide my students with opportunities to submit purely formative assessment such as an essay or a solution to a legal problem and receive written personalised feedback, without the mark for the

³¹ John Biggs and Catherine Tang, *Teaching for Quality Learning at University* (Open University Press, 2007).

³² Cooper refers to such an approach as a 'two-stage assignment': students take what they learn in the first stage and apply it in completing the second stage. Cooper claims that such a system can improve the performance of nearly all students, particularly the performance of weaker students: Neil J Cooper, 'Facilitating Learning from Formative Feedback in Level 3 Assessment' (2000) 25(3) *Assessment and Evaluation in Higher Education* 279.

³³ Allan Collins and John R Frederickson, 'A Systems Approach to Educational Testing' (1989) 18(9) *Educational Researcher* 27, 31.

³⁴ Deborah Maranville, 'Infusing Passion and Context into the Traditional Law Curriculum through Experiential Learning' (2001) 51 *Journal of Legal Education* 51, 52

³⁵ Sophie Sparrow, 'Measuring Student Learning Outcomes: Assessing Core Knowledge of Torts' (2007) *Best Practices for Legal Education* <www.bestpracticeslegaled.albanylawblogs.org>.

³⁶ Kissam, above n 10.

assessment contributing to the student's final grade. Or I could provide my students with personalised feedback about their understanding and progress by encouraging them to ask me questions about their understanding of the subject material or show me their written work in class, or by email, or on a discussion board.

KEATING:

So you're saying that you would like to replace multiple items of unrelated summative assessment with a single item of summative assessment combined with integrated purely formative assessment?

GORMSBY:

I am.

KEATING:

Well, there would certainly be a number of benefits associated with such purely formative assessment. Treating an exercise as purely formative would focus the student's attention upon what they can learn from the exercise. It would remove the anxiety associated with having to produce the best possible outcome while being unsure about the best way to approach the exercise. Students would have the freedom to make mistakes and learn from the experience without the concern that this may affect their final grade.³⁷ And there may be exercises that might provide a useful learning experience for students but for which individual student performance is not readily susceptible to objective assessment, such as where students are required to work in groups.³⁸

But how does this address the workload issue? Many of the more personalised forms of formative assessment you describe would be just as time consuming – for you, if not for your students – as the interim summative assessment. If you are teaching a subject with large numbers of students it will be difficult if not impossible for you to provide students with detailed individualised feedback on their performance.

GORMSBY:

Not necessarily. I think there would be time savings in not having to reduce each student's work to a mark or grade. In any event, there are other ways I could provide my students with access to feedback that would not be as time consuming as the provision of personalised feedback. I could, for example, encourage students to show their written work to peers and seek written or verbal feedback from them. And there are more 'collective' forms of feedback such as classes on how to answer practice problems and past examination questions; exemplar answers to practice problems and past examination questions and examiners' comments and marking guides for past examination questions.

³⁷ J N Hudson and D R Bristow, 'Formative Assessment Can Be Fun as Well as Educational' (2006) 30(1) *Advances in Physiology Education* 33.

³⁸ Mary Keyes and Kylie Burns, 'Group Learning in Law' (2008) 17(1) *Griffith Law Review* 357. Regarding the benefits of formative assessment generally, see Sadler, above n 3; Sadler, above n 25.

KEATING:

Another way that you could provide feedback to your students that would not involve the provision of time-consuming personalised feedback to each student involves having students perform certain tasks during class time while you provide instantaneous on-the-spot feedback as the students progress through the tasks. Maranville describes how experiential learning exercises in class can incorporate the provision of instant feedback. She notes that ‘for information to be useable in practice, our students must not only remember the concepts and rules we teach them; they must also be able to recognize the relevance of the information when faced with a real-life problem’.³⁹ The way that law is taught should aim to give students what Maranville calls ‘anchor points in memory’.⁴⁰ Maranville suggests that a Contract subject would be enhanced by learning exercises that involve students in the process of forming a contract, exposing students to examples of written contracts and requiring them to interpret contractual terms. In this way, students would be given ‘familiarity with the legal tasks lawyers perform, and the ways in which knowledge of legal doctrine is integral to those tasks’.⁴¹ Learning to be a lawyer may never be quite like learning to play the piano or to kick a football, but experiential learning is similar in providing the immediate feedback of succeeding (or not succeeding) in performing a task. Immediate reflection upon why they succeed or do not succeed is surely the best sort of feedback. Requiring your students to perform such experiential learning exercises in class would also assist you with ‘finding out what [your] students are actually learning’,⁴² so that timely correction can be given in respect of misconceptions. It is a way of revealing whether there is widespread confusion or miscomprehension among the students, and providing them with useful feedback.⁴³

GORMSBY:

That would be much less time consuming than providing written personalised comments on hundreds of assignments.

These classroom exercises – and the other forms of written work I described earlier – would replace the interim summative assessment I use now, and not be assessed. They may be marked but any marks awarded to the students would be purely for feedback purposes; they would not count towards the students’ final grades.

KEATING:

The problem with your proposal is that most students are ‘assessment driven’.⁴⁴ They are not motivated to put a great deal of effort into a task unless they are rewarded with

³⁹ Maranville, above n 33, 57.

⁴⁰ Ibid.

⁴¹ Ibid 56.

⁴² Ibid 72.

⁴³ Ibid.

⁴⁴ Benson R Snyder, *The Hidden Curriculum* (MIT Press, 1971).

marks or a grade.⁴⁵ Do you not think that if your students are asked to submit a practice answer but there is no ‘penalty’ for failing to do so, many will not bother?

GORMSBY:

I suspect that you are correct, but I tend to think that students should get used to the idea of doing something purely for the sake of what they can learn from it. I also believe that I should let my students decide for themselves how much effort to put into their learning. We are told that maximising law student autonomy is a good thing, after all.⁴⁶ And – speaking pragmatically – the greater the number of students who choose not to submit the purely formative assessment, the less marking there will be for me to do.

KEATING:

I think that you would have to take responsibility for ‘selling’ the formative assessment exercises to your students. You would have to make the benefits of completing these exercises – even though doing so does not contribute to the final grade – apparent to your students. You could do this by, for example, providing to your students data about student performance from previous years and the relationship between completing the formative assessment and final results.

GORMSBY:

So you would agree that setting a 100% final examination and leaving the rest of the semester free for various forms of integrated purely formative feedback is a good idea?

KEATING:

Certainly not. I still think it would be an enormous backwards step. I can perhaps see the benefits of replacing multiple items of summative assessment with a single item of summative assessment and various forms of formative assessment, at least in some law subjects, but why a final examination? Why not an essay or an assignment or a portfolio of work?

GORMSBY:

Well I can think of a number of reasons why, if I were to limit the assessment to a single item, I would choose to set an examination. One reason is that, in my experience, an examination is the most efficient use of my time – especially where I have to assess classes with hundreds of students.⁴⁷

⁴⁵ Sally Brown and Peter Knight, *Assessing Learners in Higher Education* (Kogan Page, 1994), 12; Gibbs and Simpson, above n 11.

⁴⁶ Massimiliano Tani and Prue Vines, ‘Law Students’ Attitudes to Education: Pointers to Depression in the Legal Academy and Profession?’ (2009) 19(1) *Legal Education Review* 3.

⁴⁷ Johnstone and Vignaendra report that rising student-staff ratios in Australian law schools and the impact upon academic workloads have driven a trend towards the greater use of examinations: Johnstone and Vignaendra, above n 14, 328.

Another reason is the integrity of examinations. As you are well aware, plagiarism is a growing concern within higher education in Australia and elsewhere,⁴⁸ and the use of the supervised examination as a form of assessment is a practical way of addressing this concern. With most other forms of assessment there is a risk that the work is done by someone other than the student.⁴⁹ A research assignment or essay may test the ability of students to work autonomously and conduct research, but '[t]he danger is that they simply submit something written by others'.⁵⁰ Supervised examinations have the advantage of providing an assurance that any particular student's work is that student's *own work*.⁵¹ The student has to devise a solution on her or his own feet (so to speak) and does not have opportunities to collaborate with others. This may not reflect the realities of professional practice, where students will often collaborate with colleagues, but the fact is that we award grades in our subjects on an individual basis and need to be confident that that individual grade reflects a student's individual ability.

A third reason is that law school examinations test for certain important abilities and attributes in a way that is not possible with other forms of assessment. These include the ability to internalise legal doctrine; the possession of an extensive legal vocabulary; 'legal productivity' in the form of a quickness and effectiveness at issue spotting, the specification of rules, and the application of rules to complex situations; and the capacity for self-study and an appreciation of the broader terrain of legal principle, so that they can devise solutions to situations which they have not previously encountered. These attributes are clearly important to the practice of law.⁵²

After all, the final examination has been the dominant mode of assessment in law schools for so long for good reason. Why are you so opposed to final examinations?

KEATING:

Where to start? Reliance upon final examinations as the sole method of assessment has been widely criticised by teaching and learning scholars.⁵³ I happen to agree with the view that assessment should be 'multiple, varied and fair'.⁵⁴ Different students have different learning styles, and examinations do not give some students the

⁴⁸ Vincent R Johnson, 'Corruption in Education: A Global Legal Challenge' (2008) 48(1) *Santa Clara Law Review* 1.

⁴⁹ See Ed Dante, 'The Shadow Scholar', *The Chronicle of Higher Education* 12 November 2010 <http://chronicle.com/article/The-Shadow-Scholar/125329/>.

⁵⁰ András Jakab, 'Dilemmas of Legal Education: A Comparative Overview' (2007) 57 *Journal of Legal Education* 253.

⁵¹ Phil Race, *Making Learning Happen: A Guide for Post-Compulsory Education* (Sage Publications, 2005).

⁵² Kissam, above n 10, 435.

⁵³ See e.g. Gibbs and Simpson, above n 11; Lorrie A Shepard, 'The Role of Assessment in a Learning Culture' (2000) 29(7) *Educational Researcher* 4; Angela Glasner Brown, *Assessment Matters in Higher Education: Choosing and Using Diverse Approaches* (Open University Press, 1999). For criticisms of overreliance upon examinations in law, see Barnes, above n 19; Stuckey, above n 9, 236-239, 255-260; William M Sullivan et al, 'Educating Lawyers: Preparation for the Profession of Law' (Carnegie Foundation for the Advancement of Teaching, 2007), 164-170.

⁵⁴ Hess and Friedland, above n 20, 289.

opportunity to demonstrate their understanding and skills.⁵⁵ Other criticisms of the 100% final examination include the temptation for students to postpone their learning until the end of the course, the enormous pressure placed upon students as a result of having a single opportunity to demonstrate their learning and pass the subject,⁵⁶ and the likelihood that most students will fail to retain knowledge acquired in preparing for the examination for any extended period.⁵⁷

Leaving aside the problems associated with making an examination the sole form of assessment, the examination as an assessment method has serious flaws. For example, most examinations don't effectively measure understanding; they only measure the student's ability to memorise and recall information.⁵⁸ If a student is able to study for an examination by memorising key information – by 'cramming' – they are unlikely to retain much of what they have learned after the examination. How can you claim to have contributed to student learning if your students forget what you teach them almost immediately?

GORMSBY:

I concede that 100% final exams might tempt many students to postpone their learning until the end of semester, but that is not the only factor in play. One might ask whether any such lack of student engagement during the semester is in fact the product of the way that we teach; we may, for example, be failing to engage students in a process of dialogue that is a rewarding learning experience in itself. Surely, if we can make the process of class discussion rewarding, so that students come out of class believing that their command of the subject-matter has improved, that would motivate students not to postpone their learning.

Anyway, it is not true that one cannot assess understanding by way of an examination. If the examination is a traditional closed-book short-answer style examination that requires students merely to recall and declare information presented in class or in the subject materials, then perhaps we are testing nothing more than memory. The reality is that examinations, particularly law examinations, can be – and usually are – designed to test different types of knowledge.

KEATING:

⁵⁵ Paula Lustbader, 'Principle 7: Good Practice Respects Diverse Talents and Ways of Learning' (1999) 49(3) *Journal of Legal Education* 448. See generally David Kolb, *Learning Style Inventory* (McBer and Company, 1985).

⁵⁶ This point is considered in more detail below.

⁵⁷ Jeremy B Williams, 'The Place of the Closed Book, Invigilated Final Examination in a Knowledge Economy' (2006) 43(2) *Educational Media International* 107. See also Leonard L Baird, 'Do Grades and Tests Predict Adult Accomplishment?' (1985) 23(1) *Research in Higher Education* 3; Paivi Tynjala, 'Traditional Studying for Examination Vs Constructivist Learning Tasks: Do Learning Outcomes Differ?' (2006) 23(2) *Studies in Higher Education* 173.

⁵⁸ Kissam, for example, claims that examinations produce a mentality that 'can help to generate many correct answers on law school exams, but [which] misrepresents the more complex processes of description, interpretation, evaluation, and prescription that characterize legal practice'. Kissam, above n 10, 437.

Actually, there are many scholars who would agree with you. Jakab distinguishes between ‘declarative and decontextualized knowledge’ (‘how much students know’) and ‘functioning knowledge’ (‘how well students think’). Case-reading exercises and problem-solving questions test functioning knowledge, whereas short answer questions only test declarative knowledge.⁵⁹ Similarly, Wegner explains:

Law school essay questions typically present complex scenarios that provide students with a platform they can use to demonstrate their expertise as emerging professionals with growing ability to think like lawyers. They must read carefully, comprehend the implications of what they read, analyze the issues, apply relevant doctrine, synthesize insights from a wide range of cases and statutes previously studied, and evaluate alternative approaches to uncertain and difficult areas. Well-crafted essay questions provide an effective setting in which levels of expertise relating to critical thinking can be assessed. Expertise itself reflects extensive knowledge and sophisticated organization of that knowledge, an ability to recognize and retrieve patterns, a capacity to tie knowledge to context, a fluid ability to recall and use strategies, and capacity to respond flexibly and in an adaptive way to novel problems.⁶⁰

And according to Race:

The picture painted above of the links between traditional exams and the factors underpinning successful learning is very bleak. It does not *have to be* so bleak, however. With care, for example, exams can be designed which are much better at measuring ‘making sense’ than suggested above. Problem-solving exams and case-study exams are much better at *not* rewarding reproductive learning.⁶¹

GORMSBY:

That’s right. Well-crafted problem-solving examination questions are able to test both the student’s ‘declarative knowledge’ and their ‘functioning knowledge’. Problem-solving questions are used extensively in legal education as both teaching and assessment exercises.⁶² They are frequently used in ‘black-letter’ law subjects such as Contract, Torts, Equity and Trusts, and Property Law.

KEATING:

The key term there is ‘well crafted’: the suitability and efficacy of the examination as an assessment tool depend primarily upon the design of the examination questions.

GORMSBY:

Of course. For example, it would not be good to base the examination questions too heavily upon factual scenarios in cases studied in the subject or discussed in class. I

⁵⁹ Jakab, above n 49, 262.

⁶⁰ Judith Welch Wegner, 'Reframing Legal Education's "Wicked Problems" (2009) 61(4) *Rutgers Law Review* 867, 1002-1003.

⁶¹ Race, above n 50.

⁶² According to Conley and O’Barr: ‘Almost every law school exam question presents the students with an original (and often bizarre) fact pattern and demands that they predict the likely legal response. The theory of this kind of testing is that this is just what lawyers do when clients appear in their offices and tell them about their problems’: John M Conley and William M O’Barr, *Just Words: Law, Language and Power* (University of Chicago Press, 1998) 133.

suspect that many students would simply memorise what was said in class and recite it in their answer. Instead the question should confront the students with new factual scenarios and oblige them to think for themselves.

Furthermore, the grading scheme should clearly distinguish between declarative knowledge and functioning knowledge, and reward the students capable of demonstrating the latter in addition to the former. Such a grading scheme would not reward students merely on the basis of how much correct information they can recite on the examination. It would also aim to assess the student's ability to process and apply that information so as to fashion arguments for use in a hypothetical but realistic legal dispute.

KEATING:

Educationalists have been insisting for some time now that learning objectives, learning activities and assessment should be 'constructively aligned'⁶³ and critics of examinations often emphasise the disconnection between the examination process and what happens in the classroom.⁶⁴ The way we teach law in our lectures and tutorials often does very little to prepare students for what they are called upon to do on the final examination.⁶⁵

GORMSBY:

The 'discontinuities between classroom work and examination work'⁶⁶ can be alleviated by ensuring that what is done in class involves similar thought processes to those required for the examination. For example, past examination questions could be used as tutorial problems.

KEATING:

Critics of examinations also point out the disconnection between examination questions and the realities of professional practice.⁶⁷ For example, you referred earlier to examination questions describing a 'realistic' legal dispute. In my experience examination questions are either unrealistically fictionalised, involving bizarre and unlikely characters, coincidences and events, or unrealistically simple, when in real life the problems tend to be complicated. At the very least, examination questions can be criticised as presenting an undisputed set of facts when in reality legal practitioners are rarely certain of the facts of a dispute, let alone the relevant law.

GORMSBY:

There are certainly artificialities in an exercise of this sort. In legal practice, the facts with which a practitioner has to deal are rarely set out finitely and definitively in the way that they usually are in an examination question. That said, all university assessment exercises are artificial to some extent. The examination problem question

⁶³ Biggs and Tang, above n 30.

⁶⁴ Shepard, above n 52.

⁶⁵ Kissam, above n 10, 438-440.

⁶⁶ Ibid.

⁶⁷ Shepard, above n 52.

is an attempt to simulate, as far as it is possible to do so, the type of exercise that legal practitioners have to deal with in their daily work, without ever being completely realistic. Personally, I try to build some factual ambiguity into my examination questions. My theory is that the better students should be able to use their knowledge of the law to work out what – in terms of findings of fact – the outcome depends upon.

KEATING:

Nevertheless, in teaching law to our students, we seek to achieve a wide range of learning outcomes and develop a wide range of graduate attributes. Certainly knowledge and understanding of the law (both functional and declarative), and the ability to solve legal problems, deal with factual ambiguity and engage in critical thinking are some of the more important learning outcomes. But there are others – such as oral communication skills, collaboration skills, and advanced legal research skills – in relation to which an examination is not a suitable method of assessment.

It would be a shame if after years of gradually moving towards the use of a wider variety of approaches to assessment and feedback,⁶⁸ Australian law schools were to regress to the 100% final examination.

GORMSBY:

I am certainly not suggesting that all law schools adopt the final examination as the sole method of summative assessment. I am merely exploring the possibility of the 100% examination being reconsidered as a viable assessment regime for *some* subjects. Even if this regime were available to all academics, I cannot imagine that everyone would adopt it.

KEATING:

I suppose if we were permitted to set a single item of assessment worth 100%, some academics would choose to set a research paper or some other form of non-examination assessment ... although it is likely that most academics would choose to set a final examination for the reasons you have identified.

How do you respond to the claim that 100% examinations put far too much pressure on students? For many students the awareness that the assessment of everything they have been doing in the subject for the entire semester comes down to how well they perform on a single examination is unbearably stressful. In fact, I believe the Australian Law Students' Association has called for 100% law examinations to be banned.⁶⁹ The stress associated with 100% examinations not only has consequences for the students' wellbeing, it also compromises the validity of the assessment. It is well established that students perform better in subjects that have forms of assessment

⁶⁸ Johnstone and Vignaendra, above n 14, 359-392.

⁶⁹ Lawyers Weekly, '24 Hour and 100% Exams Should Be Axed', *Lawyers Weekly* August 3 2010 <http://www.lawyersweekly.com.au/blogs/top_stories/archive/2010/08/03/24-hour-and-100-exams-should-be-axed.aspx>.

other than a 100% examination.⁷⁰ It seems to me that the poorer performance by students on 100% examinations can be largely attributed to the enormous stress involved: students under that much stress are unlikely to perform as well as they would under more favourable conditions, since they are less able to articulate their understanding and exercise their skills. Some students are better able to cope with this stress than others, so is it not possible that the final examination in many ways comes down to a measure of how well a student can manage anxiety rather than their achievement of the subject objectives? And if so, is that fair?

GORMSBY:

And what is wrong with measuring a student's ability to perform tasks under stress? Professional practice will be stressful, and graduates will be called upon to articulate understanding and demonstrate skills in stressful circumstances. A barrister asked a difficult question in court does not have the option of complaining about the stress and asking for a few days to think about the answer!

In any event, a 100% final examination might create a lot of stress for students at the end of the semester, but it seems to me that, with assessment during the semester, the stress is spread across the entire semester. Many students would experience the same amount of stress whether the examination is worth 70% or 100%, but with a 70% examination they also have stressful periods during the semester, which of course interferes with their other learning activities: I have already referred to the drop-off in tutorial attendance in weeks when assignments are due, and how those who do attend do not seem to be prepared for the tutorial.

KEATING:

They would be true for most students, but not all of them. I think for me this is the deciding factor. Regardless of what you say, there are some students for whom a 100% final examination would be more than simply difficult or challenging, it would possibly be a serious threat to their mental health and wellbeing.⁷¹

GORMSBY:

What if I gave my students a choice? I could let them decide for themselves whether to complete a single assessment item or multiple assessment items.⁷² Those unable to

⁷⁰ Regarding the performance of students on 100% examinations as compared with performance when students complete other forms of assessment see Paul Bridges et al, 'Coursework Marks High, Examination Marks Low: Discuss' (2002) 27(1) *Assessment and Evaluation in Higher Education* 36; B A Chansarkar and U Raut-Roy, 'Student Performance under Different Assessment Situations' (1987) 12(2) *Assessment and Evaluation in Higher Education* 115; Graham Gibbs and Lisa Lucas, 'Coursework Assessment, Class Size and Student Performance: 1984-94' (1987) 21(2) *Journal of Further and Higher Education* 183.

⁷¹ See Rachael Field and Sally Kift, 'Addressing the High Levels of Psychological Distress in Law Students through Intentional Assessment and Feedback Design in the First Year Law Curriculum' (2010) 1(1) *International Journal of the First Year in Higher Education* 65.

⁷² Optional assessment is already used at a number of Australian law schools including the University of Queensland, Victoria University, the University of New England, the Australian National

cope with a 100% final examination would have the option to submit interim assessment and sit a final examination worth less than 100%.

KEATING:

Giving students the choice whether or not to complete particular items of assessment certainly seems to have pedagogical merit. Students learn more effectively when they are able to guide their own learning, develop their own interests, and pace themselves.⁷³ And the offering of optional assessment is apparently a way to maintain relatively high levels of student motivation.⁷⁴ Has anyone looked closely at the use of optional assessment within legal education?

GORMSBY:

Between Semester 2 2008 and Semester 1 2010, the Law School at the University of Queensland (UQ) conducted an assessment pilot program in which a number of compulsory subjects in the Bachelor of Laws program were exempted from the University requirement that all subjects include more than one item of assessment and that no single items of assessment be worth more than 70% of the total mark. Across the four semesters of the pilot program, a total of twenty subjects were exempted from the University requirement.

KEATING:

And how did the academics respond to this liberation from the constraints of policy?

GORMSBY:

Broadly speaking there were three types of response (See Table 1). Some academics chose to continue with the use of compulsory interim assessment. Most academics used the pilot program as an opportunity to experiment with optional interim assessment, offering students the choice between (a) sitting a final examination worth 100% and (b) submitting a second assessment item and sitting a final examination worth less than 100%. The remaining academics required or encouraged their students to complete purely formative assessment tasks and then sit a 'compulsory' 100% final examination.

University, Griffith University, the University of Western Australia, and Murdoch University (based upon the results of an online search of Australian law school websites using the search term 'optional assessment'). See also Tony Martin, 'Maximising Student Participation in Optional Assessment' (Paper presented at the Evaluations and Assessment Conference, 'Enhancing Student Learning', Curtin University of Technology WA, 2006).

⁷³ Michael Jackson, 'But Learners Learn More' (1997) 16(1) *Higher Education Research and Development* 101.

⁷⁴ Sandy Millar, 'Optional Assessments in Business Programmes' (Paper presented at the HERDSA Annual International Conference, Melbourne, 12-15 July 2009).

Table 1 - Responses to assessment pilot program

Year	Semester	Subject	Compulsory interim assessment	Optional interim assessment	Compulsory 100% final examination
2008	2	LAWS1114 Law of Torts B		✓	
2008	2	LAWS1116 Constitutional Law		✓	
2008	2	LAWS2112 Contract Law B	✓		
2008	2	LAWS2114 Criminal Law and Procedure B		✓	
2008	2	LAWS3112 Law of Property B		✓	
2008	2	LAWS3114 Law of Trusts B			✓
2009	1	LAWS1113 Law of Torts A			✓
2009	1	LAWS2111 Law of Contract A	✓		
2009	1	LAWS2113 Criminal Law and Procedure A	✓		
2009	1	LAWS2115 Administrative Law		✓	
2009	1	LAWS3111 Law of Property A	✓		
2009	1	LAWS3113 Law of Trusts A		✓	
2009	2	LAWS1114 Law of Torts B		✓	

2009	2	LAWS1116 Constitutional Law		✓	
2009	2	LAWS2112 Law of Contract B	✓		
2009	2	LAWS2114 Criminal Law and Procedure B		✓	
2009	2	LAWS3112 Law of Property B	✓		
2009	2	LAWS3114 Law of Trusts B			✓
2010	1	LAWS1113 Law of Torts A		✓	
2010	1	LAWS2111 Law of Contract A		✓	
Total		20 subjects	6	11	3

The variety of academic responses to the program demonstrates that even if 100% final examinations are permitted under university policy, not all academics will choose to set them. And since different academics responded to the loosening of University regulations in different ways, the pilot program provides some useful data about how different assessment regimes affect student performance.

KEATING:

Where students were given the choice, did many students choose to sit a 100% final examination?

GORMSBY:

The proportion of students who chose to sit a 100% final examination varied across the subjects participating in the pilot program (See Table 2). As a general rule, however, most of the students in any given subject chose not to do the optional assessment, and so sat a 100% final examination.

Table 2 - Proportion of students choosing to do optional interim assessment

Subject	Optional interim assessment	Total enrolment	Students who chose to do interim assessment	Students who chose to do 100% final examination
LAWS1114	Essay (33%)	341	206 (60%)	135 (40%)

Sem 2 2008				
LAWS2114	Essay (40%)	339	153 (45%)	186 (55%)
Sem 2 2008				
LAWS2115	Essay (35%)	365	147 (40%)	218 (60%)
Sem 1 2009				
LAWS1114	Essay (33.3%)	443	55 (12%)	388 (88%)
Sem 2 2009				
LAWS1113	Essay (33.3%)	377	38 (10%)	339 (90%)
Sem 1 2010				
LAWS2111	Essay (30%)	408	109 (27%)	299 (73%)
Sem 1 2010				

KEATING:

How do you account for these different rates between subjects?

GORMSBY:

The proportion of students choosing to do optional interim assessment will depend upon a range of different factors, including the precise nature of the optional assessment activity, perceived levels of difficulty, the timing of the optional assessment, and so on.

Consider, for example, *LAWS1114 Law of Torts B*. In 2008, 60% of the students elected to complete the optional essay. In 2009, however, only 12% of the students elected to complete the optional essay, the remainder choosing to sit a 100% final examination. The academic in question offered two possible explanations for the lower participation rate in 2009. The first is the timing of the due date for the optional essay: in 2009, students did not have the benefit of the mid-semester break in order to complete the essay. The second relates to the perceived difficulty of the topic of the essay in 2009.

KEATING:

Did the students offer any reasons for their choices?

GORMSBY:

In Semester 2, 2009, feedback was sought from the students in the assessment pilot subjects for that semester by way of online survey. Three of the subjects had adopted the optional interim assessment model. Students in those subjects were asked to identify the main reason why they chose to do, or not to do, the optional assessment.

The most common reasons for doing the optional assessment were ‘I wanted to avoid the pressure of a 100% final exam’ (50%), ‘I believe that I generally perform better

on assignments/essays than on exams' (28%), and 'I thought that I would get a higher mark by doing the optional assessment and the exam than by doing the exam alone' (10%). Student comments included the following:

[I chose to do the optional essay] to avoid the risk of doing badly in a 100% exam. Performance in written exams is more unpredictable than assignments.

I feel in a better position to engage with the complex and theoretical subject matter in the context and timeframe of an essay and come out with a better understanding of it than in an exam.

I think there are two overlapping themes here, namely avoiding the pressure of a 100% final exam and achieving a higher grade. The common denominator is a belief among these students that they will maximise their performance in the subject by doing the optional assessment. Whether you look at this as maximising the chance of good outcomes or minimising the risk of bad outcomes, most of the students who chose to do optional assessment did so because they perceived that it would produce a better outcome for them.

A disappointing aspect of the results is that few students seemed to be motivated primarily by intellectual considerations. No student, in any of these subjects, claimed to have done the optional assessment in order to 'get personal feedback on my understanding of the course material'. A solitary student in LAWS1116 *Constitutional Law* claimed to have completed the optional assessment by reason of being 'interested in the topic or topics of the optional assessment'.

KEATING:

And what about the students who chose to sit a 100% final examination?

GORMSBY:

The most common reasons for not doing the optional essay, and instead sitting a 100% final examination, were 'I would have preferred to do the optional assessment but I did not have enough time' (25%), 'I wanted to distribute my workload to better fit with other courses and/or paid employment' (23%), 'I thought that I would get a higher mark by doing the exam alone than by doing the optional assessment and the exam' (19%), and 'I believe that I generally perform better on exams than on assignments/essays' (14%). Once again, these responses do not represent mutually exclusive grounds for students' choices. We can see that approximately one third of those who sat for a 100% exam confessed to a belief that, on this occasion (if not always), doing so would be a grade-maximising strategy. However, students who lacked time or preferred to devote their time to other matters were not necessarily unconcerned about their grades: it is unlikely that those who had insufficient time to do the optional assessment would have been blind to the consequences of submitting hastily prepared work. Efficient use of time – in the sense of getting the best possible outcome from the least expenditure of time – seems to have been an important consideration for many students. This is borne out in some of the student comments:

I would have spent as much time on the optional assignment as studying for the exam (because I'm not too good at time management) and so I thought it wasn't worth it because the assignment was only worth 30%.

There was not two different papers for the exam just the same paper weighted differently, this meant that if you do the assignment, not only do you have to put in the time for that - you have to work just as hard for 70% as you do for 100%.

Students in the subjects with optional assessment were more likely than those in subjects with compulsory 100% (or close to 100%) exams to agree with the statement that 'the assessment in this course was fairly weighted'. The percentages agreeing with the statement ranged from 42% in *Law of Torts B* to 66% in *Constitutional Law*. By contrast, only 20% of students in *Law of Trusts B* (compulsory 100% exam with formative assessment) and 14% of students in *Law of Property B* (compulsory 90% exam with 10% tutorial-based assessment) agreed with the statement.

Specific comments about the optional interim assessment regime were very positive:

I think an optional assessment idea was great - should be more like it.

I very strongly support the optional assessment, as I think it is an appropriate way for students to tailor their assessment so as to enable them to give their best performance.

In Semester 2, 2009, the law student society at UQ conducted its own survey of law students, and the students were asked: 'Do you feel 100% final exams are an appropriate means of assessment?' Of the 449 respondents, 278 or 61.9% stated that they were either 'inappropriate' or 'very inappropriate'. However, in response to the question 'If some of your assessment has been optional, do you like this style of assessment?', only 117 of the 432 respondents (27%) replied with either 'Not at all' or 'Not much'.

My interpretation of these results is that most students do not like being *compelled* to do 100% exams, but they like to have the option not to do interim assessment. It is *having that option* which seems to have found favour with students. This reconciles the finding that few students object to the idea of optional interim assessment with the finding that only a minority of them elect to do that assessment.

KEATING:

What about the academics teaching the subject? They must surely favour the use of optional assessment: it would certainly reduce the amount of time they spend marking student work.

GORMSBY:

It seems that if many students elect not to complete the optional assessment, it has favourable consequences for the academics' workload. According to one of the academics involved in the assessment pilot:

The use of an optional essay involved a "saving" of staff time compared to the staff time that would have been required if the optional essay had been compulsory. With 40% of

students electing to do the essay, this would normally translate roughly into a saving of 85 hours of marking time ...

My own experience is that, apart from final examination marking, I would spend the equivalent of three normal working weeks each teaching semester marking and giving feedback. Even if I were to halve this time by the use of optional interim assessment, that would be a saving of roughly 60 hours. Of course, we cannot assume that *all* of the time saved by using optional interim assessment would translate into the provision of more formative assessment to students (as discussed earlier) or productive research time for the academic, but there would be a significant increase in the amount of time that is *available* to academics.

KEATING:

True. But I wouldn't want student needs to be ignored in favour of giving academics more time to do research. I suppose that this would be one of most serious concerns about the proposal: that any move towards such a regime of optional assessment would be driven primarily by the preferences of academics to spend less time marking and more time doing other things.

GORMSBY:

I agree that the time saved in marking ought not to be the only consideration - or even the dominant consideration – in choosing a particular assessment regime. But, I also think that the University ought to give individual academics greater discretion in choosing the best mix of assessment for testing student achievement of the learning objectives in their subjects. Those who know the subject matter and methodologies of particular disciplines ought to be making the decisions about the best ways of assessing whether students are, in any particular subject, learning what they ought to be learning. This could mean *compulsory* interim assessment in some subjects because that is the best way to assess whether students are meeting the learning objectives for that subject; in other subjects it could mean a 100% examination.

And anyway, I am not opposed to having more time for research. In establishing any assessment regime, the needs of the students must necessarily be balanced with the needs of academics and of the institution itself. We do not have unlimited time or resources, and sometimes concessions have to be made. Academics are teachers, but they are not *only* teachers.

KEATING:

What about something as fundamental as passing or failing the subject? Does the use of 100% final examinations make it easier or harder for students to pass the subject?

GORMSBY:

If we look at the data collected during the UQ study, we can compare the final marks and grades attained by each of the students who completed the optional assessment with the final marks and grades that they would have attained had the examination been the only item of assessment.

KEATING:

Is that a valid comparison? Is it not possible that students would have modified their behaviour in response to the assessment regime? For example, if the final examination had been a compulsory 100% examination, those students would have put more effort into preparing for the examination and therefore received a higher mark than they in fact received having completed the optional interim assessment first.

GORMSBY:

Possibly. But it is also possible that completing the optional interim assessment prepared the students for the final examination and, had the final examination been a compulsory 100% examination, they would not have done as well. Let us assume that those two possibilities more or less cancel each other out.

In *LAWs1114 Law of Torts B* in both 2008 and 2009, basing the final grade upon the examination only instead of upon the optional assessment plus the examination does not affect the final grades of the majority of students (See Table 3).

Table 3 - Effect of weighting final examination at 100% (LAWs1114 Law of Torts B)

	2008		2009	
	Mark	Grade	Mark	Grade
Number of students whose mark or grade would have decreased if they did exam only	125	52 (25.2%)	33	16 (29.1%)
Number of students whose mark or grade would not have changed	25	140 (68%)	7	35 (63.7%)
Number of students whose mark or grade would have increased if they did exam only	56	14 (6.8%)	15	4 (7.2%)
Total number of students who completed optional assessment	206	206	55	55

These results also show that more than a quarter of students who elected to complete the optional assessment received a benefit (in terms of their final grade) in doing so. The overwhelming majority of the increases were, in both years, either students elevated from a grade of 4 (Pass) to a grade of 5 (Credit) or elevated from a grade of 5 (Credit) to a grade of 6 (Distinction), although there was movement between all of the passing grades (See Table 4).

Table 4 - Effect of election to complete optional assessment (LAWS1114 Law of Torts B) – Change in grades

	2008		2009	
	Increased grade	Decreased grade	Increased grade	Decreased grade
Between 6 and 7	5	4	-	2
Between 5 and 6	24	5	9	1
Between 4 and 5	16	5	6	-
Between failure and 4	7	-	1	1
Total number of students	52	14	16	4

The similarity of the pattern in the two consecutive years provides a modest basis for saying that the inclusion of interim assessment in an assessment regime has a levelling effect. By this, I mean that students whose performance would, in an exam-only regime, fall within the ‘middle-range’ receive a benefit from completing interim assessment. In my view, this is a point in favour of the use of the 100% final examination. It results in a much clearer separation of the exceptional students from the merely competent students – and, if as I suggested earlier, one of the purposes of assessment is to rank our students for the benefit of employers and other stakeholders, this is clearly a desirable consequence of the 100% final examination. If our goal is to rank the students by measuring the extent to which each student has met the learning objectives of the subject – and not merely to comply with university assessment policy or to give every student a chance to get the highest grades – it seems to me that the 100% final examination may, in many subjects, be the more accurate assessment method. This is particularly true for those subjects in which what really matters is whether a student has an adequate understanding of the legal doctrinal terrain so as to come up with, individually and under pressure, a solution to a previously unencountered problem. Of course, in other subjects, that may not be what really matters. As I have already said, the University should give individual academics the discretion to make those judgements.

KEATING:

So the data shows that the use of 100% final examinations is likely to lead to lower marks (if not lower grades) for most students, but this is in your view a *good* thing because it more clearly separates the merely competent students from the excellent students. Do we have similar results in any other subjects?

GORMSBY:

Let us consider the student results in the Trusts subjects taught at UQ in the first semester of each of 2007, 2008 and 2009.⁷⁵ In both 2007 and 2008, there was compulsory interim assessment weighted at 30%. In 2007, the interim assessment consisted of a drafting exercise (10%) and a legal research exercise including preparation of a short case note (20%). In 2008, the interim assessment consisted of a compulsory case analysis essay (30%).

As was the case with Torts B, the majority of students would have been unaffected (in terms of their final grade) if the examination was weighted at 100%, although the margin of the majority was, in each year, much narrower than in Torts B (See Table 5).

Table 5 - Effect of weighting final examination at 100% (Trusts)

	2007	2008
Number of students whose grade would have decreased if they did exam only	119 (48.4%)	115 (39.7%)
Number of students whose grade would not have changed	127 (51.6%)	170 (58.6%)
Number of students whose grade would have increased if they did exam only	-	5 (1.7%)
Total number of students	246	290

The large number of students whose grade would have decreased in 2007 may reflect the relative lack of difficulty of the interim assessment. Almost half achieved a higher grade as a result of their better performance on the interim assessment. The 2008 data produces a pattern closer to that of the Torts subjects. The number of students whose grade would have decreased in 2008 was still higher than that in Torts, and this may be explained by the fact that Trusts is a third-level subject and the average level of confidence (and competence) in reading, interpreting and commenting upon case law could be expected to be higher than in a first-level subject.

KEATING:

And did the average students fair better or worse than the superior students?

GORMSBY:

When the pattern of movements between grades is examined, a pattern similar to that in Torts appears (See Table 6).

⁷⁵ In Semester 2 2007 (before the curriculum change) the subject was LAWS3012 Law of Trusts. In Semester 1 2008 (after the curriculum change but prior to the assessment pilot program) and Semester 1 2009 (as part of the assessment pilot program) the subject was LAWS3113 Trusts A. The syllabuses for these subjects overlap, but are not identical.

Table 6 - Effect of weighting final examination at 100% (Trusts) - Change in grades

	2007		2008	
	Decrease in grade	Increase in grade	Decrease in grade	Increase in grade
Between 6 and 7	2	-	3	4
Between 5 and 6	33*	-	28	1
Between 4 and 5	54	-	50	-
Between 3 and 4	6	-	11	-
Between 2 and 3	24	-	23	-
Total number of students	119	0	115	5

*Includes one student who would have received only a 4 had the interim assessment not been included.

As was the case with Torts, the data suggests that the inclusion of interim assessment had a levelling effect - the 'middle-range' students received a benefit and the instances of negative effects were concentrated in the 'upper-range' of students. Again, it seems that the abolition of interim assessment – or at least, making it optional rather than compulsory – results in a lower average grade. And, assuming of course that a final examination result is the best measure of a student's ability to engage in independent legal problem solving, it results in a clearer indication of the extent to which each student has met the learning objectives of the subject.

KEATING:

I can't help but wonder whether these outcomes are representative of all, or even a majority, of law subjects. After all, this is based on data from a handful of subjects at a single law school.

GORMSBY:

This survey, being of limited breadth, does not provide a basis for any broad-sweeping conclusions. We can see that the majority of students were neither advantaged nor disadvantaged by changes to the assessment regime, but the effects at the margins were sufficient to produce quite different distributions of grades. Therefore, at the very least, we can say that care should be taken in the choice of assessment regime. We should give particular attention to whether the assessment methods to be used are an appropriate way of testing achievement of the learning objectives.

KEATING:

I agree that decisions about assessment regimes should not be taken lightly, and not only because of the impact upon pass rates. I am much more interested in the impact upon student learning, which is not necessarily reflected in pass rates.

What happened when the Trusts subject changed over to a compulsory 100% final examination?

GORMSBY:

The second semester Trusts subject, *LAWS3114 Law of Trusts B*, adopted a compulsory 100% final examination in 2008 and continued with this in 2009. (In 2009, the students were also required to complete a formative assessment activity in order to qualify for a passing grade.) Meanwhile the first semester Trusts subject, *LAWS3113 Law of Trusts A*, adopted optional interim assessment in 2009. Comparing the student outcomes with those from Semester 1 2008 again confirms that the overall level of student grades falls under an examination-only (optional or compulsory) regime (See Table 7).

Table 7 - Comparative grade distributions 2008-2009 (Trusts)

	LAWS3113 2008 Sem 1 Final examination + compulsory essay	LAWS3114 2008 Sem 2 100% final exam + optional purely formative assessment	LAWS3113 2009 Sem 1 Final examination + optional essay	LAWS3114 2009 Sem 2 100% final examination + compulsory purely formative assessment
7	14 (4.8%)	-	13 (4.6%)	-
6	91 (31.4%)	9 (3.8%)	60 (21.5%)	20 (8.1%)
5	107 (36.9%)	89 (38%)	109 (39%)	135 (54.4%)
4	67 (23.1%)	135 (57.7%)	81 (28%)	91 (36.7%)
3	-	-	-	1 (0.4%)
2	11 (3.8%)	1 (0.5%)	16 (5%)	1 (0.4%)
1	-	-	-	-
Total Fully Assessed	290	234	279	248

KEATING:

So this data again suggests that students generally do worse (in terms of final grade) when the assessment regime shifts from multiple assessment items to a single assessment item (whether optional or compulsory). I understand your point that this demonstrates the inflationary effect upon final grades of interim assessment, but so far I think your data does more to confirm my opposition to 100% final examinations than it does to confirm your support for them.

I wonder if the data supports one of my other concerns: that law examinations tend to favour male students and disadvantage female students. Kissam, for example, argues that the discourse of law examinations is:

predominantly a masculine discourse - one that employs values, techniques, and concepts that are more widely shared among men than women. Following Professor Carol Gilligan, we might say that our contemporary Blue Book language is a male code that employs rules, boundaries, game playing, speed, and numbers in order to characterize and divide many matters, interests, and persons into separate and disconnected elements. This discourse ignores the more distinctively feminine patterns of thought, moral discourse, and judgment that feature an ethic of caring or a morality of the web – in other words, thinking and caring about complex relations and interdependencies among persons, ideas, and situations.⁷⁶

If the only assessment method is an examination, it is possible that the assessment regime favours male students over female students.

GORMSBY:

The data from the UQ pilot study does not support that view. For example, in *LAW1114 Law of Torts B* in 2008, of the 206 students who chose to complete the optional research essay, 64% were female and 36% were male. Of the 66 students whose grades were affected (either positively or negatively) by their election to complete the essay, 67% were female and 33% were male. Of the 52 students whose grades would have decreased if they did a 100% exam, 63% were female and 37% were male, and of the 14 students whose grades would have increased, 79% were female and 21% were male. This indicates, if anything, that female students are slightly more likely than male students to benefit from an examination-only assessment regime.

In *LAW1114 Law of Torts B* in 2009, of the 55 students who chose to complete the optional research essay, 40% were female and 60% were male. Of the 20 students whose grades were affected, 30% were female and 70% were male. Of the 16 students whose grades would have decreased if they did a 100% exam, 25% were female and 75% were male, and of the 4 students whose grades would have increased, 50% were female and 50% were male, again suggesting that female students are more likely to benefit from an examination-only regime.

The four students who, in 2008, suffered a decrease from a grade of 7 to a grade of 6 by reason of their essay marks were female. In 2009, both students who suffered a decrease in grade from 7 to 6 by reason of their essay marks were female.

I think that the data is at least consistent with the conclusion that female students who sit 100% final examinations are no worse off than male students – even if it does not prove it. The proportion of women who completed the optional assessment and would have been worse off sitting a 100% final examination is no greater than the proportion of men in the same situation, and the proportion of men who completed the optional assessment and would have been better off sitting a 100% final examination is no greater than the proportion of women in the same situation.

⁷⁶ Kissam, above n 10, 456–457, citing Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982) and K C Worden, 'Overshooting the Target: A Feminist Deconstruction of Legal Education' (1984–1985) 34 *American University Law Review* 1141.

Of course, this limited study does not explode the thesis that examination-only regimes create a disadvantage for female students, but it does cast doubt upon whether the thesis represents an invariable and unassailable truth. If these results are to be explained by a suggestion that law students are an atypical group of students – and, in particular, that high-achieving female law students have adapted themselves to a supposedly ‘male-oriented’ assessment regime – then surely any generalisation that an examination-only assessment regime disadvantages women should not be a decisive consideration in choosing assessment regimes for *law* students. Assessment regimes for law should be selected primarily on the basis of what is the most reliable means of testing whether students have developed the attributes associated with a good foundation in the discipline of law.

KEATING:

Perhaps when you present your students with a choice between doing optional interim assessment and doing a 100% final examination you should also provide them with data about performance by women and men on examinations so that the students make an informed choice. This is, of course, just one of many types of information with which such students should be provided.

GORMSBY:

Perhaps, in so far as there is reliable data that shows that there is a difference between male and female performance, we should do that. We should also consider whether students in the early years of their study can make an informed choice about whether they ought to complete optional assessment. Obviously, students who are trying to decide whether to complete optional assessment of a particular kind will be informed by their previous experience with assessment of that kind.

It would also be good for first year students – and perhaps later year students as well – to be given the opportunity to do different types of tasks such as research essays, answers to problem questions and so on as purely formative assessment. In other words, they should be given the opportunity to learn how to do certain tasks and obtain feedback on their performance before their work ‘counts’ towards a final grade. As previously noted there was compulsory formative assessment in *Law of Trusts B* in Semester 2, 2009, and the 2009 class, taken as a whole, performed better in the compulsory 100% exam than the 2008 class. (See Table 7)

KEATING:

I remain concerned about the use of final examinations as the sole form of assessment in a subject. However, I suppose it could be an option available to academics as long as:

- (1) both the academics and the students are provided with information about the benefits and disadvantages of using 100% final examinations;
- (2) all students are provided with formative feedback about the progress of their learning prior to sitting the final examination – ideally this should be

- individualised feedback on a piece of work similar to the work the student will be required to complete on the final examination;
- (3) all students are given the option of submitting interim assessment and thus avoiding the pressure associated with a 100% final examination; and
 - (4) safeguards are put in place to ensure that no student can complete the degree and only ever sit final examinations, never being called upon to demonstrate their oral communication, collaboration and research skills.

You would still have the problem that, since you set your assessment to test students' achievement of particular learning outcomes which you consider to be essential for completion of the subject, giving students the option of *not* completing that assessment allows a student to complete the subject without having that learning outcome tested.

GORMSBY:

A fair point. I suppose that if I am serious about setting assessment that determines whether or not the learning objectives have been achieved, I will have to make sure that the final examination provides an adequate indication of whether a student has achieved each of those outcomes.⁷⁷ It has always been my argument that the compulsory assessment should be a fair measure of all of the learning objectives for the subject. That can cut both ways – in terms of adding assessment items that are necessary in order to assess particular learning objectives and eliminating assessment items that do not have any clear relationship with learning objectives.

At the end of the day, I think that the person who teaches the subject is in the best position to make a judgement about what mix of assessment (including what mix of compulsory and optional assessment tasks) is best for that subject. Hence my opposition to teaching policies that compel the use of multiple summative assessment items .

KEATING:

In the absence of such policies I am sure you would do what is best for your students. But can our colleagues be trusted to do what is best for their students and not just what is best for themselves and their own workloads?

GORMSBY:

We cannot rule out the possibility that some academics will act in a purely self-interested fashion. The question is who are the 'least worst' people to make these sorts of decisions: the individual academics who know – and hopefully love – their specific areas of expertise ... or University committees that are not necessarily aware of or sensitive to the requirements of different disciplines?

⁷⁷ For a critique of the shift within higher education towards outcomes-based education see Kevin Donnelly, 'Australia's Adoption of Outcomes Based Education: A Critique' (2007) 17(2) *Issues in Educational Research* 183.

RESPONDING TO CATASTROPHIC NATURAL DISASTERS AND THE NEED FOR COMMONWEALTH LEGISLATION

MICHAEL EBURN

ABSTRACT

The paper reviews the role of the Commonwealth in responding to natural disasters in Australia and argues that the Commonwealth can and should legislate to define its role, powers and responsibilities. In the absence of legislation governments may be able to rely on non-statutory authority to manage emergencies but it is considered prudent to ensure that the necessary powers are enshrined in legislation, before a disaster strikes. Examples from Canada and the United States are given to show how these federated states have approached the need to empower their federal governments to respond to an emergency.

I NATURAL DISASTERS IN AUSTRALIA

Australia has always been impacted by natural disasters, including floods, severe storms, bushfires and earthquakes. The Australian Disasters Database records 145 events since 1954 where insured losses exceeded \$10 million. The number of events exceeding that threshold would be much higher if costs were adjusted in real terms, and all losses, not just insured losses, were counted.¹ Severe weather poses the greatest cost; severe storms, flood, hail and cyclones have cost the community in excess of nine times more than bush and urban fires.²

Australia has well-developed emergency response organisations and management structures that have allowed Australian states and territories, with Commonwealth assistance, to manage the response to, and recovery from, the disasters that have occurred.³ Planning for response to a catastrophic disaster is in its early stages⁴ but a

¹ Attorney General's Department, *Attorney-General's Department Disasters Database* <<http://www.disasters.ema.gov.au/>>. There are severe limitations on the ability to calculate the costs of disasters and to obtain accurate figures on past disasters, so estimates should be read with caution.

² Ibid. The database records the combined costs for weather events in excess of \$20 billion, while fires are recorded to have cost nearly \$2.2 billion.

³ Council of Australian Governments (COAG), *Natural Disasters in Australia: Reforming Mitigation, Relief and Recovery Arrangements* (Commonwealth of Australia, 2002).

number of reviews⁵ have found that Australia is ill prepared to deal with a catastrophic disaster. It is argued below that the arrangements that are to be relied on in the event of a catastrophic disaster should be supported by legislation.

II WHAT SHOULD BE THE ROLE OF THE COMMONWEALTH?

It is generally argued that managing a counter-disaster response is a matter for the Australian states and territories.⁶ The Commonwealth does, however, have Constitutional responsibilities that are relevant to natural disaster relief and response. The Commonwealth has responsibility for managing the disaster response in Australia's non-self-governing territories.⁷ The Commonwealth also has responsibilities to protect life and property across Australia,⁸ reflected in the Commonwealth's involvement in areas such as health, social security, defence, national security and anti-terrorism.

Where there is a disaster that causes disaster relief to flow from overseas, the Commonwealth has particular interest because it's responsibility for managing Australia's 'external affairs'.⁹ The Commonwealth also manages Australia's international border and has legislative responsibility in the areas of customs and quarantine, international trade and commerce and the operation of foreign trading and financial corporations in Australia. In terms of the domestic response to a disaster, the Commonwealth has legislative responsibility for taxation, postal and telegraphic communications, defence (which is relevant to the use of the defence force in disaster response), insurance and the payment of social security benefits.¹⁰

⁴ Emergency Management Australia, *National Catastrophic Disaster Plan (NATCATDISPLAN)* (Commonwealth of Australia, 2010); Department of Health and Aging, *National Action Plan for Human Influenza Pandemic* (Commonwealth of Australia, 2010); Department of Health and Aging, *Australian Health Management Plan for Pandemic Influenza* (Commonwealth of Australia, 2009)

⁵ Ric Smith, *Summary and Conclusions: Report of the Review of Homeland and Border Security* (4 December 2008) Prime Minister of Australia <http://pmrudd.archive.dpmc.gov.au/sites/default/files/file/documents/20081204_review_homeland_securit.rtf>; Australian Emergency Management Committee, *Catastrophic Disasters Emergency Management Capability Working Group Review of Australia's Ability to Respond to and Recover from Catastrophic Disasters* (Commonwealth of Australia, 2005) 6; Anthony Bergin and David Templeman, 'Get ready for the big one' *The Australian* (Sydney) 7 March 2009, 22.

⁶ Emergency Management Australia, *Australian Government Disaster Response Plan (COMDISPLAN)* (Commonwealth of Australia, 2008) [1.1]; Senate Standing Committee on Industry Science Technology Transport Communications and Infrastructure, Parliament of Australia, *Disaster Management* (1994) Chapter 1; Australian National Audit Office, *Commonwealth Emergency Management Arrangements* (Commonwealth of Australia, 2000) Chapter 2; Australian Emergency Management Committee, above n 3, 5.

⁷ Christmas Island; Cocos (Keeling) Islands; Jervis Bay; Ashmore & Cartier Islands and the Coral Sea Islands; Department of Regional Australia, Regional Development and Local Government, *Territories of Australia* (16 September 2011) <<http://www.regional.gov.au/territories/>>.

⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12549 (Kevin Rudd, Prime Minister).

⁹ *Australian Constitution* s 51(xxix).

¹⁰ *Ibid* s 51.

That the Commonwealth has responsibility to respond to a truly national emergency has been recognised by the Auditor-General¹¹ and in the 2010 National Catastrophic Disaster Plan (NATCATDISPLAN). This plan defines a catastrophic disaster as:

... an extreme hazard event that affects one or more communities, resulting in widespread, devastating, economic, health, social and environmental consequences, and that exceeds the capability of existing State or Commonwealth Government emergency and disaster management arrangements.¹²

Under the NATCATDISPLAN plan the Commonwealth may take a key role in responding to a catastrophic disaster by assisting with re-establishing the government of the affected State or Territory, coordinating inter-state and international assistance and if necessary appointing a coordinator to support the affected state.¹³ The plan is not supported by legislation and the Commonwealth has no special or necessary emergency powers to give effect to the plan.

A The Need For Emergency Powers

A government faced with an emergency of catastrophic proportions requires powers that would allow the government to take immediate, urgent action that may not be justified in the normal course of events.¹⁴ Lee says:

When a natural disaster occurs, some person needs to be put in charge of the site to direct the counter-disaster operation. It is essential that the person be conferred with extraordinary legal powers to enable him to discharge his responsibilities.¹⁵

Governments may seek to rely on non-statutory emergency powers¹⁶ but increasingly powers of this sort are provided for in legislation. As it is the states and territories that will take the primary role of managing the response to a disaster, all Australian states and territories provide for emergency powers to be exercised by emergency controllers. The Commonwealth has legislated for extra-ordinary emergency powers to be exercised by the Australian Defence Force when using force to defend Commonwealth interests or the states and territories from domestic violence.¹⁷ There is, however, no similar legislation to empower the Commonwealth, Ministers or Commonwealth agencies during a catastrophic natural disaster. Defence aid to the

¹¹ Australian National Audit Office, above n 6, 40.

¹² Emergency Management Australia, NATCATDISPLAN, above n 4, [2]

¹³ Ibid [19] - [20].

¹⁴ Clement Fatovic, *Outside the Law: Emergency and Executive Power* (John Hopkins University Press, 2009) 4.

¹⁵ H P Lee, *Emergency Powers* (Law Book, 1984) 171–172.

¹⁶ See the discussion on the Executive Power of the Commonwealth and the response to Cyclone Tracy in 1974, below.

¹⁷ Australian Constitution ss 51(vi), 61, 119; *Defence Act 1903* (Cth) Part IIIAAA.

civil community, as with other Commonwealth disaster response arrangements, are governed by administrative arrangements only.¹⁸

Government departments and authorities are bound by legislation to exercise various powers and perform their statutory functions.¹⁹ How they exercise those powers and perform those functions may have an impact upon the disaster response, for example a requirement by a government department that people provide particular documentation in order to access a benefit may be appropriate in normal times, but not in a disaster when people cannot access their homes or their homes and personal papers have been lost.

Following the devastation of Burma by Cyclone Nargis in 2008, there were demands by the international community that the Burmese government should waive visa and customs requirements to allow international aid agencies to access to the affected population.²⁰ If a similar situation were to occur in Australia, without specific legislative authority, it would be difficult, if not impossible for the minister to simply ‘waive’ the application of the relevant legislation.²¹ In this context the Victorian emergency management arrangements are unique in Australia. Where the Victorian Premier has declared a state of disaster²² the Minister may direct any government agency to do or not do anything and may suspend the operation of any Act or regulation if it appears that compliance with that law would inhibit the response to, or recovery from, the disaster.²³

The New Zealand Law Commission said:

Emergencies are likely to call for immediate and drastic action. It follows that legislation authorising an appropriate response should be in place in advance of the emergency itself. This factor, and the likelihood that the emergency response will involve interference with established rights, points to the desirability of preparing emergency legislation at leisure rather than under the pressure of an actual or imminent emergency.
²⁴

¹⁸ Defence Instruction (General) OPS 05-1, *Defence Assistance to the Civil Community – policy and procedures*. Emergency Management Australia, COMDISPLAN, above n 6; Emergency Management Australia, NATCATDISPLAN, above n 4.

¹⁹ Lee, above n 15, 171.

²⁰ Reuters, ‘Burma cyclone deaths may top 100,000’, *The Age* (Online), 8 May 2008

<<http://www.theage.com.au/news/world/burma-cyclone-deaths-may-top-100000/2008/05/08/1210131102642.html>>; Anne Penketh and Pete Pattisson, ‘Burma generals agree to UN aid for cyclone victims’, *The Independent* (Online), (20 May 2008)
<<http://www.independent.co.uk/news/world/asia/burma-generals-agree-to-un-aid-for-cyclone-victims-831034.html>>.

²¹ Lee, above n 15, 171–172; though in the context of visas, the Minister could issue a special purpose visa to individuals or to a class of persons such as members of specified relief agencies but that in no way involves a ‘waiver’ of the Act; *Migration Act 1958* (Cth) s 33.

²² *Emergency Management Act 1986* (Vic) s 23.

²³ Ibid s 24.

²⁴ New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, 1991) [4.12].

Fatovic argues against passing legislation at the time of the emergency. He says that the ‘consensus generating effect’ of emergencies restricts the ability, or willingness of Parliamentarians to scrutinise emergency legislation and to question either its necessity or the appropriateness of particular provisions.

Legislation created in a state of panic tends to be of poor quality. It is more likely to be either over-inclusive or under-inclusive, indiscriminate, or unenforceable. The legislature might abdicate too much of its own power or oversight responsibilities, confer too much power on the executive, fail to make necessary exception to the law, abridge liberties that actually pose no danger to public order or safety, or some combination of these things.²⁵

B The Legislative Power Of The Commonwealth

The Commonwealth can pass emergency management legislation. The Commonwealth Parliament has the power to make laws with respect to how Commonwealth agencies will behave, and Commonwealth services will be provided and maintained during a disaster. The parliament could provide that the Minister for Immigration may waive visa requirements in an emergency as an exercise of the legislative power with respect to aliens and immigration;²⁶ the Commonwealth has the power to make laws with respect to various social security benefits²⁷ so the Commonwealth can, and does, make laws with respect to how those benefits will be delivered during an emergency.²⁸ Commonwealth agencies have offices and staff and provide services around the nation. Commonwealth staff and buildings will be affected by catastrophic events and the agencies need to plan how they will deal with the disruption and damage caused by a natural hazard. They will need to respond to the disaster to ensure that federal services are maintained and people who need and are eligible for Commonwealth assistance can receive it. It follows that the Commonwealth has constitutional authority to legislate for the emergency response by Commonwealth agencies and to legislate how the Commonwealth will respond to disasters.

The parliament could also include provisions in specific legislation to allow a minister to make particular decisions that are necessary in an emergency and there are examples where this has been done. In the event of a national disaster that required incoming international aid agencies to access Sydney airport without charge and to bring in urgently required medications based on genetically modified organisms, there would need to be four separate determinations that an ‘emergency’ existed:

²⁵ Fatovic, above n 14, 263.

²⁶ *Australian Constitution* s 51(xix), (xxvii).

²⁷ *Ibid* ss 51(xxiii), (xxiv).

²⁸ *Social Security Act 1991* (Cth) ss 1061K-1061P.

- 1) The Minister for Health and Aging would make an ‘emergency dealing determination’ to allow emergency dealing with a genetically modified organism²⁹ and
- 2) grant an exemption to allow the use of the medicaments that have not gone through the normal registration process.³⁰
- 3) The Minister for Infrastructure and Transport would give an airport operator notice to require them to give priority access to the airport for relief flights³¹ but if, and only if, the defence force is involved in the response to the hazard event, so before the minister could give that notice;
- 4) the Prime Minister, the Attorney General or the Minister for Defence would need to authorise the use of the defence force in the response.³²

There would need to be further, separate determinations, to ensure social security payments to the affected population,³³ to allow people to obtain necessary medication without being able to prove their identity with their Medicare card,³⁴ to allow government agencies to share information so that people can be located and the missing and dead identified³⁵ and to ensure fuel reserves are maintained for the emergency operations.³⁶ There would also need action by the Minister for Immigration to allow foreign aid workers to enter the country and then further action at the state level to facilitate the recognition of professional qualifications.

Notwithstanding the broad range of Commonwealth agencies involved, there is no equivalent of the Principal Federal Official or Federal Coordinating Officer of the United States³⁷ to manage and coordinate the Commonwealth response. As noted, above, the provisions in various Acts allow for the relevant minister to make a declaration that an ‘emergency’ exists. Without a single, coordinating authority, each minister must make their declaration rather than a single declaration of a national emergency being sufficient to activate all the emergency provisions.

The Branch Head of Emergency Management Australia, an administrative unit within the Attorney-General’s department that is responsible for the ‘ordination of Australian Government crisis response and recovery efforts’,³⁸ might fill the principle coordinating role but without a clear mandate and legal authority, his or her ability to

²⁹ *Gene Technology Act 2000* (Cth) s 72B.

³⁰ *Therapeutic Goods Act 1989* (Cth) s 18A.

³¹ *Airports Act 1996* (Cth) s 250.

³² *Defence Act 1903* (Cth) pt IIIA.

³³ *Social Security Act 1991* (Cth) s 36.

³⁴ *National Health Act 1953* (Cth) s 86E.

³⁵ *Privacy Act 1988* (Cth) s 80J.

³⁶ *Liquid Fuel Emergency Act 1984* (Cth) s 16.

³⁷ Christine E Wormuth and Anne Witkowsky, *Managing the Next Domestic Catastrophe: Ready (or Not)?* (Center for Strategic and International Studies, 2008).

³⁸ Attorney General’s Department, *Emergency Management Australia* (2011)

<http://www.ag.gov.au/www/agd/agd.nsf/Page/OrganisationalStructure_EmergencyManagementAustralia>

fulfil that role is uncertain.³⁹ Emergency Management Australia has no statutory authority, must seek approval from the Attorney-General and any other relevant minister before committing Commonwealth resources⁴⁰ to a disaster response and cannot direct any of the Commonwealth agencies on how they are to respond to a catastrophic disaster.

There is also room for uncertainty in the structure of the Attorney-General's Department. Within that department is the Secretary to the Department, the Deputy Secretary in charge of the National Security and Criminal Justice Group and the Branch Head of Emergency Management Australia. There are two relevant ministers; the Minister for Home Affairs and the Attorney-General.⁴¹ In the normal course of events, it would be the Secretary that would convey the Department's advice to the Minister, but with a Deputy Secretary specifically in charge of the National Security Group, and the Branch Head of EMA responsible for the operational coordination of responses to hazard events⁴² there could be multiple sources of information and advice when clarity is most required. In the United States it has been recommended that the role of federal officers needs to be clearly defined in statute to ensure that there are procedures in place for optimal response.⁴³ There is an equal need for similar clarity in Australia.

C The Executive Power Of The Commonwealth

Without specific legislation granting the necessary powers, the Commonwealth government would need to rely on non-statutory powers such as the prerogative power of the Crown, now encompassed in the phrase 'the Executive power of the Commonwealth'⁴⁴ to manage its emergency response. The executive power of the Commonwealth:

... enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibilities vested in it by the Constitution. It includes the prerogative powers of the Crown, that is the powers accorded to the Crown by common law.⁴⁵

There is debate about the source and meaning of 'the executive power of the Commonwealth'.⁴⁶ On one view it is derived from the prerogative powers of the

³⁹ David Templeman and Anthony Bergin, *Taking a punch: Building a more resilient Australia*, (Australian Strategic Policy Institute, 2008) 7.

⁴⁰ Emergency Management Australia, COMDISPLAN, above n 6.

⁴¹ Attorney-General's Department, *Attorney-General's Department Organisation Chart* (12 May 2011) <[http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/%288AB0BDE05570AAD0EF9C283AA8F533E3%29~AGD+org.pdf/\\$file/AGD+org.pdf](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/%288AB0BDE05570AAD0EF9C283AA8F533E3%29~AGD+org.pdf/$file/AGD+org.pdf)>.

⁴² Ibid.

⁴³ Ronald Waldman, 'Responding to Catastrophes: A Public Health Perspective' (2005–2006) 6 *Chicago Journal of International Law* 553; Wormuth and Witkowsky, above n 37, vii-viii.

⁴⁴ *Australian Constitution* s 61; Fatovic, above n 14, 9.

⁴⁵ *Barton v The Commonwealth* (1974) 131 CLR 477, 498 (Mason J).

⁴⁶ *Australian Constitution* s 61.

English monarch⁴⁷ ‘which, according to subsequent doctrine, was frozen in 1689 [though it] can be abrogated by statute’.⁴⁸ An alternative view, espoused by French J in *Ruddock v Vadarlis*,⁴⁹ is that the executive power of the Commonwealth is derived from the agreement that lead to the creation of the Commonwealth and is to be ‘ascertained from within the *Constitution* itself and that it is not subject to the common law limitations upon the royal prerogative’.⁵⁰ Even so, French J described the common law prerogative power as providing the ‘historical antecedents’⁵¹ to the Commonwealth executive power and conceded that the executive power ‘may derive some of its content by reference to the royal prerogative’ even if it ‘is subject ... to the limitations as to subject matter that flow directly from the Constitution’.⁵² On either view, the executive power ‘includes the prerogative powers of the Crown’.⁵³ The scope of the prerogative power is uncertain⁵⁴ and resists being defined as a list of powers or subject areas.⁵⁵ The prerogative power has included a power vested in the Crown to respond to emergencies, that are ‘... a national emergency, [where there is] an urgent necessity for taking extreme steps for the protection of the Realm’.⁵⁶ Lee, in his review of emergency powers, said:

... a special or emergency prerogative lies dormant in the fabric of executive powers. Such a prerogative awaits activation in the face of extreme necessity. The submission in this work is that the Commonwealth possesses a prerogative power to requisition a subjects’ property ... Another assertion ... is that a case can be made for an extraordinary prerogative which extends to the assumption of legislative power when the legislative arm of government is paralysed.⁵⁷

⁴⁷ *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [233] (Gummow, Crennan and Bell JJ).

⁴⁸ Robin Creyke, ‘Executive Power — New Wine in Old Bottles’ (2003) 31 *Federal Law Review* i, iii.

⁴⁹ *Ruddock v Vadarlis* (2001) 110 FCR 491; and also in *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [126]-[129] (French CJ).

⁵⁰ *Ruddock v Vadarlis* (2001) 110 FCR 491, 540 (French J); *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [127] (French CJ); [337] (Hayne and Kiefel JJ); see also Bradley Selway, ‘All at Sea — Constitutional Assumptions and the Executive Power of the Commonwealth’ (2003) 31 *Federal Law Review* 495, 497.

⁵¹ *Ruddock v Vadarlis* (2001) 110 FCR 491, 538 (French J).

⁵² *Ibid* 540.

⁵³ *Barton v The Commonwealth* (1974) 131 CLR 477, 498 (Mason J) (emphasis added). See also *Ruddock v Vadarlis* (2001) 110 FCR 491, [9] (Black CJ); *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [127] (French CJ); H. E. Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 392, 403, 419 and 420; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 232 (Williams J); George Winterton, ‘The Limits and Use of Executive Power by Government’ (2003) 31 *Federal Law Review* 421, 425-6; 430; Selway, above n 50, 497; 503; 505; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th ed, Federation Press, 2006) 522; 526; Lee, above n 15, 67.

⁵⁴ *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 99 (Lord Reid); 145 (Lord Pearce); *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [126] (French CJ); [233]-[234] (Gummow, Crennan and Bell JJ); H E Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 389, 394; New Zealand Law Commission, above n 24, [4.37]-[4.41].

⁵⁵ Blackshield and Williams, above n 53, 523-525; *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 114 (Viscount Radcliffe).

⁵⁶ *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 136 (Lord Hodson).

⁵⁷ Lee, above n 15, 322.

Renfree states:

A prerogative of the Crown regarding the preservation of the public safety was early recognized by the common law. It was described by the maxim *salus populi suprema lex*.⁵⁸

The prerogative of the Crown in the exercise of the *suprema potestas* arises from a general principle that in time of emergency the law arms Crown and subject alike with the right of intervening, and sets public safety above private right.

Apart from natural disasters and political crises, there are two main crises that may confront a nation — attack from abroad and domestic violence within.⁵⁹

Having identified natural disasters as a possible emergency, Renfree discusses only the examples of violent attacks. The case law on this subject, however, leaves open the possibility that the Commonwealth Executive, that is the Governor-General, the Prime Minister and Cabinet and the public service,⁶⁰ retain necessary powers to respond to national natural disasters despite no specific grant of legislative power in this area.⁶¹

The basis of the war prerogative is the obligation on the government to defend itself and the fundamental structures of the society, that is, it is to defend the system of constitutional government established in Australia and to keep the population safe. A war or civil violence that aims to usurp the government and the constitutional order is a direct threat to the national polity and may be resisted by the national government.⁶² A natural disaster, even a catastrophic disaster, does not pose the same threat to the underlying basis of government, but it can pose a significant threat to the government's ability to function.

Viscount Radcliffe thought the emergency prerogative need not be limited to the outbreak of war. He said:

here is no need to say that the imminence or outbreak of war was the only circumstance in which the prerogative could be invoked. Riot, pestilence and conflagration might well be other circumstances...⁶³

It is the Crown's '...right and duty to protect its realm and citizens in times of war and peril'.⁶⁴ Ensuring the safety and security of the citizens could extend to ensuring their security from catastrophic natural hazards as well as from war. 'Peril' means

⁵⁸ The Latin phrase '*salus populi est suprema lex*' is translated as 'the welfare of the people, or of the public, is supreme law': *Latin for Lawyers* (Sweet and Maxwell, 1915) 241.

⁵⁹ Renfree, above n 54, 466 see also Winterton, above n 53, 425.

⁶⁰ Blackshield and Williams, above n 53, 520.

⁶¹ *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [233] (Gummow, Crennan and Bell JJ).

⁶² *Attorney General v De Keyser's Royal Hotel* [1920] AC 508; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

⁶³ *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 143.

⁶⁴ Ibid 115 (Lord Pearce).

'risk, jeopardy, danger'.⁶⁵ A catastrophic disaster will expose the Commonwealth and its citizens to jeopardy and danger. It follows that the case law identifies that the source of the prerogative power is to protect the political entity and its citizens from threat and danger, and is not expressly limited to the dangers posed by enemies in war. It must also follow, as a matter of practical reality, that when an overwhelming disaster strikes a state, regardless of its cause, the executive government must have power to respond to that disaster.⁶⁶

The Commonwealth executive power also includes powers implied by the standing of the government as a national government.⁶⁷

... s.61 [of the Constitution] does confer on the Executive Government power "to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation" ... **It invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit.**⁶⁸ (Emphasis added).

The need for national action in the face of a disaster that requires coordinated national assets or has affects across more than one state and/or territory suggests that the Commonwealth, by virtue of its position as the national government, has the necessary power to move into areas normally the responsibility of the states, and in extreme cases could exercise legislative authority if required.⁶⁹ This authority could allow the government to waive compliance or suspend the operation of the legislation if that was required to meet the urgency of the situation.

History shows that the Commonwealth can exercise such power. In 1974 the Director-General of the Commonwealth's Natural Disasters Organisation (now Emergency Management Australia) was appointed to take supreme command of recovery operations following the devastation of Darwin by Cyclone Tracy. The appointment of the Commonwealth officer as supreme commander was 'because the situation in Darwin was a **national disaster of major dimensions**'.⁷⁰ In the absence of any specific constitutional head of power, any power of the Commonwealth to manage 'a national disaster of major dimensions' must be an exercise of the executive or prerogative power of the Commonwealth.⁷¹

⁶⁵ *The Shorter Oxford English Dictionary* (Oxford University Press, Oxford, 1973) 1555.

⁶⁶ Fatovic, above n 14, 1-10.

⁶⁷ *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ); *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [128]-[132] (French CJ); Winterton, above n 53, 427; 430-431; Selway, above n 50, 505; Blackshield and Williams, above n 53, 534.

⁶⁸ *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J).

⁶⁹ *Pape v Commissioner for Taxation* (2009) 238 CLR 1; Lee, above n 15, 322.

⁷⁰ Alan Stretton, *Darwin Disaster: Cyclone Tracy. Report by Director-General Natural Disasters Organisation on the Darwin Relief Operations 25 December 1974–3 January 1975* (Commonwealth of Australia, 1975) [8] (emphasis added).

⁷¹ *Australian Constitution* s 61. Though in the case of Cyclone Tracy, the Government could have relied on its power to make laws with respect to territories (*Australian Constitution* s 122) as the Northern Territory was not a self-governing territory but was administered by the Commonwealth

Having established that the executive power of the Commonwealth includes an undefined power to respond to truly national disasters then the Commonwealth will also have legislative power in this area. Making laws incidental to the exercise of that executive power⁷² is a valid exercise of Commonwealth legislative power⁷³ though the exercise of that power could not transcend the express terms of the Constitution.⁷⁴

D Is There A Need For Commonwealth Legislation?

If it is accepted that the Commonwealth has legislative power to make laws with respect to the response to a national emergency, it can be asked whether legislation is required or whether current, administrative arrangements are sufficient.

The need for pre-existing legal arrangements was the subject of comment by Major-General Alan Stretton who, following Cyclone Tracy's devastation of Darwin in 1974, commandeered property and restricted the movement of people without clear legal authority.⁷⁵ Notwithstanding his ability to rely on *de facto* authority and goodwill, he recommended that legal authority was required to allow the coordinator to operate in a disaster.⁷⁶

H P Lee argues that '... emergency provisions should be embodied in legislation which makes their existence conspicuous'.⁷⁷ He notes that following the bombing of the Hilton Hotel in 1978 the then Leader of the Opposition (and later, Governor-General) Mr Hayden argued for Commonwealth emergency legislation:

... not so much in order to confer sweeping new powers but rather to circumscribe, confine and define their exercise, and to remove some of the extraordinary uncertainties which now prevail.⁷⁸

As noted above, the Commonwealth has acted to legislate for the use of force when responding to domestic violence⁷⁹ but not when responding to natural disasters.

The New Zealand Law Commission recommended against relying on non-statutory authority to manage disaster response because it is 'vague and ill defined'⁸⁰ and is not

Government. That was not, however (according to Major General Stretton) the basis of his appointment. Stretton, above n 70, [8]; see also Alan Stretton, *The Furious Days: The Relief of Darwin* (Collins, 1976) and Alan Stretton, *Soldier in a Storm: An Autobiography* (Collins, 1978). See also Lee, above n 15, 322.

⁷² Australian Constitution s 51(xxxix).

⁷³ *Davis v Commonwealth* (1988) 166 CLR 79; See also *Ruddock v Vadarlis* (2001) 110 FCR 491.

⁷⁴ *Pape v Commissioner for Taxation* (2009) 238 CLR 1.

⁷⁵ Stretton, *The Furious Days*, above n 71, 80.

⁷⁶ Stretton, *Soldier in a Storm*, above n 71, 285.

⁷⁷ Lee, above n 15, 193.

⁷⁸ Ibid 192.

⁷⁹ Australian Constitution ss 51(vi), 61, 119; *Defence Act 1903* (Cth) Part IIIAAA.

⁸⁰ New Zealand Law Commission, above n 24, [1.29].

subject to scrutiny. The commission argued it is better to plan for the possible eventualities and to define in statute, before a disaster strikes, what the scope of necessary emergency powers will be.⁸¹

The Australian Strategic Policy Institute found that:

The Commonwealth agency seen to be responsible for [Commonwealth disaster response] ... Emergency Management Australia (EMA), has no mandate, legislation or Cabinet endorsement with which to take command. The delivery of EMA functions for the most part is the result of goodwill on behalf of other agencies. This is clearly not a satisfactory situation.⁸²

There is, therefore, strong support, dating back to at least 1974, for the idea that the Commonwealth should have in place emergency legislation to define the powers that the Commonwealth government may exercise in times of natural disaster.

Where a government purports to rely on non-statutory authority, there may be challenges as to whether the power existed and whether it has been displaced by legislation.⁸³ The Crown cannot exercise a prerogative power where the parliament has passed legislation curtailing that power or setting out who is to exercise various powers. It is arguable that if the legislature does not provide emergency powers in an Act, such as the *Migration Act*, there can be no prerogative power to suspend or vary the Act to deal with an emergency: if such a power were intended it would have been provided for by the legislature.⁸⁴ Leaving the matter up to a court to determine when and how the Commonwealth may act in an emergency is not appropriate when such powers are required as a matter of urgency. The better solution is to enact legislation, before disaster strikes, to ensure that the necessary emergency powers are in place, with clear criteria for when they may be used. Having a comprehensive Act will ensure that the Commonwealth does not purport to act on the basis of ill-defined powers with inadequate or no existent safeguards.

In recent times the Commonwealth has purported to act in a number of ‘emergencies’. Efforts to take extra-ordinary action, even when the government believes such action is overwhelmingly in the national interest, do not go unchallenged when private interests are involved. Deploying troops to secure the MV Tampa, to protect indigenous children in the Northern Territory⁸⁵ and allocating funds to respond to the Global Financial Crisis⁸⁶ has been done in response to a claimed emergency and all have triggered litigation over the scope of the Commonwealth’s power.⁸⁷ Even

⁸¹ Ibid.

⁸² Templeman and Bergin, above n 39, 7.

⁸³ As was the case in *Ruddock v Vadarlis* (2001) 110 FCR 491.

⁸⁴ *Attorney General v De Keyser's Royal Hotel* [1920] AC 508; Renfree, above n 54, 397ff; *Ruddock v Vadarlis* (2001) 110 FCR 491.

⁸⁵ *Northern Territory National Emergency Response Act 2007* (Cth).

⁸⁶ *Tax Bonus for Working Australians Act (No 2) 2009* (Cth).

⁸⁷ *Ruddock v Vadarlis* (2001) 110 FCR 491; *Wurridjal v Commonwealth* (2009) 237 CLR 309; *Pape v Commissioner for Taxation* (2009) 238 CLR 1 respectively.

during war, the ultimate national emergency, plaintiffs have sought court intervention to challenge government action or to seek compensation after the event. In the United Kingdom, actions that relied on the prerogative power of the Crown to commandeer accommodation for troops⁸⁸ or to destroy private assets to stop them falling into the hands of the enemy⁸⁹ have been challenged; whilst in Australia, actions based on legislation designed to secure the defence of the nation⁹⁰ have been subject to challenge and judicial review. In modern times, during the war against terror, efforts by governments to reduce or restrict the rights of citizens have not gone unchallenged.⁹¹

Specific natural disaster legislation that gives emergency powers to the Commonwealth, Commonwealth Ministers or Commonwealth agencies such as EMA, the Australian Defence Force or the Australian Federal Police would not rule out constitutional or other legal challenges, or stop the Commonwealth relying on the executive power to deal with other perceived emergencies. Legislation may, however, go some way to limiting the use of the executive power and could reassure the states that the Commonwealth will only act in a truly national, natural disaster. An Act, when negotiated in the calm before any actual emergency arises,⁹² will help to ensure that political disputes will not disrupt or hinder the response that will be required if and when the emergency arises and would stop the Commonwealth using the occurrence of a natural hazard event to expand its legislative authority.

III INTERNATIONAL EXAMPLES

Legislation from Canada and the United States will serve as useful examples of legislative models that could inform the development of Commonwealth legislation in Australia. Like Australia, Canada and the United States are federated states where the primary responsibility for disaster management is vested in the states.

A Canada

I Constitutional considerations

The Canadian constitution⁹³ lists the areas of legislative power for the national and provincial governments. The provincial legislatures are given exclusive legislative power in 15 specified areas.⁹⁴ The national legislature is granted the residual legislative power, that is, the power to make law on any subject matter not

⁸⁸ *Attorney General v De Keyser's Royal Hotel* [1920] AC 508.

⁸⁹ *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75.

⁹⁰ See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 and the cases cited therein.

⁹¹ *Hamdan v. Rumsfeld* 548 U.S. 557 (2006); *R v Thomas* [2006] VSCA 165.

⁹² New Zealand Law Commission, above n 24, [1.25]-[1.26].

⁹³ *Constitution Act 1867* (Imp) and *Constitution Act 1982* (being Sch B to the *Canada Act 1982* (UK) cl 11) s 52.

⁹⁴ *Constitution Act 1867* (Imp) s 92.

specifically reserved to the provinces. The national legislature is also granted exclusive power to make law with respect to thirty enumerated subject areas.⁹⁵ There is no specific grant of legislative power in the area of disaster or emergency management, but the federal legislature has the power to make laws for the ‘peace order and good government’ of Canada as a whole.⁹⁶ This broad provision includes the power to make laws to deal with a national emergency.

The Canadian constitution, like the Australian constitution, vests the executive power of the national government in the Queen.⁹⁷ This executive power includes the traditional prerogative powers of the monarch,⁹⁸ including an emergency prerogative that is ‘the right in an emergency to take actions that are necessary in order to defend the sovereignty of the country’.⁹⁹ The use of the executive power to manage emergencies is now governed by the *Emergencies Act*.¹⁰⁰

The provinces have a legislative power to deal with emergencies occurring within their own borders, in order to ensure the delivery of provincial services and the continuation of the provincial government. Provincial governments also have the exclusive power to make laws dealing with ‘Property and Civil Rights in the Province’,¹⁰¹ which will include rights such as the right to ‘life, liberty and the security of the person’.

Despite the aim of the Canadian constitution to distribute legislative power between the national and provincial legislatures, there is room for significant overlap.¹⁰² Where there is an inconsistency between federal and provincial law, the courts have held that even without a specific Constitutional provision,¹⁰³ the federal law is to prevail.¹⁰⁴ Further, where there is a national emergency, the federal legislature, relying on the residual power to make laws for the peace, order and good government of Canada, can make laws dealing with any subject matter including those matters otherwise within the exclusive jurisdiction of the provinces.¹⁰⁵

⁹⁵ Ibid s 91.

⁹⁶ Ibid; see also *Fort Frances Pulp and Power Co v Manitoba Free Press* [1923] AC 695, in J D Whyte, W R Lederman and D F Bur, *Canadian Constitutional Law* (Butterworths, 1992) 7-32 see also *Reference Re Anti-Inflation Act* (1976) 68 DLR (3d) 452 in J D Whyte, W R Lederman and D F Bur, *Canadian Constitutional Law* (Butterworths, 1992) 7-106 and commentary at 7-35.

⁹⁷ *Constitution Act 1867* (Imp) s 9; *Australian Constitution* s 61.

⁹⁸ Patrick Monahan, *Constitutional Law* (2nd ed, Irwin Law, 2002) 62.

⁹⁹ Ibid 63.

¹⁰⁰ *Emergencies Act* RSC 1985 (4th Supp), c 22.

¹⁰¹ *Constitution Act 1867* (Imp) s 92(13).

¹⁰² Monahan, above n 98, 107–108.

¹⁰³ Such as *Australian Constitution* s 109.

¹⁰⁴ Monahan, above n 98, 127–128.

¹⁰⁵ Ibid 261; H Marx, ‘The Apprehended Insurrection of October 1970 and the Judicial Function’ (1972) *University of British Columbia Law Review* 55 in Whyte, Lederman and Bur, above n 96, 7-36; *Reference Re Anti-Inflation Act* (1976) 68 DLR (3d) 452 in Whyte, Lederman and Bur, above n 96, 7-96 and 7-107.

Where the national legislature purports to rely on the emergency power to legislate in areas that are normally within the exclusive power of the provinces, they should make it clear that they are relying on the emergency power. Beetz J said:

What is required from Parliament when it purports to exercise its extraordinary emergency power in any situation where a dispute could arise as to the existence of the emergency and as to the constitutional foundation of its action, is an indication, I would even say a proclamation, in the title, the preamble or the text of the instrument, which cannot possibly leave any doubt that, given the nature of the crisis, Parliament in fact purports to act on the basis of that power.¹⁰⁶

If a disaster occurs within the boundaries of a province and is managed by the provincial government, relevant provincial law would apply. Where the effect of the disaster impacts upon the rights of people outside the province or involves the federal government, or constitutes a national emergency,¹⁰⁷ there is room for federal law to apply.

2 The Emergencies Act and the Emergency Management Act

The Canadian parliament has passed two complementary pieces of emergency management legislation; they are the *Emergencies Act 1985* and the *Emergency Management Act 2007*.

The 1985 Act defines a national emergency as:

- ... an urgent and critical situation of a temporary nature that
- (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
 - (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada and that cannot be effectively dealt with under any other law of Canada.¹⁰⁸

The Act provides for four types of national emergency. They are:

- a public welfare emergency;¹⁰⁹
- a public order emergency;¹¹⁰
- an international emergency;¹¹¹ and
- a war emergency.¹¹²

¹⁰⁶ *Reference Re Anti-Inflation Act* (1976) 68 DLR (3d) 452 in Whyte, Lederman and Bur, above n 96, 7-108.

¹⁰⁷ Monahan, above n 98, 257.

¹⁰⁸ *Emergencies Act RSC 1985* (4th Supp), c 22, s 3.

¹⁰⁹ Ibid ss 5–15.

¹¹⁰ Ibid ss 16–26.

¹¹¹ Ibid ss 27–36.

¹¹² Ibid ss 37–45.

An international emergency involves ‘acts of intimidation or coercion or the real or imminent use of serious force or violence’.¹¹³ A ‘public order emergency’ and a ‘war emergency’ are also emergencies caused by armed conflict or other violence. In Australia the *Defence Act*¹¹⁴ and the defence power of the Commonwealth¹¹⁵ can be relied upon to respond to threats caused by war or domestic violence.¹¹⁶ What Australia lacks is federal legislation dealing with natural disasters termed, in the Canadian legislation, a ‘public welfare emergency’. A public welfare emergency is:

... an emergency that is caused by a real or imminent
 (a) fire, flood, drought, storm, earthquake or other natural phenomenon,
 (b) disease in human beings, animals or plants, or
 (c) accident or pollution
 and that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency.¹¹⁷

The Canadian Act empowers the Governor in Council (that is the Governor acting on the advice of the Cabinet¹¹⁸) to issue a declaration of a public welfare emergency¹¹⁹ and to make orders to deal with the emergency. The orders may:

- restrict travel to or from the area affected by the emergency;
- direct the evacuation of people or property and make arrangements for the care of evacuated people and property;
- requisition or authorise the use or disposal of private property;
- require people to provide essential services as part of the response to, and recovery from, the emergency;
- regulate the distribution and availability of ‘essential goods, services and resources’;
- authorise emergency payments;
- authorise the establishment of emergency medical facilities and shelters;
- authorise the assessment of damage and the repair of such damage;
- authorise assessment of environmental damage and remediation; and
- create criminal offences for failure to comply with orders made in response to the emergency.¹²⁰

Orders made by the Governor in Council must not ‘unduly’ impede the ability of a provincial government to respond to the disaster, and must be aimed at achieving a coordinated response with the provincial authorities.¹²¹ To this end the Governor must consult with the lieutenant-governor of each province that is affected by the disaster before making a declaration of a national emergency.¹²² Where the effects of the disaster are principally in one province, a declaration of a national emergency cannot be made unless the lieutenant-governor has ‘indicated ... that the emergency exceeds

¹¹³ *Ibid* s 27.

¹¹⁴ *Defence Act 1903* (Cth).

¹¹⁵ *Australian Constitution* s 51(vi).

¹¹⁶ See *Ibid* s 119; *Defence Act 1903* (Cth) ss 51 - 51Y.

¹¹⁷ *Emergencies Act RSC 1985* (4th Supp), c 22, s5.

¹¹⁸ Monahan, above n 98, 64–67.

¹¹⁹ *Emergencies Act RSC 1985* (4th Supp), c 22, s 6.

¹²⁰ *Ibid* s 8(1).

¹²¹ *Ibid* s 9.

¹²² *Ibid* s 14(1).

the capacity or authority of the province to deal with it'.¹²³ The initial proclamation remains in force for not more than ninety days,¹²⁴ but it may be extended. There may be more than one extension, but in each case the declaration cannot be extended for more than ninety days.¹²⁵

The process of making a declaration or orders under the Act is subject to parliamentary review. Each time that a declaration is made, continued or amended,¹²⁶ a 'motion for confirmation of the declaration' must be put before both Houses of Parliament.¹²⁷ If either House (that is the House of Commons or the Senate) does not support the confirmation motion, then the declaration is deemed to be revoked.¹²⁸ Even if a declaration is confirmed it may subsequently be revoked by the parliament.¹²⁹ Every order or regulation made by the Governor to deal with the emergency must also be laid before parliament¹³⁰ or, in some cases, the Parliamentary Review Committee,¹³¹ and may be revoked.¹³²

A multi-party Parliamentary Review Committee operates during the period of the emergency and is to review 'the exercise of powers and the performance of duties and functions pursuant to a declaration of emergency'.¹³³ After the emergency has ended, an inquiry must be held looking into 'the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency'.¹³⁴ The report of the enquiry must be tabled before the parliament within one year of the revocation or lapsing of the emergency declaration.¹³⁵

This process of requiring confirmation by the parliament, and reserving to the parliament the right to revoke a declaration, ensures that the action by the executive arm of government (that is, the Governor in Council) is subject to review by the legislative arm (that is, the parliament) which can revoke the declaration if they are not satisfied that the circumstances justify the making of the declaration. This type of oversight reduces the risk that the Act and a declaration of emergency cannot be used by a government to extend its powers inappropriately. It is consistent with the recommendations made in New Zealand that either parliamentary or judicial oversight is required to ensure that the emergency provisions are not over used or abused.¹³⁶ The ability of parliament to review and revoke a declaration is particularly important

¹²³ Ibid s 14(2).

¹²⁴ Ibid 7(2).

¹²⁵ Ibid s 12(1).

¹²⁶ Ibid s 13(1).

¹²⁷ Ibid ss 7(1), 12(4), 13(2), 58, 59, 60.

¹²⁸ Ibid ss 58(7), 60(6).

¹²⁹ Ibid ss 11, 59.

¹³⁰ Ibid s 61(1).

¹³¹ Ibid s 61(2).

¹³² Ibid s 61(3)–61(8).

¹³³ Ibid s 62.

¹³⁴ Ibid s 63(1).

¹³⁵ Ibid s 63(2).

¹³⁶ New Zealand Law Commission, above n 24, [1.38]–[1.40]. See also Lee, above n 15, 193–194.

when the Canadian courts have indicated that they will give great latitude to declarations of emergency so that it is hard, if not impossible, to seek judicial review on the question of whether an emergency exists or whether the steps taken to deal with the emergency are justified by the circumstances.¹³⁷

The *Emergencies Act 1985* is complemented by the *Emergency Management Act 2007*. This latter Act sets out the obligations of the Minister of Public Safety and Emergency Preparedness to exercise leadership in the area of emergency management.¹³⁸ The minister's responsibilities including ensuring that there are policies and plans in place to ensure an adequate and timely emergency response.¹³⁹ The minister is to coordinate the response by the Canadian government to an actual emergency,¹⁴⁰ and to participate in 'international emergency management activities'.¹⁴¹

All ministers are charged with the responsibility of ensuring that their departments have emergency management plans in place that include consideration of how their department will ensure business continuity and support the provincial and local authorities in their emergency management responsibilities.¹⁴²

B The United States of America

The United States, like Australia and Canada, is also a federated state where the principle obligation for disaster management lies with the state governments, but the federal government recognises a significant role in assisting the states and can take an active role in the management of a disaster that, because of its scale, becomes a disaster of national proportions.

1. Constitutional considerations

As with Canada and Australia, the United States has a written constitution that sets out the legislative power of the federal and state governments. There is no specific power to legislate for 'disasters' or 'emergencies'. As with the Australian Government¹⁴³ there is an 'incidental' power to:

... make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.¹⁴⁴

¹³⁷ Monahan, above n 98, 258; Whyte, Lederman and Bur, above n 96, 7-28 – 7-39.

¹³⁸ *Emergency Management Act SC 2007*, c15, s 3.

¹³⁹ *Emergencies Act RSC 1985*, c 22 (4th Supp) s 4.

¹⁴⁰ *Ibid* s 4(1)(e).

¹⁴¹ *Ibid* s 4(1)(k).

¹⁴² *Ibid* s 6.

¹⁴³ *Australian Constitution* s 51(xxxix).

¹⁴⁴ *United States Constitution*, art 8.

The executive power of the United States is vested in the President.¹⁴⁵ The President is also commander-in-chief of the military and naval forces of the United States, as well as of the state militias when they are engaged in the service of the United States.¹⁴⁶

2. The Robert T Stafford Disaster Relief and Emergency Assistance Act and the Homeland Security Act.

The principal item of Federal legislation is the *Robert T Stafford Disaster Relief and Emergency Assistance Act* ('the *Stafford Act*'). The *Stafford Act* is intended to enhance assistance that is delivered to state and local governments by the federal government rather than to allow the federal government to take charge of the disaster response.¹⁴⁷ The Act is fundamentally concerned with the expenditure of federal funds to assist state and local governments with disaster preparation.¹⁴⁸ The concern of this paper is in the area of response to, rather than preparation for, a major disaster, but in this area, too, the *Stafford Act* has significant provisions.

First, the Act provides that *any* federal agency that is 'charged with the administration of a Federal assistance program may waive compliance with administrative requirements that would normally apply, but that would 'otherwise prevent the giving of assistance under such programs if the inability to meet such conditions is a result of the major disaster'.¹⁴⁹

Where the President of the United States declares that there is an emergency or a major disaster then he or she is to appoint a Federal Coordinating Officer who is to undertake a needs assessment of the area affected by the event, establish field offices and take on the role of coordinating the response by federal agencies and non-government organisations, such as the American Red Cross and the Salvation Army, where they agree to operate under the Coordinating Officer's direction.¹⁵⁰

The federal government is to establish 'Emergency Response Teams', made up of federal government employees, who may be deployed to assist the coordinating officer.¹⁵¹ A federal agency operating under the Act may engage temporary employees, seek expert advice and consulting services, and enter contracts to hire equipment, obtain supplies and resources, undertake travel and the like without

¹⁴⁵ *Ibid* art II(1).

¹⁴⁶ *Ibid* art II(2).

¹⁴⁷ 42 USC §5121.

¹⁴⁸ *Ibid* §§5131-5132; *United States Constitution* art I(8).

¹⁴⁹ 42 USC §5141.

¹⁵⁰ *Ibid* §5143.

¹⁵¹ *Ibid* §5144.

compliance with normal procedures that apply when creating jobs, appointing staff and entering contracts.¹⁵²

Once a major disaster has been declared, the President may direct federal agencies, including the Department of Defence, to undertake emergency relief work by lending or otherwise making available federal resources, making available medicine, medical equipment, food and other necessary supplies and undertaking emergency relief work such as clearing debris, search and rescue, providing medical or education services, providing technical advice, and public warnings and other urgent activities.¹⁵³ The federal government may also contribute to private and government agencies to help them provide these services. Where the Department of Defence (that is the military forces) are engaged in emergency relief work, their commitment is not to exceed 10 days.¹⁵⁴

In order to facilitate recovery the federal government may authorise the repair of its own facilities, state and local government infrastructure and assets of not-for-profit organisations, without the need for the normal processes required to authorise this expenditure.¹⁵⁵

The *Stafford Act* is supported and supplemented by the *Homeland Security Act*.¹⁵⁶ This Act establishes the Federal Emergency Management Agency.¹⁵⁷ The ‘Primary mission’ of the Federal Emergency Management Agency is to:

... reduce the loss of life and property and protect the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters, by leading and supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation.¹⁵⁸

The agency is directed to undertake a number of specific activities to achieve this overarching mission. One of the activities is to ‘... partner with State, local, and tribal governments and emergency response providers, with other Federal agencies, with the private sector, and with nongovernmental organizations’ to develop a disaster response capability.¹⁵⁹

Notwithstanding what appears to be comprehensive legislation allowing the President and the Federal Emergency Management Agency to plan for and respond to natural disasters, there are problems with the United States model. In particular it has been argued that as the Federal Emergency Management Agency is part of the larger Department of Homeland Security there is no clear line of authority to the President

¹⁵² Ibid §5149.

¹⁵³ Ibid §5170b.

¹⁵⁴ Ibid §5170b.

¹⁵⁵ Ibid §5171-§5172.

¹⁵⁶ 6 USC §311-§321j.

¹⁵⁷ Ibid §313.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

as the role of the Department and the Agency, and their respective heads, is not clearly defined.¹⁶⁰ Equally problematic is the requirement that there be a Federal Coordinating Officer¹⁶¹ who reports to the Administrator of the Federal Emergency Management Agency and, at the same time, a Principal Federal Officer who reports to the Secretary of Homeland Security.¹⁶² The presence of multiple advisors, with reporting lines to different heads and Secretary's mean that there is potential for multiple advice sources to the President. Whilst this may be good when dealing with complex issues with time to consider different views, it can lead to confusion in times of crisis as to who is in charge and who is the principal advisor.¹⁶³

IV APPLICATION TO AUSTRALIA

Some key features of the Canadian and American legislation can be identified and should be incorporated into any Australian legislation.

Emergency management legislation should facilitate decision-making by a single person, a National Coordinator, who is vested with all the powers of the Commonwealth. It is important however to distinguish between the office holder that can declare a state of emergency, for example the Governor-General or the relevant minister, and the office holder who is then empowered to exercise the special powers necessary to respond to the emergency.¹⁶⁴ If they are the same, a declaration of a national emergency by the minister would empower the minister him or herself to take action and that may be a source of real or perceived conflict of interest and increase the risk of an abuse of power. The power to declare a national emergency should be vested in the minister or Governor-General, but an office holder such as the head of Emergency Management Australia or some other 'National Coordinator' who should be empowered to exercise the necessary emergency powers.

The declaration of a national emergency should be subject to Parliamentary review. The powers granted in emergency legislation are wide-reaching and are intended to be used when the response to an emergency cannot be adequately managed under other law. Regulations made under the Act may not be subject to the normal process of development and consultation, and the risk of abuse¹⁶⁵ or unforeseen adverse consequences is real. Parliamentary review, ranging from detailed scrutiny and a power to revoke a declaration, to a simple obligation to table regulations made during

¹⁶⁰ Wormuth and Witkowsky, above n 37, vii; 21-28.

¹⁶¹ 42 USC §5143.

¹⁶² Wormuth and Witkowsky, above n 37, viii.

¹⁶³ Ibid.

¹⁶⁴ Lee, above n 15, 192–193; New Zealand Law Commission, above n 24, [5.42].

¹⁶⁵ New Zealand Law Commission, above n 24,

an emergency, is included in the legislation from Canada, New Zealand and some Australian states.¹⁶⁶

Finally Commonwealth legislation should establish Emergency Management Australia as a statutory authority with clearly defined roles and responsibilities. As noted above the presence of multiple advisors, with reporting lines to different heads and Minister's mean that there is potential for multiple sources of advice at a time when direct clarity is required.¹⁶⁷ Legislation should identify who is to be the principal adviser to government on emergency issues, ensuring that there can be no conflict as might now occur between Emergency Management Australia and the broader Attorney-General's Department.

V CONCLUSION

This paper has identified that the Commonwealth has significant interests and associated legislative powers that would allow the Commonwealth to pass legislation to define its role in responding to a disaster of national consequence. Notwithstanding this legislative power, the Commonwealth has not legislated in this area. It has been argued that legislation should be enacted to allow the Commonwealth government to exercise necessary emergency powers should a catastrophic disaster occur and to clarify the roles and reporting lines for Commonwealth agencies.

Examples of legislation from Canada and the United States have been given to show how other federated states have dealt with the issues and empowered the national governments to act in conjunction with the provinces and states when responding to a catastrophic disaster. Lessons from those schemes have been drawn out to identify key areas that should be addressed in any Australian emergencies legislation.

This paper joins with other commentators and reviewers that have found the Commonwealth, and the Australian community, would be better served by a clear legislative statement detailing who, on behalf of the Commonwealth, is empowered to exercise the necessary, extraordinary emergency powers that will be required when responding to an unlikely, but devastating, national disaster. Legislation should identify what powers may be exercised, in what circumstances they may be called upon and establish systems of review to ensure that they have been used appropriately. The alternative is to rest the Commonwealth's disaster response on the concept of the 'executive power of the Commonwealth', an inadequate foundation of uncertain strength that may be insufficient to deal with the forces unleashed during a catastrophic national disaster.

¹⁶⁶ *Emergencies Act RSC 1985* (4th Supp), c 22, pt VI; *Civil Defence Emergency Management Act 2002* (NZ) s 67; *Emergency Management Act 1986* (Vic) s 23(7); *Emergencies Act 2004* (ACT) ss 153 and 158; *Emergency Management Act 2004* (SA) s 24; *Emergency Management Act 2006* (Tas) s 63.

¹⁶⁷ Wormuth and Witkowsky, above n 37, viii.

THE MILK SCANDAL AND CORPORATE GOVERNANCE IN CHINA

JENNY FU and GEOFFREY NICOLL*

In this article, the authors examine the role of the state in corporate governance in China as manifested in the government's handling of the 2008 tainted milk scandal and subsequent bankruptcy of Sanlu, the corporate group at the epicentre of the scandal. The scandal involved 22 dairy companies in the industry and attracted worldwide attention. Although the immediate impact of the scandal has since subsided, its wider implications particularly for corporate governance in China have been subject to little analysis.^o In their involvement in the Sanlu case, the Chinese governments, at both central and local government levels, were clearly mindful of their overriding role in driving China's phenomenal economic growth. Perhaps for this reason, the government appears to have been swayed by the need to maintain business confidence and social stability in adjusting the rights and liabilities of those involved in the scandal. On most measures the government appears to have made these adjustments successfully. The authors argue that while macro-economic utility appears to have therefore provided a valid justification for the government in adjusting the liabilities of corporate managers and the claims of those suffering loss as a result of their actions, such an approach risks obscuring the distinct roles in corporate governance now required of the government, the corporate regulator, the market and the courts as China seeks to build its domestic markets and attract international investors through a strong regime of corporate governance.

* Jenny Fu, Assistant Professor, Faculty of Law, University of Canberra; Dr. Geoffrey Nicoll, Senior Lecturer, Faculty of Law, University of Canberra. The authors would like to thank Professor Peta Spender of the Australian National University for her valuable comments on an earlier version of this article.

^o The relatively few scholarly publications on the 2008 China Milk Scandal have mainly focused on food safety and social and political issues. See for example, Zhao Litao and Lim Tin Seng, 'The Tainted Milk Formula Incident: Another Hard Lesson for China' in Litao Zhao and Lim Tin Seng (eds) *China's New Social Policy: Initiatives for a Harmonious Society* (World Scientific Publishing Company, 2009)) 195; Xiaofang Pei et al, 'The China Melamine Milk Scandal and Its Implications for Food Safety Regulation' (2011)36 *Food Policy* 412; Yungsuk Karen Yoo, 'Reconceptualising Human Rights: Tainted Milk: What Kind of Justice for Victims' Families in China?' (2010)33 *Hastings International and Comparative Law Review* 555.

I INTRODUCTION

Since the late 1990s, China has attached great importance to improving corporate governance. This has been driven partly by the need to develop a strong domestic stock market and partly by the need for corporations to access international markets and the global expectations of good corporate governance. In 2002, a *Code of Corporate Governance for Listed Companies* was issued by the China Securities and Regulatory Commission (the 'CSRC'), the watchdog for the Chinese stock market and publicly listed companies.

Since this time, China has continued to strengthen its underlying legal and regulatory framework for corporate governance. The overhaul of both the PRC Company Law and the Securities Law in 2005, and the subsequent enactment of the Enterprise Bankruptcy Law in 2006 have been praised by western commentators.¹ This is especially so in the case of the Company Law revision. The 1993 Company Law, preoccupied with setting up a management structure for the corporatised state-owned enterprises (SOEs), largely ignored other issues especially protection for minority shareholders. With the adoption of many Anglo-American style directors' duties and shareholders' rights and new remedies, the revamped Company Law has been commended as bringing some 'new hope' in aligning the Chinese corporate governance with the OECD corporate governance principles.²

Nonetheless, an understanding of the role of the state in Chinese corporate law and governance must be set against its role in economic development in China. In its 30 years transition from a planned economy to a 'socialist market economy', the Chinese government has often assumed the role of business promoter.³ In addition to retaining a controlling stake in most of the country's large corporatised state-owned enterprises (SOEs), the government has maintained economic growth, measured by GDP growth,

¹ James V Feinerman, 'New Hope for Corporate Governance in China?' in Donald Clark (ed) *China's Legal System: New Developments, New Challenges* (Cambridge University Press, 2008) 36, 36; Roman Tomasic, 'Looking at Corporate Governance in China's Large Companies: Is the Glass Half Full or Half Empty?' in Guanghua Yu (ed) *The Development of the Chinese Legal System Change and Challenges* (Routledge, 2010) 182, 195; Baoshu Wang and Hui Huang, 'China's New Company Law and Securities Law: An overview and assessment' (2006) 19(2) *Australian Journal of Corporate Law* 229-236, 236; Tomasic, Roman, 'The Conceptual Structure of China's New Corporate Bankruptcy Law' in Rebecca Parry, Yongqian Xu and Haizheng Zhang (eds) *China's new Enterprise Bankruptcy Law: Context, Interpretation, and Application* (Ashgate Publishing, 2010) 21.

² Feinerman, above n 1, 36; Tomasic, above n 1, 195.

³ The close links between central and local governments and businesses in China are well documented in literature. For example, Stefan Halper, *The Beijing consensus: How China's Authoritarian Model Will Dominate the Twenty-first Century* (Basic Books, 2010); Tony Saich, *Governance and Politics of China* (Palgrave Macmillan, 2nd ed, 2004) 230; Scott Kennedy, *The business of lobbying in China* (Harvard University Press, 2008); Andrew Walder, 'Local governments as industrial firms: An organizational analysis of China's transitional economy' (1995) 101 *American Journal of Sociology* 263; Jean Oi, 'The role of the local state in China's transitional economy' (1995) 144 *The China Quarterly* 1132; Jane Duckett, *The entrepreneurial state in China: Real estate and commerce departments in reform era Tianjin* (Routledge, 1998).

as a key policy priority.⁴ This type of state-led economic development and growth has achieved phenomenal economic results and has often been seen as one foundation for hope and optimism in the midst of a global economic downturn. At the same time, the leading role played by the government in the Chinese economy inevitably conditions the governance practices of the Chinese companies, especially the large ones close to the government.

In this regard, a small number of case studies on corporate governance in China have focused on the “coincidence of the state power and state ownership” within individual companies.⁵ The blurred boundary here between government and business has often been manifested in government intrusion in corporate management, leading to doubts as to the very independence of Chinese companies as distinct legal entities.

The 2008 melamine tainted milk scandal provides a rare opportunity for understanding state involvement in Chinese companies at the broad industry level. Given the magnitude and extensive social impact of the scandal, it provides a remarkable insight into the interaction of state power, the forces of globalisation and the rise of interest group politics in China. At the end of the day, the handling of the scandal and its aftermath by the central and relevant local governments shows that corporate governance in China remains a state-led model, most akin to the ‘administrative model’ described by Milhaupt and Pistor.⁶ In this model, the state plays the prominent role in monitoring managers and mediating competing interests among key corporate stakeholders through formal and informal mechanisms.

In this article, the authors provide a brief overview of the 2008 Chinese milk scandal. More specifically, they consider the roles assumed by the central and local governments in dealing with the corporations involved while seeking always to maintain business confidence and social stability. They suggest that the close government-business relationship, apparent in the handling of the Sanlu bankruptcy case, obscures the distinct roles of the government in safeguarding public health on the one hand while reinforcing the responsibility of corporate officers and the rights of minority shareholders on the other. In these respects, the supervening paternalism of the government may ultimately hinder the development of the proper roles of the regulator, the market and the courts in maintaining good corporate governance. The article concludes that the unique Chinese government-business association, guided by a government emphasis upon economic growth, is continuing to shape corporate governance practice in China.

⁴ See the PRC State Council’s Annual Work Reports to the National People’s Congress in recent years.

⁵ For example, Alice De Jonge, *Corporate Governance and China’s H-Share Market* (Edward Elgar, 2008); Neil Andrews, ‘When the CEO Vanished in Spin: Information Disclosure, Corporate Governance and the Bank of China (Hong Kong) Holdings Ltd.’ (2004) 17 *Aust Journal of Corporate Law* 71-96; Curtis Milhaupt and Katharina Pistor, *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (University of Chicago Press, 2008) Chapter Seven: The China Aviation Oil Episode: Law and Development in China and Singapore.

⁶ Milhaupt and Pistor, above n7, 139.

II MAIN PLAYERS IN THE 2008 CHINA MILK SCANDAL

At the outset, it is important to consider the main players in the scandal. The Chinese dairy industry has experienced explosive growth since 2000. With an average annual growth rate of 23%, the total sales of the industry amounted to 23.5% of the entire food sector in 2006.⁷

Prior to the milk scandal, the industry was dominated by four corporate groups, namely Yili, Mengniu, Sanlu and Guangming groups of companies. All four groups were implicated in the scandal to various extents. Yili is an Inner Mongolia-based corporate group listed in Shanghai. The largest shareholder, the Inner Mongolia Autonomous Region government, owned about 10% of the shares in Yili in 2007. Mengniu, another Inner Mongolia-based dairy manufacturer, is listed in Hong Kong. The ultimate controllers of Mengniu were its founders primarily the Chairman and CEO. Guangming Dairy is a listed company controlled by the Shanghai Municipal government through two local state-owned enterprises.⁸

Sanlu, the corporate group at the epicentre of the tainted-milk scandal, was China's then largest infant formula producer. The group was headquartered in the northern city of Shijiazhuang, Hebei Province. Strictly speaking, Sanlu did not fall under the definition of a state-controlled company. The predecessor of Sanlu was a cooperative formed among local dairy farmers, which under the Chinese Constitution, constitutes a special form of state ownership.⁹ Shareholding reform in Sanlu was carried out by the Shijiazhuang city government in 2002, when the net assets of Sanlu were converted into shares, of which 92% were sold to the then Sanlu management and employees. The ownership reform in Sanlu as well as many other formerly state-owned companies was, in part, directed to improving corporate governance. The idea was that with the introduction of multiple shareholders, the companies would be far removed from government intervention and thus more likely to operate along the same lines with their western counterparts.¹⁰

Following a joint venture agreement with the New Zealand dairy giant Fonterra, 56% of Sanlu came to be held by Sanlu Limited which had been set up to represent the interests of Sanlu management and employees. Fonterra held 43% of shares in Sanlu and appointed three of the seven directors to the Sanlu board.¹¹ The remaining 1%

⁷ China Economy Net news story, *China Dairy Industry Policy released* [Ru ZhiPin Gongye ChanYe Zhengce Fabu] (in Chinese); China Economic Daily (17 June 2008)

<http://finance.ce.cn/macro/gdxw/200806/17/t20080617_13226765.shtml>. The news story indicates that the total sales of the Chinese dairy products reached RMB106 billion yuan in 2006.

⁸ The 2007 Annual Reports of Yili, Mengniu and Guangming.

⁹ *Constitution of the People's Republic of China*, Article 6.

¹⁰ Zhang Xu, 'An Overview of SanLu's History' [Huanyuan Sanlu Qianshi Jinsheng] (in Chinese) *Huaxia Times* (20 September 2008) <<http://finance.irj.com.cn/2008/09/2000072101769.shtml>>.

¹¹ Richard Spencer and Peter Foster, 'China Milk Scandal Threatens Giant Dairy Firm', *Telegraph* (online) 24 September 2008

shares in Sanlu were held by several small shareholders.¹² Public listing had been sought by Sanlu even before the establishment of the Sanlu-Fonterra joint venture and news reports suggested that if not for the exposure of the tainted milk scandal, Sanlu could have been listed on the Shanghai Stock Exchange in 2008.¹³

In December 2008, Sanlu was placed into liquidation. A number of former Sanlu senior executives and other persons involved have been convicted of criminal offences. Work on the compensation for tort victims has also been finalised, with most of the victims' families accepting a compensation scheme put forward by the dairy companies and backed by the central and local governments. The bankruptcy assets of Sanlu were purchased by Sanyuan Foods, a Beijing municipal government-controlled company listed on the Shanghai Stock Exchange.

III BACKDROP TO THE SCANDAL

Although corporate scandals have not been rare in China, none has attracted so much attention as the 2008 milk scandal. The various causes of the scandal have become relatively well known with their extensive media exposure. In September 2008, Sanlu was one of 22 infant formula producers which were found by China's food safety watchdog, AQSIIQ (Chinese State Administration of Quality Supervision, Inspection and Quarantine), to be using melamine at various levels in their products.¹⁴ This group comprised about one fifth of China's infant formula producers and included almost all of the large and medium sized producers.

Melamine is an industrial chemical. Sustained consumption by human beings particularly infants may cause kidney stones and kidney failure.¹⁵ Previously found in

<<http://www.telegraph.co.uk/news/worldnews/asia/china/3073998/China-milk-scandal-threatens-giant-dairy-firm.html>>.

¹² The issue of the ownership of Sanlu became quite controversial in the aftermath of the scandal, as many people believed Sanlu was a state-owned enterprise. At a press conference held on 13 September, Mr. Yang Chongyong, the Vice-governor of Hebei province in response to questions on the relationship between Shijiazhuang government and the Sanlu group, stated, "Sanlu is a company limited by shares. 43% of Sanlu is held by Fonterra of New Zealand, and 56% by Sanlu Limited. There are also some small shareholders in Sanlu. The government does not own any shares in Sanlu." See China Central Television News (online) *Hebei Vice-Governor: Government Own No Shares in Sanlu* [Hebei Sheng Fu Shengzhang; Zhengfu Zai Sanlu Jituan Youxian Gongsi zhong Meiyou Gufen] (in Chinese) (13 September 2008) <<http://news.cctv.com/china/20080913/103040.shtml>>.

¹³ Long Li, 'Application Submitted, Sanlu Hopeful of Getting Listed in A Share Market in 2008' [Sanlu Jituan Xiangguan Cailiao Yi Baopi Youwang 2008 nian Shixian A gu Shangshi] (in Chinese) *21 Century Economic Report*, (17 September 2008) <<http://news.hexun.com/2008-09-17/108945053.html>>.

¹⁴ Muxue Quan, 'China Seizes 22 Companies with Contaminated Baby Milk Powder' *Xinhua Net News* (17 September 2008) <http://news.xinhuanet.com/english/2008-09/17/content_10046949.htm>.

¹⁵ World Health Organisation, 'Melamine-contaminated Powdered Infant Formula in China - Update 2' (29 September 2008) <http://www.who.int/csr/don/2008_09_29a/en/>.

China-produced animal feed sold in the US in 2007,¹⁶ melamine contamination resurfaced in 2008 and unfortunately led to as many as six deaths and nearly 300,000 infants suffering from “urinary problems” including kidney stones, according to the Chinese Ministry of Health.¹⁷ Most of those victims were fed Sanlu’s lower-end infant formula by their middle to low income families.¹⁸

From the trial of four former Sanlu executives and dozens of melamine-related convictions, it has become evident that some unscrupulous milk station operators supplying raw milk to the dairy companies were the main culprits in the scandal. They added melamine, known as “protein powder”, to diluted milk to artificially raise its protein levels.¹⁹

However, the 2008 milk scandal was complicated by other factors. The poor internal controls of the dairy companies appeared to have fuelled the greed of the milk station operators supplying milk. The effectiveness of their internal control systems, impressively described in their annual reports, was questioned in the aftermath of the scandal. This is despite the string of awards and titles for strong corporate governance these dairy giants had received over many years.²⁰ As a report provided by Xinhua News Agency stated:

The testing and quality check personnel can't have been completely ignorant or innocent. An explanation is that the milk company's rapidly expanding business scales led to a shortage of milk sources, which forces them to collect milk loosely, turning a blind eye to poor quality raw milk.²¹

This is especially so given that spiking source milk with melamine had become a “public secret” in the industry at least in Hebei Province.²² Dairy companies in China

¹⁶ U.S. Food and Drug Administration, ‘Pet Food Recall (Melamine)/Tainted Animal Feed’ (6 February 6, 2008) <<http://www.fda.gov/oc/opacom/hottopics/petfood.html>>.

¹⁷ PRC Ministry of Health Media Office, ‘Update on Treatment of Sanlu Tainted Infant Formula Victims’ [Weisheng Bu tongbao Sanlu Pai Yingyou Er Naifen Shijian Yiliao Jiuzhi Gongzuo Qingkuang] (in Chinese) 1 December 2008 <http://www.moh.gov.cn/sofpro/cms/previewjspsfile/mohbgt/cms_0000000000000000144_tpl.jsp?requestCode=38386&CategoryID=4814>.

¹⁸ PRC Ministry of Health Media Office, above n19.

¹⁹ Yang Jianxiang, ‘Survivor Leads China’s Milk Industry’ *Xinhua News Agency (online)* <http://news.xinhuanet.com/english/2008-11/15/content_10361534_3.htm>.

²⁰ For example, the awards received by Mengnui include: Best Corporate Public Image Award 2007 presented by the Enterprise Research Institute of Development Research Centre of the State Council and China Credit Research Centre of Beijing University, People’s Social Responsibility Award 2007 by the People’s Daily Online. See Mengnui 2008 Annual Report.

²¹ Yang, above n 21.

²² The practice of spiking source milk with melamine was traced back to April 2005 by the Deputy Governor of Hebei Province. See 21 Century Economy Reports news story, *Deputy-Governor of Hebei: Law Offenders Began to Add Melamine to Raw Milk From Two Years Ago*[Hebei Sheng Fusheng Zhang Toulu: Bufa Fenzi 2005 Nian Yi Kaishi Xiang Niunai Chan Sanju Qingan] (in Chinese), <<http://news.cnfol.com/080918/101,1280,4781164,00.shtml>>. Caijing Magazine, an influential Chinese non-state medium, Citing Hebei local dairy farmers, suggested that “the practice of spiking fresh milk with additives such as melamine had been a public secret for the past two years” See

used to rely on self-sufficient dairy farms, in which quality control over source milk was not a major problem. However, with the explosive growth since 2000, there has been fierce industry-wide competition for milk sources. In a quest to expand milk sources in the most ‘cost-effective’ ways, large dairy companies, including Sanlu, Mengnui and Yili, increasingly relied upon privately-run milk collection stations to purchase raw milk from small scale dairy farmers, instead of developing their own dairy farms. The combination of market competition, commercial greed and the lax quality control of the dairy companies led milk dealers to “spike raw milk with all sorts of additives, such as melamine”.²³

As widely exposed in the media, the scandal has also been aggravated by a lack of clarity in the roles assumed by central and local government agencies in regulating a fundamental area of food safety. The focus of public criticism of AQSIQ was a system of exemption from quality inspections the agency had introduced in 2000 to “ease the burden for companies that otherwise would undergo repeated inspections”.²⁴ The system allowed many companies including dairy giants like Sanlu to enjoy the quality inspection-free status. This was so despite alarms repeatedly raised by a series of major food scandals on food safety in China.²⁵

IV THE CLOSE RELATIONSHIP BETWEEN GOVERNMENT AND BUSINESS

The close ties between Sanlu and the local Shijiazhuang municipal government, where Sanlu was headquartered, raise important questions as to the ways in which blurred lines between the government and the corporations might undermine the regulation of officers’ legal duties and broader responsibilities, and detract from the maintenance of good corporate governance practice.

As well as lax internal controls, Sanlu’s case presents a special example of outright disregard for corporate social responsibility in the name of business survival needs. As revealed by the trial of the four Sanlu executives, the company had received complaints about babies rendered ill after drinking Sanlu-produced infant formula since December 2007. Some cases, including complaints about kidney stones, had emerged as early as March 2008. However, during the eight months from December 2007 to early August 2008, when melamine contamination was confirmed by tests

Chao Xu, ‘Tracing Source of Melamine’[Sanju Qingan Suyuan] (in Chinese), (2008) 20*Caijing Magazine* <<http://magazine.caijing.com.cn/20080928/77700.shtml>>; Also see Jing Guo and Jingjing Liu, ‘Spilling the Blame for China’s Milk Crisis’ *Caijing Magazine online news*, 10 October 2008<<http://english.caijing.com.cn/2008-10-10/110019183.html>>.

²³ Xu, above n 24.

²⁴ Yang Binbin ‘Food Product Inspection Waivers Revoked’ *Caijing Magazine online news*, 18 September 2008 <<http://english.caijing.com.cn/2008-09-18/110013644.html>>.

²⁵ These include a separate incident in 2004 where about ten babies were reportedly killed by fake or defective infant formula sold in Anhui Province. See Di Fang ‘Milk Powders Kills Babies in Anhui Province, *China Daily* (online) 20 April 2004<http://www.chinadaily.com.cn/english/doc/2004-04/20/content_324727.htm>.

reluctantly carried out by Sanlu with an outside organisation, the Sanlu management took extensive measures to cover up the scandal, in the name of internal inquiries being undertaken by the company.²⁶

The extremely cosy relationship between Sanlu and the Shijiazhuang municipal government is highlighted by the latter's extensive delay in reporting Sanlu's milk contamination to its higher authority, the Hebei Provincial government. When the municipal government finally received a report of melamine contamination from Sanlu, it took the government thirty-eight days (instead of two hours stipulated by a State Council regulation²⁷) to forward Sanlu's report to the provincial government. This meant that the central government was not informed of the incident until 9 September, which was nine months after the first sign of melamine contamination emerged.²⁸ Other reports from non-official media suggested that the alarm was coincidentally raised to the central government by the former New Zealand Prime Minister.²⁹

When asked what had caused the Shijiazhuang government to sit on Sanlu's report for more than a month, allowing the impact of melamine contamination to escalate, a spokesperson of the Shijiazhuang government invoked "support for local businesses".³⁰ The spokesperson even referred to a letter from Sanlu that had pleaded with the government to "increase control and coordination of the media, to create a good environment for the recall of the company's problem products....to avoid whipping up the issue and creating a negative influence in society."³¹ The association between Sanlu and the Shijiazhuang government must have been close enough to "convince" Fonterra, Sanlu's New Zealand joint venture partner, to "work within the

²⁶ Spencer and Foster, above n13; Teiqiao Ye, 'Truth of Sanlu Incident revealed'[Sanlu Shijian Zhenxiang Dabao Guang] (in Chinese), *China Youth Daily*, 1 January 2009<http://news.xinhuanet.com/politics/2009-01/01/content_10587575.htm>.

²⁷ The State Council of the People's Republic of China, *National Emergency Plan for Handling Major Food Safety Accidents* (Effective on February 2006)[Guojia Zhongda Shipin Anquan Shigu Yingji Yuan](in Chinese), s3.2.2.

²⁸ The Chinese Central Government, 'The Central Party Committee and the State Council Handle Persons Involved in the Sanlu Milk Scandal Seriously' [Dang zhongyang Guowu Yuan Yansu Chuli Sanlu Naifen Shijian Xiangguan Zeren Renyuan] (in Chinese), the PRC Central People's Government website, 22 September 2008<http://www.gov.cn/jrzq/2008-09/22/content_1102256.htm>.

²⁹ There have been different explanations regarding how the scandal was exposed. Sanlu's New Zealand partner Fonterra claimed that it was informed by its Chinese Partner of the milk contamination on 2 August, 2008, the same day on which the Shijiazhuang city government was informed. After three unsuccessful meetings with the Shijiazhuang health officials to raise the alarm, the company reported the incident to the New Zealand Foreign Affairs Department on 22 August, which led to the issue finally being brought to the attention of the Chinese central government by the former New Zealand Prime Minister on 9 September. See Spencer and Foster, above n 13.

³⁰ Nan Su, 'Why Report of Sanlu Incident was Delayed?' [Sanlu Shijian Weihe Chichi Bubao] (in Chinese) *China Daily* (online), 1 October 2008 <[Http://paper.people.com.cn/rmrb/html/2008-10/01/content_112000.htm](http://paper.people.com.cn/rmrb/html/2008-10/01/content_112000.htm)>; BBC news, 'China Dairy 'Asked for Cover-up' ' 1 October 2008<<http://news.bbc.co.uk/2/hi/asia-pacific/7646512.stm>>.

³¹Ibid.

system” to effect an official product recall. When informed of the melamine contamination by its Chinese partner, Fonterra went public only after three failed meetings with the Shijiazhuang municipal authorities.³²

It can be argued that as an individual case, the role of the Shijiazhuang government in Sanlu’s scandal should not be generalised. However, given the substantial convergence of government and business interests, one might expect that in similar circumstances a similarly protective role could well be adopted by some other local governments. The share of tax revenue between central and local governments has been considered an important factor for widespread local protectionism. Under this scheme, large local enterprises, both state and privately-controlled ones, serve as a major source of revenue for local governments.³³ On a broader level, local economic growth, measured by GDP growth rate as well as tax revenue, forms an important part of the performance review for local officials by their higher authorities.³⁴ As such, the more milk sold by the dairy companies means not only increased local revenue but also superior performance of local officials.

In Sanlu’s case, the company contributed 330 million yuan (approximately US\$48.5 million) in tax revenue to the municipal government in 2007 alone.³⁵ As one of China’s top 500, the company was also on the lists of “key enterprises” supported by the Shijiazhuang City and Hebei Province. Ms Tian Wenhua, Sanlu’s Chairwoman and CEO, was given “more than 100” national and local honorary titles including representative to the National People’s Political Consultative Conference and the Hebei Provincial People’s Congress.³⁶

Whilst more refined judgments might be made as to the roles played by the Shijiazhuang city government and AQSIQ respectively in the 2008 milk scandal, (for

³² Spencer and Foster, above n 13; Also see Shanshan Wang, ‘Fonterra CEO reflecting on investing in China’, Caijing Magazine News (online) 5 December 2008<<http://www.caijing.com.cn/2008-12-05/110035012.html>>.

³³ Maria Edin, ‘Local State Structure and Developmental Incentives in China’ in Richard Boyed and Tak-Wing Ngo (eds) *Asian States: Beyond the Developmental Perspective* (RoutledgeCurzon, 2005)110, 117-122; Shenzhen Stock Exchange Research Institute, *An Empirical Study on the Development of China’s Private Sector Listed Companies*, January 2008 <<http://www.szse.cn/main/files/2008/02/25/091811911155.pdf>>. At the end of 2005, the private sector in China accounted for more than 57% of all enterprises in China and contributed to 65% of China’s GDP, absorbing more than 75% of the urban employment.

³⁴ Maria Edin, *Ibid*; Huayun Yang, ‘Member of the Standing Committee of the National People’s Congress Criticises Irrational Government Performance View: Local GDP Figures should be Disregarded’ Xinhua News online, 29 December 2008 [Renda Weiyuan Pengji Nuqu Zhengji Guan: Difang GDP Tongji Ying Quxiao] (in Chinese) <http://news.xinhuanet.com/fortune/2008-12/29/content_10572701.htm>.

³⁵ Willy Lam, ‘Milk scandal sours China’s ‘soft power’’, *Asia Times* (online), 10 October 2008 <<http://www.atimes.com/atimes/China/JJ10Ad02.html>>.

³⁶ Hongxiang Xiong, ‘Four Former Sanlu Senior Executives including Chairwoman Tian Wenhua Stood for Trial in Shijiazhuang Today’[Sanlu Jituang Yuan Dongshi Zhang Tianwen Hua De Sining Gaouan Shijiazhuang Shoushen](in Chinese), *Xinhua News* online 31 December 2008 <http://news.xinhuanet.com/legal/2008-12/31/content_10583852.htm>.

example, the involvement of the former appeared more deliberate and probably more culpable than the latter), the roles of both government and agency perhaps find their ultimate justification in the emphasis of the central government on maintaining strong economic growth and the need to make practical judgments directed to this end.

On the other hand, maintaining this policy priority, and the government's concern for minimising business compliance costs, have clearly produced some unintended consequences. In particular, the emphasis on economic growth tends to obscure the distinctly different roles required of the government, the corporate regulator, the market and the courts in maintaining the corporate governance framework. This loss of regulatory clarity, manifested in part by government protection of businesses, appears to have contributed to the companies' lax internal controls, and may have contributed further to excessive-risk taking and irrational competition among the dairy companies, and in some cases ignorance of law in pursuit of corporate profits.

V THE GOVERNMENT'S HANDLING OF THE SCANDAL AFTERMATH

Apart from leaving behind close to 300,000 baby victims, the exposure of the tainted milk scandal clearly threw the Chinese fast growing dairy industry into a deep crisis. Whilst the Sanlu group of 30 subsidiaries and entities became essentially insolvent, other dairy giants including Yili and Mengniu were also hit hard. Dairy sales slumped with lost consumer confidence and worldwide bans on Chinese dairy products.³⁷

As discussed above, a weak local government, substantially captured by business interests, appeared evident in the Shijiazhuang city government's involvement in Sanlu prior to the exposure of the scandal. The strong leadership of the central government in handling the aftermath of the scandal is however highly significant. The importance of the scandal to the central government is demonstrated by a broad range of measures the government promptly adopted in its aftermath. Massive dairy product recalls were issued, food safety standards tightened and free medical examination and treatment were also ordered for melamine affected children. Charges were laid against dozens of milk station operators, "protein powder" producers, and the disgraced Sanlu Chairwoman and executives. A number of government officials at both central and local levels have also "stepped down" or been sacked (though no charges have been reportedly laid against any of them).³⁸

³⁷ Jin Wang, 'China Dairy Crisis, Industry Reorganisation Inevitable' [Zhongguo Ruye Weiji- Hangye Xipai Buke Bimian] (in Chinese), *China Securities Daily*, 22 September 2008 <http://www.cs.com.cn/xwzx/05/200809/t20080922_1591661.htm>.

³⁸ The Chinese Central Government, 'The Central Party Committee and the State Council Handle Persons Involved in the Sanlu Milk Scandal Seriously' [Dang zhongyang Guowu Yuan Yansu Chuli Sanlu Naifen Shijian Xiangguan Zeren Renyuan] (in Chinese), the PRC Central People's Government website, 22 September 2008 <http://www.gov.cn/jrzq/2008-09/22/content_1102256.htm>; Xin Hua

A Dealing With The Tort Victims

Needless to say, one of the most contentious issues arising from the milk scandal is compensation for the near 300,000 tort victims. Should the scandal occur in a western market economy such as Australia, one would expect a flood of lawsuits brought before the court by the families of tort victims, or these days more probably, class actions being pursued on behalf of those victims against the tortfeasor companies, as well as the Shijiazhuang municipal government should it become evident that the government had played a role in exacerbating the loss or injury suffered by the victims. If any dairy company, such as Sanlu, became insolvent or approached insolvency due to massive debts owed to their creditors, external administration such as voluntary administration or liquidation may be the fate of the company.

In the aftermath of the scandal, most of the dairy giants have survived the catastrophe with a great deal of self-help as well as some help from the government. The latter involved government subsidies provided to companies and dairy farmers, as well as government-sponsored media campaigns in an attempt to restore consumer confidence. However, Sanlu, the corporate group most seriously affected by the scandal, was clearly on the verge of bankruptcy. At the outbreak of the scandal, while Sanlu's 15 billion yuan brand name was rendered worthless, the company faced potential claims of 0.7 billion yuan from its trade creditors alone. This means with 1.224 billion yuan worth of net assets by the end of 2007, it was difficult for Sanlu to meet all potential claims in tort and contracts.³⁹

Strangely, during the four months from the first eruption of the scandal on 11 September to 23 December 2008, when Sanlu was declared bankrupt by the Shijiazhuang City Intermediate Court (on an application filed by a state-owned bank), no other claims, including tort claims, associated with the scandal, were reportedly heard by any Chinese court. It is not that no one sued. The few claims filed were simply refused to be accepted or heard.⁴⁰

The Chinese law does provide some redress for tort victims. The 1986 General Principles of Civil Law, which sets out a basic framework for Chinese civil and

News online, 'Update on Sanlu Infant Formula Incident'[Sanlu Pai Yingyou Er Naifen Shijian Gundong Baodao] (in Chinese) 20 September 2008 <http://news.xinhuanet.com/newscenter/2008-09/20/content_9935963.htm>.

³⁹ China News online, 'Compensation Claims against Sanlu Suspended: Who shall Compensate the Victims?' [Sanlu Suopei Zanlu Lian, Shuilai Peichang Shouhai Zhe?] (in Chinese) 11 November 2008<<http://www.chinanews.com/cj/xfsh/news/2008/11-11/1445254.shtml>>.

⁴⁰ Yanxia Wu, 'Why Tort Claims Associated with the Milk Scandal refused to be Heard by Courts? Reasons Explained by Vice-president of the Hebei Lawyers Association' [Jieshi Huaner Minshi Peichang An wuyi Huo shouli Hebei Lvxi jieshi](in Chinese) Xinhua Net News 7 January 2009<http://news.xinhuanet.com/legal/2009-01/07/content_10615043.htm>; New York Times (online) 17 October 2008 <<http://www.nytimes.com/2008/10/17/world/asia/17milk.html?fta=y>>.

commercial legislation, imposes on manufacturers as well as sellers the liability for economic loss and physical injury caused by defective goods.⁴¹

This general provision has been reinforced by at least two pieces of legislation on consumer protection, namely the Law for the Protection of Consumer Rights and Interests (the “Consumer Protection Law”) and the Law on Product Quality Liability (the “Product Quality Law”). Article 35 of the Consumer Protection Law, echoed in Article 43 of the Product liability Law, allows a “consumer or other victim” who suffers economic loss or physical injury as a result of defective goods to claim compensation from both the seller and the manufacturer. The heads of damages include “medical expenses, nursing expenses during medical treatment, the reduced income for loss of working time and other expenses”.⁴² Should a consumer or victim be “disabled” by the defective product, the compensation should also include “the victims' expenses on self-help devices, living allowances, compensations for disability and the necessary living cost of the persons supported by the disabled”. Further, should death be caused by defective goods, the defendant will also be liable for “funeral expenses, death compensation and the necessary living cost of the persons supported by the deceased during their lifetime.”⁴³ Although neither compensation for pain and suffering (“mental and spiritual loss” in Chinese terms) nor exemplary damages are provided in any Chinese legislation, it is not rare for the court to award such compensation in practice, under either the heads of “compensation for disability”, “compensation for death” or a judicial opinion issued by the Supreme People’s Court on “mental and spiritual loss” in civil cases.⁴⁴

In relation to the forms of litigation, the Civil Procedure Law of the PRC provides for individual actions as well as a “collective action” that resembles some key features of an Australian style class action. A Chinese “collective action” under the Civil Procedural Law, enables the persons comprising a class to “elect representatives from among themselves to act for them in the litigation”.⁴⁵ Where the number of persons comprising one of the parties is large but uncertain at the commencement of the action, the court may issue a public notice informing those entitled to participate in the action to register their rights with the court within a specific period of time fixed by the court.⁴⁶ In the latter circumstance, the court’s decision for the collective action is binding not only upon those who have registered with the court, but also “those

⁴¹ *The Civil Procedure Law of the People’s Republic of China*, Article 122.

⁴² The Consumer Protection Law of the People’s Republic of China, Articles 41 and 42; The Product Quality Liability Law of the People’s Republic of China, Article 44.

⁴³ Ibid.

⁴⁴ The PRC Supreme People’s Court, *An Explanation on Several Issues Relating to The Assessment of Mental and Spiritual Loss in Civil Litigation* [Zuigao Renmin Fayuan Guanyu Queding Minshi Qinquan Jingshen Sunhai Peichang Zeren Ruogan Wenti de Jieshi] (in Chinese), 2001.

⁴⁵ PRC Civil Procedure Law, Article 54.

⁴⁶ PRC Civil Procedure Law, Article 55 (1).

who have not registered their rights but have instituted legal proceedings within the period of limitation of the action".⁴⁷

The fairly comprehensive law on consumer protection in China appeared to sit uncomfortably with the lack of court involvement in disputes associated with the tainted milk scandal. The highly sensitive nature of the scandal, particularly the potentially bad publicity and social unrest that could be generated by a flood of lawsuits, apparently led the courts to defer their primary role in settling disputes to the government. It is true that the legislation in China has often been drafted in too broad terms to provide the courts with much clear guidance. This is especially so with class action.⁴⁸ Such deficiency had nonetheless been often filled in China with some degree of judicial creativity, particularly in the form of judicial opinions issued by the Supreme People's Court in guiding decision-making by lower courts. There was however little room for this sort of judicial creativity to apply in the handling of the aftermath of the milk scandal.

B Government Efforts To Rescue Sanlu

Apart from compensation for tort victims, government intervention in business was also manifested in the handling of the collapse of Sanlu. The placing of Sanlu into liquidation would be a good test case for the newly enacted Enterprise Bankruptcy Law (the "EBL"). The EBL, enacted in August 2006, was to replace a 20-year-old bankruptcy law that applied only to state-owned enterprises on a trial basis. Drawing upon international experience in insolvency law and practice, the new legislation provides for bankruptcy procedures including liquidation, compromise as well as an American style reorganisation.

Although Sanlu eventually did not avoid a court-ordered liquidation, this outcome was not intended by the Hebei and Shijiazhuang governments when the scandal first broke. This can be demonstrated by the refusal of the Shijiazhuang Intermediate Court (the court which, as discussed below eventually heard Sanlu's bankruptcy case on another application) to hear an earlier bankruptcy application filed by one of its sales agents against Sanlu. The application was rejected with no clear reason given.⁴⁹

⁴⁷ PRC Civil Procedure Law, Article 55(4).

⁴⁸ Lay Hong Tan and Jiangyu Wang, 'Modelling an Effective Corporate Governance System for China's Listed State-Owned Enterprises: Issues and Challenges in a Transitional Economy' (2007)7 *Journal of Corporate Law Studies*, 143, 162-163; Broadly-based legislation is considered by Pistor and Wellons as a legal drafting technique commonly employed by state-led economies to allow for sufficient bureaucratic flexibility in intervening in the economy. See Katharina Pistor and Philip Wellons, *The Role of Law and Legal Institutions in Asian Economic Development, 1960-1995* (Oxford University Press, 1999) 53.

⁴⁹ Ning Kang, 'Sanlu Bankruptcy Case, Death or Rebirth?' [Sanlu Pochan an, Shi Xiaoshi Haishi Niepan] (in Chinese) *Xinhua News* online 5 January 2009 <http://news.xinhuanet.com/fortune/2009-01/05/content_10604233.htm>.

The idea of having Sanlu taken over by another company, rather than placing it into liquidation was clearly preferred by the government on economic grounds. The value of the “intangible assets” accumulated by the leading dairy giant over the past twenty years, ranging from advanced production and marketing systems to extensive network for source milk, could be better realised through a takeover. Further, there would be a greater chance for Sanlu to repay its debts should it stay in business.⁵⁰

The plan emerged on 26 September, when the shares of Shanghai-listed Beijing Sanyuan Foods were suspended, and the company announced that it ‘had received a government notice to consider a Sanlu merger plan’.⁵¹ Commentators said that Sanyuan had been selected for two main reasons: first, the company is the major Chinese dairy company that was not implicated by the scandal (in part due to its reliance on self-sufficient dairy farms for source milk), and second, Sanyuan is a state-controlled company which makes it easier for the government to manipulate.⁵²

The proposed Sanyuan takeover of Sanlu has been widely regarded as “an impossible mission” from a pure market perspective.⁵³ Whilst Sanlu has been one of the leading Chinese dairy giants with businesses around the country, Sanyuan, with its annual sales amounting to only about 10% of Sanlu, was largely unknown to consumers outside Beijing. Sanyuan claimed that the acquisition would raise its market competitiveness by adding to its liquid milk business an extra line of business in powdered milk. Industry experts however suggested that problems such as business integration and cash flow, particularly with the indeterminable amount of potential claims faced by Sanlu, could drag Sanyuan into insolvency. Further, the fundamental problem that had caused the demise of Sanlu, i.e., its heavy reliance on milk dealers for source milk, could pose a significant threat to Sanyuan’s branding. With the backing of Beijing and Hebei governments, the takeover negotiations nonetheless continued for months, though not always smoothly.⁵⁴

⁵⁰Ibid.

⁵¹ Xiaomin Qiu, ‘Insiders Comment on Sanyuan Sanlu Merger; Sanyuan Left with No Choice’ [Zhiqing renshi tan Sanyuan Binggou Sanlu; Sanyuan Shenbu Youji] (in Chinese), *Xinhua News*(online) 4 January 2009<http://news.xinhuanet.com/fortune//2009-01/04/content_10598930.htm>; China Economy Net news, *Sanyuan May Take over Tainted Milk Brand Sanlu*, 27 September 2007

<http://en.ce.cn/Business/Enterprise/200809/27/t20080927_16935772.shtml>.

⁵² Qiu, above n 53.

⁵³ Zhang Xu, ‘Wandashan on watch Sanlu Restructuring: Sanyuan Likely to Struggle Alone’[Sanlu: Wanda Shan Pangguan Sanyuan Huo Gudu Poju] (in Chinese), *Shanghai Securities Daily* (online) 5 November 2008 <http://cs.xinhuanet.com/cqzk/05/200811/t20081120_1659972.htm>.

⁵⁴ Xinhua Net news, *Sanyuan Taking over Sanlu, A Sensitive Case*[Sanyuan Binggou Sanlu: Guanxi Mingan de Juzhong Ju] (in Chinese), 2 January 2009< http://news.xinhuanet.com/fortune/2009-01/02/content_10590487.htm>

C Liquidating Sanlu: the role of the courts obscured by economic utility and paternalism

The Sanyuan takeover plan was not successful, and was followed by an order of the Shijiazhuang Intermediate Court placing Sanlu into bankruptcy liquidation as applied by a local branch of a state-owned bank, a Sanlu's creditor. On 12 January 2009, a public notice was issued by the court, inviting creditors to file their claims with the bankruptcy administrator appointed by the court.⁵⁵ With news reports indicating that some core enterprises in the Sanlu group had resumed production under a lease agreement with Sanyuan, commentators said that the "government-led bankruptcy" of Sanlu would probably work more favourably to Sanyuan, as it provided Sanyuan with an opportunity to acquire Sanlu's bankruptcy assets without taking over its debt.⁵⁶

Sanlu was declared bankrupt on 12 February 2009. On 4 March 2009, Sanyuan acquired Sanlu's bankruptcy assets at a public auction with the bidder criteria tailor-made to Sanyuan (The auction was only open to Chinese domestic dairy producers that had not been implicated in the milk scandal).⁵⁷ The Sanlu bankruptcy case was concluded on 22 November 2009. The court order stated that after priority creditors, including employees and secured creditors had been paid, there were no assets available for distribution among ordinary creditors, including the tainted milk victims.⁵⁸

The swift handling of the Sanlu bankruptcy case without causing major social unrest appeared to have been facilitated by some measures the central and local governments adopted outside the court proceedings. Firstly, with some "pre-arrangement" made by the government for the tort victims, the commencement of the Sanlu bankruptcy proceedings did not result in a flood of law suits filed by tort victims. On 10 December, after three months of contention surrounding the issue of the victims compensation, the Ministry of Health issued a media release stating that "relevant departments are now considering a compensation plan for the Sanlu infant milk powder incident," and "the Ministry was compiling information about the victims

⁵⁵ Shanshan Wang, 'Sanlu Bankruptcy Proceedings Commenced: Creditors to File Claims' [Sanlu Pochan An Qidong Zhaiquan Ren Dengji] (in Chinese) Caijing Magazine online, 13 January 2009 <<http://www.caijing.com.cn/2009-01-13/110047651.html>>. Article 14 of the EBL provides that the court hearing the bankruptcy proceedings shall "within 25 days from the date it has accepted a bankruptcy application, notify known creditors and issue a public notice to that effect". Under Article 45, once the court has accepted an application for bankruptcy, it must also set a time limit for creditors to file their claims, and that time limit should be within a range of no less than 30 days but not more than three months from the date the public notice of the court's acceptance of the bankruptcy application was issued.

⁵⁶ Xinhua Net news, *Sanlu to be Declared Bankruptcy: Rumoured in Favour of Sanlu* [Sanlu Jiang Xianggao Pochan Chuanyan lihao Sanlu Shougou] (in Chinese) 23 December 2008 <http://news.xinhuanet.com/fortune/2008-12/23/content_10547631.htm>

⁵⁷ People's Daily online news, *Sanyuan Buys Scandal-hit Sanlu Dairy Company at Auction*, 4 March 2009 <<http://english.peopledaily.com.cn/90001/90783/91300/6606135.html>>.

⁵⁸ Yan Wang, 'Compensation Lawsuit over Tainted Milk Postponed' *China Daily* (online) 9 December 2009 <http://www.chinadaily.com.cn/business/2009-12/09/content_9144184.htm>.

who may receive compensation".⁵⁹ No further details of the plan were subsequently released. However, on 30 December 2008, one week after Sanlu was declared bankrupt, the state media China Daily revealed that the 22 dairy companies involved in the milk scandal (including Sanlu) had committed 900 million yuan (US\$131 million) as "one-off compensation"⁶⁰ to all tort victims. Hence, each victim family would receive a sum of 2,000 yuan (US\$292) or 30,000 yuan (US\$4,400) depending on the degree of sickness of their babies caused by the tainted milk, or 200,000 yuan (US\$29,000) in case of death.

In addition, the 22 companies would establish a 200 million yuan fund to be managed by the China Dairy Industry Association to "cover medical bills for any lingering problems related to the tainted milk."⁶¹ The fund would also allow the tort victims to have access to insurance coverage with a leading state-controlled insurance company, as arranged by the dairy companies, for the "full amount of medical bills related to the tainted milk incurred before they turn 18 years of age".⁶² This arrangement appeared to be a pure business act of the dairy companies. However, it was also suggested that the 902 million yuan, contributed by Sanlu one week before it was declared bankrupt, was raised "with the assistance" of the Shijiazhuang government.⁶³

Further reports indicated that the implementation of the compensation scheme has been highly successful. The overwhelming majority (90.7%) of the near 300, 000 victim families had taken up the offer made by the dairy companies by early 2009.⁶⁴ This is so, despite various criticisms surrounding the adequacy of the compensation proposed.⁶⁵

The fact that most tort victim families gave up a judicial redress for their claims is not surprising. Lying at the bottom of the priority list for distribution of bankruptcy assets

⁵⁹Tingyu Zhou, 'Relevant Chinese Departments Considering a Compensation Plan for Problem Powdered Milk Victims' [Zhongguo Xiangguan Bumen Zhengzai Taolun Wenti Naifen Shijian Peichang Fangan] (in Chinese), *Xinhua Agency News* (online)10 December <2008http://news.xinhuanet.com/newscenter/2008-12/10/content_10484532_1.htm>.

⁶⁰Zhe Zhu and Xiaohuo Cui, '22 Dairy Firms to Pay \$160m in Compensation', *China Daily* (online) 30 December 2008 <http://www.chinadaily.com.cn/cndy/2008-12/30/content_7351554.htm>.

⁶¹Ibid.

⁶²Wu, above n42.

⁶³Lin Niu, 'Shijiazhuang Official Dismissed Alleged Government Assistance in Fund Raising for Sanlu to Repay Its Debt through providing Government Office Buildings as Guarantee' [Shijiazhuang Guanfang Cheng Diya Zhengfu Dayuan Chou Sanlu Peikuan Yiwu Xuyou](in Chinese), *Xinhua Net News*, 8 January 2009 http://news.xinhuanet.com/politics/2009-01/08/content_10625612.htm.

⁶⁴Xinhua Net news story, *Over 90% Tort Victims of the Tainted Powdered Milk Incident Voluntarily Accepted the Compensation* [Chao 90% Yingyou Er Naifen Shijian Huaner Jiazhang Yi Jieshou Zhudong Peichang)](in Chinese) 24 January 2009 <http://www.he.xinhuanet.com/news/2009-01/24/content_15543516.htm>.

⁶⁵Zhu Zhu and Xiaoho Cui, '22 Dairy Firms to Pay \$160m in Compensation' *China Daily* (online)<http://www.chinadaily.com.cn/cndy/2008-12/30/content_7351554.htm>. For example, one report indicates that "many parents find the 2000 yuan for 'the minor kidney problems' too inadequate to accept. Other criticisms on the inadequacy of compensation plan related to the scope and the period of the insurance coverage and the lack of involvement of the families of the tort victims in the formulation of the scheme.

together with other unsecured creditors,⁶⁶ there was no guarantee that they could receive more than what the companies had offered, not to mention the formidable legal and financial difficulties these families could face in filing their proof of debt with the bankruptcy administrator. Under Article 47 of the EBL, the admissible forms of proof of debt include judgement and arbitration and pending judgment and arbitration debts.⁶⁷ Without a court having heard their claims, the tort victims did not have any judgements, or pending judgements to submit to the bankruptcy administrator as proof of debt. Although they had thirty days (the time limit given by the bankruptcy administrator for filing claims and proof of debt) to lodge their claims with the Shijiazhuang Intermediate Court,⁶⁸ the tight deadline for them to prepare and lodge their cases could be an insurmountable hurdle to overcome, even if the court was prepared to hear their claims. All these factors, and a traditional Chinese mentality of resorting to the government for resolution for disputes, contributed to the high acceptance rate of the government-sponsored compensation plan.

Secondly, in relation to Sanlu's trade creditors, a separate debt repayment agreement, also backed by government, was reached outside Sanlu's bankruptcy proceedings. The agreement was signed on behalf of Sanlu by Sanlu Trading Company, a wholly-owned subsidiary of Sanlu.⁶⁹ The agreement was finalised on 23 December, when Sanlu was delivered the bankruptcy order. On the same day, the Hebei Provincial and Shijiazhuang municipal governments, after a meeting between "the Hebei Provincial Communist Party Committee, the Provincial government, and the Shijiazhuang city Party Committee and the government", agreed to "guarantee the co-ordination of the full repayment should Sanlu have difficulties in repaying the debts".⁷⁰ The guarantee was provided following a petition by 300 Sanlu sales agents who gathered at the Sanlu headquarter and in front of Hebei Provincial government.

⁶⁶ The order of distribution of bankruptcy assets as provided in Article 113 of the EBL is as follows: (1) bankruptcy expenses and common benefits debts (certain debts incurred by the debtor company after the commencement of the bankruptcy proceedings such as those arising from agency by necessity or personal loss or injury caused by the company property; (2) unpaid wages and other welfare payments; (3) unpaid social insurance premiums and taxes; (4) unsecured claims; Where the insolvent assets are not enough to satisfy the debts in the same ranking, the *pari passu* rule will apply. Note that there is currently a debate among the Chinese legal scholars on whether the debt owed to tort victims by Sanlu should be classified as common benefits debt.

⁶⁷ Note in relation to the forms of proof of debt, the EBL has adopted a much narrower approach as compared to s553 (1) of the Australian Corporations Act which includes "all debts payable by and all claims against the company (present or future, certain or contingent, ascertained or sounding only in damages)" arising before the commencement of the winding up.

⁶⁸ The Enterprise Bankruptcy Law of the People's Republic of China, Article 21. The Article provides that once a bankruptcy application against a debtor company has been accepted by the court, any civil claims against the debtor can only be lodged with the court hearing the bankruptcy case.

⁶⁹ Jing Li, 'Sanlu to be Sold through Bankruptcy Auction: Total Debts Estimated Near 2 Billion Yuan'[Sanlu Pochan Paimai Huanzha, Guji Sanlu Zong Fuzhai Jin 20 Yiyuan] (in Chine), *Xinjing Daily News Story*, 25 December 2008, found on Xinhua Net <http://news.xinhuanet.com/fortune/2008-12/25/content_10555709.htm>.

⁷⁰ *Shijiazhuang City Government Report on Sanlu Bankruptcy Case* (full text), Xinhua Net News <http://news.xinhuanet.com/fortune/2008-12/25/content_10557898.htm>.

The validity of the separate debt repayment agreement is highly doubtful. Under Article 16 of the EBL, once the court has accepted an application for bankruptcy, any repayment of debts by the debtor company to individual creditors should be void. However, in the Sanlu bankruptcy case, it is unlikely that the Court or the bankruptcy administrator (headed by an official of the Shijiazhuang State-owned Assets Supervision Commission)⁷¹ exercised their power to treat the agreement as invalid. This is especially so given the fact that Sanlu Trading Company, the wholly-owned subsidiary of Sanlu, was excluded from the Sanlu bankruptcy procedures.⁷²

Upon the commencement of Sanlu's bankruptcy proceedings, Fonterra issued a media release stating that "Sanlu will now be managed by a court-appointed receiver who will assume responsibility for an orderly sale of the company's assets and payment of creditors"⁷³ A closer examination of the Sanlu bankruptcy liquidation case in this article however suggests that the case is more of an administratively rather than judicially manipulated outcome.

VI THE CHINESE STATE-LED MODEL OF CORPORATE GOVERNANCE

In their 2008 seminal work *Law and Capitalism*,⁷⁴ Milhaupt and Pistor use a case study on the collapse of China Aviation Oil (a subsidiary of the mainland Chinese state holding company listed on the Singapore Stock Exchange) to illustrate the coordinative function of law in centralised legal systems such as the Chinese system (as distinct from a function protective of individual rights). In doing so, Milhaupt and Pistor see the Chinese model of corporate governance as an "administrative model" that performs "mainly coordinating functions".⁷⁵ In other words, corporate governance in China is primarily a tool of the state and state holding companies to coordinate competing interests among favoured groups (such as state bureaucracies, enterprises and foreign institutional investors) while holding outside shareholder and stakeholder rights in check.⁷⁶

⁷¹ Shuhui Hang, '14-Member Sanlu Bankruptcy Liquidation Team Formed' [Sanlu Pochan Qingsuan Xiaozu Shisi Ren Zucheng] (in Chinese) *Dongfang Daily* (online) 31 December 2008 <<http://www.dfdaily.com/html/113/2008/12/31/351068.shtml>>.

⁷² Xinjing Daily News Story, *Sanlu to be Sold through Bankruptcy Auction: Total Debts estimated Near 2 Billion Yuan* [Sanlu pochan paimai huanzha, guji sanlu zong fuzhai jin 20 yiyuan] (in Chinese), 25 December 2008, found on Xinhua Net <http://news.xinhuanet.com/fortune/2008-12/25/content_10555709.htm>.

⁷³ Fonterra Media Release, *Sanlu Bankruptcy Order*, 24 December 2008 <<http://www.fonterra.com/wps/wcm/connect/fonterracom/fonterra.com/our+business/news/media+releases/sanlu+bankruptcy+order>>

⁷⁴ Milhaupt and Pistor, above n 8.

⁷⁵ Ibid 139.

⁷⁶ Ibid.

The case study on the Chinese central and local governments' handling of the 2008 milk scandal aftermath clearly supports this characterisation of Chinese corporate governance by Milhaupt and Pistor. The formal structure of corporate governance in China has undergone substantial changes in the past few years. To accommodate the increasing demands made on the state for the improved monitoring of managers, the attraction of new investors to the market and the protection of other emerging interest groups, the Chinese government is attaching much greater importance to the protection of outside investors and stakeholders. This is in part reflected in the increased protection afforded to minority shareholders and outside stakeholders, such as consumers, in the Chinese law and regulations. The same approach to corporate governance will be essential to fulfilling China's longer-term objective of attracting foreign institutional investors – in order to provide greater depth and maturity to the domestic market.

As the case study in this article suggests, the important legislative and regulatory changes that have been made however, have not amounted to a systemic change of the Chinese corporate governance from a state-led to a market-led model. In practice, few of these legislative and regulatory reforms have led to a transfer of the ultimate control over the companies from the state to private sector institutions. While the state retains control over major corporate decision-making either through controlling shareholdings (in Sanyuan's case) or other informal ties (in the case of Sanlu), the state retains the power to veto private law suits by shareholder and outside stakeholders through a supportive court system. In short, the state remains playing a large role in monitoring managers and mediating competing interests among key corporate stakeholders through both legal and extra-legal means.

The model seems to have produced some highly efficient outcomes in the Sanlu bankruptcy case in economic terms. Although the scandal has seen the demise of the Sanlu empire, the business growth of this corporate group has quickly resumed under Sanyuan's branding. With government support, the dairy business might also be expected to return to its growth rate prior to the scandal. The tens of thousands of tort victims received some level of compensation and there is no guarantee that they would be better off by going through the court procedures. Nor did the over 10,000 Sanlu employees have much to lose. As the Party Secretary of Sanlu declared, "whoever wants to buy Sanlu must also take Sanlu's employees".⁷⁷ As such, with social stability successfully maintained, damage to economic growth has also been kept to the minimum.

However, from a corporate governance perspective, one may ask how the state-led model, exhibited throughout the scandal, might contribute to the governance of the Chinese companies. This, according to the CSRC (China Securities Regulatory

⁷⁷ Xinhua Net news story, *Sanlu Communist Party Secretary: Whoever Wants to Buy Sanlu Must Also Take Sanlu's Employees* [Sanlu Dangwei Shuji: Xiangmai Sanlu bixu Jieshou Quanbu Zhigong] (in Chinese) 11 January 2009 <http://news.xinhuanet.com/local/2009-01/11/content_10638134.htm>.

Commission, will underlie the healthy and sustained development of the Chinese stock market in the long term.

In the first place, rigorous monitoring of managers may be diminished with strong state involvement in business. So far, only the Chairperson and three other executives of Sanlu have been prosecuted. They were convicted for “producing and selling fake or defective products” (rather than the more serious charge of “producing and selling poisonous food products” for which the maximum penalty is death) under the PRC Criminal Law.⁷⁸ In the absence of a special investigation similar to an Australian style royal commission inquiry, questions regarding the adequacy of internal control of those companies and the attribution of fault to those involved will remain unanswered. Even if fault were attributed to those within the corporate group, there have been few reported cases in which directors of a Chinese company are brought before the court purely for breach of directors’ duties under PRC Company Law.

Secondly, with strong government intervention in Chinese companies, including not only state-owned corporations but also the large private corporations (believed to conform more closely to the concept of the modern market-driven corporation), there may be very little room left for market forces to play a role in maintaining good corporate governance. It has been suggested that as well as internal monitoring mechanisms, the external market forces, such as the market for corporate control and the product markets are important monitoring mechanisms in disciplining corporate governance by helping to align the interests of the company managers with those of the shareholders. The handling of the tainted milk scandal by the Chinese central and local governments however suggests that the function of the market forces in relation to corporate governance may be limited under the current state-led corporate governance in China. Government intervention may not allow the advantages of the modern corporate form to be fully exploited by the Chinese corporations.⁷⁹

Finally, and probably the more fundamental problem with the state-led model, has been the compromise of the rule of law. The importance of legal regulation and enforcement in keeping good corporate governance has been postulated by numerous authors.⁸⁰ Particularly, the function of insolvency law, according to the Cork Committee Report, is not limited to facilitation of distribution of insolvency assets among creditors. It is also to “uphold business standards” and “commercial morality”

⁷⁸ Feng Zhu, ‘Former Sanlu Chairwoman TianWenhua Sentenced to Life Imprisonment’ [Yuan Sanlu Jituan Dongshi Zhang Tianwen Hua Yishen Bei Panchu Wuqi Tuxing] (in Chinese) *Xinhua Net News* <http://news.xinhuanet.com/legal/2009-01/22/content_10701439.htm>. The offence for ‘producing and selling fake or defective products’ for which the maximum penalty is life sentence is provided in Article 140 of the PRC Criminal Law. The offence for “producing and selling poisonous food products” is provided in the PRC Criminal Law, Article 144.

⁷⁹ Roman Tomasic and Jenny Fu, ‘Government-owned Companies and Corporate Governance in Australia’, (2006) 3 *Corporate Ownership & Control*, 123, 126.

⁸⁰ For example, Rafael La Porta, Florencio Lopez de Silanes, Andrei Shleifer and Robert Vishny, ‘Investor Protection and Corporate Governance’ (2000) 58 *Journal of Financial Economics* 3; La Porta R, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny, Legal Determinants of External Finance 1997(52) *Journal of Finance* 1131.

through investigative and disciplinary measures.⁸¹ The importance of a robust tort system in keeping good corporate governance has also been highlighted by corporate law scholars.⁸²

China has been proud of itself for having established a “basic legal framework for socialist market economy” within a short thirty years of reform.⁸³ Both the exposure, and the handling of the 2008 milk scandal however seem to confirm commentators’ view that the Chinese system still looks “more like a system of rule by law rather than a system of rule of law”.⁸⁴ The Chinese system of rule by law itself is far from being perfect as far as corporate governance is concerned.⁸⁵ The frequent use of political rather than judicial settlement of corporate disputes, as exhibited in the tainted milk scandal, means that the capacity of law to enforce compliance and deter corporate malfeasance may be very limited.

VII CONCLUSION

In short, the intervention in business by the Chinese government may find its justification in the common goal of promoting economic growth. Although this is one important policy objective particularly with the global economic downturn, the examination of the state’s involvement in the 2008 tainted milk scandal and its aftermath in this article suggests that this policy has had some unintended effects upon governance of Chinese companies. Importantly, it has blurred the line between the role of the government and the roles of the market, the regulator and the courts in maintaining the corporate governance framework. As Chinese companies are fast

⁸¹ Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558., 1982) para 191. The Cork Report has in part prompted the Hammer inquiry into Australian insolvency law which was completed in 1988.

⁸² See for example, Peta Spender, ‘*Weapons of Mass Dispersion: James Hardie and Corporate Law*’ (2005) Griffith Law Review 280; Nicholas Howson, ‘*Regulation of Companies with Publicly Listed Share Capital in the People’s Republic of China*’ (2005) 38 Cornell International Law Journal 237, 246.

⁸³ Director of the State Council Legal Office: *30 Years in China’s Legal Development* [Guowu Yuan Fazhi Bangong Shi Zhuren: Woguo Zhengfu Fazhi Jianshe Sanshi Nian] (In Chinese), <http://www.china.com.cn/policy/txt/2009-01/07/content_17069154.htm>; For a review of the development of the Chinese legal system over the past few years, see Donald Clarke, ‘Introduction: The Chinese Legal System Since 1995: Steady Development and Striking Continuities’ in Donald Clarke (ed) *China’s Legal System: New Developments, New Challenges* (Cambridge University Press, 2008) 1.

⁸⁴ Roman Tomasic and Jane Fu, ‘Regulation and Corporate Governance of China’s Top 100 listed companies?’ (2006) 27 *The Company Lawyer*, 278, 280; Randall Peerenboom, *China’s Long March toward Rule of Law*, (Cambridge University Press, 2002) 8; Jianfu Chen, ‘Policy as Law and Law as Policy – The Role of Law in China’s Development Strategy’, in Christoph Antons (ed.) *Law and Development in East and Southeast Asia* (RoutledgeCurzon, 2003) 251, 260; Pitman Potter, *The Chinese Legal System: Globalisation and Local Legal Culture* (Routledge, 2001) 10.

⁸⁵ For a critique of the new Company Law, see for example, Zhong Zhang, ‘Legal Deterrence: the foundation of corporate governance-evidence from China’ (2007) 15 *Corporate Governance: An International Review*, 741; Hong Lay Tan and Jiangyu Wang, above n50.

expanding overseas,⁸⁶ the role of the state in Chinese corporate governance might also give intending foreign institutional investors cause to reflect upon the central importance of the state and the role of law in corporate governance in China. In practice, a great deal may continue to rest upon the capacity of the government to balance its different roles and adjust the competing interests of corporate officers, shareholders and outsider stakeholders.

⁸⁶ This point has been well-documented in a sizeable literature on the rise of sovereign investment funds in China. For example, Ian Bremmer, *The End of the Free Market: Who Wins the War Between States and Corporations?* (Portfolio, 2010); Ronald Gilson and Curtis Milhaupt, 'Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism', (2008)⁶⁰ *Stanford Law Review* 1345, 1346; Larry Cata Backer, 'Sovereign investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State Owned Enterprises and the Chinese Experience' 2010 (19) *Transnational Law & Contemporary Problems*, 3.

RESIDENTIAL PROPERTY, COMMERCIAL PROPERTY, GOODS AND SERVICES TAX AND DEREGISTRATION: A CASE STUDY ON HOW THE GST LAW MAY HAVE BEEN MANIPULATED.

JOHN MCLAREN*

ABSTRACT

When a residential property, being used for commercial purposes is sold to a buyer that intends to operate a professional practice from the premises and one of the vendors is registered for GST, what happens when the registered vendor deregisters from GST ten days before settlement? The purchaser expects to be able to claim the GST included in the price as an input tax credit but on settlement is not given a tax invoice. The purchaser then lodges the Business Activity Statement (BAS) claiming an input tax credit without a tax invoice. The purchaser believed that the Commissioner of Taxation would exercise his discretion under s 29-70(2) or under s 29-10(10) of the A New Tax System (Goods and Services Tax) Act 1999 (Cth), (GST Act) and treat the contract for sale as a tax invoice. The justification for this action being that the vendor deregistered from GST in order to retain the GST. In the case study presented in this paper the Commissioner of Taxation disallowed the purchasers' claim for the input tax credit. The main question examined in this paper is whether it is within the spirit of the GST legislation for a vendor to deregister just before settlement, not provide a tax invoice and keep the GST?

I INTRODUCTION

It is not the intention of this paper be critical of the administration of the GST legislation by the Australian Taxation Office (ATO). It is also not possible to identify the actual vendors and purchaser in this transaction without impugning their character. The paper is intended to assist both the ATO and prospective purchasers of

* The author is grateful for the very useful comments made by the two anonymous referees. Assistant Professor, Faculty of Law, University of Canberra.

real property as to a potential problem where the vendor deregisters for GST in order to collect the extra 10 percent of the price and the purchaser is not provided with a tax invoice. It is not being suggested in this paper that the ATO is failing in its obligations under the legislation to protect both the revenue and innocent taxpayers from the potential for abuse by vendors that deregister for GST. In this situation only one of the joint vendors was registered for GST although it was assumed that the business that was conducted from the premises was as a partnership. Moreover, the purchaser did not specifically address the question of GST and whether or not the price included GST. The contract of sale indicated that the price did not include GST but the purchaser did not question the vendors as to the correct treatment. Nor did the vendors give an assurance that the purchaser would be able to claim an input tax credit. There were mistakes made on the part of the purchaser and possibly the vendors.

The paper will commence with a description of the circumstances that led to the purchaser being denied the input tax credit on the purchase of a residential property to be used for business purposes. This will involve an examination of the GST status of the vendors at the time the contract was signed and their GST status at the date of settlement.

Part II of the paper will examine the application of GST to real property, both residential and commercial as well as the concept of a 'going concern'. This part of the paper will also examine the ability of the Commissioner of Taxation to overcome the situation where a tax invoice has not been issued but should have been. This will also cover the way in which the Commissioner's discretion should be exercised to allow an input tax credit to be claimed based on Practice Statement LA 2004/11.

Part III of the paper will discuss the current situation where it would appear that GST may be avoided simply through the act of deregistering just prior to settlement. Finally a conclusion will be drawn as to whether this particular tactic by a vendor is within the spirit of the law and can be used for that purpose in light of the fact that it would be expected that taxpayers signing the declaration when deregistering are not deliberately trying to avoid paying GST.

A The Fact of the Case Study

The property was located in the outer suburbs of Melbourne and consisted of a former residential home that had been used by the vendors for commercial purposes. The purchaser intended to use the former residential property for the purpose of conducting an accounting and financial planning practice. The purchaser had an Australian Business Number (ABN) and was registered for GST. The vendors were husband and wife but only the husband was registered for GST as they conducted a business from the premises. There is no information as to whether the husband and wife conducted the business as a partnership or as a sole trader. There is no information as to whether the business paid rent to both the husband and wife as joint owners of the property and GST was included in the commercial rent. The further issue of joint tenancy as opposed to tenants in common is not dealt with in this paper

but it may be relevant for the purposes of determining whether the husband could legally dispose of 50 percent of the property as a taxable supply. All of this information would help to clarify the GST status of the vendors. The vendors and purchaser entered into a contract of sale on 29 July 2010 with settlement due on 29 October 2010.

The contract price was \$400,000. The standard Real Estate Institute of Victoria contract for the sale of real estate was used by the parties to the transaction. This contract was in the form prescribed by the *Estate Agents (Contracts) Regulations 2008* (Vic). Clause 13 covers GST and at paragraph 13.1 it states the following:

The purchaser does not have to pay the vendor any GST payable by the vendor in respect of a taxable supply made under this contract in addition to the price unless the particulars of sale specify that the price is plus GST. However, the purchaser must pay to the vendor any GST payable by the vendor:

- (a) solely as a result of any action taken or intended to be taken by the purchaser after the day of sale, including a change of use; or
- (b) if the particulars of sale specify that the supply made under this contract is a farming business and the supply does not satisfy the requirements of section 38-480 of the GST Act; or
- (c) if the particulars of sale specify that the supply made under this contract is a going concern and the supply does not satisfy the requirements of section 38-325 of the GST Act¹

The real property in question was not farming land; it was not the sale of a going concern; and the use to which it was currently being used was not to change. The special treatment of farming land and going concerns will be discussed briefly in the next part of the paper. The contract was specifically marked as the price not including GST. The specific box needed to have the words 'plus GST' inserted in it in order for the purchaser being required to pay \$400,000 plus GST of \$40,000. In this case the words 'plus GST' was not inserted into the contract for sale. The contract specifically excluded reference to farming land and to the margin scheme applying. The margin scheme will be discussed briefly in the next part of this paper. On the face of it, the contract indicated that the price of \$400,000 did not include GST. Again this was because there was no specific reference to the price of \$400,000 plus GST. However, the purchaser did not clarify this issue with the vendors prior to signing the contract.

On settlement the balance of the purchase price, namely \$360,000 was paid given that a deposit of \$40,000 was paid at the date of the contract. The vendors did not provide the purchaser with a tax invoice but the purchaser had intended to claim the sum of \$36,363 as an input tax credit.² Unbeknown to the purchaser, the only vendor being registered for GST, namely the husband had 10 days earlier deregistered for GST. The wife, having not been registered for GST at any time earlier, was not involved directly with the deregistration process. The vendor, in this case the husband, applied to deregister himself retrospectively effective from 30 June 2010. In effect, the vendor

¹ Real Estate Institute of Victoria, Contract of Sale of Real Estate, Form 1 – particulars of sale, Clause 13.

² This represents 1/11th of the purchase price being 10 percent of the value.

was placed in the position to claim that he was not registered for GST when the contract was signed, namely on 29 July 2010. At no time during negotiations for the purchase did the purchaser question the vendors over their GST status and in hindsight this would have helped to clarify this matter. This situation highlights the fact that mistakes are more costly when involving real property and it is vital that vendors and purchasers are provided with very good advice before signing contracts.

The purchaser then lodged their BAS and claimed an input tax credit for the \$36,363. The ATO denied the claim on the basis that no tax invoice had been issued by the vendors. Clearly the vendors were not in a position to provide a tax invoice as they had deregistered for GST. The ATO considered imposing penalties on the purchaser but in the end declined to take this action.

A number of issues are raised in this situation and each will be examined in the following part of this paper. The issues to be assessed can be summarised as follows:

- (1) Was the sale of the commercial residential premises a ‘taxable supply’ and what are the consequences where one of the vendors is registered for GST and the purchaser is registered for GST?
- (2) Did the purchaser have a legitimate expectation, based on the wording of the contract for sale, that they would legally be able to claim the GST as an input tax credit?
- (3) Would the vendors or the husband only have been required to pay GST if they had not deregistered? The wife had not been registered for GST which may or may not raise additional questions.
- (4) Was the process of deregistering 10 days before settlement legitimate and was this strategy used to prevent the purchaser from claiming an input tax credit and the vendors from paying GST?
- (5) Should the Commissioner have exercised his discretion and allowed the purchaser to claim the input tax credit in the absence of a tax invoice and take action against the vendors for payment of the GST?

II THE GST IMPLICATIONS

The vendors had been carrying on a business from the premises that they sold in accordance with s 9-20 of the GST Act. The business was in the nature of an enterprise. The property was being used for a creditable purpose within the meaning of s 11-15 of the GST Act in that they were carrying on an enterprise from those premises. The vendors would have obtained an ABN and if their turnover had been in excess of \$75,000 they would have needed to be registered for GST, s 23-15. Similarly, the purchaser had an established financial planning and accounting practice and had been carrying on an enterprise within the meaning of s 9-20. The purchaser had an ABN and was registered for GST.

A When should GST be included in the price of residential premises?

The main question to be answered within this context is was the sale of the real property a ‘taxable supply’ within the meaning of the GST Act? If so, were the vendors required to pay 10 per cent of the value or 1/11th of the price to the ATO as the GST due on the sale of property? The supply of the real property will either be a taxable supply; a GST free supply; or an input taxed supply. GST is only an issue in this case if the sale of the house and land was a taxable supply. Prior to reaching a conclusion on this point, it is necessary to examine the following situations where real property has a different GST treatment depending upon the use to which it is being put and the registration requirements of the vendor and purchaser.

1 Residential Premises

Generally the sale of residential premises that are existing homes are input taxed supplies and not subject to GST, s 40-65, GST Act. This means that costs which include GST, involved in acquiring or selling the residential home are not capable of being claimed as an input tax credit. In most cases the vendor and the purchaser are not registered for GST simply because they are not disposing of the property in the course of a business.³ Residential premises are considered to be land or a building that is actually occupied as a residence.⁴ For the sale of the residential premises to be an input taxed supply, as opposed to a taxable supply, pursuant to s 40-65, they must satisfy the condition that they are ‘used predominantly for residential accommodation’.⁵

This contention is supported by the Full Bench of the Federal Court in the case of *Marana Holdings Pty Ltd v Federal Commissioner of Taxation* (2004) 57 ATR 521, where it was held that the term ‘residential’ requires an aspect of permanency or long term occupation.⁶ In this case a former motel that was converted to strata titled home units could not be said to have been residential premises when first acquired. Therefore the sales of the new strata titled apartments were ‘new residential premises’ and taxable supplies.⁷ GST had to be included in the price or the margin scheme used for the purchasers. In the present situation, the real property had not been used by the vendors as residential premises as they conducted a business from the property. The purchaser did not intend to use the premises as a residential property and this was made known to the vendors.

The next question is: are the premises to be treated as ‘commercial residential premises’? If this is the case then the sale of the real property is not an input taxed

³ Philip McCouat, *Australian Master GST Guide*, (9th ed. 2009) 275.

⁴ Ibid.

⁵ Ibid, 276. See also ATO GST Ruling GSTR 2000/20.

⁶ (2004) 57 ATR 521, 527.

⁷ Ibid, 535.

supply.⁸ In order for the property to be treated in this way the premises must be used for accommodation and have the characteristics outlined in GST Ruling, GSTR 2000/20.⁹ The Commissioner contends that the intention of the purchaser should be taken into account in determining whether the premises are commercial residential premises. At paragraph 83 he outlines a number of factors that should be taken into account such as the commercial intention of the taxpayer; multiple occupancy; holding out to the public; accommodation is the main purpose; central management; management offers accommodation in its own right; the services offered; and the status of guests.

The distinction between ‘residential premises’ and ‘commercial residential premises’ is an important one since a supply of ‘commercial residential premises’ by way of sale is potentially a taxable supply.¹⁰ Commercial residential premises are a subset of residential premises.¹¹ However, the definition of ‘commercial residential premises’ raises a number of issues in its interpretation. The definition is as follows: commercial residential premises means:

- (a) hotel, motel, inn, hostel or boarding house; or
- (b) premises used to provide accommodation in connection with a school; or
- (c) a ship that is mainly let out on hire in the ordinary course of a business of letting ships out on hire; or
- (d) a ship that is mainly used for entertainment or transport in the ordinary course of a business of providing ships for entertainment or transport; or
- (e) a caravan park or a camping ground; or
- (f) anything similar to residential premises described in paragraphs (a) to (e).

The most disappointing thing about the above definition is the ‘just in case’ subsection (f) which would render the definition useless.¹² It is the existence of this subsection that would lend weight to the argument that purchasers of strata titled units should be able to claim an input tax credit and that the Commissioner’s ruling requiring ‘multiple occupancy’ is incorrect.¹³ The subsection refers to ‘anything similar’ should be interpreted in light of the criteria (a) to (e).

⁸ Ibid, 280.

⁹ Ibid, 281.

¹⁰ Tony Van Der Westhuysen, ‘Just What is a “Residence” for GST Purposes?’, (2008) 3(1) *Journal of the Australasian Tax Teachers Association* 116 125.

¹¹ Ibid.

¹² Ibid.

¹³ GST Ruling GSTR 2000/20 at paragraph 52 and Tony Van Der Westhuysen , 126.

Once again, this category of ‘commercial residential premises’ does not apply to the current situation examined in this paper. The premises which had originally been used for residential premises had been used in a commercial enterprise and were to be used in the future for a commercial enterprise by the purchaser.

2 Going Concern

Was the purchase of the real property part of the acquisition of a ‘going concern’? The sale of a going concern, namely a continuing business enterprise, is a GST-free supply provided it satisfies the conditions set out in s 38-325, GST Act. In order to satisfy this section, the sale must be for consideration. In other words it must be for money or something of value, s 9-15. Next, the buyer must be registered for GST on and from the date of the sale.¹⁴ A further requirement is that the seller and buyer must have agreed that the sale is of a going concern; the seller carries on the business right up until the date of settlement; and the seller supplies the buyer with all things necessary for the enterprise to continue to operate.¹⁵ One of the issues of the case study that is not examined in this section is whether or not the husband and wife vendors were registered for GST in their tax law partnership. The purchaser did not discuss this issue with the vendors and only became aware that the husband was the only joint owner of the property that was originally registered for GST.

In the current situation it would be impossible to comply with this section. First, the business carried on by the vendor was not that of a financial planner and accounting practice. Second, the seller and buyer did not agree that it was the sale of a going concern, and third; the premises could not be said to be a necessary supply in order for the continued operation of the same business. Therefore the sale of the former residential premises was not a GST-free supply pursuant to the provisions of s 38-325, as a ‘going concern’.

3 Farming Land

If farm land is sold as a going concern, it will also be a GST-free supply. However, even if farm land is not sold as a going concern, it will still be GST-free in certain circumstances. If a farming business has been conducted on the land for at least five years before sale it will be GST-free, s 38-480. The concession also applies to farm equipment and not only the land. In that situation the sale of farming equipment and land will be GST-free provided a farming business will continue to be conducted by the purchaser. In the current case study, the former residential premises were not sold as farming land and therefore it was not GST-free.

¹⁴ Ibid, 310.

¹⁵ Ibid.

4 Margin Scheme

The next issue to be determined is whether or not the margin scheme applied to this particular sale of real property? If the margin scheme applied then the purchaser would not be entitled to claim an input tax credit. In order for the margin scheme to apply the seller must be registered for GST. In the current situation the seller was registered but deregistered retrospectively so that they would not satisfy this condition. The sale must not be GST-free, as discussed above, or an input taxed supply.

The margin scheme basically provides relief for buyers who are not registered for GST and who wish to use the property as a residential home and not as part of an enterprise. The seller must be registered for GST and carrying on an enterprise. Moreover, the sale must not be GST-free or an input taxed supply. The margin scheme is typically applied by property dealers and developers selling to home buyers.¹⁶ In that situation, the vendor only adds the 10 per cent GST to any increase in value of the property since 1 July 2000. If the property being sold was acquired after 1 July 2000, the margin scheme can also be used even if the vendor acquired the property as a GST-free supply because the vendor was not registered for GST, and input taxed supply, or from a vendor that used the margin scheme when selling the property.¹⁷

If the margin scheme is used this prevents the purchaser from claiming an input tax credit for the GST paid, and in this situation a tax invoice is not required to be issued, s 75-30. However, in the present case study neither the vendor nor the purchaser ‘ticked the box’ to indicate that the margin scheme was to apply to the transaction even though at the time the contract was signed the vendor was registered for GST.

The sale of real property that is used for commercial purposes, as an office from which an enterprise is to be conducted, would be a taxable supply and not a GST-free supply or an input taxed supply. That is the situation in this case study and the two issues that now remain to be examined are what is the effect of the deregistration process and should the Commissioner have exercised his discretion and allowed the claim for an input tax credit without a tax invoice being supplied by the vendor? More importantly, should there be in existence a process whereby deregistration is not accepted where a large transaction is yet to be settled. In this case the vendor was due to receive the sum of \$400,000 from the sale of commercial premises.

5 Sale of assets when enterprise ceases

Another explanation for the justification by the vendor to deregister when still disposing of the assets of the enterprise is found in section 188-25, GST Act. Section

¹⁶ Ibid, 288.

¹⁷ S 75-5, GST Act.

188-25 allows for the sale of assets to be disregarded when considering the GST turnover figure if the supply is being made as a consequence of ceasing to carry on an enterprise or substantially reducing the size and scale of the enterprise. This allows the vendors to deregister and still dispose of assets connected with the former business. However, there is no evidence that the business that was conducted by the vendors from the premises in question was being reduced in size or even ceasing to operate. Clearly the main asset was being disposed of, but the business may have continued from other premises. If that was the case then the deregistration process should taken place.

B Deregistration for GST – requirements

A taxpayer is required to cancel their registration within 21 days when they cease to carry on an enterprise, 25-50. However, if you are doing something in the course of terminating your business you are still considered to be carrying on an enterprise and you should maintain your registration.¹⁸ In this case study, it could be argued that the vendor was still carrying on their enterprise by disposing of the assets of the enterprise. Of course, if the turnover drops below \$75,000 then the registration can be cancelled even though the enterprise continues to operate.

The Commissioner can cancel the registration as at the date of the determination to cancel the registration or the taxpayer can request a retrospective cancellation, 25-60. The retrospective cancellation can only apply to a date at the start of a tax period, s25-65. In the current case study, the vendor was granted retrospective cancellation back to 30 June 2010 even though the contract to sell the real property was dated 29 July 2010. The application for cancellation was made by the vendor on 19 October 2010.

In order to obtain a retrospective cancellation, the taxpayer would be required to show the ATO that they have not held themselves out to other businesses as being registered for GST.¹⁹ The taxpayer is required to sign a declaration to that effect. A false declaration can attract severe penalties. However, the purchaser contends that they were aware that the vendor was registered for GST at the time of signing the contract and they specifically told the vendor that they intended to use the real property for carrying on an enterprise. However, they did not advise the vendor that they intended to claim an input tax credit.

It would appear that deregistration is virtually automatic and that the ATO does not question taxpayers as to the accuracy of the form. Obviously the ATO relies on the fact that the taxpayer is making a declaration and that the contents are correct. It may be unrealistic for the ATO to devote resources to checking the accuracy of the information contained in the cancellation form and therefore taxpayers may be in a position to take advantage of the situation. In the present case study, it may have been

¹⁸ Philip McCouat, n 2, 49.

¹⁹ Ibid, 50.

expected that the vendor would apply for cancellation of their GST registration once all the assets of the vendor's enterprise had been disposed of in the normal course of terminating the enterprise. That was not the case being examined in this paper. This then leads to the final question: should the Commissioner have exercised his discretion in favour of the purchaser and accepted the contract of sale as being equivalent of a tax invoice pursuant to s 29-70(1), GST Act?

C No Tax Invoice – Commissioner's discretion

In order for the Commissioner to exercise his discretion in this type of situation, the sale of the commercial premises must have been a taxable supply. In light of the above analysis, it is strongly contended that the supply of the premises were of a commercial nature and therefore a taxable supply. However, the deregistration of the vendor prior to the actual settlement of the real property may have rendered this a non-taxable supply but this issue would require further evidence from the vendors. It is also contended in this paper that the vendors failed to comply with subsection 29-70(2) of the GST Act which requires a party that makes a taxable supply to provide the recipient, in this case the purchaser, with a tax invoice for the supply within 28 days of the recipient requesting a tax invoice. This is on the basis that the act of deregistration should not have taken place until after settlement of the property.

The Commissioner has discretion pursuant to s 29-10(3) to allow a recipient of a supply to claim an input tax credit in the absence of a tax invoice. In GSTR 2011/D1 the Commissioner discusses the basis on which this discretion will be exercised.²⁰ The following paragraphs from GSTR 2000/D1 assist in determining how that discretion may be exercised:

94. There may be situations where a document relevant to a taxable supply does not meet all the tax invoice requirements of subsection 29-70(1). In these situations, the requirement to hold a tax invoice may impose a disproportionate burden on a supplier or recipient, particularly if that document substantially complies with the requirements. The Commissioner has the discretion in subsection 29-70(1B) to treat a document or documents as a tax invoice in these situations. However, the Commissioner is under no obligation to exercise the discretion. It is therefore the onus of the supplier or the recipient to demonstrate in their request to the Commissioner that their circumstances make it appropriate for the Commissioner to treat the document or documents as a tax invoice.

95. The relevant principles for making administrative decisions were set out by Mason J in Minister for Aboriginal Affairs v. Peko-Wallsend Ltd & Ors (1986) 162 CLR 24, where his Honour said at 39-40:

What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion... where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject matter, scope and purpose of the statute some

²⁰ This is only a draft ruling but it replaces GSTR 2000/17 which was withdrawn on 25 May 2011. It is similar to GSTR 2000/17.

implied limitation on the factors to which the decision-maker may legitimately have regard ...By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject matter, scope and purpose of the Act.

96. It is therefore important to consider the subject matter, scope and purpose of sections 29-10 and 29-70.²¹

The Ruling states that the issues to be considered before a decision is made to exercise the discretion are contained in Practice Statement LA 2004/11. The practice statement sets out the steps to be taken by ATO staff when deciding to exercise the discretion.

26. This situation will usually arise during Tax Office verification activities, but may arise on other occasions, for example when the recipient has discovered the error and brings this to the attention of the Tax Office. In considering the exercise of the discretion, officers must adopt a case by case approach, based on the compliance model. The Tax Office wishes to encourage future compliance as well as uphold the importance of tax invoices and adjustment notes. If there is a creditable acquisition or decreasing adjustment, and the recipient has made a genuine attempt (in their circumstances) to comply, the discretion should be exercised.

27. Officers should ensure that a tax invoice or adjustment note is needed for the recipient to claim the input tax credit or decreasing adjustment. Refer to paragraph 12 for a discussion of when a tax invoice or adjustment note is required.

28. Officers should follow the steps below in deciding whether to exercise the discretion.

STEP 1 - Is it reasonable to conclude from the available evidence that the recipient has made a creditable acquisition or has an adjustment from an adjustment event?

the current situation, the purchaser would contend that they made a creditable acquisition in buying the real property for the purpose of conducting an accounting and financial planning practice. At the time of settlement the purchaser was registered for GST and believed that one of the vendors was also registered for GST. The ATO should have answered yes.

If YES, go to step 2.

If NO, the discretion will not be exercised and the recipient must be advised accordingly. Amend the activity statement to disallow the input tax credit or decreasing adjustment.

STEP 2 - In the circumstances is it reasonable to exercise the discretion? The key focus here is whether the recipient, through its actions, has made a genuine attempt to meet the requirements to hold a tax invoice or adjustment note. The answer to this question will depend on your judgment. Officers should consider all relevant circumstances, and not irrelevant circumstances when reaching a decision. Some factors which may be relevant are set out in paragraphs 29-30.

²¹ GSTR 2000/D1, paragraphs 94-96.

In the current situation the purchaser made an attempt to obtain a tax invoice from the vendor but was advised that they were no longer registered for GST and could not provide a tax invoice. The purchaser had an excellent record of compliance and this should have been taken into account.

If YES, exercise the discretion - go to Step 3.

If NO, do not exercise the discretion - Go to Step 4.

STEP 3 - If the answer at step 2 was Yes, exercise the discretion to treat a particular document, that was held at the time the relevant activity statement was lodged, as a tax invoice or adjustment note.

- If there is sufficient evidence to establish a creditable acquisition or decreasing adjustment, there will be some document on which the discretion can operate (for example, invalid tax invoice, normal invoice, contract, etc).
- The recipient will be taken to have held a tax invoice or adjustment note at the time of giving the GST return in which the credit or decreasing adjustment was claimed. If the other requirements for attribution have been met, the recipient will have made a valid input tax credit claim or decreasing adjustment and there is no need to take any further action in respect of this claim.
- The recipient must be given clear advice about the requirements to hold a tax invoice or adjustment note and advised to take steps to avoid similar problems in future. If the tax invoice or adjustment note problems are caused by the supplier, and the supplier does not comply in the future, we would expect the recipient to approach the Tax Office in the first instance, before claiming an input tax credit or decreasing adjustment.
- If the supplier has not issued a valid tax invoice, consider whether to refer details to compliance for possible follow-up action. For example, was the problem a significant one likely to be repeated and cause problems for other recipients?

In the current situation it is contended that the Commissioner should have exercised his discretion and accepted the contract of sale of real property as being equivalent to a tax invoice.

STEP 4 - If the answer at step 2 was No, do not exercise the discretion. Officers must:

- amend the activity statement to disallow the input tax credit or decreasing adjustment.
- advise the recipient to keep and retain adequate records of their GST transactions and indicate that failure to do so could lead to an administrative penalty.
- advise the recipient to make a reasonable attempt to obtain a tax invoice or adjustment note from the supplier. What constitutes making a reasonable attempt to request the document is explained at paragraph 25.
- advise that, if a tax invoice or adjustment note is subsequently obtained, the input tax credit or decreasing adjustment can be claimed in a later activity statement.
- advise that if the recipient makes a reasonable attempt to request a tax invoice or adjustment note, but is not able to obtain one, they may make a new request for the exercise of the discretion. The recipient's new request should be considered as if the input tax credit or decreasing adjustment had not been claimed before - that is, in accordance with the first flowchart in paragraph 9 and the discussion in paragraph 22-25.
- consider whether to refer details of the supplier's actions to compliance for possible follow-up action. For example, was the problem a significant one likely to be repeated and cause problems for other recipients?

The ATO did not allow the purchaser to claim an input tax credit and considered imposing a shortfall penalty for making a false or misleading statement.

In what circumstances would it be reasonable to exercise the discretion for the recipient?

29. If there is a creditable acquisition or decreasing adjustment, and the recipient has made a genuine attempt (in their circumstances) to comply, the discretion should be exercised. The key focus here is whether the recipient, through its actions in the circumstances, has made a genuine attempt to meet the requirements to hold a tax invoice or adjustment note. If not, it may be reasonable to refuse to exercise the discretion. Officers should consider the recipient's circumstances, including the practical and commercial realities of record keeping.

The purchaser contends that they made a genuine attempt to comply with the law and that the actions of the vendors deliberately prevented the purchaser from being able to claim an input tax credit. Therefore in the circumstances, the purchaser contends that the discretion should have been exercised and the input tax credit allowed on the basis that the contract of sale was an adequate substitute.

III Deregistration: A LEGITIMATE STRATEGY?

This part of the paper raises the question as to whether it is a legitimate strategy for accountants and lawyers to encourage taxpayers to cancel their GST registration in a situation where a business asset is being sold and GST that should be paid to the ATO is subsequently retained by the vendor. Is this action within the spirit of the law?

The vendor deregistered prior to settlement and as a result did not provide a tax invoice to the purchaser. Quite correctly he was unable to provide a tax invoice. The sale of the property was for the sum of \$400,000 and the contract of sale indicated that GST was not included in the price. If GST had been included then the price would have been \$440,000. The purchaser contends that the vendor led them to believe that they were registered at the time of entering into the contract and this would be their status up until settlement. If this was the case then why did the vendor not include GST in the price because the premises were commercial premises and as such a taxable supply. The position of the vendor would have been that an extra \$40,000 would have been paid by the purchaser; the \$40,000 extra collected by the vendor paid to the ATO as GST and the purchaser claiming an input tax credit. However, the vendor cancelled the registration retrospectively which meant that at no time during negotiations for the sale of the real property was the vendor registered for GST. However, in order to obtain deregistration, the vendor gives an assurance that at no time have they held themselves out as being registered for GST. The cancellation process requires the taxpayer signing a declaration that the information is correct. This is a similar declaration that every taxpayer signs when lodging their income tax return or a Business Activity Statement.

Is it therefore a legitimate strategy to have a client deregistered from GST in these circumstances? If the position taken by the ATO is to be accepted, then in this case

the vendor escaped the liability of paying GST to the ATO in the sum of \$36,363. Clearly this would *prima facie* indicate that the action taken by the vendor was completely legitimate. It would also indicate that all accountants and lawyers should advise their clients to cancel their GST registration in similar circumstances. The only issue for the purchaser is that they need to be very clear in their negotiations with a vendor as to the GST status of both parties and if GST is to be included in the price.

IV CONCLUSION

From the above analysis of the case study it could be inferred that a perfectly legal strategy for a taxpayer to avoid paying GST is to deregister just before settlement of the sale of a business asset. The purchaser will not be provided with a tax invoice and the Commissioner will not exercise his discretion in those circumstances to treat the contract as a tax invoice. However, this case study appears to raise more questions than it does provide answers. Those questions can be summarised as follows:

- (i) What role should the ATO take in scrutinising application to cancel GST registration?
- (ii) What role should the ATO take in investigating the conduct of the vendors in similar circumstances? Should the activity be referred to the Australian Federal Police for investigation into whether a false or misleading declaration was signed by the vendors?
- (iii) Does the conduct of the vendors' amount to false and misleading conduct that should be investigated under the Australian Consumer Law, Schedule 2 to the *Competition and Consumer Act 2010* (Cth)? This would not require involvement by the ATO.
- (iv) Should the ATO Practice Statement PS LA 2004/11 be amended to specifically discuss situations where deregistration occurs and the purchaser is not provided with a tax invoice, similar to the circumstances in this case study?

The answers to the above questions are beyond the scope of this paper and require the ATO to consider situations similar to those discussed here. It would appear that the winner is the vendor in that no GST was paid; the winner was also the government's revenue base because the purchaser did not claim an input tax credit; and the loser was the purchaser based on the current application of the GST law to these circumstances. Quite clearly this is one way to legitimately avoid paying GST. There is one important lesson that should be gained from reading this paper and that is all purchasers and vendors of real property must openly discuss the issue of GST as it relates to their particular transaction. There must be a clear understanding of the registration status of both parties and whether the price includes GST.

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 will be published in a later issue of the *Canberra Law Review*.

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, almanacs^{s¹} and other

* Senior Lecturer in Law, University of Canberra

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.

public documents.² The exercise of the Crown's prerogative right in England over the centuries has been by the grant in letters 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

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 164. 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.

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 'SP 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 incouragemt. and [...] 'help' to grant vnto him his request.' (WW Greg, *A Companion to Arber* (Oxford, 1967), 267, *SP.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.' (*SP Dom: Charles II 1680-1681* (London, 1921), 665).

the Crown's exercise of control over all forms of publication in the 16th and 17th centuries.⁶ This control 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 songs 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

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 Expence (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 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).

⁷ Maxwell JC (ed), *WW Greg: Collected Papers*, Oxford, Clarendon Press, 1966, 343,348. 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.

"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 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,

⁹ Dated 22 January 1575, *Calendar of Patent Rolls: Elizabeth I*, Vol VI (1572-1575) (London, 1973), 471. Thomas Tallis and William Byrd 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 Scruton 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; *SP 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; *SP Dom: 1701-1702* (London, 1937), 391. The microfilm publication *Hanoverian State Papers Domestic 1714-1782* contains copies of some original petitions and grants, for 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 Compleated'; 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 called the comon 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): *SP Dom: 1678* (London, 1913), 37, 38.

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 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

¹³ King James I expressed the grant of monopoly rights in psalters, psalms, prymers, 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 pages 164-169.

¹⁷ (1938) 38 SR (NSW) 195 (Sup Ct).

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-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

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 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)).

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 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

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).

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).

Mansfield in *Millar v Taylor*.³² The second proposition has not been advanced by other courts.

In the second reported case of *Roper v Streeter*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

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.

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).

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 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*

⁴³ Presumably a reference to an Act 'Concerning the jurifdictioun and autoritie of the bishope of Rome callit the Paip', dated 24 August 1560, which provided penalties for administering sacraments of the 'popish church' and for hearings on the same 'to be callit befoir the Jufice or his deputis or befoir the lordis 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 Ciuile 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 Magistratis in fre cieteis', are not only appointed 'for ciuile policie bot alwa for mantenance of the trew religiou' (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.

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

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'.

importance of the observance of the rites of the Church of England to the 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

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 Streeter* (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 Guildford 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).

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 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 PREOGATIVE 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

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 Scruton, *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),

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 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

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).

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 Reformed', dated 26 March 1717: *Hanoverian State Papers Domestic Series, 1714-1782 Part I 1714-1722* (Sussex, 1978), SP 35/8 No. 87.

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, 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

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).

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).

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 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

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 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 king'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.

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" 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.

⁶⁹ (1938) 38 SR (NSW) 195, 257.

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).

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 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

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.

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 ss 24-26 of the *Legislation Act 2001* (ACT). Similarly, also refer to the *Acts Publication Act 1905* (Cth) ss 4-8.

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 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

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 annotacions faithfully translated and fynyshed' 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.

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 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

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 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

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 Cathechisme"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 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.

⁸⁴ a species, that the public ought to have a security ..." Lord Eldon LC in *Universities of Oxford and Cambridge v Richardson*.

⁸⁵ 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).

⁸⁶ *Ibid.*, 194.

⁸⁷ *Ibid.*

⁸⁸ *Halsbury's Laws of England* (4th ed.) Vol 14 (London, 1975), 489, 490, 493-495.

⁸⁹ 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.

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 Streeter*,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 Yettsweirt in respect of "the bookees 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

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

⁹⁶ 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 justees 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).

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 Streeter*, a grant to the defendant of the right to print law books "touching or concerning the common or statute law" was regarded as 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

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 Streeter*).

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 Sawer, *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.

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 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

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

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).

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 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

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 Musgrave* (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). (1677) 1 Mod 256 (86 ER 865).

¹¹⁴ EF Bosanquet, 'English Seventeenth-Century Almanacks', *The Library*, Fourth Series, Vol X No 4, (March 1930) (London, 1930), 361, 362.

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 became known as the Company's English Stock. Subsequently the privilege 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

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

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 (Willes 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.

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 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 *Philosophiae 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

¹²⁴ For the Decree of 1586 refer Arber, op cit, Vol II, 807, 810. Section 4 provided, inter alia, that no person 'shall ymprynt 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 under the great seale of England ...'

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

'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...'

¹²⁵ 13 and 14 Car II, c.33, s.XXII.

'Provided alfo, That neither this act, nor any thing therein contained, shall extend to prejudice the juft rights and priviledges granted by his Majefty, or any of his royal predeceffors, to any perforn or perfons, under his Majefties great feal, or otherwife, but that fuch perfon or perfons may exercife and ufe fuch rights and priviledges as aforefaid, according to their refpective grants; anything in this act to the contrary notwithstanding'.

¹²⁶ 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).

¹²⁷ *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.

¹²⁸ CS Terry, *John Christian Bach*, (2nd ed, London, 1967), 78 (text of grant).

¹²⁹ 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).

copy having vested in the grantee, that is, a reference to the rights given by the Statute¹³⁰ or as claimed at common law.

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 vesting the copies of printed books in the authors or purchasers of such 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*

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 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 Scruton, *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 Cwyp 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'.

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:

... 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 Commissioners 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

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.

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,

recorded instances of 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

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); *Taylor 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 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*

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.

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 ‘Becaufe that Act gives a Property in Books to fuch Perfons, as fuch Books are, or fhall be, granted to by Letters Patents, whether the Crown had, or fhall have, any Right to grant the fame, or not, at the time of fuch 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.

CRIMINAL SENTENCING IN THE ACT – THE NEED FOR EVIDENCE

SHANE RATTENBURY*

Sentencing in the ACT has recently been the focus of attention for the three political parties in the ACT Legislative Assembly. A number of bills have been prepared by the Government and the Canberra Liberals to increase maximum sentences for certain crimes. As the ACT Greens Attorney Generals spokesperson, I have advocated for a different approach which involves gathering evidence on the effectiveness of current sentences before considering raising penalties.

As a practical suggestion of how to implement such an approach, I drafted the Greens own bill on sentencing. It proposed to create a review of sentencing in the ACT to gauge how well current sentences are meeting the purposes of the *Crimes (Sentencing) Act 2005*. (“the Act”). I recently brought my bill on for debate in the Assembly but was unable to secure the support of either the Government or the Canberra Liberals. Nevertheless, I continue to advocate that a review of sentencing would be beneficial to the ACT and that this needs to occur before any further amendments are made to sentencing law. Before turning to the need for a review of the Act, it is of course important to understand the history of the Act itself.

I THE CREATION OF THE *CRIMES (SENTENCING) ACT 2005* (ACT) (‘THE ACT’)

Prior to 2002 there were twelve or more separate pieces of legislation in operation that governed sentencing law and procedures in the ACT. To improve this situation, the ACT Government established a Sentencing Review in 2002 which reported in 2004.

The Government determined that the 2002 Sentencing Review would:

- (a) consider extending the use of diversionary/restorative justice programs and other non-custodial sentencing options in the ACT;
- (b) assess the sentencing options/programs available for offenders who are chronically sick or elderly, have a disability, personality disorder or substance

* MLA, ACT Greens Attorney General spokesperson

abuse problem, are indigenous Australians, young persons, women, mentally ill and/or persons whose first language is not English; and

- (c) in light of the results of (a) and (b) above, make recommendations about the consolidation of the legislation governing sentencing in the ACT, including legislative amendments to rectify identified difficulties and defects in ACT sentencing legislation.¹

The Sentencing Review ran for two years and the result was the enactment of the Act and the *Crimes (Sentence Administration) Act 2005*.

When tabling the bill to create the Act the then Attorney General, Jon Stanhope, identified the key aspects of the proposed Act to be: consolidating the diverse range of ACT sentencing law into the one Act; harmonising language, concepts and procedures; the introduction of the concept of combination sentences and removal of old restrictions on combining penalties for individual convictions; the clarification of the ability for periodic detention to be available as part-time imprisonment; the creation of good behaviour orders; the creation of two new preventive tools for the courts in non-association orders and place restriction orders; increased scope of presentence reports to enable the court to select the topics of assessment, as needed; and, an expanded availability of victim impact statements.²

Seen in this context, the 2002 Sentencing Review was a valuable exercise in consolidating existing law and establishing new tools for sentencing judges to utilise.

However, the 2002 review was not asked to look closely at how well the sentences that were being imposed were meeting the purposes of sentencing. While part of the review included a survey of Magistrates to determine the key factors that were used to determine whether a custodial or non custodial sentence was most appropriate, the review did not measure or analyse the *effect* of those sentences being imposed.³

II PURPOSES OF SENTENCING

One aspect of ACT sentencing law that was not amended significantly during the review was the stated purposes for which a judicial officer could impose a sentence. The new section 7 of the Act essentially replicated the pre-existing purposes that were outlined in Part 12 of the *Crimes Act 1900* (ACT).

¹ ACT Government Issues Paper, *Sentencing Review*, September 2002, 1.

² ACT Legislative Assembly Hansard 7th April 2005

<<http://www.hansard.act.gov.au/hansard/2005/pdfs/20050407.pdf>>

³ Sentencing Review Issues Paper tabling statement to ACT Legislative Assembly, September 2002

Section 7 of the Act states that:

- (1) A court may impose a sentence on an offender for 1 or more of the following purposes:
 - (a) to ensure that the offender is adequately punished for the offence in a way that is just and appropriate;
 - (b) to prevent crime by deterring the offender and other people from committing the same or similar offences;
 - (c) to protect the community from the offender;
 - (d) to promote the rehabilitation of the offender;
 - (e) to make the offender accountable for his or her actions;
 - (f) to denounce the conduct of the offender;
 - (g) to recognise the harm done to the victim of the crime and the community.⁴

Importantly, a single primary or overriding purpose is not listed in section 7. This reflects a long running debate surrounding the true purposes of sentencing.⁵ Whereas the predominant theory in the 19th century was one of punishment to achieve retribution and deterrence, this was challenged in the 20th century by the aim of rehabilitating the offender. This was again challenged in the late 20th century by a return of retribution under the phrase ‘just deserts’. In more recent decades this has again been challenged by newer theories that focus on achieving restoration for the victim and ensuring offenders understand the consequences of their actions.

This long running discussion has left courts around Australia with a plethora of stated purposes for which they may impose a sentence. This was acknowledged in the High Court by Mason CJ, Brennan, Dawson and Toohey JJ in *Veen*:⁶

Sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from the unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution, and reform. The purposes overlap and none can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to appropriate sentence but sometimes they point in different directions.

Regardless of the historical context to section 7 or at times, the difficult task it sets for sentencing judges, it does form the cornerstone for the entire Act and the way in which sentences are determined. Using the language of the High Court, section 7 provides the “guideposts” to finding an appropriate sentence.

⁴ *Crimes Act 1900* (ACT).

⁵ For a discussion of the historical context surrounding purposes of sentencing see Warner, *Sentencing in Tasmania* (2002) The Federation Press, 63-74.

⁶ (1988) 164 CLR 465, 476.

III THE ARGUMENT FOR A REVIEW OF SENTENCING IN THE ACT

A Important pieces of new legislation that should be reviewed

Many new important pieces of legislation include a section requiring the Government of the day to review the Act after it has operated for a certain period of time. This is important as it provides a mechanism by which the impact of the legislation, both positive and negative, can be measured. Statutory reviews often result in further amendments being made to the legislation to fine tune particular provisions and to make them work more effectively.

Review clauses typically state the time after which the review must be commenced by the relevant Minister, the matters the review must inquire into and the date the review must be tabled in the Assembly.

Over the last 15 years there were over twenty new Acts passed by the Legislative Assembly that included statutory review clauses.⁷ This is a relatively recent trend which improves accountability and the increases opportunities for improving legislation over time. This improvement is achieved by measuring the impact of a new legislative initiative and further improving the Act to get a better result, if the review shows this to be possible.

Given the Act was a significant new piece of legislation which was central to the operation and deliberations of our courts and ultimately used to determine sentences, it is curious a review clause was not inserted into the Act when it passed in 2005. Nevertheless, this can be rectified easily via legislative amendment.

The review clause I proposed in the Greens Sentencing Bill⁸ read as follows:

- (1) The Minister must review the operation of this Act.
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⁷ See, Workplace Privacy Act 2011 (ACT)s 48; Climate Change and Greenhouse Gas Reduction Act 2010 (ACT) s 26; Health Practitioner Regulation National Law (ACT) Act 2010 (ACT) s 11; Plastic Shopping Bags Ban Act 2010 (ACT) s 9; Building and Construction Industry (Security of Payment) Act 2009 (ACT) s 45; Road Transport (Third-Party Insurance) Act 2008 (ACT); Protection of Public Participation Act 2008 (ACT) s 11; Terrorism (Extraordinary Temporary Powers) Act 2006, Radiation Protection Act 2006 (ACT) s 125; Pest Plants and Animals Act 2005 (ACT) s 54; Construction Occupations (Licensing) Act 2004 (ACT) s 131; Emergencies Act 2004 (ACT) s 203); Environment Protection Act 1997 (section has expired now that review has taken place), Government Procurement Act (section has expired now that review has taken place), Territory Records Act (section has expired now that review has taken place), Dangerous Substances Act 2004, Legal Profession Act 2006, Terrorism (Extraordinary Temporary Powers) Amendment Bill 2011, Working with Vulnerable People (Background Checking) Bill 2010

⁸ Available at the ACT Legislation Register:
http://www.legislation.act.gov.au/b/db_43118/default.asp

- (2) The review must begin before the end of this Act's 6th year of operation.
- Note* The Act commenced on 2 June 2006. The review must begin not later than 1 June 2012.
- (3) The Minister must present a report of the review to the Legislative Assembly within 12 months after the day the review is started.
 - (4) In reviewing this Act, the Minister must have regard to—
 - (a) how effective sentences imposed in the ACT are in meeting the purposes mentioned in section 7; and
 - (b) a comparison of custodial and non-custodial sentencing options available in the ACT with options in other jurisdictions, with an evaluation of the effectiveness of sentencing options that are not available in the ACT; and
 - (c) community attitudes to current sentencing outcomes; and
 - (d) options to improve the level of understanding within the community of sentencing purposes, processes and outcomes.
 - (5) In conducting the review, the Minister must consult with the following:
 - (a) the director of public prosecutions;
 - (b) civil liberties groups;
 - (c) entities that represent—
 - (i) police officers; and
 - (ii) victims of crime; and
 - (iii) the legal profession; and
 - (iv) offenders;
 - (d) any other entity that, in the Minister's opinion, has an interest in sentencing.
 - (6) In conducting the review, the Minister may have regard to anything else that the Minister considers relevant.
 - (7) The report must include recommendations about ways to improve the effectiveness of sentences imposed in the ACT in meeting the purposes of sentencing mentioned in section 7.
 - (8) This section expires 2 years after the day it commences.

B Sentencing reviews provide evidence

Sentencing is an issue that is highly emotive. For victims the sentence imposed will be closely felt. The same will be felt by close family and close friends. However, because of the media interest in crime generally and sentencing specifically, emotions are not restricted to those directly involved. Public outrage can erupt at times through the media about perceived leniency of a particular sentence or a certain type of crime over time.

Governments in Australia have, at times, responded to this type of public outcry by increasing maximum sentences and promising to 'get tough on crime'. While Governments are responsible to the people, there are two dangers in responding to public outcry in this way.

Firstly, increased sentences may not better achieve any of the stated purposes of sentencing. For example, while Government may promise to cut crime through tougher penalties, the evidence is well settled that increasing the severity of punishment does little extra to deter or prevent crime.⁹

Secondly, where Governments do react to public outcry by increasing sentences, they risk creating the precedent for legislative action to follow any public outcry. This is a dangerous precedent to set or to reinforce because there will be times when it is appropriate for Government to be able to ride out a particular public or moral outrage in the long term best interests of the particular issue.

Because of these twin dangers, Governments should ensure that any sentencing reforms are firmly based on evidence. A sentencing review in the ACT is the ideal way to update existing sentencing evidence and gather new emerging thinking and strategies.

The idea of sentencing review is not new to the ACT. In 2009 the idea received tri-partisan support in the Standing Committee on Justice and Community Safety. When inquiring into a proposal to amend the definition of murder in the ACT, the committee made the unanimous recommendation that the ACT Government consider the need to undertake a general review of sentencing in the Territory.¹⁰ Each of the three political parties in the ACT was represented on the committee.

C A case study of a missed opportunity to implement an evidence based approach

To illustrate this point about the opportunity for an evidence based approach, I'd like to provide a case study from the ACT. Recently, the ACT Legislative Assembly passed a Government bill to double the maximum sentence for culpable from seven to fourteen years. This was in response to the *Creighton* case¹¹. The Government and the Canberra Liberals came to the view that previous maximum penalty of seven years was out of step with community views about the severity of crime. In part this was based on other Australian jurisdictions who have a penalty higher than seven years.

The purpose of sentencing that the Government's bill sought to better achieve was “*to ensure that the offender is adequately punished for the offence in a way that is just and appropriate*”. The bill was passed on the basis that it was not “just and appropriate” for sentencing judges to be limited to imposing a seven year sentence for the crime of culpable driving and that community expectations demanded a harsher punishment.

⁹ For example, Weatherburn *Law and Order in Australia, Rhetoric and Reality* (2004) The Federation Press

¹⁰ ACT Legislative Assembly Standing Committee on Justice and Community Safety, *Inquiry into Crimes (Murder) Amendment Bill 2008*, Final Committee Report,

¹¹ *R v Creighton* SCC 88 of 2010

There was no information or evidence provided by Government to support their rationale that the ACT community thought sentencing laws were deficient in this area. The argument at its highest pointed to laws interstate which imposed harsher punishments for similar crimes. But an evidence based approach to this issue could have been adopted. Recent research in Tasmania has looked explicitly at this question of community views about sentencing. The results from the Jury Sentencing Survey¹² are revealing and the approach could have been adopted in the ACT.

The Jury Sentencing Survey developed a reliable statistical method for assessing whether sentences being handed down do reflect community standards. The rationale behind the survey was that jurors will provide a better source of informed community standards than the rest of the community which have to rely on media reports which can only ever cover the most newsworthy aspects of a case.

The survey asked jurors involved in criminal cases what they thought about sentencing generally and what they thought about the sentence imposed in the case they served on. When talking about sentencing in general, the jurors felt that sentences imposed were too lenient. That is, for those cases where they relied on the media, they held the view that harsher penalties were warranted.

However, the results changed dramatically when the jurors were asked about the particular case that they served in the jury for. In these cases around fifty percent of jurors thought the sentence imposed was too harsh and the other half thought the sentence imposed was too lenient. These findings suggest that judges were striking an appropriate balance in their sentencing decisions.

This is a telling finding that shows how important it is to measure *informed* community standards of people who are likely to know all the facts of a case, not just those reported on in the media.

Research of this type in the ACT would have provided the Government with an evidence base to assess the claim that sentencing in the ACT is out of step with community expectations. If the results of the Tasmanian research were repeated in the ACT, this would have shed significant doubt on the need for doubling the maximum sentence.

D Current bills before the Assembly cover only a fraction of sentences being imposed

During 2011, there were three bills tabled by the ACT Government and the Canberra Liberals proposing to increase sentences across four offence categories. The bills covered manslaughter, grievous bodily harm offences, culpable driving offences and

¹² Warner, Davis, Walter , Bradfield, Vermey *Jury Sentencing Survey* (2011) Criminology Research Council

crimes involving physical violence against police. At the time of writing the Canberra Liberals have also indicated they are contemplating tabling one further bill to increase penalties in additional categories.

However, the three bills cover only a fraction of all the crimes that occur in the ACT and receive convictions. A broad review of all crimes and sentences would be better approach because it would provide a comprehensive overview of how sentences are working across all crime types and would show where the greatest priority for attention and possible reform is.

For example, recent media reports cite court data that shows thirty percent of ACT drink drivers are repeat offenders. If the review confirmed this statistic it would show that the current sentencing approach is failing to deter or rehabilitate repeat drink drivers. A sentencing review would look at the new sentencing options that exist, how effective they have been in other jurisdictions, and whether the ACT could consider implementing them here.

Only once a comprehensive review of all crimes and sentences has been conducted will the Government have a sense of where the priority areas exist for sentencing reform.

IV Conclusion

A review of the Act represents the best opportunity to gather evidence about the effectiveness of current sentences. By mid 2012 the Act will have been operating for six years and this represents a good time to commence the review. Only once we have conducted the review and gathered the data can we have a grasp of which areas we need to prioritise for attention and potential reform.

The ACT Greens are not against sentencing reform. The drink driving statistics discussed in this article are certainly one area the needs attention. However, the approach we advocate for is one where any changes are based on evidence that one or more of the stated purposes of sentencing will be better achieved.

Ultimately, the review will facilitate a ‘smart on crime’ approach where we look address the root causes of crime and prevent it before it occurs. This is contrasted to a ‘tough on crime’ approach where the promise is made to reduce crime by locking offenders up for longer and longer. This promise rings hollow when the evidence is taken into account. Our community deserves better, and we should be looking to take a smarter approach that delivers real results and less rhetoric.

GETTING THE BALANCE RIGHT: WHY THE MURRAY DARLING BASIN PLAN CAN IMPLEMENT THE ‘TRIPLE BOTTOM LINE’ APPROACH

RACHEL KELLY

I INTRODUCTION

Australia is the second most arid continent on Earth after Antarctica.¹ Therefore the management of our valuable water resources should be one of our main priorities. Australia’s dependence on water is profound and this is highlighted by the needs of two important stakeholders who rely on this valuable asset, being the agricultural industry and the environment.

Water within the Murray-Darling Basin is essential to the agricultural industry. The Murray Darling Basin is responsible for 40 percent of the nation’s gross value of agricultural production and is home to 75 percent of Australia’s irrigated agriculture.² However this industry is under increasing pressure to produce more food as a consequence of population growth both nationally and internationally. It is estimated that each Australian farmer currently feeds 600 people, 150 within Australia and 450 overseas.³ However the UN Food and Agricultural Organisation has estimated that food production must increase by 70 percent in order to feed the world’s population in 2050.⁴ There is a significant reliance on irrigation farmers, who are responsible for the widest variety of, and highest yielding, agricultural production.⁵

Water within the Murray-Darling Basin is obviously also essential to ensuring the sustainability of the local environment. Australia’s isolation from other continents

¹ Power, Matthew, ‘Peak Water: Aquifers and Rivers Are Running Dry. How Three Regions Are Coping’ (2008) 16(5) *Wired Magazine* 7.

² ABS, ‘Socio-Economic Context for the Murray–Darling Basin’ (Descriptive Report MDBA Technical Report Series: Basin Plan: BP02, September 2009), 50

³ Mick Keough, ‘Australia’s Response to World Food Security Concerns’ (Speech Delivered at the National Farmers Federation Annual Conference, Brisbane, 2009).

⁴ United Nations Food and Agricultural Organisation, *How To Feed The World In 2050*, (2011) 2.

⁵ *Ibid*, 52, 59.

means it is residence to countless unique and varied ecosystems,⁶ many located within the basin. Hence it is vital water is supplied to meet the needs of these ecosystems.

The Federal government has endeavoured to regulate water use in the Murray-Darling Basin through the *Water Act 2007* (Cth). This Act made provisions for the establishment of the Murray-Darling Basin Authority (MDBA), responsible for creating a plan to regulate the Basin's water resources. The Act also necessitated the establishment, by the MDBA, of Sustainable Diversion Limits (SDLs), which determine the quantity of water that can be extracted from the river systems for human consumption, including agriculture.

The Guide to the plan was released in October 2010.⁷ It prioritised the needs of the environment over the social and economic needs of the basin.⁸ It was argued that this approach was necessary as the Act sourced its power from the external affairs power granted to the Commonwealth under section 51 (xxix) of the Constitution, and relied upon a number of environmental treaties.⁹

However this article will argue that a 'triple bottom line' approach, where environmental, social and economical factors can be prioritised equally, can be implemented under the current legislative framework. This argument focuses on the extent to which the MDBA is obliged to implement the requirements of the treaties, and what the treaties themselves actually necessitate.

It will also be argued that the SDLs implemented under the Act are both impractical and unnecessary and should either be altered with amendments to the Act, or the relevant sections of the Act should be revoked and alternative strategies, better suited to achieving the goals of the triple bottom line approach should be implemented.

II WATER REFORM IN THE MURRAY-DARLING BASIN

The *Water Act 2007* (Cth) was passed by Federal Parliament on 3 September 2007. Its title reads: '[this] is an Act to make provision for the management of the water resources of the Murray-Darling Basin (MDB)'.¹⁰ Its implementation signalled a new era for water politics in Australia.¹¹ Until its enactment, the sole power to regulate water in the MDB had been granted to the States. As water is a very important and necessary common resource of the five states and territories of the MDB, being Queensland, New South Wales, Australian Capital Territory, Victoria and South

⁶ Daniel Connell, *Water Politics In The Murray-Darling Basin* (Federation Press, 2007) 8

⁷ Murray Murray-Darling Basin Authority, 'Guide to The Proposed Basin Plan: Overview' (Murray-Darling Basin Authority, 2010)

⁸ Kildea, Paul And Williams, George, 'The Water Act And The Murray Darling Basin Plan' (2011) 22 Plr 9

⁹ Ibid

¹⁰ *Water Act 2007* (Cth), Title.

¹¹ Kelly, N, 'A Bridge? The Troubled History of Inter-State Water Resources and Constitutional Limitations on State Water Use' (2007) 30(3) *UNSW Law Journal* 639.

Australia, these states and the ACT had coordinated the use of the Basin's water through a number of inter-governmental agreements.¹²

The MDB produces the major share of Australia's agricultural produce,¹³ and there are many industries and communities which rely upon this. At the time of the 2006 Census, 3.4 million people, or 17 percent of the Australian population, lived in communities directly reliant on the Basin's water. Further, agriculture was the third largest direct employer in the region, accounting for the employment of 11 percent of this population. It was third to retail and public administration (mainly in Canberra) sectors¹⁴. The Basin is also home to many significant and unique environmental ecosystems.¹⁵

Considering the impacts of the worst drought in Australia's recorded history, from late 2001 to 2010,¹⁶ the Commonwealth sought to harmonise the regulation of water within the basin to balance the needs of the environment and communities in the region.

The move towards a holistic approach to managing the MDB began in 1994 when the Council of Australian Governments (COAG) agreed to a Water Reform Framework Agreement which sought to 'implement a strategic framework to achieve an efficient and sustainable water industry'.¹⁷

However the ability of the Government to achieve this holistic management approach was limited by the *Constitution*. The Commonwealth only has the ability to regulate in accordance with powers granted under section 51 of the *Constitution*. In this section there is no reference to a power to regulate water resources. Therefore the management of water resources is exclusively a power of the states, and the Commonwealth would need either a reference of this power from the MDB states or a referendum changing the Constitution to be granted this power.¹⁸

In early 2007, the Howard government announced a National Plan for Water Security.¹⁹ This 10 year plan endeavoured to achieve the goal of Federal regulation of the MDB.²⁰ It included provisions for the investment of \$10 billion of Federal funds into water management strategies in the MDB.²¹ The Howard Government had anticipated achieving the power to implement this plan through negotiating a referral

¹² Ibid

¹³ ABS, above n 2, 50.

¹⁴ Ibid, 42, 52.

¹⁵ Connell, above n 6, 8

¹⁶ Wahlquist, Asa, 'Longest, hottest drought on record, says Bureau of Meteorology', *The Australian* (online), 11 October 2008 <<http://www.theaustralian.com.au/news/health-science/longest-hottest-drought-on-record/story-e6frg8gf-1111117721981>>.

¹⁷ COAG, *Communiqué*, Attachment A, Hobart, 25 February 1994

¹⁸ Tony Abbott, 'Address to the Sydney Institute' (Speech delivered at the Sydney Institute, Sydney, 14 January 2010).

¹⁹ Parliament of Australia, *A National Plan for Water Security* (2007), <http://www.nalwt.gov.au/files/national_plan_for_water_security.pdf>

²⁰ Kildea and Williams, above n 8.

²¹ Ibid, 2.

of legislative power from the four basin states. However Victoria refused to grant this referral. Premier Steve Bracks sought a greater share of the federal investment, and argued the plan favoured states with poor infrastructure and water efficiency.^{22 23},

Following this failure of negotiations, the Commonwealth sought another avenue for implementing its plan. In August 2007 the *Water Bill 2007* (Cth) was tabled and passed through Parliament. According to section 9, the Bill relied upon several constitutional powers to regulate the MDB water resources. These constitutional powers are as follows: Interstate trade and commerce, corporations, external affairs, and territories powers, along with powers relating to meteorological observations, statistics and weights and measures.²⁴

III THE WATER ACT AND THE MURRAY-DARLING BASIN PLAN

The key components of the *Water Act 2007* (Cth), for the purpose of this essay, are the sections regarding the establishment of a Murray-Darling Basin Authority (MDBA). This body has the responsibility for creating a Murray-Darling Basin Plan. The power to enact these relevant sections stemmed from the external affairs power.²⁵ The external affairs power has been interpreted by the High Court to give the Commonwealth Parliament power to implement treaty obligations as law for the whole of Australia. The fact that the Commonwealth can use treaties as a means of overriding State legislation and policy has been made clear by the High Court in several cases,²⁶ the most famous example being the *Franklin River Dam Case*.²⁷ The *Water Act 2007* relied on a number of ‘relevant international treaties’ described in section 4(1) to include the Ramsar Convention on Wetlands and the Convention on Biological Diversity.

Considering this, the purposes of the Basin Plan relevant to this essay, described in section 20 are,²⁸ amongst other things, to provide for:

- (a) giving effect to the relevant international agreements,
- (b) the establishment and enforcement of environmentally sustainable quantities of ... water that may be taken from the Basin water resources,...
- (d) The use and management of the Basin Water resources in a way that optimises economic, social and environmental outcomes.

²² P Ker and M Grattan, ‘Bracks Isolated as Premiers Sign Up for Water Deal’, *The Age* (Sydney), 24 February 2007, 4.

²³ In July 2008, the basin states signed an Intergovernmental agreement providing for a referral of constitutional powers. The purpose of the referral was limited to transferring powers of MDB Commission to MDBA, granting ACCC increased powers to regulate Irrigation Infrastructure Operators and enabling the Basin Plan to provide for critical human water needs.

²⁴ Australian Constitution s51(i), 51(xx), 51(xxix), 122, 51(viii), 51(xi) and 51(xv)

²⁵ Kildea and Williams, above n 8.

²⁶ *Koowatta v Bjelke-Petersen* (1982) 153 CLR 168; *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992. (1994).

²⁷ *Commonwealth of Australia v Tasmania* (1983) 158 CLR, 541 per Deane J

²⁸ *Water Act 2007* (Cth)

With these objectives in mind, the appointed MDBA released a guide to the proposed Murray-Darling Basin Plan (Guide) in October 2010. The guide was subject to much criticism and a fiery public debate.²⁹ Central to the debate were the proposed SDLs.

The SDLs proposed under section 20(b)³⁰ are described as the quantity of water which can be extracted for consumption³¹ after environmental requirements have been met. These SDLs must reflect an 'environmentally sustainable level of take'.³² According to section 23(2)³³ these limits may be expressed as a formula or in any other way that the MDBA determines to be appropriate. Furthermore the limits are determined according to, and may vary between, each catchment area.³⁴

IV CONTROVERSY SURROUNDING THE MURRAY-DARLING BASIN PLAN

The Guide recommended that to meet environmental objectives, current diversion limits³⁵ would need to be reduced by between 3,000 and 7,600 gigalitres annually.³⁶ This equated to reductions of 27 percent to 37 percent to the water allocations of irrigation farmers under their irrigation licenses.³⁷ Further the guide noted that this increase in SDLs would 'have significant negative implications on some Basin communities, industries, enterprises and individuals' and that these effects would vary in each catchment and community, 'depending on a complex array of factors'.³⁸

The criticisms centred on the fact that the plan prioritised the outcomes of the environment, rather than applying a 'triple bottom line' approach where environmental, social and economic outcomes were balanced.³⁹ This was a significant issue as the proposed percentage cuts to water allocations would have major flow-on

²⁹ See for example Anne Delaney, 'Massive water meeting for Griffith', *ABC Riverina* (online), 15 October 2010 <<http://www.abc.net.au/local/stories/2010/10/15/3039023.htm>>.

³⁰ *Water Act 2007* (Cth)

³¹ Consumption includes use of water for watercourse diversions, floodplain harvesting and for water taken by farm dams and for forestry: Murray-Darling Basin Authority, '*FAQs: Sustainable Diversion Limits*', (24 February 2011)

<http://www.mdba.gov.au/basin_plan/faqs/sdl#What_sustainable_diversion_limit.accessed>; *Water Act 2007* (Cth) s23.

³² *Water Act 2007* (Cth) s23(1).

³³ *Water Act 2007* (Cth)

³⁴ Murray-Darling Basin Authority, 'Basin Plan Guide released for public discussion', (Media Release, 8 October 2010) <<http://www.mdba.gov.au/files/Media-release-Basin-Plan-Guide.pdf>>

³⁵ There is currently a limit, called 'the Cap', on the amount of surface water that can be taken for consumptive use in the Basin. The current Cap on surface-water diversions is set at a level based on historic use, and varies dependent on the different irrigation areas within the basin; Murray-Darling Basin Authority, *Key elements of the Basin Plan* (2008) <http://www.mdba.gov.au/basin_plan/concept-statement/key-elements>.

³⁶ Murray-Darling Basin Authority, Above n 7, 57.

³⁷ Ibid 110.

³⁸ Ibid 81.

³⁹ Senate, Parliament of Australia, *A Balancing Act: provisions of the Water Act 2007*, (2011).

effects for agriculture, including the livelihoods of the people and the survival of the communities reliant on irrigation, as well as the more general effects nationally and internationally, regarding food availability, increased food prices and the global food shortage crisis.⁴⁰

The approach of prioritising environmental outcomes was confirmed by the then Chair of the MDBA, Mr Mike Taylor, who stated the Water Act was ‘focused on returning water to the environment.’⁴¹ The argument for this approach is found in section 3 of the Act, which describes the relevant objects of the Act as:

- (b) to give effect to relevant international agreements ... and
- (c) in giving effect to those agreements, to promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes.

It is argued that subsection (c) implies that economic and social outcomes can only be taken into account after the requirements of the relevant treaties have been implemented.⁴² As the Act has sourced its power from several environmental treaties this means that the economic and social considerations are secondary to the environmental requirements within those treaties.⁴³ However several weaknesses in this reasoning have been identified below.

V GETTING THE BALANCE RIGHT: WHY THE ‘TRIPLE BOTTOM LINE’ APPROACH CAN BE IMPLEMENTED

While it is acknowledged that an ‘objective of the Act and the Plan is to give effect to relevant international agreements,’⁴⁴ the first criticism centres on the extent that the external affairs power necessitates the Commonwealth to implement the requirements of the treaties. According to the case of *Victoria v Commonwealth*,⁴⁵ it is clear that legislation based upon the external affairs power must be ‘reasonably capable of being considered appropriate and adapted to implementing the treaty.’⁴⁶ If not it bears the risk of being struck down by the court on the grounds that it is unconstitutional.⁴⁷ However in this case, the High Court further clarified this by stating that:

⁴⁰ House of Representatives Standing Committee on Regional Australia, Parliament of Australia, *Inquiry into the impact of the Guide to the Murray-Darling Basin Plan: Of drought and flooding rains*, (2011).

⁴¹ ‘Murray-Darling Water Meeting in Deniliquin Overflows with Farmers’, ABC (online), 13 October 2010 <<http://www.abc.net.au/pm/content/2010/s3037494.htm>>.

⁴² Kildea and Williams, above n 8.

⁴³ Ibid.

⁴⁴ Robert Orr QC, Chief General Counsel, and Ms Helen Neville, Senior General Counsel, ‘The role of Social and economic factors in the basin plan’, (Advice, Australian Government Solicitors, 25 October 2010) Para 9.

⁴⁵ *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416.

⁴⁶ Ibid, at 34 per Brennan CJ, Toohey, Gaudron, McHugh AND Gummow JJ.

⁴⁷ Ibid.

- The law under the external affairs power which implements the treaty need not implement the whole treaty; and
- The Commonwealth has a great deal of scope in deciding exactly how it will implement treaty obligations.⁴⁸

This was further explained in the case of *Project Blue Sky Inc v Australian Broadcasting Authority*⁴⁹ which stated 'Often [treaties] provisions are more aptly described as goals to be achieved, rather than rules to be obeyed'. This is relevant to the *Water Act* which sources its power from a number of identified treaties, as well as 'any other international convention that is...relevant to the use and management of Basin water resources'.⁵⁰ Hence considering the sources of power for the Act have not all been identified, and the Act may be subject to treaties which have not yet been ratified, it would be more appropriate to describe the provisions of the identified treaties as goals providing direction to the MDBA, rather than strict rules that must be obeyed.

Considering these decisions, two conclusions can be reached. Firstly the *Water Act* does not oblige the MDBA to implement the provisions of the relevant treaties that require the environment to take precedence over economic and social outcomes, and secondly the MDBA, through delegation of executive power within the Act, is given a great deal of discretion in deciding what provisions of the treaty they may implement, and how they may implement these chosen provisions.

The discretion to decide how the treaty's provisions will be implemented is conferred by section 18E(1), which grants the MDBA the functions, powers and duties that (b) relate to water and other natural resources in the Murray-Darling basin. It is a very broad provision, which allows the authority to make any relevant decision as long as the requirements of the Act are complied with.⁵¹ However the act's requirements are very unspecific, the objectives of the act in Section 3⁵² simply states that the relevant treaties, economic, social and environmental outcomes should be taken into account in giving effect to the agreements. As the treaties, simply provide direction to the authority, there is no requirement on the MDBA to not accept a triple bottom line approach.

However if it is established otherwise, and held that all requirements of the identified treaties must be implemented, a careful analysis of the treaties is necessary to discern what the specific requirements of the treaties are. It has been suggested that 'the terms of the key treaties provide an indirect avenue for the Commonwealth to take into account social and economic factors'.⁵³ In particular, 'both the Convention on Biological Diversity and the Ramsar Convention on wetlands appear to frame their

⁴⁸ Ibid.

⁴⁹ (1998) 194 CLR 355

⁵⁰ *Water Act 2007* (Cth) s4

⁵¹ *Water Act 2007* (Cth) s 18E(2).

⁵² Ibid.

⁵³ Gilbert and Tobin Centre of Public Law, Submission No 15 to Senate Legal and Constitutional Affairs Reference Committee, *A Balancing Act: provisions of the Water Act 2007*, 10 June 2011, 3.

environmental obligations in ways which permit consideration of social and economic factors'.⁵⁴

For example, the Convention on Biological Diversity requires signatories to 'as far as possible and appropriate, adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity'.⁵⁵ Therefore when this treaty is implemented in Federal legislation, it specifically requires that the relevant legislation take into account economic and social factors, so far as is possible and appropriate.

Also the current text of the Ramsar convention states 'The inclusion of a wetland in the List does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated.' Hence this treaty provides that the ratification and implementation of the treaty does not affect the nation's ability to legislate in its best interests.⁵⁶

This position was confirmed by the advice released by the Australian Government Solicitors (AGS) following the release of the Guide. This advice stated that both conventions 'establish a framework in which environmental objectives have primacy but the implementation of environmental objectives allow consideration of social and economic factors'.⁵⁷ Therefore, if this is correct, then the MDBA is still under no obligation to favour environmental outcomes at the expense of social and economic outcomes. Rather this obligation should be framed as follows: the environment should be protected to such an extent that is possible considering economic and social outcomes.

The advice stated that the Act does allow the MBDA to consider the triple-bottom-line approach:

The *Water Act* makes clear that in giving effect to those agreements the Plan needs to optimise economic, social and environmental outcomes. Therefore, where a discretionary choice must be made between a number of options the decision-maker should, having considered the economic, social and environmental impacts choose the option which optimises these outcomes.⁵⁸

The currently proposed SDL's will drastically cut the amount of water irrigators available to irrigators and will create major losses both socially and economically for many people living in the MDB.⁵⁹ Hence they can be considered unnecessary to achieving the outcomes desired by the treaties and the *Water Act*. They are unnecessary as there are a number of other more suitable strategies based on water

⁵⁴ Ibid.

⁵⁵ *Convention on Biological Diversity*, opened for signature 5 June 1992 (entered into force 29 December 1993), Article 11.

⁵⁶ *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, Ramsar, opened for signature 2 February 1971, (entered into force 8 May 1974), Article 2(3).

⁵⁷ Australian Government Solicitors, above n 44, [23].

⁵⁸ Australian Government Solicitors, above n 44, [4].

⁵⁹ Kildea and Williams, above n 8.

saving initiatives, that have been recommended by the 'Windsor Committee' report,⁶⁰ that could be implemented alternatively. These strategies are more suitable as they will optimise all three outcomes. These strategies form part of the 21 recommendations made by the committee regarding the Guide, and include establishing a national water fund to invest in water saving projects, environmental works and measures, strategic purchase of water entitlements and research to improve irrigation efficiency.⁶¹ This report opposed the view that the Act required environmental outcomes to take precedence, and rather supported the view that a triple bottom line approach could be implemented under the current legislative framework.

These, and the other various alternative strategies recommended in the report, would lead to increases in water-use efficiency within the irrigation sector.⁶² This would allow farmers to sustain their current levels of production, and therefore their livelihoods and communities and the industries reliant upon them.⁶³ Also these strategies allow for water surplus's gained through more efficient water use to be returned to the environment, increasing the amount of water available to the environment simultaneously. For example the report stated that 'Whereas the buyback program [and SDLs] are seen to be removing productive water from regions, government investment in infrastructure [alone] provides 50 percent of the water savings to the environment without reducing agricultural productivity'.⁶⁴ These strategies have much more potential for successfully achieving a 'triple bottom line' approach.

Not only are the currently proposed SDLs unnecessary, their calculation is also very impractical. According to the Act, the MDBA is given the power to express the SDLs as a formula or in any way that the MDBA determines appropriate⁶⁵. As mentioned earlier, the SDLs are proposed as a numerical figure, currently 3000 gigalitres. This is inflexible considering climatic fluctuations.

A formula that takes into account the effects of drought and years of above average rainfall is more appropriate.⁶⁶ To ensure this is achieved, it is recommended that the definition in section 4⁶⁷ for the 'environmentally sustainable level of take' should be amended to include the object of optimising economic, social and environmental

⁶⁰ On Thursday 28 October 2010 the Minister for Regional Australia, Regional Development and Local Government, The Hon Simon Crean MP, asked the Committee to inquire into and report on *the impact of the Murray-Darling Basin Plan in Regional Australia*. The Committee invites interested persons and organisations to make submissions. On Thursday 2 June 2011, the Committee tabled its report on the inquiry entitled *Of drought and flooding rains*.

⁶¹ House of Representatives Standing Committee on Regional Australia, above n 40, ch 5.

⁶² Ibid, [5.79].

⁶³ Ibid, ch 5.

⁶⁴ Ibid, 120.

⁶⁵ *Water Act 2007 (Cth)* s 23(2)

⁶⁶ House of Representatives Standing Committee on Regional Australia, above n 40.

⁶⁷ *Water Act 2007 (Cth)*.

outcomes equally, as a factor to be taken into account.⁶⁸ This would simply ensure that the triple bottom line approach is utilised when formulating the SDL's.

On the other hand, considering the unnecessary nature of the SDLs and their impracticality, it has been suggested that the legislation requiring them and other strategies of a similar be revoked.⁶⁹ Alternatively, the more relevant strategies proposed by the 'Windsor Committee' that seek to sustain and protect the environment, while providing for economic and social needs, should be incorporated into the Act instead.⁷⁰

VI CONCLUSION

This article has demonstrated that the Commonwealth government does have the ability to implement a 'triple bottom line', where environmental, social and economic needs are all given equal weight, when regulating water use in the MDB under the *Water Act 2007* (Cth). This is due to a number of High Court decisions which have established that the government is given a wide discretion when implementing treaties. Further this approach is justified by the various requirements within the applicable treaties.

It has also been shown that the requirement for SDLs within the Act is both impractical and unnecessary, and would be better substituted with the strategies recommended by the 'Windsor Committee' report which are more apt to achieving the 'triple bottom line' approach.

⁶⁸ Commonwealth, Productivity Commission, *Market Mechanisms for Recovering Water in the Murray-Darling Basin Research Report* (2010) 114.

⁶⁹ National Irrigators Council, Submission No 19 to Senate Legal and Constitutional Affairs Reference Committee, *A Balancing Act: provisions of the Water Act 2007*, 10 June 2011; Cotton Australia, Submission No 43 to Senate Legal and Constitutional Affairs Reference Committee, *A Balancing Act: provisions of the Water Act 2007*, 10 June 2011, 3.

⁷⁰ House of Representatives Standing Committee on Regional Australia, Parliament of Australia, *Regional Committee release report on impacts of the Guide to the proposed Murray-Darling Basin Plan*, (2011).

THE FUTURE OF FINANCIAL ADVICE REFORMS: RESTORING PUBLIC TRUST AND CONFIDENCE IN FINANCIAL ADVISERS – AN UNFINISHED PUZZLE

MARCUS AP

I INTRODUCTION

In a media release on the Future of Financial Advice (FOFA) reforms, the assistant treasurer and minister for financial services and superannuation, Bill Shorten MP said

[i]t is a concern that only one in five Australians access financial advice. These reforms will restore trust and confidence in the sector following collapses such as Storm, Westpoint and Trio. They also remove the red tape that has prevented low-cost, good quality advice being delivered to millions of Australians.¹

In order to ‘restore trust and confidence’ in the financial services industry, the FOFA draft legislation proposes a ‘best interest’ obligation that requires financial advisers to give priority to client their interests when giving advice,² enhancements to the licensing and banning powers of ASIC,³ changes to the charging of on-going fees with new disclosure and service renewal provisions,⁴ and the banning of specific types of adviser remuneration structures.⁵ However, this paper contends that further reforms will need to be implemented to properly restore public faith in the financial advice sector, because issues about adviser competence and professional standards that were raised in the Parliamentary Joint Committee *Inquiry into Financial Products and Services in Australia* (Ripoll Inquiry) have not been addressed in the FOFA bills.⁶ Without taking a holistic approach to reforming the industry, which includes

¹ Bill Shorten the Assistant Treasurer and Minister for Financial Services and Superannuation, ‘Future of Financial Advice – Draft Legislation’ (Media Release, no. 127, 29 August 2011) <<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/127.htm&pageID=003&min=bris&Year=&DocType=>>

² Corporations Amendment (Future of Financial Advice) Bill 2011 (Cth) cl 961C (1).

³ See, eg, Corporations Amendment (Future of Financial Advice) Bill 2011 (Cth) sch 1 items 2 – 8; Explanatory Memorandum, Corporations Amendment (Future of Financial Advice) Bill 2011 (Cth) ch 3.

⁴ Corporations Amendment (Future of Financial Advice) Bill 2011 (Cth) div 3.

⁵ See, eg, Corporations Amendment (Further Future of Financial Advice) Bill 2011 (Cth); Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice) Bill 2011 (Cth).

⁶ The Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Financial Products and Services in Australia* (2009).

improving the minimum competency levels of the people who give financial advice, attempts to improve consumer confidence in the financial advisory industry will be significantly hindered.

This paper will provide a brief overview of the Ripoll Inquiry and key issues that were identified in the report. It will then outline the Ripoll Inquiry recommendations that have been implemented in the FOFA reforms, followed by important recommendations that have been omitted from the FOFA draft legislation, in particular, the failure to address issues regarding adviser competency, ethics training and continuing professional development. This issue is closely linked with concerns about the wide range of people who advertise themselves to be financial advisers and yet provide significantly differing services with varying levels of knowledge and skill.⁷ This creates confusion about professionalism and the services provided by financial advice industry. It is therefore difficult for consumers to select an appropriate adviser who can provide services that meets their financial needs.⁸ Furthermore, the FOFA reforms fail to address calls for the restriction of the use of the term ‘financial adviser’ and mandatory membership of advisers to a self-regulating body.⁹ It will argue that these issues need to be addressed before progress can be made to restore consumer trust and confidence in the financial advice industry. This is because the recommendations outlined in the Ripoll Inquiry are not mutually exclusive and it cannot be reasonably expected that selective implementation of the inquiry recommendations will be effective. Finally it will look at evidence that indicates further industry reform and legislation is likely to be implemented to address the issues that were omitted from the FOFA draft legislation.

II THE JOINT PARLIAMENTARY COMMITTEE INQUIRY INTO FINANCIAL PRODUCTS AND SERVICES

In 2009, the Parliamentary Joint Committee conducted an *Inquiry into Financial Products and Services in Australia* (Ripoll Inquiry) ‘on the issues associated with recent financial product and services provider collapses, such as Storm Financial, Opes Prime and other similar collapses.’¹⁰ The committee identified ‘two broad issues behind the debate on the regulation of financial products and services.’¹¹ The first is that the collapse of financial product and service providers Storm Financial and Opes Prime highlighted, *inter alia*, the existence of an advice-sales

⁷ See, eg, *Ibid* 90 [5.87]; BFPPG, Submission No 251, The Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Financial Products and Services in Australia*, 2009, 21.

⁸ The Parliamentary Joint Committee on Corporations and Financial Services, above n 6, 90 [5.87]

⁹ Financial Planners Association of Australia, *FPA Calls On Minister Shorten to Recognise Financial Planning Profession Under Law* (13 April 2011) Adviser Voice

<<http://www.adviservoice.com/2011/04/fpa-calls-on-minister-shorten-to-recognise-financial-planning-profession-under-law>>.

¹⁰ The Parliamentary Joint Committee on Corporations and Financial Services, above n 6, 1.

¹¹ *Ibid* 69 [5.1].

conflict in the financial advice industry. This conflict can largely be attributed to ‘the industry’s historical beginnings, particularly the emergence of financial advisers as a sales force for product manufacturers, which is a legacy [that is] potentially inconsistent with contemporary expectations that financial advisers provide a professional service that meets their clients’ best interests.’¹² The committee identified arguments¹³ that ‘the tension between the industry’s dual sales and advice functions should be clearly resolved in favour of regulations that mandate a higher level of professionalism and better protect consumers from the negative consequences of conflicted advice.’¹⁴

This advice-sales conflict is addressed through a combination of several committee recommendations. The primary recommendations that, when implemented concurrently, result in priority being given to the provision of financial advice over any product sales motivations are recommendations one; ‘that the Corporations Act be amended to explicitly include a fiduciary duty for financial advisers operating under an AFSL, requiring them to place their clients’ interests ahead of their own,’¹⁵ and recommendation four; ‘that the government consult with and support industry in developing the most appropriate mechanism by which to cease payments from product manufacturers to financial advisers.’¹⁶

The other broad issue is

whether advice about financial products, or the financial products themselves, are responsible for poor investment outcomes. This question is important because the answer dictates whether the focus of regulation needs to be on improving the quality of financial advice, or identifying and restricting the sale of poor financial products.¹⁷

The committee came to the conclusion that it is the role of the financial advisers to prevent investment losses,¹⁸ therefore, it is poor financial advice that is responsible for poor investment outcomes. The committee focused its recommendations primarily on regulatory issues concerned with the advice given about investment products.¹⁹ A number of regulatory issues were raised,²⁰ including adviser competency under the current licensing system.²¹ The committee found that ‘[t]he major criticism of the current system is that licensees’ minimum training standards for advisers are too low, particularly given the complexity of many financial products.’²²

¹² Ibid 69 [5.1].

¹³ Ibid 69 – 71 [5.6] – [5.10].

¹⁴ Ibid 71 [5.11].

¹⁵ Ibid 150.

¹⁶ Ibid 150.

¹⁷ Ibid 69 [5.2].

¹⁸ Ibid, 73 [5.18].

¹⁹ Ibid 72 [5.21].

²⁰ See Ibid [5.22] – [5.103].

²¹ Ibid 87 [5.76] – [5.87].

²² Ibid 87 [5.76].

The Institute of Chartered Accountants of Australia in its submission to the inquiry noted:

Currently the education requirements introduced through FSR are at a minimum level and the training courses available range from a few days to completion of a post graduate diploma or under graduate degree. All of these course options meet the regulatory requirement of a financial planner becoming compliant with ASIC Regulatory Guide 146. Australians cannot have a professional relationship with an adviser when there is such disparity in the education levels of the advisers in the industry.²³

A major problem resulting from low levels of competency is the correlation that exists with unethical conduct.²⁴ Argyle Lawyers asserted that

...the minimum competency levels that exist within ASIC Regulatory Guide 146 at the moment are completely inadequate to allow advisers, for example, to position themselves to deal with the complex ethical issues they face when giving advice, and the younger and more inexperienced they are the more likely they are to make the wrong decision and the more likely they are to be influenced by peers and superiors to take the wrong action.²⁵

Several other submissions to the inquiry also support the notion that minimum competency requirements are too low,²⁶ including a claim by AXA that 'it was too easy for prospective licensees to demonstrate that they can meet their obligations, without having the skills or resources to actually do so.'²⁷

Another issue associated with the low standards of competency is 'that the licensing system enabled too many people with minimum competency to use the term 'financial planner' in a way that is misleading to consumers.'²⁸ The Financial Planning Association of Australia suggested 'there are too many people out there holding themselves out to be financial planners when in fact they are not; they are doing a whole range of other things'.²⁹ This creates difficulties for clients to differentiate between quality financial advice given by properly trained financial planners and advice given by others whom only have knowledge of a specific type or class of product. This confusion results in some members of the public unknowingly obtaining poor advice from inadequately trained advisers, which conversely affects the public perception of the financial advisory profession. As noted by the Boutique Financial Planning Principals Group:

The public can readily identify other professions: doctors, lawyers etc by their title.

²³ ICAA, Submission No 363, The Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Financial Products and Services in Australia*, 2009, 6.

²⁴ The Parliamentary Joint Committee on Corporations and Financial Services , above n 6, 90 [5.87].

²⁵ Argyle Lawyers, *Official Committee Hansard*, Melbourne, 26 August 2009, 108.

²⁶ Ibid.

²⁷ See The Parliamentary Joint Committee on Corporations and Financial Services, above n 6, 87 – 90.

²⁸ AXA, Submission No 385, The Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Financial Products and Services in Australia*, 2009, 20.

²⁹ Ibid 89 [5.84].

²⁹ FPA, *Official Committee Hansard*, Canberra, 28 August 2009, 34.

There are, however, thousands of individuals holding themselves out to be financial planners who meet the bare minimum training or ethical requirements. In most cases these people are associated with single product areas of advice or advice that is focussed strongly into one type of asset class or investment type. There are real estate agents who call themselves financial planners so that they can offer advice on the investment of excess funds after the purchase or sale of a property. There are property developers who call themselves financial planners so that they can package the sale of their property development into superannuation funds.³⁰

The committee acknowledged

legitimate concerns about the varying competence of a broad range of people able to operate under the same 'financial adviser' or 'financial planner' banner. The licensing system does not currently provide a distinction between advisers on the basis of their qualifications, which is unhelpful for consumers when choosing a financial adviser.³¹

It took the view that the most effective way to address these issues and to increase professionalism and transparency in the industry is through the use of a professional standards board. As a result, the key recommendation that addresses the aforementioned issues was recommendation nine, which requires

ASIC [to] immediately begin consultation with the financial services industry on the establishment of an independent, industry-based professional standards board to oversee nomenclature, and competency and conduct standards for financial advisers.³²

Furthermore, the Financial Planning Association of Australia has made several submissions to define the term 'financial planner' and 'financial adviser' in the *Corporations Act 2001(Cth)*.³³ This would attempt to remove the ambiguity associated with whom may advertise themselves as financial advisers and also raise the minimum standards of those who wish to continue to identify themselves with the profession.

Trust and confidence in a professional industry is built upon the belief that the professionals working in that industry have special training and knowledge, high standards of accountability and a belief that advice given is in the best interest of the client seeking expert knowledge. Without adequate training and specialist knowledge, it is difficult to see how any of the previously mentioned factors can be fulfilled, as good advice cannot be given by an adviser whom has not been properly trained and lacks specialist knowledge. In order to restore trust and confidence in the financial advice industry, these issues must be addressed.

³⁰ BFPPG, above n 7, 21.

³¹ The Parliamentary Joint Committee on Corporations and Financial Services, above n 6, 90 [5.87].

³² Ibid 151.

³³ Financial Planners Association of Australia, *FPA Calls On Minister Shorten to Recognise Financial Planning Profession Under Law* (13 April 2011) Adviser Voice

<<http://www.adviservoice.com/2011/04/fpa-calls-on-minister-shorten-to-recognise-financial-planning-profession-under-law>>.

III IMPLEMENTATION OF THE RIPOLL INQUIRY RECOMMENDATIONS

The Joint Parliamentary Committee on Corporations and Financial Services *Inquiry into Financial Products and Services* (Ripoll Inquiry) made eleven recommendations for legislative change and regulatory improvement of the Australian financial advice and services industry.³⁴ The Government's new Future of Financial Advice (FOFA) reforms stem from these recommendations.³⁵ The new draft legislation was released in two tranches. The first tranche, released on 28 August 2011, proposes a 'best interest' obligation on financial advisers to give priority of client interests when giving advice,³⁶ enhancements to the licensing and banning powers of ASIC,³⁷ and changes to the charging of on-going fees by introducing new disclosure and service renewal provisions.³⁸

The 'best interest' obligation is the direct implementation of the first recommendation that states 'the Corporations Act be amended to explicitly include a fiduciary duty for financial advisers operating under an AFSL, requiring them to place their clients' interests ahead of their own.'³⁹ Similarly, enhancements to ASIC's licensing and banning powers are the implementation of recommendation six and eight:

- The committee recommends that section 920A of the Corporations Act be amended to provide extended powers for ASIC to ban individuals from the financial services industry;⁴⁰ and
- That sections 913B and 915C of the Corporations Act be amended to allow ASIC to deny an application, or suspend or cancel a licence, where there is a reasonable belief that the licensee 'may not comply' with their obligations under the licence.⁴¹

The second tranche, released a month later on 28 September 2011 proposes the banning of specific types of adviser remuneration structures that were raised as issues by the inquiry.⁴² The types of adviser remuneration that will be banned if the bill is passed can be generally characterized as 'conflicted remuneration' and also fees that otherwise raise suspicion or questions as to the whether the client's interests have been placed first when the advice was given.

³⁴ The Parliamentary Joint Committee on Corporations and Financial Services, above n 6.

³⁵ Explanatory Memorandum, Corporations Amendment (Future of Financial Advice) Bill 2011 (Cth) 3.

³⁶ Corporations Amendment (Future of Financial Advice) Bill 2011 (Cth) cl 961C (1).

³⁷ See, eg, Corporations Amendment (Future of Financial Advice) Bill 2011 (Cth) sch 1 items 2 – 8; Explanatory Memorandum, Corporations Amendment (Future of Financial Advice) Bill 2011 (Cth) ch 3.

³⁸ Corporations Amendment (Future of Financial Advice) Bill 2011 (Cth) div 3.

³⁹ The Parliamentary Joint Committee on Corporations and Financial Services, above n 6, 150.

⁴⁰ Ibid 151.

⁴¹ Ibid 151.

⁴² See committee recommendation four, Ibid 151.

Conflicted remuneration means any monetary or non-monetary benefit given to a licensee or representative that might influence or distort advice, by either influencing the choice of financial product being recommended or by otherwise influencing the financial product advice more generally.⁴³

It will ban all commission based remuneration schemes. This is the embodiment of recommendation four which aimed to find a mechanism to ‘cease payments from product manufacturers to financial advisers.’⁴⁴

These proposed laws are the legislative implementation of four of the eleven recommendations made in the Ripoll Inquiry. They aim to reduce consumer vulnerability to tainted financial advice and try to build and restore trust and confidence in the financial services industry.⁴⁵ However, progress to build trust and confidence in the industry will be significantly hindered without the introduction of legislation and changes to the industry that require an increase in the competence and professional conduct standards of financial advisers. This issue was addressed in recommendation nine, which called for the ‘establishment of an independent, industry-based professional standards board to oversee nomenclature, and competency and conduct standards for financial advisers.’⁴⁶ The initial response at the time by Chris Bowen MP was that the government did not support this recommendation for reasons that it is the role of the government to establish a Professional Standards Board (PSB) not ASIC.⁴⁷ He also raised concerns ‘about the costs of a separate PSB, which may be passed to consumers, and for the potential for significant overlap with the role of ASIC in enforcing competency and conduct standards.’⁴⁸

Furthermore, a closely related matter to this issue that is yet to be implemented is the restriction of the use of the term ‘financial adviser’ and ‘financial planner’ to people that have membership to the appropriate professional standards board. Until these issues have been addressed, there will remain significant deficiencies in the implementation of the Ripoll Inquiry recommendations which will hinder progress in restoring consumer trust and confidence in the financial advice industry. Despite the unenthusiastic initial response to recommendation 9 and no mention of professional standards in the FOFA draft legislation, it is likely that the Government will implement legislation based on recommendation 9 in the future. Reasons for this conclusion will be discussed in the next part of this paper.

⁴³ Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice) Bill 2011 (Cth) 8 [1.12].

⁴⁴ The Parliamentary Joint Committee on Corporations and Financial Services, above n 6, 150.

⁴⁵ See Ibid 150-151.

⁴⁶ Ibid 151.

⁴⁷ Chris Bowen Minister for Financial Services, Superannuation and Corporate Law, ‘Overhaul of Financial Advice’ (Media Release, no. 036, 26 April 2010)

<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/036.htm&pageID=&min_ceba&Year=&DocType=0>.

⁴⁸ Ibid.

IV THE REQUIREMENT FOR FURTHER LEGISLATION TO RAISE PROFESSIONAL STANDARDS AND INCREASE CONSUMER CONFIDENCE

The inquiry noted various submissions raised concerns regarding low and inconsistent minimum entry education levels, the relative ease in obtaining an AFS license, and 'the varying competence of a broad range of people able to operate under the same 'financial adviser' or 'financial planner' banner.'⁴⁹ It is recommendation 9 that attempts to remedy these issues. A primary objective of the FOFA reforms is to 'restore trust and confidence' in the financial services industry, but without the inclusion of reforms that address recommendation 9, there will continue to be issues concerning the competency and professionalism of financial advisers.

There are indicators that this significant gap will be filled in the future, although the addressing of these issues appear to still be in its preliminary stages and no specific timeline has been given for when any possible reforms may be introduced. On 24 November 2010, the Government announced the formation of the advisory panel on financial advice and professional standards, which would be chaired by Greg Medcraft, the ASIC Commissioner at the time.⁵⁰ This was followed up by ASIC's release of consultation paper 153 titled *Licensing: Assessment and professional development framework for financial advisers* in April 2011.⁵¹ This is aimed at addressing the inconsistent and relatively low education standards of entry into the financial advice and planning industry. The paper also raises discussion about ethics and continuing professional development for financial advisers.⁵² It proposes a professional development framework for financial advisers that is 'intended to enhance and maintain the competence of financial advisers, [and] lead to improvements in the quality of advice and increase consumer confidence'.⁵³

The final indication that further legislation and reforms will be introduced to supplement the FOFA bills is the statement made by the Assistant Treasurer Bill Shorten that:

Treasury will release a public consultation paper by the end of the year [2011] on restricting the term 'financial planner'. This is consistent with Minister Shorten's announcement in April this year that Treasury will provide the Government with a recommendation as to whether the term 'financial planner/adviser' should be defined in the Corporations Act and its use restricted.⁵⁴

⁴⁹ The Parliamentary Joint Committee on Corporations and Financial Services, above n 6, 90 [5.85]-[5.87].

⁵⁰ Bill Shorten, above n 1.

⁵¹ Australian Securities and Investments Commission, 'Licensing: Assessment and professional development framework for financial advisers' (Consultation Paper 153, 6 April 2011)

<<http://www.asic.gov.au/cp>>.

⁵² Ibid.

⁵³ Ibid 1.

⁵⁴ Bill Shorten, above n 1.

This is a clear response to a proposal made by the Financial Planning Association on 14 April 2011 to define the term ‘financial planner’ and ‘financial adviser’ in legislation.⁵⁵

V CONCLUSION

The introduction of an obligation for advisers to act in the best interest of the client,⁵⁶ which requires giving priority to the clients interests in the event of any conflict, bringing changes to the charging of on-going fees,⁵⁷ banning conflicted remuneration and remuneration structures that may increase consumer vulnerability to tainted advice,⁵⁸ in conjunction with increasing ASIC’s powers to prevent the issuing and banning of AFS licensees and individuals will, in part, help to build and restore trust and confidence in the financial services industry.⁵⁹

These new laws are the legislative implementation of some of the recommendations made in the Ripoll Inquiry, however, without introducing reforms to the competence and professional standards of financial advisers, restrictions on the use of the term ‘financial adviser’ and ‘financial planner,’ there will remain significant deficiencies in the implementation of the Ripoll Inquiry recommendations. If these deficiencies remain, it will hinder progress in restoring trust and confidence in financial advisers. Therefore it is likely that there will continue to be further implementation of legislation concerned with the financial advice industry. Indicators of government plans to introduce new legislation include statements made in media releases for a discussion paper to be released on the restriction of the use of the term ‘financial planner,’ the formation of an industry based advisory board on professional standards, and discussion papers such as the ASIC 153 paper regarding the licensing and professional development framework for financial advisers.

⁵⁵ Financial Planners Association of Australia, above n 8.

⁵⁶ See Corporations Amendment (Future of Financial Advice) Bill 2011 (Cth) cl 961C (1).

⁵⁷ See Corporations Amendment (Future of Financial Advice) Bill 2011 (Cth) div 3.

⁵⁸ See, eg, Corporations Amendment (Further Future of Financial Advice) Bill 2011 (Cth); Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice) Bill 2011 (Cth).

⁵⁹ See, eg, Corporations Amendment (Future of Financial Advice) Bill 2011 (Cth) sch 1 items 2 – 8; Explanatory Memorandum, Corporations Amendment (Future of Financial Advice) Bill 2011 (Cth) ch 3.