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FOREWORD

It is my pleasure to welcome readers to the inaugural issue of the *Journal of the Australasian Law Teachers Association* (JALTA).

JALTA is a double-blind refereed journal that publishes scholarly works on all aspects of law. JALTA satisfies the requirements to be regarded as peer reviewed as contained in current Higher Education Research Data Collection (HERDC) Specifications. JALTA also meets the description of a refereed journal as per current Department of Education, Employment and Workplace Relations (DEEWR) categories.

JALTA was established by the Australasian Law Teachers Association (ALTA) in 2008, following a decision by the ALTA Executive to proceed with the proposal. I am delighted to have the honour of being JALTA’s inaugural Editor-in-Chief and would like to record my sincere appreciation to the ALTA Executive for being brave enough to allow me to proceed with this project.

JALTA represents an important initiative which supports the research endeavours of its members, in addition to ALTA’s highly regarded *Legal Education Review* (LER) and the Centre for Legal Education’s *Legal Education Digest* (LED), which is included in ALTA membership. The journal also appropriately reflects the prestige, maturity and development of ALTA as an organisation which now represents well over 1,000 members.

The response to this issue of JALTA has been overwhelming and we received many more submissions for consideration to be published than we imagined. All submissions have undergone a rigorous double-blind peer review and I am confident that readers will find the articles not only interesting and topical, but scholarly as well.

Finally, and most importantly, I need to extend my sincere thanks to a number of people whose collective efforts have made this journal possible. First, in addition to all members of the ALTA Executive, I would like to thank my Editorial Board colleagues for their counsel and support. Second, I must thank ALTA Interest Group Convenors and all referees who assisted us with the double-blind refereeing process. I would also like to offer my thanks to WritWrite for their exceptional work in proofreading, David Brennan for his efforts in typesetting, and to CCH Australia Ltd for their generous sponsorship and support in printing this inaugural edition of the journal. Lastly, I need to record a special thanks to Katherine Poludniewski who is ALTA’s Administrative Coordinator and ALTA Secretariat. Words cannot adequately capture the herculean effort that Katherine has put into making this journal possible. Katherine has been tireless in her work on all aspects dealing with JALTA and has been supremely organised and efficient. I can safely say that without Katherine’s contributions this issue of JALTA would simply not have been produced in such a timely and professional manner.

I commend this issue of JALTA to all readers and ALTA looks forward to continuing to contribute to the legal profession through this journal.

Professor Dale Pinto
Editor-in-Chief
JALTA
LEADERSHIP AND CLIMATE CHANGE

Stephen Keim SC*

I. INTRODUCTION

The 1973 Oil Crisis is commonly credited with causing a sustained period of stagflation. Increasing oil prices and rises in the price of grain during 2008 are already leading to social and political disruption in many countries including Australia.

The cost of limiting the growth in carbon emissions will have economic and social impacts. Reducing current greenhouse gas emissions by more than 50% before 2050 provides more significant challenges. The impact on prices of goods and on the competitiveness of particular industries of such reductions will be profound.

The adjustments required to make significant emission reductions may have to take place in a world which is adjusting to ‘peak oil’. Weaning economies off the export and use of coal for static electricity production at the same time as one’s access to petroleum is limited by an inability to increase world oil production will be asingularly difficult task.

Many consider that the hole in the Intergovernmental Panel on Climate Change (IPCC) doughnut is the failure of that organisation to address the increased likelihood of large scale increases in world sea levels through the melting of polar ice caps. The threatened loss of the world’s most expensive urban landscapes may destroy economic confidence well before millions of Bangladeshis are forced to flee, permanently, their homes.

Adjustment to climate change will be needed at the same time that emissions reductions are required to prevent more climate change. Most frightening is the prospect that, at any point in time in the foreseeable future, the oceans will store more than 50 years of climate change impacts resulting from the emissions that have already occurred.

Preventing and coping with climate change will require social and political leadership of the highest calibre. The need for such leadership will not subsist for five or six years, the period of the last world war. It will not subsist for a decade, the approximate period of the worst years of the Great Depression. The need will subsist for at least 50 years, perhaps, double that.

The leadership which is needed is not leadership which creates a false crisis and then responds to it: the leadership of the war on terror. It is not leadership just at the political level. It will be needed in all aspects of our society, in government, in educational institutions, in industry, and in the organisations that constitute civil society.

We, who are used to pusillanimous leadership from our politicians, will be tempted to despair at such a great need and wonder from where such leadership may come.

The purpose of this paper is to seek inspiration. Who, I ask, are the role models to whom we should look to respond to our society’s needs in this prolonged period of challenge? What should we demand from the leaders that we have? Who, from the past and present, can provide the inspiration that might allow each of us to provide some of the leadership our societies need to restrict, and cope with, the threat of climate change.


The three people discussed in this paper provide some of the qualities needed to provide the inspiration we require. One reason why the misinformation campaigns of the fossil fuel industry have been so successful among our politicians is the difficulty of imagining a threat to society as profound as climate change. Tim Flannery, Al Gore and many like them have assisted politicians to understand the enormity of the threat. Nicholas Stern and, more recently, Ross Garnaut have allowed us to imagine that responding to the threat of climate change can be successful.

We need to go further. We need to imagine the sort of people that we need to get that response going. Even more importantly, we need to imagine the sort of people to lead when the going gets tough; when there is much more to be done; when the bad news and the difficulties still outnumber and outweigh the happy stories and the signs of improvement.

This paper is a tiny step along the path of that imagining.

II. MEASURING THE TRUTH: DAVE KEELING

On 20 June 2005, Charles David Keeling died at his Montana home of a heart attack. In a speech marking Dave Keeling’s passing and honouring his scientific work, the director of his institution, the Scripps Institution of Oceanography, compared Dave’s measurements of background levels of carbon dioxide in the atmosphere to Tycho Brahe’s measurement of the planets and Albert Michelson’s measurements of the speed of light.6 Brahe’s work had paved the way for the work of Isaac Newton and Galileo Galilei. Michelson’s work made possible the theoretical contribution of Albert Einstein to our understanding of the universe. Dave Keeling’s work has given us a chance to prevent extinction for many species, including our own.

It was Dave Keeling’s love of the outdoors and the environment that led him to the field in which he made his great scientific contribution. As a postdoctoral student at the California Institute of Technology (Caltech) in the mid-1950s, Dave was committed to his work as a chemist but he spent as much time as he could find climbing mountains and exploring woodland rivers. He chose research projects that would keep him in direct contact with wild nature. Measuring the level of carbon dioxide in the open air was a pretty good decision in that regard.7

Prior to Dave Keeling taking up the task, a group of Scandinavian scientists had attempted the task of measuring CO2 concentrations in the atmosphere and been discouraged by the widely fluctuating readings as pulses of the gas from natural or artificial sources came by the measuring instruments. One commentator had described the task as ‘almost hopeless’.8

In tackling the task, Dave Keeling had to create his own tools. No instrument available to purchase had the necessary accuracy to make the kind of fine measurement that was necessary. Months of hard work and ingenuity, therefore, went into solving that initial problem.9 While still based at Caltech, Dave used his newly made instrument to measure levels of carbon dioxide in pristine locations around California including Big Sur, an area that was both mountainous and coastal. He began to get the same reading from a number of locations and on different days. Having achieved a degree of stability in his measurements, when fluctuations occurred, he was able to track down the source of the interfering concentrations. He was scrupulous and tireless in this pursuit. At last, he knew that

6 The speaker was Director of the Scripps Institution of Oceanography at the University of California, San Diego, Charles Kennel. For a report of the speech, see Charles Kennel, ‘Climate Science Pioneer: Charles David Keeling’ (Press Release, 22 June 2005) <http://scrippsnews.ucsd.edu/Releases/?releaseID=687> at 2 December 2008.


9 Ibid 25.
measuring the background level of carbon dioxide in the atmosphere was possible. But this was only the beginning.

Roger Revelle, a former director of the Scripps Institution of Oceanography and the person who recruited Dave Keeling to that institution, later, said of him:

Keeling’s a peculiar guy. He wants to measure CO2 in his belly. And he wants to measure it with the greatest precision and greatest accuracy possible.\(^\text{10}\)

Newly ensconced at Scripps, Dave lobbied hard to get the funding necessary to construct the new generation of precision instruments necessary to achieve the level of accuracy that would make his readings useful to science. He succeeded and, in September 1957, had one such instrument set up in Antarctica and, in March 1958, another set up atop the volcanic peak of Mauna Loa in Hawaii. Even in such pristine locations, sources of error were lying in wait: petrol-driven machinery in Antarctica and vents in the side of the volcano on Mauna Loa. But they were no match for Dave Keeling who chased them down.

Thus was born the famous Keeling curve, showing extensive seasonal variations but a steady increase in the base level. With a short break in 1964, when the funding ran out briefly, the Scripps Observatory has maintained the Mauna Loa readings to this day. They show that the steady increase has taken the level from 315 ppm (parts per million) in 1958 to over 380 ppm today.\(^\text{11}\) Dave Keeling’s dedication to measuring CO2 levels, and getting it right, has produced the most uncompromising evidence of all that our addiction to burning fossil fuels is fundamentally changing the thin layer of gases upon which life on earth depends.

In a paper submitted on 25 March 1960, the combination of Dave Keeling’s visceral understanding of the importance of measuring CO2 levels, his tireless devotion to technical accuracy, and his keen scientific instincts combined to point the way to knowledge that many are still trying to absorb. He wrote:

Where data extend beyond one year, averages for the second year are higher than for the first year. At the South Pole, where the longest record exists, the concentration has increased at a rate of about 1.3 ppm per year. Over the northern Pacific Ocean the increase appears to be between 0.5 and 1.2 ppm per year. Since measurements are still in progress, more reliable estimates of annual increase should be available in the future. At the South Pole, the observed rate of increase is nearly that to be expected from the combustion of fossil fuel (1.4 ppm) if no removal from the atmosphere takes place …\(^\text{12}\)

Dave Keeling’s search for truth is carried on by his son, Ralph Keeling, the current director of Scripps CO2.

### III. TELLING THE TRUTH: DR. JAMES HANSEN

Mark Bowen’s book about Jim Hansen and the attempts to silence him begins as follows:

One sweltering June afternoon in 1988, an understated Iowan named Jim Hansen turned global warming into an international issue with one sentence. He told a group of reporters in a hearing room, just after testifying to a Senate committee, it’s time to stop waffling … and say that the greenhouse effect is here and affecting our climate now.\(^\text{13}\)

Jim Hansen’s approach to life is reflected in his approach to science. It is about the relationship between the truth, the evidence and what we would like the evidence to be. He attributes his approach to a quote from the famous, Nobel Prize-winning physicist, Richard Feynman:

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10 Ibid 36.
13 Bowen, above n 6, 1.
The only way to have real success in science ... is to describe the evidence very carefully without regard to the way you feel it should be. If you have a theory, you must try to explain what’s good about it and what’s bad about it equally. In science you learn a kind of standard integrity and honesty.  

Jim Hansen commenced employment as a postdoc at NASA’s Goddard Institute for Space Studies (GISS) in New York in January 1967. He is still there and has been the director of GISS since 1981. His early work at GISS involved using the light-scattering effects of particles in the atmosphere to identify aspects of the atmosphere of Venus. This equipped Jim to work on the heating of earth’s atmosphere by sunlight as part of GISS’s work in developing a computerised weather model, which also commenced in 1967 as part of an international program called the Global Atmospheric Research Program.

Jim Hansen suggested that GISS develop a Global Climate Model (GCM) in 1975. Funding was not available until the following year. In an era of off-the-shelf computer models for flood studies, waste-water analysis and even cyclone frequency, the use of computer modelling seems almost a substitute for scientific endeavour. The impression is very misleading. The world’s climate system is extremely complex. A large number of factors impact on the system, producing complex and dynamic interactions. Each of those factors were only to be effectively incorporated into the model by a painstaking combination of measurement, analysis using the principles of theoretical physics and chemistry, and meticulous checking of the model results against climate in the real world. Hansen places particular emphasis on the importance of real-world data. He said in 2007:

Even now I argue that the record of the history of the earth is much more useful in ... giving us an understanding of what the [human] impact is going to be ... than models per se.

As part of this affinity with real-world data, Jim’s group began assembling a global database of temperature readings going back to the late 1800s. This would not only inform the theory on which the model was developed but also allow detailed checking of its accuracy as development proceeded.

Jim Hansen is best known for his courage in speaking out about climate change and for alerting Congress, the United States and the world about the dangers of continued use of fossil fuels. His ability to speak out, however, is the product of his scientific contribution to the study of the subject. By 1988, the GCM developed by Jim’s team at GISS was retroactively able to predict temperature changes by applying what was now 30 years of data from Dave Keeling’s Mauna Loa facility. The departures from straight-line changes, associated with the cooling caused by volcanic interruptions, allowed calibration and confirmation of the accuracy of the modelling. The advanced ability to model real-world climate and, thereby, make accurate predictions of future changes based on differing scenarios of CO2 levels was assisted by the use of some advanced mathematical physics to reduce the amount of computation time. Jim’s group used the mathematics developed by Akio Arakawa to allow the model to use larger grids in simulating the earth and predicting its climate. This not only allowed the work to proceed when funding restrictions prevented

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14 Ibid 53.
15 Ibid 191.
16 Ibid 198.
17 Ibid 198.
18 Ibid 200-01.
20 Weart, above n 8, 20.
21 Bowen, above n 6, 208.
22 Ibid 208.
the acquisition of modern computing capacity. It also allowed detailed modelling of past climate and accurate prediction of future climate to be carried out. For another 20 years, Jim Hansen has worked over 80 hours per week, improving the GCM; incorporating new data including the detailed information about palaeo-climate from ice cores and cores taken from the bottom of freshwater lakes and the ocean floor; and refining the predictions of past and future climate.

Despite all this, as I mentioned, it is not for his science but his willingness to speak the truth about the results of the science to legislators and the public for which Jim Hansen is famous.

It wasn’t the first time that Jim Hansen had given evidence to a Congressional Committee. However, 23 June 1988, 20 years and two weeks ago, was a very hot day in a very hot and dry year in the northern United States and across northern Europe and Asia. Thoughts of 1934 and the Dust Bowl were not far from many people’s minds.

It was on that day that Jim Hansen told the sweating crowd in the Senate Committee room that he was 99% sure that humans were already heating the planet. He said: ‘The greenhouse effect has been detected, and it is changing our climate now.’

The comments caused a sensation. They were widely reported. Almost single-handedly, Jim Hansen had made ‘global warming’ a term that we could all recognise and understand.

Jim Hansen suffered as a result of his 1988 comments. It was not only politicians and the fossil fuel industry who criticised his outspokenness. Many of his fellow scientists did not approve of his preparedness to communicate with the public without the usual set of qualifications and caveats which form such an essential part of science-speak. Ironically, many of the scientific colleagues who so criticised Jim had a far less complete knowledge of what the science was revealing than he did, coming as they were from the limited perspective of their particular specialties. Many have gradually caught up with his understanding over the ensuing two decades.

Eventually, Jim Hansen went back to concentrating on his scientific work and left the public statements on global warming to others.

However, after five years of inaction — indeed, positive subversion by the administration of George W Bush — and 17 and a half years after his 1988 Senate testimony, Jim Hansen decided it was time again to take up the cudgels in public. On 6 December 2005, at a meeting the American Geophysical Union (AGU) in San Francisco, he delivered a speech. Fittingly, he had been invited by the AGU to give a speech in memory of Dave Keeling, the first of our three subjects for today’s talk.

In his Keeling speech, Jim Hansen said:

Earth’s climate is nearing, but has not passed a tipping point, beyond which it will be impossible to avoid climate change with far ranging consequences. … The Earth’s history suggests that with warming of 2-3 degrees C … sea level will [rise about] 25 metres. …


24 Bowen, above n 6, 221.


27 Bowen, above n 6, 231.
Real world data suggest substantial ice sheet and sea level change in centuries, not millennia.28

Thus a new period of speaking out by Jim Hansen was commenced. It has not stopped. The Keeling speech, and later press releases by GISS confirming that 2005 was the hottest year on record for the Earth, triggered the most blatant attempts yet by the Bush White House to prevent earth scientists, including Jim, himself, from telling the public the results of their work. Jim spoke out and exposed that censorship, giving rise to Congressional investigations and forcing Bush’s political appointees in government institutions, at least, to retreat to the more clandestine methods they had previously used to muzzle scientists. Jim’s bravery encouraged (literally) other scientists in various institutions across the United States to speak about the censorship and political pressure they had been experiencing.29

And through it all, Jim Hansen has continued to communicate to the public the reality that his work, the work of his team, and the work of climate scientists around the world has revealed: the reality of the great danger that global warming presents and the reality of the steps which must be taken now to avert at least some of the danger.

On the 20th anniversary of his 1988 Senate testimony, on 23 June 2008, Jim Hansen was invited back to Capitol Hill to commemorate his earlier momentous testimony. In his written abstract of his speech, he said:

Changes needed to preserve creation, the planet on which civilization developed, are clear. But the changes have been blocked by special interests, focused on short-term profits, who hold sway in Washington and other capitals. … But more warming is already “in-the-pipeline,” delayed only by the great inertia of the world ocean. And climate is nearing dangerous tipping points.

Climate can reach points such that amplifying feedbacks spur large rapid changes. Arctic sea ice is a current example. … ominous tipping points loom. West Antarctic and Greenland ice sheets are vulnerable to even small additional warming. These two-mile-thick behemoths respond slowly at first, but if disintegration gets well underway it will become unstoppable. In my opinion, if emissions follow a business-as-usual scenario, sea level rise of at least two meters is likely this century. Hundreds of millions of people would become refugees.30

Jim Hansen continues to fearlessly speak to us the truth.

IV. THE TRUTH IS OBVIOUS: EDDIE KOIKI MABO

My third subject of today’s talk may be thought an unusual person to follow two distinguished climate scientists. His achievements, however, and his world view, also provide us with guidance as to the leadership we require to mitigate and adapt to climate change.

Many of you, of course, and especially those of you who are from North Queensland, will know Eddie Mabo’s story much better than I can tell it. Nonetheless, it is such a story that it is certainly worth the attempt.

Eddie Koiki Mabo was born on Mer, or Murray Island, in 1936. His mother died soon after Eddie’s birth. Eddie was raised by his mother’s brother and his wife. As a result of a teenage prank, the Island Council exiled Eddie from his home island and he went to work on pearling boats and, later, in Townsville, on the railways.

In 1967, Eddie got a job as a gardener at James Cook University in Townsville. He took advantage of working at a centre of learning by sitting in on lectures and reading books in

29 Ibid 257-259.
the library. His interests included discovering what the world of learning said about his people and his culture.

The truth for which Eddie Mabo is famous comes from a much repeated anecdote of a conversation between university gardener Mabo and history professors, Noel Loos and Henry Reynolds. Loos tells the story as follows.

[W]e were having lunch one day in Reynolds’ office when Koiki was just speaking about his land back on Mer, or Murray Island. Henry and I realised that in his mind he thought he owned that land, so we sort of glanced at each other, and then had the difficult responsibility of telling him that he didn't own that land, and that it was Crown land. Koiki was surprised, shocked and even ... I remember him saying 'No way, it's not theirs, it's ours'.31

From that point onward, Eddie Mabo threw himself into campaigns for Aboriginal and Torres Strait Islander land rights. A strong speech at a Land Rights Conference held at James Cook University in 1981 about his understanding of land ownership and land inheritance on Mer convinced at least one lawyer in the audience that a test case was worth bringing. Eddie Mabo, along with other Torres Strait Islander elders, became a plaintiff in the case which, in most people’s minds, is simply called Mabo or Mabo (no.2).32

The case was commenced in the High Court in 1982. It was remitted to the Supreme Court of Queensland for a finding of facts. Justice Moynihan’s decision on the facts was not particularly favourable to Eddie Mabo, personally, and he is reported to have been very disappointed and discouraged for one of the few times in his life.33

Eddie Mabo did not live to see the landmark decision of the High Court that found that the common law recognised native title of Aboriginal and Torres Strait Islanders.34 He died of cancer aged 56 on 21 January 1992. The High Court handed down its decision on 3 June the same year.

It takes a strong vision and a great sense of belief in oneself and one’s culture to conclude that the science of anthropology, the makers of maps, and the law of the country in which you live have simply got it wrong, and to retain the belief that the land on which you were raised remains your land. It takes a strong personality to tell the world of learning that they are wrong and you are right. Such strength of vision and personality and self-belief will be needed to deal with the danger our past use of fossil fuels has already created and to avert even greater danger.

It also takes great persistence to strive for 11 years, and even with one’s dying breath, to make that vision a reality. Eddie Mabo had that persistence.

Eddie Mabo knew an important truth and let no-one take it from him. He gave that truth to all of us.

V. THE QUALITIES OF LEADERS

A. Vision

Dave Keeling had an unusual vision: that background levels of carbon dioxide were measurable and that measuring it accurately was important. It turned out to be a crucially important insight.

Jim Hansen’s vision was more complex. He could envisage the importance of real-world data of the past to predicting the futures among which we must choose. He found ways of solving the problems of theoretical physics that modelling real-world complexities

31 ‘Eddie Mabo Biography’, Biography Base  
33 ‘Eddie Mabo Biography’, Biography Base  
threw up. And he could see ways to apply other scientists’ advances almost before they were made.

Eddie Mabo’s vision was home-grown and tenacious. He saw what his people had told him about land ownership on Mer. He kept that vision in his heart and no ‘clever person’ would persuade him that he and his people were wrong. Eventually, enough ‘clever people’ shared his vision.

B. Persistence
The persistence of Eddie Mabo is obvious. It would have been so easy for him to say: ‘I guess you’re right’ to those who contradicted him. But he kept on reading books and kept on talking about his vision. And when he found a means of bringing a case and lawyers to help him, the task had just commenced. He saw it through. Only his life gave out.

Dave Keeling also persisted until his heart stopped beating. He needed persistence even to construct the instrument and chase down the interference to establish that carbon dioxide could be reliably measured. Even when the importance of the Keeling curve had been established, he realised that the continued accuracy and reliability of the data he could provide had lost none of its importance and he kept on providing it.

And Jim Hansen keeps on persisting. Two weeks ago, he repeated and expanded upon his warning of 20 years before that. That repeat warning is backed by a new scientific paper in press. The importance of what he has to say does not alter the quality of the science which allows him to say it.

C. Courage
Courage may well be the most important quality in the leadership we require to grapple with and restrict the impacts of global warming. And our three iconic figures have, in their lives and their work, displayed no lack of courage.

Every time Jim Hansen speaks, the attack dogs of the fossil fuel industry, in their various disguises, launch fresh attacks on his integrity and his credibility. Yet, he keeps coming back to speak again.

For Dave Keeling, it was the courage to pursue an idea that others thought was impossible to achieve and few, if any, thought was important. And he never ceased pursuing it.

Perhaps Eddie Koiki Mabo was the most courageous of all. His was the courage of a person whose idea was thought ridiculous even by his well qualified friends. His was the courage of the downtrodden to persist against the ridicule of the dominant culture. And his was the courage to persist when, to all but yourself, the cause looked hopeless. But Eddie displayed that courage. And he succeeded.

Even as the debate on the shape and timing of a promised emissions trading system in Australia starts to get a little rough, the need for long-term leadership becomes even more obvious. The leadership required will include the qualities of courage, vision and persistence displayed throughout their lives by the three exemplars about whom I have spoken today.

VI. EPILOGUE
While today’s talk is about leadership and inspiration in a world facing climate change, there is a deeper to point to make. Just as Tim Bonyhady and Peter Christoff’s book on Climate Change Law indicates that there is enough law on the subject to fill an undergraduate or master’s course, there is enough history of climate change science to fill

35 ‘Libs Unlikely to Back Emissions Scheme’, Sydney Morning Herald (Sydney), 29 June 2008  
36 Tim Bonyhady and Peter Christoff, Climate Law in Australia (2007).
similar units in our history schools (and our science faculties). Our sociology departments should be investigating our lemming-like behaviour and trying to find explanations for our failure to demand more of our politicians and less of our fossil fuel industry. Hopefully, our marketing schools in our business faculties will be drawing the attention of their students to the remarkable way in which the denialist industry uses the tactics and strategies, and even the same consultants, as our tobacco industries used for so many years. Hopefully, they will collaborate with our ethicists wherever in our universities they may be found.

The threat of climate change is part of our history as well as something that may destroy our future. It is a proper subject for study in all of its aspects.

37 A recommended textbook would be the following: Guy Pearse, High and Dry: John Howard, Climate Change and the Selling of Australia’s Future (2007).
CENTRE OF MAIN INTERESTS UNDER THE AUSTRALIAN
CROSS-BORDER INSOLVENCY ACT 2008:
LESSONS FROM THE UNITED STATES

ANIL HARGOVAN*

The recent passage of the Cross-Border Insolvency Act 2008 (Cth) in Federal Parliament brings Australian domestic law a step closer to the United Nations Commission on International Trade Law (UNCITRAL) Model Law and in line with many of Australia’s trading partners. The aim is to allow foreign creditors and foreign insolvency practitioners easier access to Australian assets of debtors. The application of the Model Law is dependent upon the operation of many factors, including the concept of centre of main interests (COMI) which is integral to the recognition procedures in the Model Law. It impacts on the ability of creditors to exercise their rights against the debtor’s business and assets. Neither the Cross-Border Insolvency Act 2008 (Cth) nor the Model Law, however, offer a definition of COMI. The purpose of this article is to explore the meaning and the potential application of COMI in Australia. This article assesses, with reference to recent judicial precedents in the United States, the likely operation of COMI in Australia. An examination of this issue is useful for the potential guidance it can offer to Australian courts when considering the concept of COMI in our jurisdiction.

I. INTRODUCTION

Many complex issues may arise in the context of cross-border insolvency, including the principal issue of identifying and satisfying conditions for recognition of a foreign insolvency proceeding and for granting relief. The location of a debtor’s centre of main interests is of great significance in cross-border insolvencies. It impacts on the ability of creditors to exercise their rights against the debtor’s business and assets. The Cross-Border Insolvency Act 2008 (Cth) applies the concept of ‘centre of main interests’ (COMI) to allow a court to determine whether a proceeding is a ‘foreign main proceeding’ or a ‘foreign non-main proceeding’.

However, neither the Cross-Border Insolvency Act 2008 (Cth), nor the UNCITRAL Model Law on Cross-Border Insolvency on which it is based, offer a definition of COMI. The reason for this deliberate omission is provided in the Explanatory Memorandum to the Bill:3

The Bill does not seek to define COMI as a considerable body of common law exists in overseas jurisdictions in relation to that concept. It is expected that Australian courts will be guided by that body of law in considering the definition of COMI in the context of the Bill. Such an approach will ensure that Australian law is in harmony with that in other jurisdictions.

The purpose of this article is to explore the meaning and the potential application of COMI in Australia as a result of the enactment of the Cross-Border Insolvency Act 2008 (Cth). This article assesses, with reference to judicial precedents in the United States following a spate of cases arising from the fallout of the subprime crisis and global credit crunch, the likely operation of COMI in Australia. An examination of this issue is useful for the

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1 The Cross-Border Insolvency Act 2008 (Cth) has now been passed and received royal assent on 26 May 2008. Part 1 of the Act commenced on that date. Parts 2, 3 and 4 of the Act came into effect on 1 July 2008.
3 Explanatory Memorandum, Cross–Border Insolvency Bill 2008 (Cth).
4 See below Part III.
potential guidance it can offer to Australian courts when considering the concept of COMI in our jurisdiction.

Part II of this article provides an overview of Chapter III of the Model Law which contains key provisions dealing with recognition of a foreign proceeding and relief. The operation of Chapter III of the Model Law is pivotal in cross-border insolvencies as it is concerned with a threshold requirement of recognition that must be met. The incorporation of Chapter III into the Cross-Border Insolvency Act 2008 (Cth) addresses the fundamental question of whether foreign insolvency proceedings will be recognised in Australia and, if so, the extent to which Australian courts will give effect to those foreign proceedings. Part II of this article focuses attention on the relevant provisions in Chapter III of the Model Law, in particular Articles 15-21, concerned with such issues. Part III of the article provides commentary on the potential application of Articles 15-21 with reference to international jurisprudence that has focused on the Model Law. It surveys the judicial approaches adopted in the United States and highlights the judicial tension and controversy that currently exists in the United States demonstrating the absence of a uniform approach to the threshold requirement of recognition. Notwithstanding the uncertain position in the US to date, there are some interpretational aspects of the decisions that may be instructive for Australian courts. Thus, Part IV draws on the lessons from the US experience and concludes with some observations about the way forward in the interpretation and application of Chapter III of the Model Law.

II. RECOGNITION OF FOREIGN PROCEEDINGS AND RELIEF

One of the main aims of the new Cross-Border Insolvency Act 2008 (Cth), for the purposes of this article and for practitioners, is to encourage cooperation between courts and insolvency practitioners of different jurisdictions. This is achieved through the key mechanism of recognition, located within Chapter III of the Model Law and incorporated into the Cross-Border Insolvency Act 2008 (Cth) through operation of s 6 of the Act which confers the force of law onto the Model Law in Australia. The design principles, centred on the recognition of foreign proceedings, form the focus of the discussion below.

Article 17 of the Model Law sets out the criteria affecting the decision to recognise foreign proceedings. Essentially, recognition turns on the satisfaction of the concepts relating to ‘foreign main proceeding’ and ‘foreign non-main proceeding’. In turn, Article 2 of the Model Law defines the former as taking place in the state where the debtor has the centre of its main interests (COMI); in contrast, the latter takes place in a state where the debtor has an establishment. Article 2(f) offers guidance to the meaning of ‘establishment’ by defining that concept with reference to ‘any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.’ The significance of the distinction in types of recognition ('main' or 'non-main' proceeding) lies in the nature of relief available, discussed below.

Statutory presumptions concerning recognition are available to aid in the decision to recognise foreign proceedings. Article 16 states, inter alia, that in the absence of proof to the contrary, the debtor’s COMI is presumed with reference to the debtor’s registered office, or habitual residence in the case of an individual. Insight into the purpose and operation of the presumption can be gained from the UNCITRAL Guide to Enactment of the Model Law on Cross-Border Insolvency which explains that Article 16

8 The other two assumptions concern identity of foreign representatives and authenticity of documents in support of the application for recognition.
9 See 11 USC § 1516 (2005) of the US Bankruptcy Code for a modified provision. Chapter 15 changed the Model Law standard that established the presumption to make it clearer that the ultimate burden is on the foreign representative. To this end, Chapter 15 has substituted the word ‘proof’ with the word ‘evidence’ to now read ‘in the absence of evidence to the contrary’.
allow[s] the court to expedite the evidentiary process; at the same time they do not prevent, in accordance with the applicable procedural law, calling for or assessing other evidence if the conclusion suggested by the presumption is called into question by the court or an interested party.

With regard to the recognition of foreign main proceedings, the UNCITRAL Guide to Enactment of the Model Law on Cross-Border Insolvency explicitly warns against consideration of factors other than the location of the debtor’s COMI: 10

[It] is not advisable to include more than one criterion for qualifying a foreign proceeding as a main proceeding and provide that on the basis of any of those criteria a proceeding could be deemed a main proceeding. An approach involving such a ‘multiple criteria’ would raise the risk of competing claims from foreign proceedings for recognition as the main proceeding.

Once the definitional aspects under Article 17, discussed above, are met, the decision to recognise a foreign proceeding confers many benefits; in particular, upon recognition as a foreign main proceeding which confers much broader relief.

Upon recognition of a proceeding as a foreign main proceeding, Article 20 allows for the following consequences:

a) commencement or continuation of individual actions or proceedings concerning the debtor’s assets, rights, obligations or liabilities is stayed;

b) execution against the debtor’s assets is stayed;

c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

Significantly, as seen above, recognition of a foreign insolvency proceeding produces an immediate and automatic moratorium which is capable of modification in light of local insolvency laws. Relief in respect of a foreign non-main proceeding is limited to assets that, according to local laws, should be administered in that proceeding or concerns information required in that proceeding.11 Once a foreign proceeding is recognised by the Court, either as main or non-main proceeding, Article 21 confers discretion on the Court to grant relief as necessary to protect the debtor’s assets or the creditors’ interests.

The Cross-Border Insolvency Act 2008 (Cth) tracks the provisions of Chapter III of the Model Law. The key concept of COMI, derived from the European Union Convention on Insolvency Proceedings, in the Model Law, has been adopted into Australian insolvency law; and herein lays the difficulty. Since the adoption of COMI as the gateway to recognition as a main proceeding under the Model Law, it has since remained ‘stubbornly undefined’.12

The judicial opportunity, however, for further exploration of this concept has recently arisen in the wake of the subprime mortgage crisis in the United States. Divergent judicial approaches to the application of the COMI concept in the United States, in Re SPhinX13 and in Re Bear Stearns,14 arising out of similar facts involving insolvent hedge funds have excited some controversy.15 Notwithstanding the resultant tension in US law, it is


12 Judge Leif Clark, “Center of Main Interests” Finally Becomes the Center of Main Interest in the Case Law’ (2008) 43 Texas International Law Journal Forum 14, 14.

13 Re SPhinX, Ltd (2006) 351 BR 103 (Bankr SDNY); aff’d (2007) 371 BR 10 (‘SPhinX’).


The recent decision in Re Basis Yield Alpha Fund (2008) 381 BR 37 followed the judicial approach adopted in Bear Stearns.

15 See below n 26-27.
instructive to refer to the experiences in the US jurisdiction for guidance on the potential application of COMI in Australia.

III. UNITED STATES JURISPRUDENCE

It pays to examine in detail the facts and contrasting decisions arising from both SPhinX and Bear Stearns, decided under Chapter 15 of the Bankruptcy Code which was enacted in 2005 to implement the Model Law on Cross-Border Insolvency. Both cases presented opportunities for US bankruptcy courts to consider, in a comprehensive way, the working of the Model Law in the US and are thus considered significant for this reason. Prior to the decision in SPhinX, there appears to be no published case involving a dispute over COMI under Chapter 15 of the Bankruptcy Code.

Both cases involved a Chapter 15 petition for recognition in the US Bankruptcy Court, preceded by a winding up proceeding in the Grand Court of the Cayman Islands, but with different approaches to the mandatory eligibility test for recognition discussed in Part II of this article.

A. Re SPhinX

The SPhinX Funds (‘Funds’), whose business consisted of buying and selling securities, were established as offshore entities to exploit favourable tax benefits and regulations in the Cayman Islands. Although regulated in the Cayman Islands, the Funds did not conduct a trade or business in the Cayman Islands. The Funds were prohibited as ‘exempted companies’ under Cayman Islands law from engaging in business in the Cayman Islands except in furtherance of their business conducted outside of that jurisdiction. 16

From the Funds’ inception, their hedge fund business was conducted under a fully discretionary investment management contract by another entity, a Delaware corporation located in New York City. Except for the maintenance of corporate books and records required under Cayman Islands law, the Funds had no assets in the Cayman Islands. Substantially, all of the Funds’ assets were in the United States — at least 90 percent of the Funds’ approximately $500 million of assets were located in accounts in the United States. They had no employees and no physical offices in the Cayman Islands or elsewhere. None of the directors resided in the Cayman Islands, nor were any board meetings held there. Investors, located throughout the world, sent their subscriptions to the Cayman Islands. This review facility was devised, apparently, for purposes of compliance with Cayman Islands anti-money-laundering requirements. Corporate administration of the Funds was conducted primarily in the United States. The Funds’ auditors, a major international accounting firm, had a Cayman Islands address in compliance with the requirements of local law. The evidence, however, did not make clear how much work the auditors actually performed in the Cayman Islands.

Voluntary winding up proceedings in the SPhinX Funds were commenced in the Cayman Islands. In conjunction with this event, the insolvency representatives of the SPhinX Funds filed petitions in the US Bankruptcy Court, seeking recognition of the foreign proceedings as foreign main proceedings or, in the alternative, as foreign non-main proceedings under Chapter 15 of the Bankruptcy Code. As noted in Part II of this article, Chapter 15 contains provisions substantially similar to the Australian Cross-Border Insolvency Act 2008 (Cth). 17

Of necessity, in determining when the proceeding should be recognised as a ‘foreign main proceeding’, the judicial inquiry requires an examination of COMI and its operation. The judgment in Re SPhinX, for reasons discussed below, has received trenchant criticism for its inadequate attention to the mandatory eligibility test for recognition under Chapter 15.

16 Companies Law (2004 Revision) (Cayman Islands) s 193.
17 Note, however, a significance difference discussed in Part II.
The Bankruptcy Court denied recognition of the Cayman Islands proceedings as foreign main proceedings and afforded recognition as foreign non-main proceedings. However, the Court declined relief on the facts due to the improper purpose associated with the Chapter 15 petition.\(^\text{18}\)

Controversially,\(^\text{19}\) Judge Robert Drain indicated a preparedness to recognise the case as a foreign main proceeding on the basis the funds were registered in the Cayman Islands. In reaching that position, the Court reviewed Chapter 15 and concluded that recognition of foreign proceedings involved a two-step process. Firstly, the Court must determine whether the foreign representatives should be recognised and given access to the local courts. The Court did not anticipate this task to be problematic. Secondly, the Court must determine whether the foreign proceedings can be recognised as main or non-main. Judge Drain noted that the statutory and practical effects of the distinction between foreign main and non-main were ‘not as important as the parties may believe.’ The Court was influenced by considerations of flexibility inherent in Chapter 15 and by case law which predated Chapter 15.

In determining the debtor’s COMI, Judge Drain held that\(^\text{20}\)

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\text{[factors influencing COMI] should be viewed in light of Chapter 15’s emphasis on protecting the reasonable interests of parties interest pursuant to fair procedures and the maximization of the debtor’s value. Because their money is ultimately at stake, one generally should defer, therefore, to the creditors’ acquiescence in or support of a proposed COMI …}
\]

Although the objective factors pointed to the debtors’ COMI being located outside of the Cayman Islands, Judge Drain was prepared to find the debtors’ COMI in the Cayman Islands and recognise the proceedings as foreign main proceedings for the following reasons:\(^\text{21}\)

\[
\text{[B]ecause these are liquidation cases in which competent [insolvency representatives] under the supervision of the Cayman Court are the only parties ready to perform the winding up function, and, importantly, the vast majority of the parties in interest tacitly support that approach, normally the Court would recognize the Cayman Islands proceedings as main proceedings …}
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Notwithstanding that objective facts did not show any establishment in the Cayman Islands, Judge Drain recognised the Cayman proceedings as foreign non-main proceedings.\(^\text{22}\) On similar facts, the Bankruptcy Court in *Bear Stearns* adopted a fundamentally different approach to Chapter 15 discussed below. The implications of the conflicting decisions for Australian courts are discussed in Part IV.

**B. Re Bear Stearns**

Bear Stearns operated open-ended investment companies incorporated in the Cayman Islands,\(^\text{23}\) structured as limited liability companies and subject to Cayman Islands tax law. In particular, two of the funds designed to attract sophisticated investors were registered as ‘exempted’ companies under Cayman Islands law and, similar to the facts *Re SPhinX*, resulted in the same trading restrictions and conditions discussed earlier.\(^\text{24}\)

\(^{18}\) A primary basis for the petition, as conceded by the petitioners, was to improperly frustrate a settlement by obtaining an automatic stay to block the appeal.

\(^{19}\) Contra *Bear Stearns* (2007) 374 BR 122; aff’d (2008) 389 BR 325

\(^{20}\) *SPhinX* (2006) 351 BR 103, 117.

\(^{21}\) Ibid 121.

\(^{22}\) The appellate court in *SPhinX* did not address this issue, hence no reference is made to that decision in the article.

\(^{23}\) The investment companies operated funds that invested in a range of financial products and securities including derivatives, swaps, futures, options and, significantly, mortgage-backed securities.

\(^{24}\) Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd (High Grade Fund) and the Bear Stearns High-Grade Structured Credit Strategies Enhanced Leverage Master Fund Ltd (Enhanced Fund) are collectively referred to as the ‘Funds’.
PFPC Inc (Delaware) was the administrator of the Funds. The daily function of the administrator included accounting and clerical functions, maintaining the Funds’ principal administrative records as registrar, disbursing payment of expenses of the Funds and responding to inquiries from the general public. The books and records of the Funds were maintained and stored in Delaware. Bear Stearns Asset Management Inc (BSAM), incorporated in New York, was the investment manager for the Funds and the assets managed by BSAM were located within the Southern District of New York. The investor registers were held by a related company in Dublin, Ireland.

As a consequence of the subprime mortgage crisis in the United States in early 2007, the Funds suffered a significant devaluation of their asset portfolios. The financial downturn led to margin calls from the Funds’ trading counterparties which the Funds were unable to meet. Default notices were issued by the counterparties who, in turn, elected to exercise their rights as secured creditors and sold off assets over which they held security interests.25

On 30 July 30 2007, the Funds’ board of directors filed winding-up petitions in the Cayman Islands under local company laws26 and sought the appointment of foreign representatives to act as joint provisional liquidators of the Funds. The Cayman Court granted such orders the next day, subject to the supervision of the Cayman Grand Court.

Against this factual background, the insolvency representatives of the Funds sought recognition of the Cayman liquidation proceedings in the US Bankruptcy Court under Chapter 15 of the Bankruptcy Code. Thus, in common with SPhinX, the Bankruptcy Court had to resolve the central issue of whether the Cayman Islands proceedings were either main or non-main proceedings in accordance with the definitional elements discussed in Part II of this article. The difference, however, lay in the primacy afforded to COMI as the gateway to recognition of foreign proceeding in Bear Stearns.

Judge Burton Lifland denied main recognition on the grounds that the Funds’ COMI, as defined under Chapter 15, was in the United States and not the Cayman Islands.

Unlike the two-step judicial approach adopted in SPhinX, Judge Lifland considered the process of recognition of a foreign proceeding to be single-step process which required the recognition to be coded as either main or non-main. Drawing support from academic commentators (who were also involved in the drafting of the law),27 the determination of whether the foreign proceedings were main or non-main was held to be a formulaic one requiring compliance with a rigid procedural structure. Judge Lifland endorsed the view that if the foreign proceeding is not pending in a country where the debtor has its COMI or where it has an establishment, then the foreign proceeding is simply not eligible for recognition under Chapter 15.28

Turning attention to the definitional test for recognition under Chapter 15, Judge Lifland traced the origins of the COMI concept to the European Convention, and relied on the regulation adopting the European Convention,29 and also on European case law,30 to conclude that the concept of COMI generally equates with the concept of a ‘principal place of business’ in US law.

25 For example, in June 2007, Merrill Lynch exercised its rights as a secured creditor and sold off some of the assets which exacerbated the devaluation of the Funds’ asset portfolios.
26 Companies Law (2004 Revision) (Cayman Islands).
27 Jay Westbrook, ‘Locating the Eye of the Financial Storm’ (2007) 32 Brook Journal of International Law 3; Daniel Glosband ‘SPhinX Chapter 15 Opinion Misses the Mark’ (December 2006) 25(10) American Bankruptcy Institute Journal 44. It should be noted that Judge Lifland was among the authors of the Model Law and Chapter 15 of the Bankruptcy Code.
28 Glosband, above n 27.
29 In the regulation adopting the European Convention, the COMI concept is elaborated upon as ‘the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties’: EU Council Reg (EC) No 1346/2000.
The Bankruptcy Code does not state the type of evidence required to rebut the presumption that the COMI is the debtor’s place of registration or incorporation. The Court noted, with reliance upon *SPhinX*, the variety of factors that might justify COMI status:  

[T]he location of the debtor’s headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor’s primary assets; the location of the majority of the debtor’s creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.

Turning to the facts, Judge Lifland found that the petitioners’ own pleadings provided the evidence to establish that the Funds’ COMI is in the United States, not the Cayman Islands. The Bankruptcy Court in *Bear Stearns* held:

The only adhesive connection with the Cayman Islands that the Funds have is the fact that they are registered there. … The only business done in the Cayman Islands apparently was limited to those steps necessary to maintain the Funds in good standing as registered Cayman Islands companies, thus the Funds closely approximate the ‘letterbox’ companies referred to in the *Eurofoods* decision.

Turning attention to the operation of the presumption under Chapter 15, which presumes that the COMI is the place of the debtor’s registered office but only in the absence of evidence to the contrary, Judge Lifland held that the petitioners demonstrated such evidence to the contrary in the following manner:

[T]here are no employees or managers in the Cayman Islands, the investment manager for the funds is located in New York, the Administrator that runs the back-office operations of the Funds is in the United States along with the Funds’ books and records and prior to the commencement of the Foreign Proceeding, all of the Funds’ liquid assets were located in the United States … the investor registries are maintained and located in the Republic of Ireland; account receivables are located throughout Europe and the United States; counterparties to master repurchase and swap agreements are based inside and outside the United States but none are claimed to be in the Cayman Islands.

Based on the evidence above, and in reliance upon the European Court, the Bankruptcy Court concluded that each of the Funds’ real seat, and therefore their COMI, is the United States — the place where the Funds conduct the administration of their interests on a regular basis and is therefore ascertainable by third parties.

In rejecting recognition of the foreign proceedings as main proceedings, Judge Lifland stressed the need for the Bankruptcy Court to make an independent determination as to whether the foreign proceedings meet the definitional tests under Chapter 15. His Honour noted the departure from the approach adopted in *SPhinX* and held:

I part with the dicta in the *SPhinX* decision opining that if the parties in interest had not objected to the Cayman Islands proceeding being recognized as main, recognition would have been granted under the sole grounds that no party objected and no other proceeding had been instituted anywhere else … to the extent that non objection would make the recognition process a rubber stamp exercise, this Court disagrees with the dicta in the *SPhinX* decision.

Similarly, Judge Robert Gerber in *Re Basis Yield Alpha Fund* concurred with the observations of Judge Lifland in *Bear Stearns* and held that the determination of recognition is not a rubber stamp exercise. Whilst expressing caution against the

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32 Ibid 129.
33 Ibid 130.
pendulum swinging too far to deprive parties of the use of presumptions, Judge Gerber held:37

But the decision necessarily must remain with the court, which may not be satisfied with
reliance on the presumption or not, consistent with its ultimate responsibility, and power,
to determine that the requirements of sections 1502 and 1517 [dealing with recognition for
a main proceeding] are satisfied.

On appeal to the District Court for the Southern District of New York, in Bear Stearns,38
the central issue that fell for determination centred on whether the Cayman Islands
proceedings were either main or non-main proceedings in accordance with the definitional
elements discussed in Part II of this article. Judge Robert Sweet of the District Court
affirmed Judge Lifland’s decision in Bear Stearns and, more significantly, the judicial
approach adopted in the determination of recognition. In particular, the proposition that
principles of comity (based on principles of cooperation with foreign courts) do not figure
in the recognition analysis was upheld.39 Judge Sweet held, contrary to the judicial
approach in Re SPhinX, that the plain language and history of Chapter 15 requires a factual
determination with respect to recognition before principles of comity come into play.

Judge Sweet also affirmed that the appellants in Bear Stearns had failed to allege facts
establishing non-main recognition. For the latter type of recognition to arise, the debtor
must show an establishment as defined under Chapter 15 (i.e. any place of operations
where the debtor carries out non-transitory economic activity). This is a factual question,
with no presumption in favour. Judge Sweet held that auditing activities and preparation of
incorporation papers by a third party in the Cayman Islands did not constitute ‘operations’
or ‘economic activity’ by the Funds.40

In a powerful endorsement of Judge Lifland’s reasoning in Bear Stearns, Judge Sweet
expressed the hope that the resolution of the issues may provide some aid to navigation in
these uncharted waters.41

IV. LESSONS FOR AUSTRALIA

The review of the emerging US experience, in Part III of this article, is instructive for
Australian courts for its legal reasoning — notwithstanding the factual matrix in the US
cases dealing with troubled offshore hedge funds in tax havens. The value lies in the
potential guidance it offers to the Australian courts on the competing approaches in the
determination of recognition.

The approach adopted to the issue of recognition under Chapter 15, and in particular to
COMI, in Bear Stearns (by both levels of the judiciary in the Bankruptcy Court) is to be
preferred from a construction and policy perspective over the competing decision in
SPhinX for the following reasons.

The unitary approach to recognition adopted in Bear Stearns, discussed in Part III of
this article, appears to be more in tune with the Model Law which requires a proceeding to
be either a foreign main proceeding or a foreign non-main proceeding as a prerequisite to
recognition.42 If follows from the judicial analysis in Bear Stearns that if the proceeding
cannot satisfy either criteria, the Court is powerless to grant recognition. That should be
the end of the matter. In determining whether the mandatory eligibility test for recognition
is satisfied, COMI has a central role to play under the approach in Bear Stearns. Judge

37 Ibid 55.
39 Ibid 333.
40 Ibid 338.
41 Ibid 327. The amici to the District Court included members of the group that drafted the Model Law (Jay Westbrook
and Daniel Glosband) and assisted with the drafting of Chapter 15.
42 See further, Look Chan Ho ‘Proving COMI: Seeking Recognition Under Chapter 15 of the US Bankruptcy Code’
comports with the intent and structure of Chapter 15 that the determination of the existence of a foreign main or non-
main proceeding is a definitional matter, not a discretionary matter.’
Lifland’s analysis in *Bear Stearns*, as affirmed by the District Court, appears to be less tolerant in affording recognition to a jurisdiction in which the debtor has little more than a registered name and a letterbox. Judge Leif Clark observes that *Bear Stearns* attends to the structural integrity of Chapter 15, in effect counselling that only in this way can the door be closed on opportunistic filings designed to subvert the cross-border insolvency regime.\(^{43}\) The denial of access to foreign representatives in such circumstances is not inconsistent with the aims of the Model Law on which Chapter 15 is modelled.

In contrast, the judicial approach adopted in *SPhinX* does not afford the same degree of primacy to considerations based on COMI when determining recognition of foreign proceedings. This result is reached from a broader statutory construction of Chapter 15 which is plainly at odds with *Bear Stearns*.

Judge Drain’s analysis of Chapter 15 in *SPhinX* favoured a two-step process in determining recognition of foreign proceedings. Step one was to determine if the foreign representative was to be accorded recognition and access to the local court, based on mechanical considerations in Chapter 15 relating to speed and efficiency. On the premise that recognition is given, step two requires the Court to simply determine whether the foreign proceeding is a main proceeding or a non-main proceeding. This approach clearly illustrates the secondary role accorded to COMI as a determinant to recognition of foreign proceedings.

The judicial approach adopted in *SPhinX* is difficult to reconcile with the central status accorded to COMI under the Model Law and the decision in *Bear Stearns*. The risks in adopting *SPhinX* to develop a standard for recognition of foreign proceedings have been identified by Daniel Glosband: \(^{44}\)

> [T]he judgment [in *Re SPhinX*] creates a wholly unnecessary, serious and regrettable breach with European case law [*Re Eurofood IFSC Ltd* (2006) E.C.R. I-3813] on the meaning of key concepts taken from a European statute. It threatens to break the very unanimity that is meant to be at the heart of the Model Law and the goal of uniform interpretation throughout the world …

Apart from offering insight into the approach to be adopted in the determination of the threshold question of recognition in Chapter III of the Model Law, incorporated into the *Cross-Border Insolvency Act 2008* (Cth), the US cases also offer valuable guidance on the meaning of COMI. In *Bear Stearns*, discussed in Part III of this article, COMI was described as similar to the concept of principle place of business. Importantly, the Bankruptcy Court in *SPhinX* and *Bear Stearns* were influenced by the regulation adopting the EU Convention on Insolvency Proceedings which explains that COMI means “the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”\(^{45}\)

Noting that the Bankruptcy Code does not state the type of evidence relevant to the COMI determination, importantly, both US cases adopted a common approach in identifying a list of potentially relevant factors which a court may use in a COMI determination. The array of factors includes: the location of the debtor’s headquarters; the location of those who actually manage the debtor; the location of the debtor’s primary assets; the location of the majority of the debtor’s creditors or a of a majority of creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes. Given that the *Cross-Border Insolvency Act 2008* (Cth) is also deliberately silent on the standard required for the COMI determination, the US precedents (together with the regulations under the EU Convention) are instructive in this regard.

The US precedents discussed in Part III of this article are also potentially helpful in determining the weight to be given to the statutory assumption to determine COMI,

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\(^{43}\) Judge Leif Clark, above n 12, 16.

\(^{44}\) Glosband, above n 27.

notwithstanding divergent judicial approaches and statutory wording.\textsuperscript{46} This issue is particularly relevant when there is an absence of objecting parties in a case, as demonstrated in all three cases discussed in Part III.

Unlike the approach in \textit{Bear Stearns} and \textit{Re Basis Yield Alpha Fund} discussed earlier, the Bankruptcy Court in \textit{SPhinX} placed greater weight on the presumption that a debtor’s COMI is located at its registered office. In doing so, sight has been lost of the fact that the COMI presumption was designed for speed and convenience of proof, only where there is no serious controversy. The Court in \textit{SPhinX} treated the COMI presumption as having special evidentiary value when such an approach was unsupported by the facts. The courts must remain free to engage in analysis and use judicial discretion to call for evidence, or assess other evidence, as recognised by the Court in \textit{Bear Stearns} and \textit{Re Basis Yield Alpha Fund}. The preferred approach to this issue is captured by Judge Sweet of the District Court in \textit{Bear Stearns}:\textsuperscript{47}

Appellant’s emphasis on the fact that their petition was unopposed is unavailing. The lack of objection to the petition may result from any number of considerations, unknown to the court but subject to any assumption. That absence does not relieve the bankruptcy court of its duty to apply the statute as written.

In Australia, the judicial spotlight is yet to fall onto the concept of COMI and its application. Australia will do well to learn from the US experience to date, following the recent passage of the \textit{Cross-Border Insolvency Act 2008} (Cth), when it enters its uncharted waters and forges its own jurisprudence in the development of an effective cross-border insolvency regime.

\textsuperscript{46} Chapter 15 changed the Model Law wording. See above Part II.
\textsuperscript{47} (2008) 389 BR 325, 338.
E-LEARNING IN CORPORATE LAW: THE VALUE-ADD OF ONLINE RESOURCES

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ABSTRACT

The last decade has seen an amazing growth in the use of online technology in law and the development of e-learning environments generally. One aspect of this growth in the university sector has been the development, in conjunction with the major publishers, of electronic resources to support the main textbooks provided to students. This paper examines one particular set of developments around a new textbook called *Australian Corporate Law* (2008) and the perceived need for supporting e-learning materials to accompany the text. A specific arrangement was entered into with the publisher to provide a series of advanced features to support the textbook, which is primarily designed for business students studying Company Law at an undergraduate level. This paper explains the type of resources created, the pedagogical approach taken, and some of the student feedback received, placing these within the context of and emerging trends within the online learning environment. As ‘Generation Y’ attitudes towards learning become increasingly prevalent, the addition of e-learning features to traditional textbooks will be essential in order to meet student needs and expectations of learning resources.

I. INTRODUCTION

The last decade has seen an amazing growth in the use of online technologies in law. Universities around the world have been encouraging academics in all disciplines to incorporate information technology (IT) into their teaching for a number of years. In Australia, however, law schools and faculties in particular have been at the forefront of these changes, encouraging and supporting their staff through the process of integrating ‘e-learning’ into their teaching.

E-learning is a general term that encompasses a range of different approaches to teaching. These include the use of online learning resources, the implementation of formal and informal assessments, and the encouragement of online interaction and collaboration between students. However, all these approaches have one thing in common, namely the use of IT. In short, e-learning is about learning through, and being supported by, the use of IT. ¹ However, the level of reliance on IT may vary between subjects.

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Diagram 1: Continuum of learning

As illustrated in Diagram 1, some subjects are taught entirely online with no face-to-face component. Such classes are referred to, in this article, as ‘online classes’. These online classes are frequently used in distance learning. However, even though technology today is making it easy for students to enrol in distance learning, such a mode of teaching was established as early as the 18th century. On 20 March 1728, the *Boston Gazette* contained an advertisement placed by Caleb Phillips that was entitled ‘Teacher of the New Method of Short Hand.’ This was the start of teaching shorthand through the post. The material was sent weekly to the students enrolled in those classes. In the 20th century, the development of radio and then television allowed the introduction of new teaching methods to improve distance learning. For example, the University of Iowa was the first university to use educational television in its teaching. This was followed, in 1953, by the University of Houston that offered the first televised credit classes via KUHT. However, the technological tool that truly revolutionised teaching was the World Wide Web (the ‘Web’) which was invented in 1989 by Professor Tim Berners-Lee.

Many universities have also integrated e-learning with face-to-face classes. Such a method of teaching is referred to in this article as ‘blended learning’. In such blended learning units, the level of inclusion of e-learning varies from a minimal to a major online presence. Some academics may use IT simply to load information onto a website that is

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2 Phrases such as ‘distance learning’, ‘distance education’, ‘distance teaching’, ‘tele-work’, ‘tele-learning’, ‘outreach’ and ‘tele-teaching’ have been used to describe one mode of teaching. For the purpose of consistency, distance learning will be used here to describe learning that takes place at a distance. For more information on distance learning, see Barry Willis, *Distance Education: A Practical Guide* (1993).


4 KUHT was the first public television station in the United States. See Desna L Wallin, ‘Televised Interactive Education: Creative Technology for Alternative Learning’ (1990) 14(3) *Community College Quarterly of Research and Practice* 259, 260.


6 Blended learning has been defined as the integrated combination between traditional learning and IT. See Denise Whitelock and Anne Jelfs, ‘Editorial: Journal of Educational Media Special Issue on Blended Learning’ (2003) 28 *Journal of Educational Media* 99-100. However, the use of such a terminology has been criticised by Martin Oliver and Keith Trigwell who considered that ‘there is little merit in keeping the term blended learning as it is currently understood. It is either inconsistent … or redundant’. Martin Oliver and Keith Trigwell, ‘Can Blended Learning be Redeemed’ (2005) 2(1) *E-Learning* 17, 19-20.
accessible to students. Others may go further by using IT as a mode of delivery for the unit content or other material and as a mode of communication with students.

The development of IT has not only affected the teaching mode adopted by academics but it has also had a direct impact on teaching materials. This article focuses on the resource materials used in teaching Company Law.\(^7\) The reason that Company Law is considered here is because, out of the 40 Australian universities, there are 28 law schools and 40 business schools and Company Law is a compulsory subject in all of these schools. Law students are required to study this subject by the Priestley Eleven requirements.\(^8\) It is also a compulsory subject to be taught in business schools due to s 1280 of the Corporations Act 2001 (Cth), which requires all auditors to have completed Company Law before being eligible to be registered with the Australian Securities and Investments Commission (ASIC).

Part II of this paper focuses on the impact that e-learning may have on teaching methods and on the ways e-learning features can be used to create different and innovative resource materials. Part II also considers the integration of textbooks and supplementary online materials and explores the benefits of such resources. Part III focuses on the development and use of a particular textbook featuring online enhancements of this kind, entitled Australian Corporate Law.\(^9\)

II. E-LEARNING: ITS DEVELOPMENT AND IMPACT ON RESOURCE MATERIALS

The extent of the impact e-learning has recently had on modes of teaching is quite a natural development in view of the historical impact technology has had on teaching practices. This began in the 1920s when Sidney Pressey, an educational psychology professor at Ohio State University, created the first teaching machine. This device offered practice questions and multiple-choice questions to students to improve their learning.\(^10\) In 1991, the use of computers was incorporated into learning and teaching. In 1994, with the improvement of computers, interactive, multimedia, computer-based learning was introduced and this was followed in 1995 by online computer-managed quizzes and videoconference lectures. By 1996, the Web was sufficiently developed to permit internet-assisted learning and online assessments.\(^11\) Since that time, the development of online technology has allowed increasingly creative ways of teaching to emerge. Currently, online tools academics can use to enhance the quality of teaching even include virtual worlds, such as Second Life.\(^12\)

A. Incorporation of Online Tools in Teaching

The availability of the Web has placed a number of resources at the disposal of academics and learners. One of them is ‘learning management systems’ (LMS).\(^13\) Australian law schools and faculties have been encouraging their staff to incorporate such teaching environments into their teaching. The widespread adoption of IT in our day-to-day lives has also facilitated the incorporation of online tools into learning and teaching. A

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\(^7\) Company Law maybe defined in simple terms as the law regulating the formation, operation and dissolution of companies.


\(^9\) Jason Harris, Anil Hargovan and Michael Adams, Australian Corporate Law (2008).


\(^12\) Second Life <http://secondlife.com> at 2 December 2008.

\(^13\) Examples of virtual environments are WebCT, Blackboard and Vista. WebCT is now owned by Blackboard. A look at the advantages and disadvantages of studying through a controlled online environment is beyond the scope of this paper.
survey conducted in 2006-07 found that 64% of Australian households had home internet access, and 73% had access to a home computer.14

Diagram 2: Household home computer or internet access - 1998 to 2006-0715

As illustrated in Diagram 2, household computer and internet access has evolved over the years. For example, in 1998 less than 20% of households had internet access. By 2006-07, this figure had drastically changed with 60% of the households having internet access. Similarly, household access to personal computers has skyrocketed over the years.

The general consensus appears to be that e-learning improves the teaching experience of students.16 Even politicians support the growth of e-learning, referring to it as a ‘digital education revolution’.17 One of Kevin Rudd’s election promises in 2007 was to buy a computer for every high school student in Australia to enhance student learning.18

However, it is important to remember that IT is just one of the tools at the disposal of academics. The incorporation of IT may solve certain problems but, like any tool, it can also be misused and may thereby create other problems. ‘Student Course Experience Questionnaires’ completed by students at the University of Sydney’s Faculty of Law show that the incorporation of e-learning in particular law subjects can receive a mixed reaction from learners. Some students noted that the use of ‘WebCT is especially good’.19 Others stated that ‘law lecturers were not able to integrate the use of technology or online learning at all with their programs’.20 The latter comment was especially true in cases where academics had simply posted ‘chunks’ of content onto the website for students to access. Accordingly, e-learning should not simply consist of offline materials made available electronically. Good e-learning practice should take advantage of the medium by redesigning and presenting ‘courseware’ in new ways that can target particular audiences.

15 Ibid.
B. The Importance of Knowing Your Audience

The concept that higher cognitive functions find their origins in social processes may be considered the most widely recognised of Lev Vygotsky’s ‘theoretical foundations’ themes. According to this theory, students’ cultural and social experiences may affect the manner in which they study and their levels of motivation. 21

Applying this theory, academics should be aware of their audience because each audience has different characteristics and different needs. It is important to remember, when using e-learning, that one size does not fit all. What may work for business students studying Company Law may not work for law students studying Company Law. The method of teaching law students and interdisciplinary students is different. For instance, textbooks prescribed for law students are not usually prescribed for non-law students undertaking a law subject such as Company Law, and vice versa.

Accordingly, academics have to consider the characteristics of students in order to be aware of their needs not only when prescribing the textbook but also when creating or prescribing e-resources. Academics should take into consideration the identity of the learner: Are the e-learners mature age students? Are they international students? Are they working full-time? How can they manage their time? How will e-learning improve the quality of their learning experience? Are the students computer literate?

Studies have shown that mature age students are more likely to be motivated to use online technology due to the flexibility it offers them. However, academics who use e-learning do not always ascertain the identity of their audience. There is a tendency to treat all students in the same way in an online environment. 22 Such generalising of the needs of students is not always desirable. For instance, even at a Masters level, the characteristics of students may vary widely. Students completing a Master in Professional Accounting (MPA) have different needs from students completing a Master of Business Administration (MBA). In a number of universities, such as the University of Western Sydney or University of Southern Queensland, most of the MPA students are international students. On the other hand, MBA students tend to be working in the industry and, as a result, require less guidance and may be interested in more practical matters than MPA students. Thus, it may be useful for digital resources to be customised, depending on the specific goals of academics and students. 23

Academics can determine the characteristics of their students in a number of ways. They may, for example, access past data to identify the cultural profile of students they will be teaching. Academics may also be proactive, for example, by conducting an online survey of their students before or at the start of the semester. Such information allows an academic to design online learning activities that motivate and encourage the particular cohort of students. 24 Furthermore, such information may help to bridge the gap between ‘what is’ and ‘what should be’. 25 Barry Willis noted the following in that regard: 26

To better understand the distant learners and their needs, consider their ages, cultural backgrounds, interests, and educational levels. In addition, assess their familiarity with the various instructional methods and delivery systems being considered, determine how they will apply the knowledge gained in the course, and note whether the class will consist of a broad mix of students or discrete subgroups with different characteristics (e.g., urban/rural, undergraduate/graduate).

26 Ibid.
As a consequence, the more information obtained about students, the better the academics can customise their teaching to suit their learners. Targeting one’s audience may also be relevant in relation to the e-resources utilised in the course.

C. Different Resources Available

The concept of ‘student-centred learning’ was clearly articulated by Carl Rogers in 1965. This term may be defined as a way of teaching that focuses on how the students are learning, what they experience and how they engage in the learning context. This concept centres all activities and resources on the student. Graham Gibbs observed that such a mode of teaching ‘gives students greater autonomy and control over choice of subject matter, learning methods and pace of study’. A student-centred approach helps facilitate a better learning environment in which students can develop their knowledge. Ultimately, the ownership of learning lies with the learner.

The more traditional teacher-centred method (sometimes referred to as the ‘fountain of all knowledge’ approach) has been criticised for failing to deliver lifelong learning skills for students and for distorting the learners’ views in order to align them with the academic’s. Under a teacher-centred approach, learning is viewed as a passive experience from the point of view of students. However, it is important to acknowledge that a ‘student-centred approach’ is not the only effective method of teaching. It can even fall prey to the above criticism because the academics are the ones who ultimately select the resources surrounding the students as illustrated in Diagram 3.

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27 Khan, above n 24, 184.
32 Rogers, above n 28, 389.
33 Brandes and Ginnis, above n 30, 2.
Diagram 3: Student-centred learning

Diagram 3 illustrates that students are at the heart of learning and there are different resources that may help them achieve their learning goals. Students are encouraged to take control of their learning by using all the resources at their disposal. Each of the four resources available to support student learning will be dealt with in turn.

The first is human resources. The academic may play the role of a lecturer or a tutor depending on the structure of the course. Lecturing may be viewed as the ‘standard tertiary method of teaching’. The lecturer informs the learners about the subjects. The flow of information is one-way, with students’ contributions limited to asking questions and clarifying doubts that they may have about the subject.

While in lectures the learner is usually passive, in tutorials the students do much of the work. The tutor’s role is limited to monitoring and ensuring that learners do the required tasks. In tutorials, probing questions are raised, misconceptions are challenged and building students’ understanding of the concept is paramount. On the other hand,

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34 Ibid 3.
35 Biggs, above n 16, 82.
36 Ibid.
seminars are usually ‘a student’s presentation on a topic that each student has researched.’\textsuperscript{38}

However, academics, no matter what role they play, should not be subject-centred but student-centred. David Hargreaves has described the subject-centred teacher in the following manner:

The teacher’s authority ultimately rests in the authority of his subject. For such a teacher his subject expertise is absolutely central to his identity. He thinks of himself not as a teacher, but as a mathematics teacher, or a history teacher.\textsuperscript{39}

This method of subject-centred teaching does not involve the students and it considers the students as empty vessels waiting to be filled with knowledge. In student-centred learning, by comparison, the academic becomes a facilitator, a source of learning. A teacher will enter into a dialogue with the students in which their needs are exposed. David Ausubel noted that ‘the most important single factor influencing learning is what the learner already knows. Ascertain this and teach him accordingly.’\textsuperscript{40} Following this method, the teaching of students who are working in the corporate sector will be conducted in a different way than the teaching of students who have no working experience in the industry. A further factor to consider in determining the best way to construct the course to suit the particular cohort is that different students will prefer different styles of learning.\textsuperscript{41} Some students may clearly prefer to be fully directed to the material, while others are more likely to explore the more contentious issues.

Even though this article favours the student-centred approach, the authors also acknowledge that, in this model of teaching, academics still have a strong role in shaping students’ learning of the subject matter because they select the material and direct students about how it is best used.

The second resource relates to peer learning. Theoretical and empirical research has demonstrated that students’ learning is greatly influenced by peer and teacher interaction.\textsuperscript{42} The relationship between students is very important because students may learn from each other. Research has shown that students are usually more motivated to learn when they are collaborating with other students than when working independently.\textsuperscript{43} Peer interaction allows students to develop their own questions, search together for solutions and to share resources.\textsuperscript{44} This form of learning requires a dialogue between the students, and interaction of this kind is best established and maintained by the development of a robust learning community within the unit. Collaborative forums can promote effective discussion by allowing the learners to build coherent and cohesive explanations in the process of discussing issues with other learners.

The third category is paper resources. Textbooks, for example, are prescribed by academics because they help achieve established curriculum objectives. They also reinforce certain learning outcomes. However, over time, these books have come to be used together with a range of supplementary materials designed to enhance student learning. Study guides, learning materials, case books and workbooks have been created and incorporated into the curriculum for most legal subjects. John Clarke acknowledged the benefit of these types of resources, quoting L C Taylor: ‘I am taught by a teacher; but I learn from a book … Herein lies the essential difference between teacher-based and resource-based learning systems.’\textsuperscript{45}

\textsuperscript{38} Ibid 89.
\textsuperscript{40} David P Ausubel, Educational Psychology: A Cognitive View (1st ed, 1968) 171.
\textsuperscript{43} O’Donnell, Hnelo-Silver and Erkens (eds), above n 21, 63.
\textsuperscript{44} David McConnell, E-learning Groups and Communities (2006) 61.
However, all these resources described above are static and they only capture information that is valid at a particular moment in time. The danger is that such data, while useful for ‘standardizing information’, may quickly become obsolete or inaccurate.\(^{46}\) This may be a problem with a subject such as Company Law, where major reforms have taken place over the last 20 years and further reforms are currently proposed. For instance, the Corporations and Markets Advisory Committee (CAMAC) has recently issued a number of important discussion papers dealing with external administration and the treatment of different creditors.\(^{47}\) But such discussion papers naturally cannot be dealt with in textbooks published prior to their release.

The problem paper resources have with currency may be remedied through the fourth category of resources available to students — electronic resources. Such resources, if designed appropriately, can be integrated into the curriculum and may enhance the students’ learning experiences as they are dynamic resources.\(^{48}\) They can be updated frequently, allowing learners to keep in touch with the latest developments.\(^{49}\) In Corporate Law, these resources are abundant. For instance, the Australasian Legal Information Institute (AustLII)\(^ {50}\) allows students to access a huge number of online sources such as Australian cases, legislation at both state and federal level, discussion papers, reports and journals. Similar sites such as the British and Irish Legal Information Institute (BAILII), the Canadian Legal Information Institute (CanLII) and Droit Francophone are available for overseas laws. ComLaw\(^ {51}\) is another general legal website that can allow students to access to both current and repealed Commonwealth legislation. The ASIC website,\(^ {52}\) the Australia Securities Exchange website\(^ {53}\) and the CAMAC website\(^ {54}\) also provide information about recent developments in the corporate world. The Commonwealth Treasury website may also be relevant because it may have information on current reforms or proposed reforms in the corporate world.\(^ {55}\) Various law firms’ websites may also be useful for secondary materials discussing various aspects of the law.

Similarly, textbook publishers have noted the benefit of online resources and they now consider the web to be a new forum for supplementary textbook material.\(^ {56}\) In Company Law, such material allows students to keep up to date with current corporate law issues and also enhances students’ way of learning. Electronic resources not only assist students, but are an important way in which academics can respond to the needs of Generation Y in relation to e-learning. Further, the published material may help academics in designing online courses that are tailored specifically for their cohort of students.

One of the leading textbooks for Company Law that is often prescribed for interdisciplinary students is *Understanding Company Law*.\(^ {57}\) This textbook has an online presence\(^ {58}\) that many learners find very helpful. For instance, it provides links to the most recent cases, such as the *Sons of Gwalia* High Court decision.\(^ {59}\) This online resource was

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\(^{46}\) Hill and Hannafin, above n 23, 42.

\(^{47}\) A copy of all the discussion papers and reports issued by CAMAC can be found on the following website: <http://www.camac.gov.au>.


\(^{49}\) Hill and Hannafin, above n 23, 42.

\(^{50}\) Australasian Legal Information Institute <www.austlii.edu.au> at 2 December 2008.


\(^{57}\) Phillip Lipton and Abe Herzberg, *Understanding Company Law* (14th ed, 2008).


\(^{59}\) *Sons of Gwalia Ltd v Margarctic and Another* (2007) 232 ALR 232.
the winner of the of the 2001 and 2003 Tertiary Websites category in the Awards for Excellence in Educational Publishing conducted by the Australian Publishers Association.60 However, not all online textbook resources target students. For instance, Commercial Applications of Company Law61 has an online presence that may be considered teacher-oriented rather than student-centred as most of the teaching materials, such as PowerPoints and web quizzes, are only available to academics.

A textbook may be oriented toward a different audience and may achieve different goals depending on their pedagogy, the goals that an academic wishes to achieve, and the manner in which students use the material. Similarly, online supplementary material to the textbook may have different aims and outcomes. It is submitted that textbooks accompanied by e-resources are to be preferred because they allow students to maintain much greater current awareness of the subject, and their flexibility provides real scope for courses to be designed and customised by the academic to support the learning styles of the particular cohort of students taking the unit.

The next section looks at one of the textbooks used to teach Company Law to interdisciplinary students and the manner in which its online material may enhance the learning experience of students.62 There are a number of books that could have been used for this illustration. However, the authors were involved with the writing of the textbook and the development of the online materials. Thus there is a natural degree of bias in the example, but it is intended as an illustration rather than an endorsement of one textbook’s superiority over any other. Australia has a healthy, competitive market in all the main subject areas of law and each academic will determine the most appropriate book to match the students with the substantive material covered.

III. EXAMPLE: AUSTRALIAN CORPORATE LAW AND ONLINE RESOURCES

The previous sections of this paper described the variety of resources available to help students learn the complex subject of Company Law. In Diagram 3 above, the relationship of both paper resources and electronic resources to student learning is illustrated. To illustrate how the mix of paper and electronic resources can be directly linked, the authors’ involvement with the textbook Australian Corporate Law,63 published by LexisNexis, shall be used as an example.64 One of the reasons this textbook was selected as an example of the type of resources available is the fact that there was a clear design philosophy relating to e-resources that was behind its original creation. This textbook has a clear focus and pitch, as do most textbooks. However, not all textbooks are accompanied by e-resources that are explicitly designed to be of benefit to all types of learners and also to help academics in providing additional support.

A. Designing Philosophy of the Textbook

As discussed above, the knowledge that students bring to the class affects how they deal with and assimilate new concepts. When designing Australian Corporate Law, the authors gave particular consideration to the fact that their target audience is primarily a non-legal one. Accordingly, the textbook clarifies certain legal terms for the students in margin notes throughout the book. For instance, vicarious liability is defined as ‘liability imposed on one person for the wrongful act of another on the basis of the legal relationship between them, for example that of employer and employee.’ Such clarification makes it easier for non-law students to grasp certain complex issues such as the nature of different forms of liability of

62 The authors of this article were involved in writing the textbook and the online materials.
63 Jason Harris, Anil Hargovan and Michael Adams, Australian Corporate Law (2008).
64 The electronic resources were developed by Marina Nehme and Anne Durie.
companies. It may also serve as a reminder of concepts studied in the past. Accordingly, the textbook identifies the learning needs of the relevant students and caters to them.65 Ultimately, the strength of the book’s design comes from its student-centred philosophy, complementing face–to-face classes by encouraging students to take responsibility for their own learning. Each chapter has an outline to help students find the material they need. The chapters also have learning objectives. Defining the learning objectives is beneficial to learners as it enables them to understand the desired outcomes. Learning activities, such as revision questions and problem questions, are included for students to test their knowledge and to help them ultimately to achieve those outcomes. The learning objectives are also useful for academics as they allow them to answer the following question: ‘Did the student understand, appreciate, or see in a new way?’66 Other company law textbooks attempt to resolve these issues in other ways. The background and experience of teaching Company Law of all the authors at a variety of large educational institutions, covering Group of Eight (Go8), Australian Technology Network (ATN) and new universities,67 will naturally shape the final outcome of a book and its supporting resources.

A key characteristic of the book is that, at the end of each chapter, there is a guide to answering problem-based questions. This may help guide the students when they attempt to solve questions. A unique feature is the final chapter of the textbook which is entitled ‘Researching Corporate Law’. This chapter is targeted toward interdisciplinary students in particular, and explains primary and secondary sources of legal authority to them. It also contains further guidelines for solving typical assessment questions such as problem-based questions and essay questions.

B. The E-Resources Available

Australian Corporate Law has a website that caters specifically for students’ needs.68 The website is designed and supported by the publisher, LexisNexis, and contains a range of different resources such as case links and journal links. When a student accesses one of the chapters online, he or she is able to check cases relevant to the chapter through LexisNexis. Such a feature is designed to motivate non-law students to go beyond the textbook and check primary sources of the law. Further, the online resources allow students to test their own knowledge through a series of web quizzes. This exercise is very student-orientated because it allows the learner to participate and be personally involved in the learning experience. Ivan Illich confirms that this is a crucial aspect of students’ education, noting that ‘most learning is not the result of instruction. It is rather the result of unhampered participation in a meaningful setting. Most people learn best by being “with it.”’69

Students’ needs are therefore at the heart of the textbook and the e-resources available. These resources offer students the tools to learn by ‘depending far more on materials and far less on face-to-face teaching.’70 However, at the end of the day, the advantage that learners derive from having all the resources made available to them really does depend on the teaching pedagogy of each academic and, in particular, whether the academic is student-centred or subject-centred. A student-centred academic will explain to students the benefit of each resource. This is important because explaining the goals that may be achieved may motivate students to learn and to use the resources.

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65 It is not possible to know whether this book, or any other textbook, adequately addresses this issue of prior knowledge of law.
67 New universities are post-Dawkins (1990) universities.
69 Ivan Illich, Deschooling Society (1971) 44
C. Highlighting the Goals That May Be Achieved

The selection of different materials to be used in a course usually depends on the learning goals that students need to achieve. These goals, and how the resources will help the students to achieve them, need to be clearly explained by the academic. If learners do not understand why particular resources are useful, they may not use them or they may use them less productively. Accordingly, the academic needs to make the role of all the materials clear. Moreover, students are most likely to be motivated and to want to learn more productively if they understand what the ultimate goals are and how engagement with the selected resources will help them achieve those goals.

Therefore, when prescribing an online resource, it is important for academics to do the following:

- Explain to students why this online resource is important and interesting to them: How will it improve their learning experience?
- Define the learning objectives. The performance standards that a student needs to meet to reach the desired goals should be identified.
- Give advice on how students can access the online material. The ability to access the online material and locate the information may be a problem if students do not have clear instructions.

All these elements help students to understand the benefit that may be derived from these materials.

IV. CONCLUSION

Today, a number of resources are available to educate students. In addition to the traditional resources such as face-to-face classes and paper materials, online resources have become an integral part of the learning process. They allow academics and students to take advantage of all the information available online to enhance the teaching and learning process. However, for online resources to be of benefit to the students, academics need to guide their learning. To do this, they have to develop a process that incorporates multiple resources into a coherent learning environment. Only then will learners maximise the use of all the resources at their disposal.

*Australian Corporate Law* is one of a number of textbooks designed to enhance student-centred learning. It helps students to be self-sufficient and supports them in achieving their learning goals. It allows students to take ownership of their own learning by helping them to identify, clarify and deal with their concerns.

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71 Khan, above n 24, 185.
72 Laurillard, above n 66, 201.
73 Khan, above n 24, 185.
74 Holt, Rice and Armatus, above n 70, 3.
75 Hill and Hannafin, above n 23, 38.
SHAREHOLDER APPROVAL OF FUNDAMENTAL CHANGE?
AN ANALYSIS OF S 129 OF THE COMPANIES ACT 1993 (NZ)

PATRICIA KEEPER

1. THE STATUTORY FRAMEWORK

Section 129 of the *Companies Act 1993* (‘the Act’) was proposed by the New Zealand Law Commission in 1989 as both a regulatory and governance strategy. For s 129 provides that a company must not enter into a major transaction, unless the transaction has been approved by a special resolution of shareholders or is contingent on such approval being obtained. A major transaction is defined in s 129(2) in relation to a company as follows:

(a) the acquisition of, or an agreement to acquire, whether contingent or not, assets the value of which is more than half the value of the company's assets before the acquisition; or
(b) the disposition of, or an agreement to dispose of, whether contingent or not, assets of the company the value of which is more than half the value of the company's assets before the disposition; or
(c) a transaction that has, or is likely to have, the effect of the company acquiring rights or interests or incurring obligations or liabilities, including contingent liabilities, the value of which is more than half the value of the company's assets before the transaction.

This section was part of a package of reforms proposed by the Law Commission in its 1989 Report, *Company Law: Reform and Restatement* (the 1989 Report) to create a ‘comprehensive system for protection of minority shareholders’. This package also included the introduction of buy-out rights, which are more commonly known as ‘appraisal rights’ in North American corporate law. Buy-out rights operate to provide minority dissenting shareholders, who have voted against a special resolution to approve a major transaction, with an avenue to exit the company by having their shares acquired by the company or a third party, subject to certain financial safeguards contained within the Act. Like its North American counterparts, unsuccessfully voting against a major transaction is not the only pathway to be entitled to exercise such rights. The other triggering transactions specified in the Act are when a shareholder votes against a special resolution to adopt, alter or revoke a constitution and the proposed alteration imposes or removes a restriction on the activities of the company; when a minority shareholder votes

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1 *Companies Act 1993 (NZ)* s 2 defines ‘special resolution’ as a resolution approved by a majority of 75 per cent or, if a higher majority is required by the constitution, that higher majority, of the votes of those shareholders entitled to vote and voting on the question.
2 *Companies Act 1993 (NZ)* s 129(2B) provides that matters similar to those relevant to the solvency test under s 4 are to be considered when determining the value of a contingent liability.
4 Ibid 2.
5 Buy-out rights in a limited form already existed in New Zealand corporate and securities law. Section 208 of the *Companies Act 1955* (NZ) applied to a shareholder who dissented from an offer to purchase all the shares of the company and of which 90% of other shareholders have accepted; replaced by Part 7 of the *Takeovers Code Approval Order 2000* (NZ) and s 209 of the *Companies Act 1955* (NZ) which conferred a power on the High Court to order various forms of relief including the purchase of the minority shareholders shares if just and equitable to do so.
6 *Companies Act 1993 (NZ)* s 112.
7 *Companies Act 1993 (NZ)* s 113.
8 *Companies Act 1993 (NZ)* ss 114-5.
9 *Companies Act 1993 (NZ)* s110.
10 *Companies Act 1993 (NZ)* s 110(a)(i).
against a resolution to change class rights;\(^{11}\) and also when a shareholder votes against a long-form amalgamation pursuant to s 221 of the Act.\(^ {12}\)

This paper focuses on the ‘major transaction’ approval requirements. Following an overview of the background to and objectives behind the introduction of the section, it examines the relatively sparse number of cases that have considered the section to date. As the New Zealand Law Commission in 1989 identified the Canadian corporate law statutes as working models for the new Act,\(^ {13}\) the paper then contrasts the essentially quantitative formulation contained in s129 with the more qualitative test in the Canadian Business Corporations Act and considers whether the quantitative, bright line formulation of fundamental change adopted in New Zealand has achieved its legislative objectives.

II. BACKGROUND AND OBJECTIVES

A. Shareholder Protection

Although the principal purpose of a Memorandum of Association was to govern the relationship between the company and the outside world,\(^ {14}\) limits on the capacity of the company contained in a Memorandum also operated to protect shareholders from uncontrolled and unforeseen changes in business direction. However, one consequence of the development through the 20\(^ {th}\) century of all-purpose object clauses in a Memorandum of Association, was a decline in the importance of this constitutional document, ultimately, to its statutory demise. In New Zealand, by 1984, the Companies Act 1955 had been amended to provide that, subject to certain conditions,\(^ {15}\) companies had the rights and powers of a natural person.\(^ {16}\) This evolution in the vast majority of companies effectively removed any real protection afforded to shareholders from fundamental changes to the nature of the business of such companies. The New Zealand Law Commission observed, in its 1987 discussion paper, ‘Company Law’,\(^ {17}\) that since the ‘abolition of the ultra vires doctrine it may be said that shareholders have insufficient protection against substantial and rapid change which may transform the nature of the business’.\(^ {18}\)

This discussion paper identified a number of options for reform including a proposal that all substantial decisions be passed or ratified by the same majority of shareholders as is required for alteration of class rights, and by providing for buy-out rights for those who dissent.\(^ {19}\) However, the Law Commission at that time was not convinced of the necessity of these reforms. The Commission considered that courts already had the power to require a company to acquire minority dissenting shareholders shares under s 209 of the Companies Act 1955, taking into account that this section had been amended in 1980 to enlarge the range of circumstances in which a court had the power to intervene in cases of shareholder oppression. Also, the Law Commission stated ‘there may be substantial

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11 See Companies Act 1993 (NZ) s 118, where a shareholder that has voted against a special resolution that affects the rights attached to shares (as that term is defined in s 117(2)) is thereby entitled to require the company to purchase those shares in accordance with s 111 of the Act.
12 Companies Act 1993 (NZ) s 110(d) further provides that if the triggering resolution as set out in s 110(a)(i) or (ii) is passed by under section 122 by a resolution in lieu of meeting, then the right to require the company to acquire a shareholder’s shares under s 111 arises upon the shareholder not signing the resolution. Section 122(1) requires that for a resolution in lieu of notice to be as valid as if it had been passed at a meeting of shareholders, it must be signed by (a) 75 per cent or (b) such other percentage as the constitution may require for passing a special resolution, whichever is the greater, of the shareholders who would be entitled to vote on that resolution at a meeting of shareholders who together hold not less than 75 per cent (or any higher percentage as required by the constitution) of the votes to be cast on that resolution.
14 Companies registered before 1 January 1984 continued to be regulated by the Second Schedule of the Companies Act 1955 (NZ) and the list of ‘incidental and ancillary’ objects and powers therein listed unless the company had expressly adopted the new section 15A setting out that the company had the right, powers and privileges of a natural person.
15 Companies Act 1955 (NZ) s 15A.
17 Ibid [278].
18 Ibid [278].
difficulties in defining fundamental change. However, in the 1989 Report, the New Zealand Law Commission abandoned such reservations and recommended the adoption of major transaction and buy-out right provisions, including potential provisions in the draft Companies Act that formed part of this Report. The Law Commission had concluded that the oppression remedy then contained in s 209 was an insufficient remedy in itself as buy-out rights would arise on the occurrence of certain changes to a company, its activities or rights attached to shares, regardless of whether or not the action taken by the company is unfairly prejudicial to the shareholder. As Vanessa Mitchell in 1996 observed, the Law Commission views when read together with the legislation ‘appear to be saying that something can be ‘unfair’ without necessarily being “unfairly prejudicial”.

B. Increased Shareholder Determination

The major transaction requirement in the 1989 Report formed part of a larger package of reforms designed to increase shareholder protection from abuse where management of the company is given to the directors. Shareholder determination was identified as one method to increase protection from such abuse. Section 129 is located in Part 8 of the Act, which is headed ‘Directors and Their Powers and Duties’, and specifically is grouped with two other sections under the heading ‘Powers of Management’. Accordingly, the inclusion of the ‘major transaction’ provision in the Act must not only be viewed as a conduit for minority shareholders to exit a company, but also as a strategy to increase the rights of shareholders as a class. The requirement that 75 per cent of shareholders must confirm or ratify fundamental transactions ensures the alignment of the interests of the board with those of the shareholders. Finally, its enactment can also be seem as facilitating the rights of the majority to use the corporate structure for legitimate entrepreneurial activity, without being concerned with a disaffected minority.

One of the underlying tensions in modern corporate law, with its concentration on the importance of delegation of management to the board, is the problem of optimal delegation. As Kraakman and others stated in their seminal text, The Anatomy of Corporate Law, while the efficiencies of the corporate form require centralizing management power, shareholders need not (and generally do not) delegate all authority to act for the corporation to the board of directors. They identify shareholder decision rights in this context as a governance strategy, expanding the rights of principals to intervene in a firm’s management, albeit as ex post ratification of the most fundamental corporate decisions. This role of s 129 as a governance strategy to reduce agency costs is often overlooked in commentary and case law. However, this attitude is not surprising given that Kraakman and others comment that a corporate law system’s decision rights strategies will be much less prominent than its appointment rights strategies. Moreover, this ‘disparity is a logical consequence of the fact that the corporate form is designed as a vehicle for the delegation of managerial power and authority to the board of directors.”

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20 New Zealand Law Commission, above n 17, [281]. In this paragraph, the Law Commission also observed that if a company wanted buy-out rights to be triggered on the happening of certain events, then a company could chose to include a provision to this effect in its articles, although this observation was clearly contingent on the proposed recommendation, also contained in the discussion paper, that the existing strict rules on a company purchasing its own shares should be relaxed.
21 Above n 3, [202].
23 New Zealand Law Commission, above n 3, [85].
24 The other two sections are s 128, which sets out the rights of the board to manage the company, and s 130 that establishes which powers of the board they may delegate.
26 Ibid 131.
C. Buy-out Rights

In terms of buy-out rights, the rationale put forward by the Law Commission reflects the current North American ‘appraisal right’ rationales based on shareholder expectations and fairness for minority shareholders (rather than shareholders generally). At paragraph 499 of the 1989 Report, the Law Commission states that the provision is:

[b]ased on the view that some dealings have such far-reaching effects that they should be referred to shareholders. Shareholders should not find that massive transactions have transformed the company they invested in without warning. Clearly, unless the constitution of a company restricts its activities, all shareholders will have to accept a large measure of change. Normally that may be achieved over some time, permitting the shareholder who does not like the direction the company to leave or to exercise his rights to call management to account. What we are concerned with is abrupt and substantial change which transforms the nature of the enterprise.

Buy-out or appraisal rights provisions were included in the Act among a number of other reforms designed to increase minority shareholders rights and protections, although the introduction of this concept into New Zealand corporate law formed a central platform of the reforms. The 1989 Report further provides that buy-out rights create a mechanism for dissenting shareholders to exit a company, when that company has undertaken a ‘level of change to which it was unreasonable to require shareholders to submit’ and that this remedy arises ‘where there is an alteration of class rights or a fundamental change to the company’, and therefore a ‘dissenting shareholder does not inevitably have to accept the majority decision. The shareholder will instead have the option of leaving the company.’ Kraakman and others discuss exit rights in agency theory terms. They argue that the corporate law adopted by a jurisdiction should include, as a regulatory strategy, controls as to how principals can enter and exit from a relationship with particular agents. By the use of regulations in this regard, corporate law can attempt to reduce agency costs between shareholders as principals and their agents. Kraakman and others identify buy-out or appraisal rights as one method of allowing a principal to escape opportunistic agents ex post. Dissenting shareholders can avoid a prospective loss if they believe a proposed major transaction is a value reducing decision.

Many commentators originally viewed the inclusion of these two connected reforms as an important innovation of the new Act. As David Goddard stated in 1997, the fact that ‘[t]he majority of shareholders (for major decisions, a 75 per cent majority) has been given much greater freedom to make decisions regarding the future of the company, with the remedy for an aggrieved minority shareholder being (able to) exit at a fair price’ was one of the successes of New Zealand’s new company law. However, as is the case with many great ideas, the devil is in the detail and subsequent cases have undermined its potential.

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28 In fact, the historic justification for appraisal rights was compensation for the loss of the unanimous consent requirement for shareholder agreement to change. See Barry M Wertheimer ‘The Shareholders’ Appraisal Remedy and how Courts determine Fair Value’ (1998) 47 Duke Law Journal 613.
29 The New Zealand Law Commission, above n 3, [499].
30 The New Zealand Law Commission identifies these other reforms as including provisions to grant standing to shareholders to enforce through the courts, obligations owed to the company and directly to shareholders. See New Zealand Law Commission, above n 3, [10].
31 Ibid [206].
32 Ibid [202].
33 Ibid [203].
34 Kraakman, above n 25, 25.
36 Ibid. Footnote 1 explains that although this article first appeared in (1998) 16 Company and Securities Law Journal 236, the article had been developed from a paper presented at a ‘conference on Australia’s Corporate Law Economic Reform Program (CLERP) in Canberra in November 1997.’
37 Goddard, above n 35, 152.
III. QUANTITATIVE TEST?

A. Inconsistent Approach

Although the Law Commission described the intended purpose for s 129 in its 1989 Report in terms of the need to protect shareholders from ‘massive transactions’ and from ‘abrupt and substantial change’, the test for major transactions used in the Draft Act which was attached to that Report and in the Companies Act 1993 by contrast is quantitative in nature — for the s 129 (2) definition focuses on whether the value of the proposed transaction is more than half the value of the company’s current assets.38 Boards are called upon to assess if a proposed transaction has a value greater than 50 per cent of the existing value, in monetary terms, of the entity before the transaction. The inconsistency between these approaches was highlighted in the 2004 High Court decision of Re Fletcher Challenge Forests Ltd.39 This case arose out of a complex series of transactions to be undertaken by various subsidiaries of Fletcher Challenge Forests Ltd (FCF). FCF was a holding company and listed on the New Zealand Stock Exchange. Its assets comprised shares in, and loans to, its various subsidiary companies, including three companies which owned certain forestry assets that were proposed to be sold. It was not disputed that the value of the forest assets to be sold by each subsidiary was more than half the total value of each subsidiary’s assets before the sale transaction. Accordingly, each sale was required to be approved by special resolution of the shareholders which, given their subsidiary status, was not problematic.

The matter came before the court as FCF sought a declaratory judgment, that although the value of the assets to be disposed of by the subsidiaries was more than half the value of FCF’s total assets before the proposed sales, FCF was not itself undertaking a major transaction. This was on the basis that it was not disposing of its assets or incurring obligations or liabilities and FCF was not a party to any of the transactions.40 Counsel appointed to represent the contrary view to the company argued at paragraph 36 that to ‘interpret the section as other than including the holding company and its subsidiaries would be to utterly defeat the purpose of the section’. However, Justice Salmon preferred FCF’s argument that there ‘is nothing in the Act itself which would support an interpretation for s129 different to that conveyed by the words used’.41 Accordingly, in his Honour’s opinion, as the words of the statute are clear, it was not permissible to find a context outside of the words used, regardless of the fact ‘the observations of the Law Commission seem to be at odds with the wording of the section prepared by the Commission’.42 Therefore, the quantitative nature of s 129 did not allow an extended interpretation of the section and must be strictly construed as applying to the value of assets and liabilities of only one company.43

B. Quantitative Approach: An exclusive Test?

However in a subsequent case, the High Court in Central Avion Holdings Ltd v Palmerston North City Council & Anor44 took a less literal approach when deciding whether a certain transaction needed to comply with s 129. This cause of action was secondary to the primary claims of unfair prejudice under s 174 and of undue influence over the majority shareholder’s nominee directors on the board of the company, Palmerston North Airport

38 Companies Act 1993 (NZ) s 129(2). This defines ‘assets’ to include property of any kind, whether tangible or intangible.
40 Also, as Fletcher Challenge Forest Ltd’s (FCF) constitution required a special resolution when the company, including its subsidiaries, entered a transaction that may have changed the essential nature of the FCF business or the gross value of the transaction was in excess of the 50% of the lesser of the average market capitalisation of FCF or the gross value of assets of the FCF Group in accordance with the New Zealand Stock Exchange Listing Rules, declarations as to these matters were also sought.
42 Re Fletcher Challenge Forests Ltd (2004) 9 NZLJR 263, 447, [40].
43 Re Fletcher Challenge Forests Ltd (2004) 9 NZLJR 263, 447, [40].
Ltd (PNAL). The origin of the dispute was an alleged binding agreement or understanding between PNAL and the majority shareholder as to the circumstances in which PNAL would make a call on unpaid share capital. The claim of non-compliance with s 129 concerned a board decision to proceed with a proposal to extend the runway at Palmerston North Airport. The total cost of the extensions was estimated at $15 million. As at 31 December 2004, PNAL’s Statement of Financial Position stated that its current assets were valued at $17,783,967. However, Justice Goddard did not find there had been non-compliance with s 129 because she decided that the runway extension was not a single transaction, but a series of individual transactions and what had been approved was a phased business plan to be implemented in stages, with each stage requiring an individual assessment and approval of funding.\(^{45}\) As the first stage consisted of a transaction valued at less than 50 per cent of the assets of the PNAL before the acquisition in question occurred, it did not, in the words of Goddard J at paragraph 153, ‘fall foul of s129’.\(^{46}\) In reaching this conclusion, she also relied on qualitative analysis based on the substance of the transaction to support this analysis. In formulating this qualitative test, Goddard J relied on the language of the Law Commission discussed above and concluded that the facts of case were sufficient to take the proposed runway expansion outside the Law Commission’s characterisation — namely, that the transactions in this case were outside the nature of a ‘major transaction’ as described by the Law Commission, that is ‘a single large transaction, of which the investors had no warning and which will abruptly transform the nature of the company’.\(^{47}\) As the plaintiff in this case had acquired its shares in PNAL in full knowledge of the proposed runway extensions, the decision was undoubtedly correct in the circumstances. However, an implication of the focus in this case on a ‘single large transaction’ as a requirement of a major transaction under s 129 may be to encourage avoidance of s 129 procedure by structuring large projects as series of separately approved, but linked transactions.

In reaching this conclusion, Justice Goddard distinguished the earlier High Court decision of *Hogg v Shephard*.\(^{48}\) In this case Paterson J had held a series of individual agreements in reality did constitute one major transaction. He concluded that ‘the fact that the 95 sections were sold by 95 individual agreements, does not in my view, deprive the sale of major transaction status’\(^{49}\) because the agreements were all with a single purchaser and on identical terms. Paterson J took the view that ‘notwithstanding the form of the sale, it was in substance a major transaction’, although this comment needs to be interpreted as simply referring to the method of calculating the value of the transactions involved, rather than an assertion that the courts should decide if the transaction in question fundamentally changed the business of the company. The test applied in this case was essentially quantitative, focusing on the total cost of the sale and the identical character of the sale and purchase agreements without any discussion of whether the transactions fundamentally changed the nature of business.

IV. ALTERNATIVE FORMULATIONS

A. Canadian Business Corporations Act

The Law Commission in its 1989 Report supported the introduction of buy-out rights into New Zealand’s corporate law environment as such rights had ‘long been a feature of United States corporation statutes … and has been a feature of the Canadian statutes

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\(^{48}\) GHS Hogg and J Haigh & Ors v BH Shephard & Anor [2003] HC CP 448/02 (Unreported, Paterson J, 4 September 2003), [21].
introduced following the Dickerson Committee Report in 1971.\textsuperscript{50} Appraisal rights were introduced in 1975 into the Canada Business Corporations Act (CBCA) and were based on New York’s Business Corporation Law. Under the CBCA, a right of dissent and appraisal,\textsuperscript{51} in contrast to s 129 of the New Zealand Act, arises upon ‘a sale, lease or exchange of all or substantially all of the property of a corporation other than in the ordinary course of business of the corporation’.\textsuperscript{52} Most states also have some version of this right.\textsuperscript{53}

**B. Non-Inclusion of Acquisitions**

Section 129 not only differs from the Canadian provision in terms of its more qualitative focus, but also in terms of the range of transactions potentially requiring shareholder approval. Section 129 applies not only to dispositions, but also to acquisitions of assets and rights, provided the value of the transaction exceeds the 50 per cent value requirement. The inclusion of acquisitions as a qualifying transaction is unique to the New Zealand statutory formulation of fundamental change. The Law Commission did not explain why it chose to include acquisitions within the range of transactions that are covered under s 129 other than a means of ensuring shareholder participation in transformational transactions generally. The inclusion of acquisitions is potentially the most problematic for start-up companies, as it is likely that any large purchase could trigger s 129 without necessarily being a fundamental change to a company, although, perhaps this is mitigated by the fact that for start-up companies, shareholders and directors, interests should be aligned.

**C. All or Substantially All**

The CBCA provision requires that the transaction must involve ‘all or substantially all’ of the corporation’s property and be other than in the ‘ordinary course of business’. As this may not always be clear-cut, at least in comparison to a quantitative test reliant on asset valuations, the overall approach of the courts has been ‘to look at the effect of a transaction, not its form when considering these issues.’\textsuperscript{54} In terms of the phrase ‘all or substantially all’, although some of the earlier Canadian cases held that ‘substantially all’ required there to be a sale that would effectively destroy a corporation’s business,\textsuperscript{55} later cases have rejected this approach as too narrow and instead have focused on whether the transaction is a radical and fundamental change to the corporation.\textsuperscript{56} In *Canadian Broadcasting Corporation Pension Plan v BF Realty Holdings Ltd*,\textsuperscript{57} the Court of Appeal for Ontario followed a two-stage inquiry proposed by the Quebec Court of Appeal in *Cogeco Cable v CFCF Inc.*\textsuperscript{58} This inquiry requires:\textsuperscript{59}

(1) in the interpretation of s 189(3) of the Act, it is appropriate to take into account both quantitative and qualitative criteria;

(2) the concept of ‘substantially all of the property’ has acquired a special meaning in this area of law;

(3) it is difficult to fix a percentage, but in my view, when the sale involves 75% of the value of the property, it ought to be submitted for shareholders’ approval;

(4) if the case cannot be decided by using the quantitative test, then we must proceed with a qualitative analysis of the transaction;

\textsuperscript{50} New Zealand Law Commission, above n3, [203].
\textsuperscript{51} Canadian Business Corporations Act, RSC 1985, c C-44, s 190(1).
\textsuperscript{52} Canadian Business Corporations Act, RSC 1985, c, C-44, s 189(3).
\textsuperscript{54} Ibid, 414.
\textsuperscript{55} See 85956 Holdings Ltd v Fayerman Bros Ltd Ltd (1986]) 25 DLR (4th) 119, 125 (Sask CA).
\textsuperscript{57} Canadian Broadcasting Corp. Pension Plan v BF Realty Ltd (2000) 10 BLR (3d) 188.
\textsuperscript{58} Cogeco Cable Inc v CFCF Inc [1996] AC No 1069; [1996] RJQ 1360.
\textsuperscript{59} Canadian Broadcasting Corp. Pension Plan v BF Realty Ltd (2000) 10 BLR (3d) 188, 205.
(5) in such a case, it must be determined whether the proposed transaction constitutes a fundamental reorientation which strikes at the heart of the company’s activities — in other words, whether this is a transaction which is out of the ordinary and which substantially affects the company’s purpose and existence; and

(6) application of the qualitative test must take quantitative criteria into account; the greater the proportion of property sold in relation to all of the company’s property, the more likely we would be to conclude that the transaction strikes at the heart of the company and necessitates the shareholders’ approval.

Although the two-stage approach in this case has received some criticism as overly emphasising the importance of the quantitative test,60 it does highlight that the judicial approach is to compare the nature of the company’s business before and after the transaction. Inexorably, the question of whether that business is fundamentally altered after the transaction in question will require consideration of what was the ordinary course of business of the company before the transaction.

D. Ordinary Course of Business

The issue of what is the ordinary course of business is always a question of fact that a court must determine from the record and activities of the corporation. Koehnen stated that ‘generally speaking, ordinary course of business refers to day-to-day business activities of the sort that a manager can carry out on his own initiative without prior or subsequent reporting to superiors’, 61 which will vary depending on the nature and size of the business. In a leading Canadian case, 85956 Holdings Ltd v Fayerman Bros Ltd, 62 a decision to sell the inventory of company was held not be in the ordinary course of business because a decision had been made not to replace the inventory. This decision, while only representing approximately 33 per cent of the value of the company, would have the effect that ‘it will be a holding company with no ability to accomplish the purpose or objects for which it is incorporated.’ 63

The New Zealand Law Commission did consider whether the major transaction provision in the 1993 Act should include an exemption for transactions that were in the ‘ordinary course of business’. However, the Commission decided against this exemption given the ‘imprecision of such a test and the possibilities of abuse.’ 64 Instead, they took the view that for any transaction large enough to be caught by the provision, then the section should apply to it and the ‘shareholders be given an opportunity to determine it, whether or not it can be said to be in the ordinary course of business.’ 65 There is some merit in this reasoning, but together with the fact that s 129 applies to acquisitions, it does extend the potential application of the provision far beyond s 189 of the CBCA. Further, it is a surprising conclusion given the stated intention for s129 was to ensure that dissenting shareholders do not inevitably have to accept a ‘fundamental change to the nature of the enterprise’ which self-evidently should not include a transaction in the ordinary course of business. This point aside, the concerns that the Law Commission expressed as to the potential for abuse due to the imprecision of an ‘ordinary course of business’ exception has validity. As O’Neal and Thompson 66 state with regard to this exception, which operates in many of the American states, establishing what is the nature of the business of a corporation is not always straightforward 67 and this can act to the detriment of minority shareholders wishing to challenge a transaction.

60 Koehnen, above n 52, 414.
61 Koehnen, above n 52, 415.
63 85956 Holdings Ltd v Fayerman Bros Ltd (1986) 25 DLR (4th) 119, 129; 32 BLR 204, 214 (Sask CA).
64 New Zealand Law Commission Report, above n 3, [502].
65 Ibid.
67 O’Neal and Thompson, ibid, Vol 1, 5.19.
It is perhaps ironic that one of the first cases to consider s 129 took into account ‘ordinary course of business’ considerations to narrow the application of the section. In Flight Trainers Ltd v McGormick68 one of the allegations was that the affairs of the company in question had been conducted by the two directors in a manner that was unfairly prejudicial to one shareholder in that they had entered into a debenture in contravention of s 129(2)(b). It was accepted by all parties that the debenture had not been the subject of a special resolution or contingent upon one, ‘so if it was by definition a major transaction, it would have been entered into [in] contravention of s 129’.69 Salmon J however held that that the debenture was not a disposition within the meaning of s 129(2)(b). Part of his reasoning was a view that Parliament could not have intended that a special resolution would be required every time a company granted a debenture, given the prevalence of their use. Although subsequent cases have not developed this ordinary course of business exception, it should be noted that subsequently s 129 was amended in accordance with this decision.70

E. Exclusive Remedy

In the United States, there is some debate as to whether or not the right of dissent and appraisal is an exclusive remedy available to minority shareholders. For example, Mitchell stated in 1996 that ‘the law on exclusivity varies between jurisdictions and has been changed both by statute and case law.’71 In the New Zealand context, she commented that the New Zealand Companies Act ‘does not address this issue,’ but she suggests that it ‘would be highly likely that the New Zealand courts would allow for other possible remedies in cases whether the actions of the corporation or its directors and management were particularly reprehensible’. Further, in cases of fraud or illegality, ‘it would appear remedies other than appraisal would also be available, in particular the oppression remedy.’72 This question is now apparently settled, for example, with the courts willing to hear claims based on both failure to comply with s 129, as well as prejudice or oppression claims under s 17473 or as the basis for placing a company in liquidation under s 241.74 There is a clear relationship between the right of shareholders to bring an action under s 174 and non-compliance with s 129, as failure to comply with s 129 is expressly deemed by s 175(1)(i) to be unfairly prejudicial for the purposes of section 174.

The High Court decision in Dunning v Chabro Holdings Ltd75 provides a useful example of the relationship between these two sections. In this case, it was alleged that Chabro had guaranteed a subsidiary’s obligation and provided funds to that subsidiary to enable it to acquire a commercial property. The transactions in question were approved by the shareholders in Chabro by a resolution in lieu of a meeting to which the plaintiff in this case, who held 10% of the shares in Chabro, did not consent and in fact had not received notice of as required by the Act. The judge was not willing to find that the provision of the guarantee and the loan finance did not breach s 129, as detailed evidence of the financial position of Chabro at the time of the resolutions was not presented to the court. The judge ‘was not prepared to speculate to the extent required’ given the consequences of non-compliance. However, the fact that a 10% shareholder had been excluded from any involvement in the decision-making about ‘what was an important transaction to Chabro’

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68 (1999) 8 NZCLC 261, 998.
70 The addition of new subsection s 129(2A) by s 10 of the Companies Act 1993 Amendment Act 2001 (NZ) to extend its application to dispositions under section s 129(2)(b) has been taken as approval of the approach taken in this case.
71 Mitchell, above n 22, 293.
72 Ibid 299.
74 See Flett v JH Flett Ltd (1999) 8 NZCLC 261, 893
reinforced his Honour’s view that the company was being operated in a way that was oppressive and unfairly prejudicial to the plaintiff shareholder.

V. CONCLUSION

One question that is difficult to assess is the degree of non-compliance with the requirement of shareholder approval for major transactions, given that ‘a transaction that satisfies the definition of a major transaction may not necessarily involve a fundamental change to the nature of a company.’ As Lynne Taylor observed ‘an investment company that sells a major asset but replaces it with an almost identical asset — both the sale and purchase fall within the definition of a major transaction but the nature of the company remains unchanged.’ This question is unanswerable, but given the broad application of the section, especially for start up companies, it is very surprising that there have only been two cases to date where the courts have been required to interpret the buy-out rights provisions contained in ss 110-115 of the Act. The inadequacies of this remedy have received some articulation, with one judge even describing them as defective. This judicial criticism and the subsequent recommendations of the Law Commission to amend the remedy have been incorporated in the Companies (Minority Buy-Out Rights) Amendment Act 2008 that came into force on 16 September 2008. One amendment contained in the Act is a new requirement that companies, when giving shareholders notice of any special resolution under Schedule 1 of the Act, will not only be required to provided the text of that special resolution but also, in the case of the resolution triggering buy-out rights, the existence of such rights. It may be difficult to assess the success of the amendments contained in the Amendment Act as private arbitration has been retained as the method of resolving valuation disputes. However, one implication is that as companies are now required to advise shareholders when buy-out rights arise, there will be greater incentives for companies to structure transactions so as to avoid compliance with s129 in the future.

Overall, the few cases to date to consider the scope of s 129 have generally taken a literal approach to its construction, with judges focusing on the bright line formulation of fundamental change used in s 129(2) to concentrate on the value of a transaction, rather than whether the transaction, or transaction as a whole, will fundamentally change the business of the company. If a Canadian ‘fundamental change’ approach had been adopted when the Companies Act 1993 was drafted, it may not have actually resulted in different outcomes for the Hogg v Shephard, Central Avion Holdings Ltd v Palmerston North City Council and Flight Trainers Ltd v McGormick cases. In terms of the Fletcher Challenge Forests case, the position is less clear and this would depend on the exact nature of the company’s business. However, while most of these cases were probably correctly decided as to whether they involved fundamental change to the business of the respective companies, the rationales put forwarded in the respective judgments are inconsistent and cumulatively have undermined the statutory objective for the provision. However, the certainty provided by the bright-line transaction based test does have the advantage of setting a minimum backstop for transactions that are deemed to fundamentally change the business of a company. Accordingly a mixed approach is recommended which requires compliance with the section for transactions that change the essential nature of a company or exceed in value a specified minimum comparative value in relation to the value of the existing assets of the company. This value could be greater than 50 per cent of the value of

77 Ibid.
82 Companies (Minority Buy-Out Rights) Amendment Act 2008 (NZ), s 10.
assets, as companies would still need to consider the essential nature of the business for transactions with a smaller comparative value. It is, however, not recommended that an ‘ordinary course of business’ exception be adopted.
I. INTRODUCTION

Fyffes Plc v DCC Plc [2007] IESC 36 (‘Fyffes’) is a recent appeal decision of the Supreme Court of Ireland concerning the ‘reasonable investor’ test for insider trading.

At first instance, applying the ‘reasonable investor’ test in the earlier 2005 Irish High Court decision, Justice Laffoy found that the relevant information was not ‘price sensitive’ and therefore could not form the basis of a claim of insider trading. The civil liability action had been taken by Fyffes Plc (Fyffes) against one of its directors, Mr James Flavin, and the company he had founded, DCC Plc (DCC). In a unanimous decision in 2007, five justices of Ireland’s highest court rejected the ‘reasonable investor’ test as construed by Laffoy J. The Supreme Court stated that the test was not provided for in the Irish statute or in the applicable EU Directive. The court allowed the appeal against Mr Flavin and DCC and awarded damages to Fyffes.

Laffoy J deduced that a ‘hypothetical test’ may be needed to profile the reasonable investor:

As a general proposition, it is not clear to me that it should be necessary to profile the ‘reasonable investor’ any more than it is necessary to profile the reasonable man in applying the principles of the tort of negligence. However, on the facts and arguments in this case, a question has arisen as to whether the profile has to take account ... of the enthusiasm for internet stocks ... The question is whether it must be assumed that the reasonable investor would be infected by, or immune from, the market’s infatuation with internet stocks or stocks with an internet dimension.

The ‘reasonable investor’ test is an extension of the test in tort and refers, with varying degrees of complexity, to a ‘reasonable person’ who could be considered an investor in the relevant securities. In Australia, legislative changes to the insider trading provision were introduced largely as a result of the recommendations of the Griffiths Report in 1989 and the earlier Anisman study of insider trading in Australia. Both documents recognised the issue as ‘essentially a problem of non-disclosure’. Non-disclosure accentuates the difference between the value of the securities, as the insider knows it, and the value placed on these securities by the marketplace. In the second recommendation in the Griffith Report, the Committee ‘suggested that ‘materiality’ be defined by reference to a reasonable

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5. The standard to be applied to the materiality of undisclosed information could be borrowed from s 52 of the Trade Practices Act 1974 (Cth). Deane and Fitzgerald JJ in Taco Co of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177, 202 rely on an expansive reasonable person test, used by Lockhart J in Puxu Pty Ltd v Parkdale Custom Built Furniture Pty Ltd (1980) 31 ALR 73 (‘Puxu’). The class of ‘reasonable’ persons that is likely to be misled or deceived is wide. It includes ‘the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations’: Puxu (1980) 31 ALR 93 (Lockhart J). This process for applying the reasonable person is ‘more concerned with describing the class than with identifying any particular member’. The criterion for selecting the class member is reasonableness: National Exchange Pty Ltd v Australian Securities & Investments Commission [2004] FCAFC 90, 25.
8. Ibid 2.
person test' 9 The majority of the Griffith Report's recommendations were accepted by the Government and new provisions on insider trading came into effect on 1 August 1991. One of the new provisions was:

a statutory definition of inside information based on a “reasonable person” test; a person will be prohibited from trading in securities whilst knowingly in possession of information that is not generally available and if it were generally available a reasonable person would expect it to have a material effect on the price or value of securities. 10

The ‘reasonable investor’ test has become more complex and forms part of the definition of ‘material effect’ for the insider trading prohibitions and the continuous disclosure requirements in the Corporations Act 2001. 11 The Federal Court of Australia employed the ‘reasonable investor’ test in determining the materiality or price sensitivity of information in the failed 2007 initial corporate civil penalty proceedings against Citigroup 12. Are there any implications for Australian law in the Supreme Court of Ireland’s Fyffes decision to reject the ‘reasonable investor’ test?

II. AUSTRALIAN INSIDER TRADING CASES

In Australia, there is no example comparable to the civil liability action 13 taken by Fyffes against one of its directors for insider trading in the company’s securities. Insider trading proceedings in Australia are traditionally initiated by the regulator or referred to the Director of Public Prosecutions (DPP) if a criminal action is pursued. A review of the main Australian insider trading cases discloses little detailed discussion of the ‘reasonable investor’ test in s 1042D of the Corporations Act 2001. In most instances, the court appears to treat the test as if it were a simple ‘materiality’ test of the information’s price sensitivity. Alternatively, the definition in the provision is quoted without further attempt at application of the ‘reasonable investor’ test 14 to the share price. On other occasions, it is simply ignored. However, in three recent Australian insider trading cases, against Hannes, Petsas and Citigroup, 15 the Australian courts attempted some interpretation of the requirements for materiality of the information in the context of insider trading.

11 ‘When a Reasonable Person would take Information to have a Material Effect on Price or Value of Division 3 Financial Products: For the purpose of this Division, a reasonable person would be taken to expect information to have a material effect on the price or value of particular Division 3 financial products if (and only if) the information would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire or dispose of the first-mentioned financial products.’ Corporations Act 2001 (Cth) s 1042D.
13 Corporations Law 2000 (Cth) s 1317E enables ASIC to take a civil penalty action against a director for misuse of insider information under s 183 and the company may apply for a compensation order under s 1317H(2) under s 1317I whether or not a declaration of contravention has been made. A similar financial services compensation order is also available to the company under s 1317HA following a contravention of s 1043A.
14 TSC Industries Inc v Northway Inc 426 US 438 (1976), 449 is cited as authority for the test in several Australian cases, including failure to comply with the continuous disclosure provision. See, eg, Kim Riley in His Capacity as Trustee of the Ker Trust v Jubilee Mines NL [2006] WASC 199, 289. Also at 59, the simpler ‘reasonable person’ test found in the then ASX listing rule 3A was applied: ‘There are two concepts present in that requirement. The first is that from the point of view of a “reasonable person” that it is to be determined whether the information would have an effect on the price. It is not from the point of view of a stockbroker or a geologist or a seasoned trader, but of a reasonable person. Second, the information is only to be released if there is an expectation that it would have a “material effect” on the price or value of securities. So information that might be thought to cause a stock trading at $20 to jump by 1 cent would probably not be “material”, whereas information that might cause a stock trading at 10 cents to jump by 1 cent, would be “material”.
15 R v Hannes [2002] NSWSC 1182 (‘Hannes’) was a criminal prosecution that resulted in a conviction. ASIC v Petsas and Mist (2005) 23 ALC 269 was the first civil penalty proceeding for insider trading. It was uncontested as the defendants pleaded guilty. Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Limited (2007) FCA 963 (‘Citigroup’) was an unsuccessful civil penalty action against a corporate entity.
Jacobson J, in *Citigroup*, a case about corporate insider trading, at Issue 15 discussed whether the information was ‘price-sensitive’:

In order for the information to be taken to have the necessary material effect on the price of Patrick shares, it had to be information that ‘would, or would be likely to, influence persons’ who commonly acquire shares in deciding whether or not to acquire or dispose of Patrick shares.  

Although Jacobson J found that much of the alleged information was supposition and was not generally available, he concluded that if the information had been available to the market, then the better view was: ‘that it would not have had the requisite material effect at the time when the first insider trading is alleged to have taken place’. Further, at Issue 18, Jacobson J, while alluding to the ‘reasonable investor’ test in the provision, actually used the market reaction to the information as establishing materiality, as per Denham J in *Fyffes*:

Moreover, it seems to me to be likely that information as to the timing of the bid would have been price sensitive within the test stated in s 1042D of the *Corporations Act*. This seems to me to be borne out by the fact that Patrick shares opened on the day of the announcement at AUD$7.15, being 10.9% above the closing price on Friday 19 August 2005, and, during the course of very heavy trading on 22 August 2005, rose to AUD$7.38.

Earlier in *Hannes*, an insider trading criminal case, the court referred to the market reaction in determining the materiality or price sensitivity of the information. In the final appeal case of Simon Hannes in the NSW Court of Criminal Appeal, Basten JA acknowledged that ‘for the purposes of materiality, the information must be assessed objectively in the context of what is generally available’. In Hannes’ earlier appeal to the NSW Court of Criminal Appeal, Spigelman CJ highlighted the nexus between objective materiality and actual price movement. In doing this he cited the original lower court decision of Backhouse DCJ where she explained clearly ‘material effect’ in the provision:

That is price sensitive, that is what that means, and where would you be likely to find that out, and where would people who commonly invest in securities [go] to find out information of a kind which may affect the price of the particular security, and that is in the market place. (AB2082-3)

In the first civil penalty action for insider trading, against Petsas and Miot in the Federal Court, Finkelstein J relied on a straightforward variation of market price to determine the materiality of the information:

The defendants did not have long to wait to learn that their strategy was successful, at least in a financial sense. On Tuesday January 14, BRL announced that it was in merger discussions with Constellation. The price of its shares immediately rose by about 17% to close at $8.95. The share price kept rising until it reached $10.50, being the cash value

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16 Australian Securities and Investments Commission v *Citigroup Global Markets Australia Pty Limited* [2007] FCA 963, 566.
17 Ibid 571.
18 Ibid 578.
19 Australian Securities & Investments Commission, ‘Court of Appeal dismisses appeal by Simon Hannes against conviction’ (ASIC Media Release 06-410, 2 November 2006): ‘Mr Hannes, a former executive director of Macquarie Bank Limited, was convicted on one charge of insider trading in the securities of TNT Limited (TNT) and two charges under the Financial Transactions Reports Act in the Sydney District Court in August 1999. He was jailed for two years and two months and fined $130,000. However, the convictions were quashed following a decision by the New South Wales Court of Criminal Appeal in December 2000, and he was released after serving 15 and a half months of the sentence. In September 2002, following a 15-week retrial in the Supreme Court, Mr Hannes was again found guilty of the same offences. He was sentenced in December 2002 to two and a half years jail and served four months and nine days, in consideration of previous time served. This Court of Appeal judgment confirms that his conviction will stand’.
20 *Hannes v DPP (Cth)* (No 2) [2006] NSWCCA 373, 385.
21 Corporations Law 2000 (NSW) s 1002C.
attributed to the shares under the proposed merger which, in due course, was effected by a scheme of arrangement.  

III. RECENT DEVELOPMENTS IN THE IRISH COURTS

A. The Irish High Court Decision

The securities of both Fyffes and DCC were listed on the Irish Stock Exchange (ISE) and the London Stock Exchange (LSE). Fyffes, the issuer of the securities, took proceedings against DCC and companies associated with Mr Flavin, who was also one of Fyffes’ directors, for trading on the basis of confidential management reports. The sale of more than 31 million Fyffes shares by Mr Flavin, as agent for DCC and other companies, occurred from 3-15 February 2000 at the height of ‘dot.com’ speculation. Mr Flavin resigned as a director of Fyffes during this period, on 9 February 2000. Following investigation of the transactions by the ISE and LSE, neither the Director of Public Prosecutions (DPP) in Ireland nor the regulator took action against the perpetrators for insider trading in Fyffes’ shares. After a considerable delay, Fyffes initiated a civil liability action for unlawful insider dealing based on s 108 of Part V of the Irish Companies Act 1990 (IE).

The lower court decision rested on the judicial interpretation of price sensitivity and whether the defendant had knowledge that the information was price-sensitive at the time of dealing in the Fyffes’ shares. The factual component, that the specific information contained in the reports to the board was not generally available, was not disputed by the parties. It was the materiality or price sensitivity of the information that was contentious. As Laffoy J pointed out, there was very little guidance in the Companies Act 1990 (IE) as to how the price-sensitivity test in s 108(1) should be applied and, as this was the first case in which any of the civil remedies provided for in Part V had been invoked, there was no authority within the jurisdiction to assist the Court.

After a three month hearing that concluded in July 2005, Laffoy J handed down her decision on 21 December 2005. Fyffes failed in its petition for €106 million compensation as Laffoy J concluded that:

Mr Flavin was not in possession of price-sensitive information at the dates of the share sales. Therefore, the dealing was not unlawful under s 108 and no civil liability arises under s 109.

Subsequently, on 8 April 2006, Fyffes announced that it would appeal the decision to the superior court, the Irish Supreme Court.

B. The Irish Supreme Court Decision

All five justices of the superior court concurred in the judgment delivered on the 27 July 2007. Denham J, in delivering the judgment, stated that in spite of the many complex
issues that had come before Laffoy J in the 87-day High Court hearing, the Supreme Court was only required to consider a single issue, that of ‘price sensitivity’, in the context of alleged insider dealing. The appeal court found that the trial judge had failed to assess the information by reference to the price-sensitivity or materiality test in the statute. ‘[I]nstead she purported to develop a “reasonable investor” test, by reference to case law’. Denham J believed that version of the ‘reasonable investor’, formulated by Laffoy J in the High Court, found no support in any of the authorities and it was not provided for by the statute. It was inconsistent with what the Court was required to do under the statute. The test was not considered by the appeal court to be an appropriate legal tool as there is no reference to the ‘reasonable investor’ in s 108 of the Companies Act 1990 (IE), which implemented the EU Council Directive on insider dealing that was current at the time of the share sales.

The Supreme Court reasoned that it was more appropriate to apply a retrospective test of materiality by viewing the impact of the information on the price of the relevant securities once the information was finally made public. Denham J was critical of the lower court’s approach:

The trial judge failed to pay any regard whatsoever to the actual impact upon Fyffes’ share price when the information in the possession of Mr Flavin on the dates on which he dealt (or information substantially similar thereto) was ultimately released to the market on 20 March 2000.

Ignoring the market reaction on release of the information, the High Court used a legal principle referred to as the ‘reasonable investor’ to deduce whether, as a matter of probability, on the 3 February 2000, the reasonable investor would conclude the information would impact on Fyffes’ share price ‘in the context of the total mix of information available ... would probably impact on Fyffes’ share price to a substantial or significant degree’. TSC Industries Inc v Northway Inc is US authority for a judicial test where materiality was held to be a function of the size of the effect that an event has on a company. Marshall J, in delivering the opinion of the US Supreme Court, stated that there must be ‘... a substantial likelihood that the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available’.

In Fyffes, Denham J stated that there were ‘a myriad of factors and investors in a market, and to choose some or either as representative of a reasonable investor appears subjective and arbitrary’. The real issue is the effect of the information on the share price in the market and there is ‘no reason in law to view the market through the prism of a “reasonable investor”’. The Supreme Court found no assistance from the United States case law that had been so persuasive in the High Court’s acceptance of the ‘reasonable investor’ test. To quote Denham J: ‘I respectfully disagree with the adoption by the learned trial judge of a test grown upon such cases. Irish statute law is different to that of the United States’.

Jeremiah Burke has provided detailed academic analysis of the High Court decision of Laffoy J from the perspective of US securities law. Burke accepted the use of the

33 Ibid 7(ii).
34 Ibid.
36 Fyffes Plc v DCC Plc [2007] IESC 36, 7(iii).
38 Fyffes Plc v DCC Plc [2007] IESC 36, 22.
40 Ibid 449.
41 Fyffes Plc v DCC Plc [2007] IESC 36, 22.
42 Ibid 23.
43 Ibid.
‘reasonable investor’ test but acknowledged other commentators on the case who thought
that a simpler ‘materiality’ test, indicated by ‘a market reaction might be a good indicator
of whether information is material’ or price-sensitive. The article concluded with the
statement that: ‘Irish insider trading law focuses on whether the information is price-
sensitive rather than merely on whether the information is material’. This distinction
between ‘price sensitive’ and ‘material’ information in the market is perplexing and does
not seem to apply in the context of either the Irish or Australian statute, where the terms
seem synonymous.

The Supreme Court found that the relevant test, as set out clearly in the Companies Act
1990 (IE) s 108(1), is an objective test — that is, if the information was made generally
available, would it be likely to materially affect the price of the shares on the market? The
Court reasoned that the answer was equally clear:

There was information. It was not generally available. It was bad news, it was information
of a risk, it would concern the market. It was information likely to affect the price of the
shares on the market. In considering the information it is not appropriate to offset that with
information already in the market.

Based on this simplified ‘materiality’ test, the Supreme Court allowed the appeal and
awarded damages to Fyffes. Denham J concluded: ‘I am satisfied that the November and
December 1999 Trading Reports contained price-sensitive information’.

IV. LEGISLATIVE DEVELOPMENTS

Fyffes, in its action against DCC and Mr Flavin, invoked the provisions of the Companies
Act 1990 (IE), which implements the EU Council Directive on insider dealing. Part V of
the Act creates civil liability (s 109) and criminal liability (s 111) in relation to insider
trading. Section 108 was the basis of the civil liability claim and it is specifically
concerned with a person connected with the company.

Legislation was introduced in 1995 to implement the 1993 EC Investment Services
Directive, which named the Central Bank and Financial Services Authority of Ireland as
the competent authority for authorising stock exchanges in Ireland. The Minister then
designated the ISE as the competent authority for the purpose of implementing the EU
directives already adopted by Ireland under the European Communities (Stock Exchange)
Regulations 1984. By means of the statutory authority of the Companies Act, the ISE
undertook reviews of relevant company announcements and unusual price movements, as
part of its responsibility for the investigation of possible cases of insider trading. The
insider trading activity in Fyffes shares occurred within this regulatory environment.

A. The ‘MAD’ Effect on Corporate Law in Ireland

The Market Abuse (Directive 2003/6/EC) Regulations 2005 (Ireland) came into operation
on 6 July 2005 to implement the Market Abuse Directive (MAD) of the European
Community. Part 2 of the Regulations is concerned with insider trading and, in particular,
reg 5 prohibits the use or disclosure of inside information by a person who is in possession
of such information. There is no explicit or implied reference to a ‘reasonable person’
test in this prohibition. In contrast to reg 5, reg 10 is similar to the Australian ‘continuous
disclosure’ provision and places an obligation on the issuer to publicly disclose inside
information without delay:

Regulation 10(1)…the issuer of a financial instrument shall publicly disclose without delay
inside information –

a) which directly concerns the issuer, and

b) in a manner that enables fast access and complete, correct and timely assessment
of the information by the public. 58

The obligation referred to above in reg 10 of the Market Abuse Regulations is conveyed in
terms similar to those of the Financial Services Authority (FSA) in its Handbook, 59 as
discussed below. The Financial Regulator is now the competent authority in Ireland for the
purposes of the Regulations and has issued additional Rules60 for the guidance of
disclosure under reg 10 that explicitly require the issuer to use the ‘reasonable investor’
test in identifying insider information. Rule 5 provides the issuer with general guidance on
disclosure, while r 5.3 is specific guidance to the issuer in identifying inside information
using the ‘reasonable investor’ test.

To implement another EC Directive,61 the Stock Exchange Act 1995 (IE) has been
replaced by the Markets in Financial Instruments and Miscellaneous Provisions Act 2007
(IE) as the relevant legislation governing the ISE. 62 Certain duties are still delegated to the
stock exchange and the ISE retains sole responsibility for the investigation of insider
trading activities under Part V of the Companies Act 1990 (IE). ‘[H]owever, since the
introduction of MiFID the Exchange is obliged to report any market abuse identified on its
markets to the Financial Regulator’.63

B. The Relationship with UK Regulation

The ‘reasonable investor’ test is also excluded from the definition of inside information in
the Criminal Justice Act 1993 (UK). This statute is in accord with the Irish Companies Act
1990 (IE) in that it employs the simpler market-related test of price sensitivity or
materiality of the information.

Inside information is ‘price-sensitive information’ in relation to securities, if and only if
the information would, if made public, be likely to have a significant effect on the price of
the securities.64

However, the Market Abuse Directive has been implemented in the Financial Services and
Markets Act 2000 (UK), which adopts the following ‘reasonable investor’ test.

Market abuse is behaviour… [that] is based on information which is not generally
available to those using the market but which, if available to a ‘regular user’ of the market,
would or would be likely to be regarded by him as relevant when deciding the terms on
which transactions in investments of the kind in question should be affected. 65

In this section, a ‘regular user’, in relation to a particular market, means a ‘reasonable
person’ who regularly deals on that market in investments of the kind in question.66

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57 Corporations Act 2001 (Cth) s 674.
59 Financial Services Authority (UK), ‘Disclosure of inside information by issuer’, FSA Handbook, DTR 2.2.4 <
60 Financial Regulator (Ireland), Market Abuse Rules (March 2006) r 5.3.
December 2008.
64 Criminal Justice Act 1993 (UK) s 56(2).
65 Financial Services and Markets Act 2000 (UK) s 118(1), (2).
66 Ibid s 118(10).
The FSA Handbook, which has been revised to incorporate the Transparency Directive as part of the listing rules, gives particular reference to a ‘reasonable investor’ test. In this context, the test is to be used as guidance for an issuer of securities in determining the likely price significance of the information.\footnote{Simon Carswell, ‘Stock Exchange Move on Insider Trading’, The Irish Times (Dublin), 18 July 2008.} In this situation the ‘reasonable investor’ test could play a more significant role as it is evaluating the likely materiality of information before it is made public, rather than valuing the price sensitivity of the information in hindsight after the insider trading. These instructions to the disclosing entity, offered in both the Irish Market Abuse Rules and the FSA Handbook in the UK, are based on the ‘reasonable investor’ test. It can be argued that this test is more appropriate in the context of disclosure of information than in the prohibition of insider trading. The simpler, market price variation ‘materiality’ test, applied retrospectively, as outlined by the Supreme Court in Fyffes and supported by the Companies Act 1990 (IE) and the Criminal Justice Act 1993 (UK), seems more efficient in the context of an alleged insider transaction.

C. The Next Chapter

The ISE has announced plans to establish a separate supervisory body to remove any perception that it is not independent in its supervision. It has also appointed a ‘career regulator’ who formerly led the market abuse investigation team at the FSA in the UK. At the time of the Fyffes case, the ISE investigated suspected instances of insider trading and, if required, forwarded the files to the DPP. Following adoption of the Market Abuse Directive, the Director of Corporate Enforcement has been given the responsibility of investigating insider trading cases.\footnote{Arthur Beesley, ‘Findings on Fyffes Deal Could Take a Year’, The Irish Times (Dublin), 29 May 2008.} In spite of the two long and detailed court hearings initiated by Fyffes, the Director of Corporate Enforcement in Ireland is dissatisfied with the outcome. He has been quoted as saying that matters heard during the High Court and Supreme Court proceeding between Fyffes and DCC were not ‘evidentially useful’\footnote{Mary Carolan, ‘Circumstances Suggest Unlawfulness, Says Judge. Court Inspector to Investigate DCC’, The Irish Times (Dublin), 30 July 2008.} to the Office of Corporate Enforcement. The Director moved an application before the High Court for the appointment of inspectors to further investigate insider trading issues within DCC and the transfer and sale of shares in Fyffes.\footnote{Ibid.} The High Court agreed with the Director that a ‘thorough investigation’\footnote{Arthur Beesley, ‘Shipsey a “Sound” and “Measured” Barrister’, The Irish Times (Dublin), 30 July 2008.} is in the public interest and has appointed Senior Counsel\footnote{Commonwealth of Australia, Insider Trading, Position and Consultation Paper, Treasury (2007) 1-32 (Released by the Parliamentary Secretary to the Treasurer on 2 March 2007).} to provide an interim report to the court by the end of January 2009. Contrary to expectations, the boards of DCC and its related companies decided not to appeal to the Supreme Court on the appointment of an inspector by the Irish High Court.

V. IMPLICATIONS FOR AUSTRALIAN LAW

The Australian Treasury\footnote{The Australian Treasury has stated its aim of providing greater protection for investors against insider trading and the Australian Securities & Investments Commission (ASIC) has nominated among its priorities the monitoring and enforcing of laws relating to insider trading.} has stated its aim of providing greater protection for investors against insider trading and the Australian Securities & Investments Commission (ASIC) has nominated among its priorities the monitoring and enforcing of laws relating to insider trading.\footnote{Six priorities we will focus [on] over the next 12 months... ASIC monitors and enforces laws relating to insider trading, continuous disclosure and market manipulation... A special team (to be headed by a senior person) is being established to determine what additional actions ASIC (in cooperation with ASX) can take’: Tony D’Aloisio, Chairman, Australian Securities & Investments Commission, ‘Opening Statement on ASIC’s Priorities for the next 12 Months’ (Senate Standing Committee on Economics, 30 May 2007) 3-4.} At July 2008, following referrals to ASIC from the Australian Securities
Exchange (ASX)75 of ‘suspicious market transactions’, there were 61 active investigations. Of these, 29 were instances of insider trading where the regulator must ‘prove a case up to the point that legal proceeding can be brought’.76 Six insider trading matters are with the Commonwealth DPP.77 There is always difficulty in providing the requisite proof to satisfy the criminal standard, and even that of a civil penalty proceeding. Part of this difficulty will be in ensuring that the ‘inside’ information at the core of the proceedings complies with the complexity of the ‘reasonable investor’ test in s 1042D:

[where] a reasonable person would be taken to expect information to have a *material effect* on the price or value of particular Division 3 financial products if (and only if) the information would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire or dispose of the first-mentioned financial products.

Could insider trading regulation be more successfully enforced if it tested whether the alleged ‘insider’ ‘is in possession of information that is not generally available, but, if it were, would be likely materially to affect the price of those securities’? This is the simpler test of ‘materiality’ or price sensitivity of the *Companies Act 1990* (IE) and similar to that of the *Criminal Justice Act 1993* (UK). It is also the test applied in the Supreme Court of Ireland’s *Fyffes* decision to reject the ‘reasonable investor’ test.

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75 Australian Securities Exchange Annual Report 2008, 29. For the financial year to 30 June 2008, ASX reported referring 27 potential breaches of insider trading to ASIC, a decline of 21% on the preceding comparative period.


UNFAIR PREJUDICE: WHO HAS IT RIGHT, ECONOMICALLY SPEAKING?

MATTHEW BERKAHN

I. INTRODUCTION

The company law statutes of New Zealand, Australia and the United Kingdom (amongst other jurisdictions) all include very similar remedies for unfairly prejudicial conduct towards shareholders. These provisions were applied consistently between the early 1980s and 1999. The courts of all three jurisdictions recognised that a shareholder’s legitimate expectations (which, if breached, could lead to a remedy) could arise from personal circumstances or generally accepted commercial standards rather than just from formalised arrangements. The 1999 House of Lords decision in O’Neill v Phillips represents a significant change of approach by the UK courts in that it effectively limits ‘unfairness’ in terms of the remedy to breaches of legally enforceable agreements.

In 1990, Professor Brian Cheffins noted the lack of consideration of the theoretical basis for the unfair prejudice remedy. He proposed an economic analysis of the provision, under which courts would focus on the ‘bargain’ between corporate participants, whether express or implied. This article examines the background to the introduction of the unfair prejudice remedy, including an examination of the approach taken to the provision in North America, the source of the remedy in its present form. It then compares that approach with those taken in New Zealand, Australia and the UK, both before and after the O’Neill case, and assesses each approach in light of Cheffins’s economic analysis.

II. THE UNFAIR PREJUDICE REMEDY: BACKGROUND AND PURPOSE

Remedies for unfairly prejudicial conduct towards shareholders appear in s 994 of the Companies Act 2006 (UK), Part 2F.1 (ss 232-235) of the Corporations Act 2001 (Cth) and s 174 of the Companies Act 1993 (NZ). The remedy dates from 1948, when the original ‘oppression remedy’ was enacted in the UK. The provision was enacted both to provide a remedy in situations where no specific duty owed by (or to) the company had been breached, and a personal or derivative action was therefore not available, and in recognition of the fact that the only existing equitable remedy — winding up on just and equitable grounds — was often much too drastic a step, particularly if the company was prospering.

Although the remedy had its origins in the UK, the broader wording now used in most jurisdictions — using phrases such as ‘unfair prejudice’ and/or ‘unfair discrimination’ in addition to or instead of ‘oppression’ — appears to be based on that first used in North American statutes. Bruce Welling notes that ‘the complex wording of the Canadian statutes was designed to get around the failures of the English section’ in its original form. The 1962 Jenkins Committee, when recommending the broadening of the remedy in the UK to
its current form, referred to unspecified United States antecedents. 7 Given this pedigree, it is worthwhile noting how the provision has been applied in North America.

Section 241 of the Canada Business Corporations Act, which provides that relief may be granted for conduct that is ‘oppressive or unfairly prejudicial to, or that unfairly disregards the interests of any security holder, creditor, director or officer’ of a company, is typical. The court is empowered to make any order it thinks fit, ‘to rectify the matters complained of’. Broadly similar provisions appear in Canadian provincial legislation and throughout the United States. 8

The three expressions used in s 241 — oppression, unfair prejudice and unfair disregard of a petitioner’s interests — have been generally treated by the Canadian courts as indicative of a single, broad standard of conduct which, if breached, will attract relief. In Westfair Foods Ltd v Watt, for example, it was held that the ‘repetition of overlapping ideas is only an expression of anxiety by Parliament that one or the other might be given a restrictive meaning’. 9 John Lowry 10 also emphasises the flexibility and open-endedness of the Canadian approach to the remedy. He notes the ‘often-cited recommendation’ in Ferguson v Imax Systems Corporation, that ‘the section should be interpreted broadly to carry out its purpose ... What is oppressive or unfairly prejudicial in one case may not necessarily be so in the slightly different setting of another’. 11

The Canadian provision does not specifically incorporate a ‘just and equitable’ standard for relief. However, the principles set out in Ebrahimi v Westbourne Galleries 12 have been applied by the Canadian courts to s 241. It was made clear in Lord Wilberforce’s judgment in Ebrahimi that the courts need not look exclusively at a company’s constitution when deciding the nature of the obligations undertaken by its participants. What is important is the giving of effect to the full set of terms and understandings on which it has been agreed the company will operate, be they expressed or implied. Thus, for example, where there is a reasonable expectation that all shareholders will participate in the company’s management, exclusion from management may be considered unfairly prejudicial, and a remedy will be available under s 241. This was the case in Diligenti v RWMD Operations Kelowna Ltd where the court concluded that, in such circumstances,

there are ‘rights, expectations and obligations inter se’, which are not submerged into the company structure, and these rights are enjoyed by a member as part of his status as a shareholder in the company ... Although [the applicant’s] fellow members may be entitled, as a matter of strict law, to remove him as a director, for them to do so in fact is unjust and inequitable, and is a breach of the equitable rights which he in fact possesses as a member. 13

The circumstances under which the courts have not been willing to give effect to shareholder expectations are illustrated by cases like Jackman v Jackets Enterprises Ltd, 14 where a shareholder was denied relief for her exclusion from the company’s management as she had been given her shares only as a gift and, therefore, had no real expectation of

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7 Lord Jenkins (Chairman), Report of the Company Law Committee, Board of Trade (1962) [207]. This recommendation was only actioned in 1980.
8 See, eg, s 248 of the Ontario Business Corporations Act. See also Robert Thompson, ‘The Shareholder’s Cause of Action for Oppression’ (1993) 48 The Business Lawyer 699, note 70, for a list of the 37 American states whose corporate statutes include a remedy for ‘oppression’ or ‘unfair prejudice’.
9 (1991) 79 DLR (4th) 48, 52. See also the conclusion reached by Robert Dickerson, John Howard and Leon Getz, Proposals for a New Business Corporations Law for Canada, Report to the Department of Consumer and Corporate Affairs (1971) [484]: ‘In sum, we think that the courts should have very broad discretion, applying general standards of fairness, to decide these cases on their merits.’
11 (1983) 43 OR 128, 137.
13 (1976) 1 BCLR 36, 51. See also Canbev Sales and Marketing Inc. v Natco Trading Corp (1998) 42 OR (3d) 574, where it was held that the remedy may be invoked where the reasonable expectations of the applicant, as construed by reference to the circumstances in which his or her rights in the company were acquired, are frustrated. This is described by Kevin McGuinness as ‘the prevailing Canadian view’ of the provision in The Law and Practice of Canadian Business Corporations (1999) 960.
14 (1977) 4 BCLR 358.
UNFAIR PREJUDICE: WHO HAS IT RIGHT?

having any management role. In 820099 Ontario Ltd v Harold E. Ballard Ltd, Farley J said that those expectations which the courts will consider are not ‘those that a shareholder has as his individual “wish list”. They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders’.

A significant feature of the unfair prejudice remedy in Canada is that a lack of good faith on the part of the defendant is not required for relief to be granted under s 241 and its equivalents — a point noted, for example, in Sparling v Javelin International Ltd:

It is not necessary that oppression and unfair treatment be caused by the deliberate act of the corporation or its directors, nor is it necessary for the unfairness to have its source in the management of the corporation at all. What is important is the result, not the intent. Thus, the applicant does not have to establish bad faith on the part of the corporation’s directors or management in order to convince the court to make an order. This approach has since been questioned in some cases, but the weight of authority has found that the intent of the ‘oppressor’ is irrelevant. In the leading case of Brant Investments Ltd v Keeprite Inc, the Ontario Court of Appeal held that a requirement of lack of bona fides would unnecessarily complicate the application of the provision and add a judicial gloss that is inappropriate given the clarity of the words used. The difficult question is whether or not [an applicant’s] rights have been prejudiced or their interests disregarded ‘unfairly’. In testing the facts in a given case against the word ‘unfairly’, evidence of bad faith as to motive could be relevant, but there may be other cases where particular acts effect an unfair result, but where there has been no bad faith whatsoever on the part of the actors.

III. APPROACHES TO THE REMEDY IN NEW ZEALAND, AUSTRALIA AND THE UK PRE-O’NEILL

A. New Zealand

The approach taken by the New Zealand courts to s 174 of the Companies Act 1993 can be traced to the judgment of Richardson J in Thomas v H.W. Thomas Ltd, a case brought under the equivalent provision in s 209 of the Companies Act 1955 after its amendment in 1980. Prior to this case, few actions had been brought under s 209 due to the restrictive approach adopted by the courts. Since then, however, Richardson J’s more liberal interpretation of the remedy, in line with the approach taken by the Canadian courts, has led to a much greater use of the provision. His Honour held that:

The three expressions [oppression, unfair discrimination and unfair prejudice] overlap, each in a sense helps to explain the other, and read together they reflect the underlying concern of the subsection that conduct of the company which is unjustly detrimental to any

15 (1991) 3 BLR (2d) 113. Similarly, in Westfair Foods Ltd v Watt (1991) 79 DLR (4th) 48, 58, the contrast between ‘reasonable expectations’ and ‘wishful thinking’ was noted.
18 (1999) 3 OR (3d) 289, 305-306. See also Sidaplex Plastic Suppliers Inc v Elta Group Inc. (1995) 131 DLR (4th) 399, 403-404: ‘While some degree of bad faith or lack of probity in the impugned conduct may be the norm in such cases, neither is essential to a finding of “oppression” in the sense of conduct that is unfairly prejudicial to or which unfairly disregards the interests of the complainant’. This point was specifically upheld on appeal to the Ontario Court of Appeal ((1998) 162 DLR (4th) 367, 373) and applied, for example, in Downtown Eatery (1993) Ltd v Alouche (2001) 200 DLR (4th) 289, 305-306; Desjardins Ducharme Stein Monast v Empress Jewellery (Canada) Inc. (Unreported, Quebec Superior Court, 11 March 2004), [38] and Ford Motor Co. of Canada Ltd v Ontario (Municipal Employees Retirement Board) (2004) 41 BLR (3d) 74, [225]-[227].
20 The amendment added ‘unfair prejudice’ and ‘unfair discrimination’ to the existing provision which provided for relief in cases of ‘oppression’.
member of the company, whatever form it takes and whether it adversely affects all members alike or discriminates against some only, is a legitimate foundation for a complaint.22

Richardson J also noted that, as the court has jurisdiction to grant relief when it is ‘just and equitable’ to do so, equitable considerations should be applied to the remedy as expressed in the Ebrahimi case.23 He held that the court may intervene ‘where there is a visible departure from the standards of fair dealing … in the light of the history and structure of the particular company and the reasonable expectations of the members’. 24

The initial intentions and legitimate expectations of shareholders — whether expressed formally or not — were used as a basis for assessing what was just and equitable in a number of subsequent New Zealand cases brought under s 209,25 and continue to represent perhaps the overriding principles used in applying s 174 of the 1993 Act. In Cornes v Kawerau Hotel (1994) Ltd, for example, the company’s two directors each held 49.5 per cent of its shares, with one other shareholder holding 1 per cent. One of the directors (Mr Cornes) was removed from office and effectively excluded from management, contrary to an understanding between the parties that he would continue to be involved. Wild J relied on both Thomas and Ebrahimi in finding that, as the plaintiff was being ‘excluded from the benefits he was intended to receive from … the company’, a remedy under s 174 was appropriate.26 The judgment in Cornes makes no mention of any specific agreement, formal or otherwise, that Mr Cornes would continue in his management role. Yet the court held that this was the apparent intention of the parties and that, therefore, Mr Cornes had a reasonable expectation that it would continue.27

Richardson J, in Thomas, also stated that it is not necessary to show a ‘lack of probity or want of good faith’ by those in control of the company for a remedy to be available. ‘Unfairness’ or ‘unreasonableness’, however, is required.28 It is clear that the first of these two requirements applies to the oppressors’ motives and the second to the effects of the conduct on the applicant. This tallies with the Canadian authority noted above, and with Richardson J’s general view that the test for unfair prejudice should be objective rather than subjective.29

B. Australia

Despite intermittent rewording and renumbering, the remedy for unfair prejudice in Part 2F.1 of the Corporations Act 2001 remains substantially unchanged since 1983.30

Shortly after the first cases under the amended unfair prejudice remedy in New Zealand and Australia were reported, Professor Robert Baxt commented that ‘my guess is that the Thomas line of interpretation will eventually prevail’.31 This has proven to be the case. The

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23 See II THE UNFAIR PREJUDICE REMEDY: BACKGROUND AND PURPOSE above for the application of the principles expressed in Ebrahimi in Canada.
29 He notes, for example (at [1984] 1 NZLR 686, 692) the Australian case of Re M. Dalley and Co. Pty. Ltd (1968) 1 ACLR 489, 492, where Lush J said that oppression should be understood ‘in terms of its impact on the oppressed, not in terms of the intention of the oppressor’ (emphasis added).
30 As in New Zealand and the UK, the remedy was widened in 1983 so that ‘unfair prejudice’ and ‘unfair discrimination’, as well as ‘oppressive’ conduct, are now covered by Part 2F.1: see Ashley Black, Tom Bostock, Greg Golding and David Heale, CLERP and the New Corporations Law (1998) 166, and Keith Fletcher, ‘CLERP and Minority Shareholder Rights’ (2001) 13 Australian Journal of Corporate Law 290, 301. Black et al note that ‘whether conduct falls within [the scope of Part 2F.1] will be determined by reference to case law concerning s 260 [the relevant section until 1998] and its predecessors’. Fletcher states that ‘since [1983] the numbering of the provision has been altered a number of times as a result of corporate reform and legislative reorganisation but its substance has been virtually unaffected. The current Part 2F.1, ss 232-235, although amended in minor ways by the CLERP Act 1999 (Cth) is little changed from its 1983 precursor’.
approach taken to the remedy by the Australian courts has been very similar to that employed in New Zealand. John Farrar, for example, discusses the two jurisdictions’ unfair prejudice sections together, and devotes much of his discussion to the *Thomas* case. He notes that Richardson J’s reasoning was followed by the High Court of Australia in *Wayde v New South Wales Rugby League Ltd*,\(^{32}\) the most commonly cited Australian unfair prejudice case,\(^ {33}\) and has also been applied in a number of subsequent Australian cases.\(^ {34}\)

For example, in *Re Norvabron Pty. Ltd*, Derrington J considered the principles applicable to a just and equitable winding up in *Ebrahimii*\(^ {35}\) (the same principles applied by Richardson J in *Thomas*), and concluded that ‘precisely the same considerations apply to [the unfair prejudice provision], where the relationship of those persons inter se is the foundation of the remedy’.\(^ {36}\) Similarly, in *Re Dalkeith Investments Pty. Ltd*, McPherson J implied that in cases where the facts justified a just and equitable winding up, relief would also be available under the unfair prejudice provision. The basis for this finding was that the parties had ‘entered into an arrangement, which was no doubt implied rather than expressed, the substance of which was that they constituted a partnership in corporate form’.\(^ {37}\)

In more recent Australian cases too,\(^ {38}\) the liberal attitude taken by Richardson J, in *Thomas* and in later New Zealand cases, to unfairly prejudicial conduct continues to be applied. In *Raymond v Cook*, for example, the court relied on *Thomas*, *Wayde* and *Ebrahimii* in concluding that equitable considerations should, where appropriate, be superimposed upon the dealings between company shareholders and that, while conduct that will justify a winding up on just and equitable grounds will not necessarily always secure relief on an unfair prejudice application, ‘there is a considerable area of overlap’.\(^ {39}\)

Relief under the Australian unfair prejudice provisions does not require a want of good faith or probity. It is not a condition of relief under Part 2F.1 that the persons whose conduct is alleged to be unfairly prejudicial act with a dishonest motive, purpose or intention; it is the effect of their conduct that is material.\(^ {40}\)

**C. United Kingdom (Pre-O’Neill)**

Section 994 of the *Companies Act 2006* (UK), like its predecessor, s 459 of the *Companies Act 1985*, allows a remedy for conduct which is ‘unfairly prejudicial to the interests of [a company’s] members generally, or to some part of its members’. In keeping with the

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\(^{40}\) Robert P Austin and Ian M Ramsay, above n 5 [11.450]. In *Re Quest Exploration Pty Ltd* (1992) 6 ACSR 659, 669, for example, Mackenzie J noted Richardson J’s comments in *Thomas* and those of Lush J in *Re M. Dalley and Co. Pty Ltd* (1968) 1 ACLR 489, 492 to this effect, and concluded that ‘want of probity is only one of the ways in which oppression can manifest itself … [The provision] speaks of oppression in terms of its impact on the oppressed, not in terms of the impact of the oppressor’. See also *Fexuto Pty. Ltd v Bosnjak Holdings Pty. Ltd* (1998) 28 ACSR 688, 703 and *Popovic v Tanasijevic (No. 5)* (2000) 34 ACSR 1, 71.
approach applied elsewhere, it was, until 1999, consistently held in the UK that illegality or bad faith by those in control of a company is not necessary for a remedy to be granted:

It is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test, I think, is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner’s interests.\(^\text{41}\)

This statement has been cited with approval in a large number of subsequent cases,\(^\text{42}\) indicating general agreement with the approach taken in New Zealand and Australia.

Until 1999, it was also commonly held in the UK that ‘unfair prejudice’ could encompass the breach of a shareholder’s legitimate expectations, not necessarily limited to those matters set out in the company’s constitution or in other express agreements.\(^\text{43}\) For example, in *Quinlan v Essex Hinge Co. Ltd*\(^\text{44}\) it was held that a minority shareholder and director was entitled to relief after being excluded from the management of a company, even though the strict terms of his service agreement allowed for his dismissal as a director upon six months’ notice. In addition, the majority shareholder claimed that he considered the applicant to be his employee rather than his business partner, and that the applicant’s directorship was merely a ‘courtesy title’. The court, however, concluded that the applicant had established a legitimate expectation of continued participation in management, on the basis of ‘an understanding’ to that effect, and that he would participate in the conduct of the company’s business over and above the specific areas defined in the service agreement.

In similar circumstances, it was noted in *Richards v Lundy* (decided before, though reported after, *O’Neill v Phillips*) that although it is

usually appropriate to treat the company’s articles as representing the agreed contractual position between the shareholders, and therefore not to regard as unfair any action which the articles sanction, … this is one of the cases, not all that infrequent, in which the personal relationships within a small company have given rise to legitimate expectations which, as a matter of equity, must be taken into account.\(^\text{45}\)

The court held that, despite the lack of any statement to this effect in the articles, and despite the applicant’s minimal (10 per cent) shareholding, it was ‘clearly understood’ that he would participate in the company’s management. His exclusion was, therefore, unfairly prejudicial.

**IV. THE O’NEILL CASE**

*O’Neill v Phillips* represents a shift away from the previous liberal approach to the unfair prejudice remedy in the UK. The case involved a similar situation to both the *Quinlan* and *Richards* cases noted above. The applicant, O’Neill, was given a 25 per cent shareholding in the company by Phillips, the then sole shareholder and director, who expressed the hope that O’Neill would assume responsibility for managing the company, in which case he would receive half of the company’s profits. O’Neill duly did take over the running of the

\(^{41}\) Re R.A. Noble and Sons (Clothing) Ltd [1983] BCLC 273, 290, citing the words of Slade J in *Re Bovey Hotel Ventures Ltd* (Unreported, Chancery Division, 31 July 1981).

\(^{42}\) See eg, *Re London School of Electronics Ltd* [1986] 1, Ch 211; *Re Sam Weller and Sons Ltd* [1990] Ch 682; *Re Elgindata Ltd* [1991] BCLC 959; *Re J.E. Cade and Son Ltd* [1992] BCLC 213; *Re Little Olympian Each-way Ltd (No. 3)* [1995] 1 BCLC 636; *Re Regional Airports Ltd* [1999] 2 BCLC 30; and *Richards v Lundy* [2000] 1 BCLC 376.


\(^{44}\) [1996] 2 BCLC 417.

\(^{45}\) [2000] 1 BCLC 376, 393.
company and subsequently entered negotiations with Phillips to increase his shareholding to 50 per cent. Market conditions then changed, the company’s fortunes declined and Phillips decided to resume personal control of the company. O’Neill was removed from his management position and the agreement that he would receive a 50 per cent shareholding in the company, and continue to receive 50 per cent of the profits, never eventuated. O’Neill sought an order that he be bought out by Phillips under s 459 of the 1985 Act.

It was, in the words of Shapira, ‘a run-of-the-mill unfair prejudice case, which would not have commended much attention if it were not for the House of Lords’ reversal’. The Court of Appeal took what had hitherto been the conventional approach, finding that the absence of a conclusive agreement that O’Neill’s shareholding would be increased did not prevent him from having a legitimate expectation that it would. The House of Lords, however, adopted a narrower view. Lord Hoffmann accepted that the ‘just and equitable’ principle underlying the Ebrahimi decision was equally applicable to s 459 but, contrary to the earlier cases, he saw the basis of this principle to be good faith on the part of those in control of the company:

Company law has developed seamlessly from the law of partnership, which was treated by equity ... as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith ... Thus unfairness may consist in a breach of the rules [on which it is agreed that the affairs of the company should be conducted] or in using the rules in a manner which equity would regard as contrary to good faith.

On the issue of ‘legitimate expectations’, Lord Hoffmann concluded that ‘the concept ... should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which traditional equitable principles have no application’, and that legitimate expectations should only be held to have been frustrated when the conduct in question ‘would be contrary to what the parties, by words or conduct, have actually agreed’. In this case, as no binding, unconditional promise had been made regarding the matters in question, it was held that no unfair prejudice had occurred. O’Neill had a ‘reasonable’ expectation that these things would happen (in the sense that they appeared reasonably likely to him) but not a ‘legitimate’ expectation, as redefined by his Lordship.

O’Neill v Phillips has since been followed in a number of cases, including Re Guidezone Ltd, where Parker J summarised the effect of the case as follows:

O’Neill v Phillips establishes that ‘unfairness’ for the purposes of s 459 is not to be judged by reference to subjective notions of fairness, but rather by testing whether, applying established equitable principles, the majority has acted, or is proposing to act, in a manner which equity would regard as contrary to good faith ... Applying traditional equitable principles, equity will not hold the majority to an agreement, promise or understanding which is not enforceable at law unless and until the minority has acted in reliance on it.

In Parker J’s opinion, such reliance will most often occur in the case of agreements or understandings reached when a company was formed, by the minority’s entering into the company in the first place. But the same cannot be said of subsequent agreements which are not, themselves, enforceable at law. There will be no lack of good faith (and therefore no ‘unfairness’) unless the majority allows a minority to act in reliance on such an agreement.

46 Shapira, above n 43, 260, 261 and 266.
50 A term Lord Hoffmann had himself used previously: see Re Saul D. Harrison and Sons plc [1995] 1 BCLC 14, 19.
51 [1999] 1 WLR 1092, 1101-1102.
52 [2000] 2 BCLC 321, 355. See also Anderson v Hogg [2002] SLT 354, where Lord Prosser (dissenting, but not on this point) said at [9] that ‘having regard to what was said in O’Neill and Re Guidezone Ltd, it seems to me that [a] finding of good faith provides a proper basis for holding that unfairness was not established’.
V. REACTION TO O’NEILL IN NEW ZEALAND AND AUSTRALIA

The most recent New Zealand cases to discuss the unfair prejudice remedy in detail confirm that the New Zealand courts are standing by their previous more liberal approach despite what the House of Lords said in O’Neill.

A. Latimer Holdings Ltd v SEA Holdings New Zealand Ltd [2005] 2 NZLR 328

This is perhaps the most significant recent New Zealand case. The plaintiffs were shareholders in a listed company, and brought a case under s 174 of the Companies Act 1993 alleging that the company had been managed unfairly prejudicially. In particular, they claimed that their legitimate expectation of a return on their investment had not been met due to flawed management policies. The Court of Appeal (upholding the decision of the High Court) held that, although s 174 does apply to listed companies, in this case the plaintiffs were not entitled to a remedy. In the case of a large publicly listed company, minority shareholders have no legitimate expectation of being involved in (or of influencing) management. In such companies, the constitution will generally set out the parties’ rights and obligations exhaustively, which will not necessarily be the case in small closely held companies.

In coming to this decision, Hammond J, delivering the court’s judgment, noted that the High Court had questioned whether the Thomas principles should continue to apply, in light of the suggestions by the English courts that ‘the law in this area has moved on’ since the Thomas and Ebrahimi cases. After considering both the decision in O’Neill and the alternative approach employed in Thomas and subsequent cases in some detail, Hammond J came out firmly on the side of the latter. He noted the lack of any concern by the New Zealand courts as to the approach adopted in Thomas and, after considering recent analysis of unfair prejudice cases in the UK, identified the main problem in that country to be the length and complexity of proceedings and the costs thereof, rather than any fault in the courts’ approach per se. He also noted the English Law Commission’s recommendation that the way forward was through better case management, and not through changing the law. His conclusion was that the House of Lords was correct in its statement that the remedy should not provide a ‘right to exit at will’ for disgruntled company shareholders — a right of ‘no fault divorce’ as Lord Hoffmann put it — but that the O’Neill approach should nonetheless be rejected on three grounds:

1. The economic danger that senior executives and directors might avoid smaller companies for fear of being ‘locked in’.
2. The doctrinal danger that the O’Neill approach effectively narrows what is ‘fair’ down to what is defined by pre-existing formal arrangements. Hammond J thought that, although the House of Lords’ approach conforms with the economists’ theory of the firm (as a ‘nexus of agreements’), the approach in Thomas is more appropriate: ‘This is because something may be lawful and “expected”, but still be unduly prejudicial’.

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53 The Court of Appeal’s decision was upheld by the Supreme Court: (2004) 17 PRNZ 552. The approach taken in the Latimer case was most recently accepted as the ‘proper approach’ to s 174 in Dunning v Chabro Holdings Ltd [2007] 10 NZCLC 264.213, 264.225.
54 [2005] 2 NZLR 328, 340-341.
56 [2005] 2 NZLR 328, 341.
60 [2005] 2 NZLR 328, 344-345.
61 As discussed below, VI ECONOMIC ANALYSIS OF THE UNFAIR PREJUDICE REMEDY, this is not quite correct. ‘Agreements’, in the economic sense, are not confined to express, fully articulated bargains.
3. The problem of excessive, time-consuming and costly litigation, which seems to have been behind the O’Neill decision to a large extent, has not in fact been solved by the restrictive approach adopted by Lord Hoffmann.

B. Re Environmental Products (New Zealand) Ltd (2005) 9 NZCLC 263,779

This case concerned a breakdown in the relationship between participants in a possum hide tanning and processing business. The disagreement led to the plaintiffs ceasing to work for the company on a day-to-day basis.

Heath J noted, and purported to adopt, Lord Hoffmann’s words in O’Neill, including that the affairs of a company are governed by formal agreements made between shareholders, which may only be overridden if the conduct in question is contrary to good faith. However, he also found that unfair prejudice had occurred, despite finding ‘no intention on the part of [the defendants] to prejudice [the plaintiffs]’ and ‘expressly refrain[ing] from making findings on allegations of dishonesty’ — that is, of conduct that was contrary to good faith. Instead, his Honour’s decision was based on the lack of trust and confidence that had developed between the parties, making it ‘impracticable for [them] to work together in the future’. This is much closer to the approach taken in the Thomas and Latimer cases (despite neither case being directly referred to) than it is to that applied in O’Neill.

C. Johnson v Sneyd [2005] NZHC 348

The situation in this case was, in some ways, similar to that in the Environmental Products case. The basis of the plaintiff’s complaint was that there had been a complete breakdown in trust between the parties (the directors and shareholders of a small printing company) and that a continuing business relationship was therefore untenable. Among the specific allegations were forgery by the defendant of the plaintiff’s signature on company documents, unauthorised transfers of company funds and other self-interested conduct. Goddard J found that these allegations were made out and that they amounted to ‘serious allegations of bad faith’. However, she was also careful to note (relying on Latimer and Thomas) that bad faith or lack of probity is not required for a remedy under s 174, and that the parties’ reasonable expectations, not restricted to purely internal or formal expectations, are distinctly relevant in assessing whether conduct is unfairly prejudicial.

D. Australian Cases

The first Australian case to consider the approach to unfair prejudice put forward in O’Neill in detail was Fexuto Pty. Ltd v Bosnjak Holdings Pty. Ltd, a case involving a corporate ‘partnership’ between family members. The appellant claimed that he had been ‘alienated from decision-making’ contrary to the principle of equality and consensus management upon which the company had been founded. The New South Wales Court of Appeal agreed, with Spigelman J noting that the appellant was not able to point to any document, nor give any evidence of any conversation, by which the ‘understanding’ for which it contended was created. There was no evidence of any communication constituting any such understanding, or on the basis of which any express understanding could be inferred. The case, in this respect, was entirely a

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63 (2005) 9 NZCLC 263,779, [49].
64 Ibid [62] and [64].
65 Ibid [53].
67 Ibid [8]-[10].
68 (2001) 37 ACSR 672.
The right to participate was to be established by a process of inference. Such an inference may be drawn in an appropriate case.

Priestley JA held that

the conduct of all concerned parties … in my opinion showed a set of mutually accepted understandings giving rise to a situation [where] … it would be arguable that it would properly be unjust, inequitable or unfair for a majority in [the defendant company] to use their voting power to exclude [the appellant] from participation in the management without giving him the opportunity to remove his capital upon reasonable terms.

The major part played by the appellant in building the business, and its family nature, were considered significant factors contributing to the appellant’s case that he had a legitimate expectation of not being excluded from management.

Although the court in Fexuto (and Priestley JA in particular) discussed the O’Neill case at length, apparently with approval, the approach taken by the court is actually more in keeping with that employed in Thomas and Latimer. Farrar and Laurence Boulle make the point that although no unequivocal disagreement is expressed with Lord Hoffmann’s statements in O’Neill, neither is it ‘clear whether the Court of Appeal agrees with this conservative revisionism. One detects a mild scepticism in the judgments’.

Some of the comments of the court in Fexuto are certainly inconsistent with Lord Hoffmann’s judgment in O’Neill. For example, as well as accepting the possibility of an ‘understanding’ between shareholders which, though established only by a process of inference, could still give rise to a legitimate expectation of continued participation in management, Spigelman J also specifically rejected the assertion that the unfair prejudice remedy applied only to situations ‘which equity would regard as contrary to good faith’.

In Ebrahimi … as in other authorities, reference is made to situation in which equity as a formal body of doctrine would intervene to prevent the exercise of the legal right. The statutory remedy, whether expressed in terms of winding up on the ‘just equitable ground’ or in terms of ‘oppression’ or ‘unfair prejudice’ or ‘unfair discrimination’, does not apply only to situations in which equity would intervene. No doubt the principles reflected in the formal doctrines of equity will assist the court in reaching the judgment for which the statutory provisions, respectively, provide. Nevertheless, the terminology employed by the Parliament was not of a technical character and was intended to confer a wide jurisdiction on the courts.

Other recent Australian cases also indicate a continued adherence to the pre-O’Neill approach to the unfair prejudice remedy. For example, in Benjamin Corp. Pty. Ltd v Smith Martis Cork and Rajan Pty. Ltd, Carr J accepted that the plaintiffs had a reasonable expectation of continued involvement in the company’s management. This finding was based in part on a verbal agreement between the parties that they would acquire and conduct the business together, and in part on ‘common assumptions’ that the court held were shared by the parties. These assumptions arose from the parties’ previous personal and business relationships, rather than from any agreement as such.

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69 Ibid 679.
71 See (2001) 37 ACSR 672, 742-745.
74 (2001) 37 ACSR 672, 679 (emphasis added).
75 [2003] FCA 1471 (Unreported, Federal Court of Australia, 11 December 2003) [50] and [81]-[82].
VI. ECONOMIC ANALYSIS OF THE UNFAIR PREJUDICE REMEDY

The pre- and post-O’Neill approaches to the unfair prejudice remedy agree that its purpose is to enforce the ‘bargain’ between the parties.76 The difference between the two approaches lies in the content of this bargain: does it consist only of express, fully articulated terms, or will something less than that suffice? An economic analysis provides a coherent theoretical framework to answer this question.77

In economic terms, a company is considered a ‘legal fiction serving as a nexus for a set of contracts that are different from and presumably more efficient than those which would arise in the market’.78 In other words, it is a ‘pre-packaged legal form which is made conveniently and cheaply available’ and which ‘has been adjusted over time to reflect the needs of its users; current users thus benefit at low cost from the accumulated experience of previous users’.79 It minimises the costs of doing business because its pre-packaged features supply, as standard terms, things that the parties would otherwise have to expressly adopt. The reasons that such terms are not generally fully articulated include the costs (in terms of time and resources) of setting out an express bargain, and the difficulty in clarifying the content of such an agreement, given imperfections in information and communication.80 As well as this ‘generalised hypothetical bargain’, based on universally accepted commercial practice, there also exists the possibility of a ‘particularised bargain’, consisting of rights and expectations that are not subject to express contractual provision. The terms of such a bargain should, in economic terms, not be treated any differently to expressly agreed terms, provided they are ‘founded on a fundamental understanding, or shared expectation’.81

Based on this framework, Cheffins concludes that economic theory suggests that in applying the [unfair prejudice] remedy, the courts should focus on the content of the agreement between the participants, both in relation to express clauses and what the agreement would have been if negotiations had been costless … Where the participants had not actually agreed on the matter in question, the next step would be to consider the matter in terms of a hypothetical bargain … In certain situations the nature of the corporation and the circumstances under which the applicant became involved in the business might provide some assistance.82

VII. CONCLUSION: WHO HAS IT RIGHT?

O’Neill v Phillips leaves no room for the alternative approach to unfair prejudice, which recognises that legitimate expectations could be based on personal circumstances or on generally accepted commercial standards, rather than just on formalised arrangements.83 The scope for relief for unfair prejudice is thus now much more limited in the UK than it has been in the past, or than it continues to be in either New Zealand or Australia.

The revision of the remedy in O’Neill seems at odds with its apparent purpose — the enforcement of the ‘hypothetical bargain’ — a purpose evident from consideration of the
Ebrahimi case, and the consistent adoption of its principles by the courts of all jurisdictions with similar provisions.

This conclusion is supported by an economic analysis of the remedy. This suggests that Lord Hoffmann was wrong to limit the ‘bargain’ that is enforceable under the remedy to legally enforceable terms. Provided they have been agreed to by all parties (whether expressly or impliedly), expectations based on any form of agreement, however poorly articulated, should be considered ‘legitimate’ under the unfair prejudice provision.
DIRECTORS' LIABILITY FOR FALSE STATEMENTS IN THE INFORMATION DISCLOSURE OF LISTED COMPANIES IN CHINA

BIN HU* CHENXIA SHI**

I. INTRODUCTION

Economic globalisation has increased the value of reliable information in internationalised capital markets. Hence, reliable information disclosure has become essential for the efficient functioning of capital markets. The importance of information disclosure cannot be understated. Rampant occurrence of false statements in the information disclosure of Chinese listed companies is not only materially adverse to the interests of investors but also detrimental to the market. Without investors’ confidence in the integrity of the market, the market cannot operate well and grow. Accuracy and transparency of information disclosure are therefore the key areas of market regulation.

Achieving transparency in the information disclosure of listed companies in China has been a challenge. Although mandatory and continuous disclosure of information has been improved legislatively, and listed companies are prohibited from using false or misleading information or omitting material information from disclosure documents, in practice, misleading or deceptive information disclosure by listed companies has been widespread. However, companies and directors are not sufficiently punished for such corporate fault, affecting public confidence in the market.

This paper sets out to investigate directors’ liability for false statements in the information disclosure of listed companies in China. The paper first looks at the current regulatory framework for directors’ liability for false statements made by their companies. It closely examines recent rules of the Supreme People’s Court on cases concerning false statements. It then discusses and evaluates current directors’ liability for their companies’ false statements and puts forward recommendations for reform.

II. REGULATORY FRAMEWORK FOR DIRECTORS’ LIABILITY FOR FALSE STATEMENTS MADE BY THEIR COMPANIES

A. Regulatory and Legislative Developments

Since the early years of the development of listed companies and the securities market in China, false statements, misleading disclosure and market manipulation have been significant problems. Making false statements in the information disclosure of listed companies refers to conduct in contravention of securities law where persons involved in the information disclosure of companies make false statements which contain untrue, misleading information or material omission in relation to the facts, nature and prospect of

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3 Continuous disclosure means that listed companies are required to not only provide annual and periodical financial and operational information to their shareholders and to the regulators but also report information arising when certain material events occur in relation to the company’s operations or financial position. See generally chapter 3 of the Securities Law of People’s Republic of China (promulgated by the National People’s Congress on 29 December 1998 and amended in 2005).
4 Ibid.
offering and trading of securities. The Securities Law, Company Law and Criminal Law impose civil, administrative and criminal penalties on any person who contravenes provisions of these laws dealing with false statements. Authentication, accuracy and completeness are adopted as three benchmarks of proper information disclosure. Before the promulgation or amendment of this primary legislation, the securities market regulator — the China Securities Regulatory Committee (CSRC) — had been active in tackling securities fraud through conducting regular reviews and random investigations and imposing administrative penalties on wrongdoers.

B. Early Stage Administrative Regulations

In 1993, the Securities Committee of the State Council (SCSC, the former body of CSRC) introduced Provisional Measures on Prohibition of Securities Fraud to specifically deal with insider trading, market manipulation, false information disclosure and other forms of securities fraud. It imposes primarily administrative penalties on issuers, with no reference to penalties on directors. The SCSC also issued Interim Regulations on Share Issuing and Trading which contain similar provisions but subject any organisation and individual making false and materially misleading statements or major omissions to administrative penalties and potential criminal liability. These regulations did not provide civil liability and specific remedies for false statements made by listed companies and directors.

In June 1993, before the Company Law was promulgated, the SCSC released preliminary rules on the content and form required for information disclosure by listed companies, requiring directors of listed companies to ensure there is no false or misleading statement or material omission in the disclosure documents of their companies. Directors may be jointly liable if they fail to do so. However, no specific liabilities of directors were provided.

C. Major Legislations

The first Company Law was promulgated in 1993. It states that a company in contravention of the law shall bear civil liability for compensation. Where companies present false financial reports to shareholders and the public or make material omissions, the person in charge of the company, or other persons directly responsible, shall be fined between 10,000 and 100,000 RMB Yuan, and criminal liability may be imposed.

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7 See article 69 of 2005 Securities Law, articles 150 and 153 of 2005 Company Law and article 5 of the Criminal Law (6th Amendment).
8 Article 63 of 2005 Securities Law.
9 The CSRC regularly inspects activities of listed companies and publishes the inspection results if misconduct is detected. It gives warning to a company if the infringements are only minor. The CSRC usually issues public criticism, public condemnation, official warnings and monetary fines. See Liebman, Benjamin L. and Milhaupt, Curtis J., "Reputational Sanctions in China's Securities Market" (June 8, 2007). Columbia Law and Economics Working Paper No. 318 Available at SSRN: http://ssrn.com/abstract=999698 at 27 November 2008.
10 Issued by the State Council Securities Committee on 2 September 1993.
11 See articles 12, 21 and 22 of the Provisional Measures on Prohibition of Securities Fraud (Issued by the State Council Securities Committee on 2 September 1993).
12 See articles 21 and 22 of the Provisional Measures on Prohibition of Securities Fraud (Issued by the State Council Securities Committee on 2 September 1993).
13 Issued by the State Council Securities Committee on 22 April 1993.
14 See articles 74, 77 and 78 of Interim Regulations on Share Issuing and Trading (Issued by the State Council Securities Committee on 22 April 1993).
16 Promulgated by the National People's Congress on December 29, 1993, effective from July 1, 1994, and amended in 1999 and 2005.
17 Article 228 of the 1993 Company Law.
18 Article 212 of the 1993 Company Law.
1997 Criminal Law amendments incorporated new criminal offences relating to false statements.\(^{19}\)

The first Securities Law, promulgated in 1998, prohibits conduct involving securities fraud, insider trading and market manipulation.\(^{20}\) It states that a company is subject to civil liability if it engages in falsifying records, makes misleading statements or material omissions which result in trading losses.\(^{21}\) Despite this provision, the first such action, brought against Chengdu Hongguang Co. Ltd for its accounting and disclosure irregularities, was dismissed by the court on the basis of lack of specific procedure for such civil actions in China at that time.\(^{22}\) Hence, cases of making directors personally liable for companies’ false statements and providing civil remedies for investors harmed by market misconduct were non-existent. Serious market scandals involving false statements and market manipulation frequently surface, shaking investors’ confidence in the market.\(^{23}\)

Legal academics and practitioners adamantly called for civil compensation cases arising from securities frauds to be accepted and heard by the courts.\(^{24}\)

This situation compelled the commencement of the Securities Law amendment. However, as legislative amendment is a lengthy process and could not address problems in the immediate term, the SPC stepped in and provided interim rules to deal with problems to alleviate investor anxiety about market environment with certain provisions on civil remedies for false statements in 2003.

**D. Rules of the Supreme People’s Court and Its Enforcement Role**

The Supreme People’s Court (SPC) issued three circulars instructing local courts on how to deal with civil compensation claims arising from securities fraud between September 2001 and January 2003.\(^{25}\) In the First Circular, the SPC explained that the reason for not accepting such cases was that ‘the people’s courts do not have adequate resources to accept and hear such cases due to current legislative and judicial limitations.’\(^{26}\)

In the Second Circular, the Supreme Court gave designated courts permission to accept civil actions relating to the contravention of securities laws on the condition that the company had been administratively sanctioned for false disclosure by the CSRC.\(^{27}\) The Second Intermediate Court of Shanghai tried the first such case on 11 November 2002 and the case was eventually settled.\(^{28}\)

The Third Circular (hereafter SPC Rules) maintains the condition for accepting false-statement compensation cases by the courts set out in the Second Circular and also permits

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19 The Criminal Law was first promulgated in 1979 by the National People’s Congress, which was then amended in 1997, 1999, 2001, 2002, 2005 and 2007 respectively. See articles 160 and 161.

20 See Article 5 of 1998 Securities Law.

21 Article 63 of the 1998 Securities Law.

22 L Wang, ‘Supreme Court Instructs Lower Courts Not to Accept Civil Actions Concerning Securities Fraud’ Shanghai Security Daily (Shanghai), September 2001.

23 Such as Qiongminyuan company in 1996; Hongguang company in 1998; Yinguangxia company in 2001 and Qionghua Hi-tech company in 2004.


25 The first is the ‘Circular of the Supreme People’s Court on Temporary Refusal to Lodgement of Civil Compensation Cases Concerning Securities’ [’Zuigao remin fayuan guanyu she zhengquan minshi peichang anjian zan buya shouli de tongzhi’] issued on 21 September 2001; the second is the ‘Circular of the Supreme People’s Court on Issues Concerning Filing of Tort Cases Resulting From False Statement on the Securities Market’ [’Zuigao remin fayuan guanyu shichang yin xujiachengshu yinfa de minshi qinquan jiufen anjian yonguan wenti de tongzhi’] issued on 15 January 2002; the third is the ‘Certain Provisions of the Supreme People’s Court on Hearing Civil Compensation Cases Arising From False Statement on the Securities Market’ [’Zuigao reminmin fayuan guanyu shenli zhengquan shichang yin xujiachengshu yinfa de minshi peichang anjian de ruogan anjian de tongzhi’] issued by Judicial Committee of Supreme People’s Court on 9 January 2003, available at PRC Laws & Regs <http://www.lawinfochina.com> at 27 November 2008.

26 See the ‘Circular of the Supreme People’s Court on Temporary Refusal to Lodgement of Civil Compensation Cases Concerning Securities’ [’Zuigao remin fayuan guanyu she zhengquan minshi peichang anjian zan buya shouli de tongzhi’] issued on 21 September 2001.

27 See the ‘Circular of the Supreme People’s Court on Issues Concerning Filing of Tort Cases Resulting From False Statement on the Securities Market’.

actions where the company had been sanctioned for false or misleading disclosure by other administrative agencies or convicted of a crime. Directors can be jointly liable to compensate investors with their companies for making false statements. However, before investors initiate compensation action for their losses resulting from false statements, there must be an administrative penalty decision or a criminal court judgment made against alleged persons for their roles in false statements.

As a result, investors can sue only if the alleged false statement has been investigated by relevant authorities and the alleged persons are subject to an administrative or criminal sanction. In other words, if alleged persons such as directors involved in a false statement have not been sanctioned by either a regulator or the criminal court, investors cannot sue them and get compensation for losses suffered from the alleged false statement. This not only deprives investors of their constitutional right to take civil action as citizens but also strips them of their right to take civil action in conjunction with a criminal proceeding. On the other hand, such provisions may create opportunities for alleged wrongdoers to escape civil action by influencing administrative investigation outcomes or criminal proceedings through guanxi (personal connections) or bribery.

Even for investors who manage to take the action to the court, the onus is on them to persuade the courts to accept the case and prove their case is taxing. The court accepts a case if investors’ losses result from a false statement concerning securities and if requirements for a civil action set out in article 108 of the 1991 Civil Procedure Law are satisfied. The key factor to determine is whether the investors’ loss is causative to the alleged false statement.

The courts may combine individual actions into one trial after reaching consensus with both parties. The SPC Rules favour joint action over individual action and provide more detailed rules on joint action. However, the joint action the SPC favours falls within the second category of a joint action defined by the Civil Procedures Law with the effect that the onus is on investor claimants to make sure they ‘join the party’ before the hearing of the case, otherwise they may lose out on the case. Such a procedural hurdle is really unfair to individual minority investors and may cause substantial injustice.

29 See the ‘Certain Provisions of the Supreme People’s Court on Hearing Civil Compensation Cases Arising from False Statement on the Securities Market’ and article 2 of the ‘Circular of the Supreme People’s Court on Issues Concerning Filing of Tort Cases Resulting from False Statement on the Securities Market’.
30 See Articles 26, 27 and 28 of the SPC Rules.
31 Article 6 of the SPC Rules.
32 Authorities that can impose administrative sanctions include CSRC, the Ministry of Finance and other organisations that have power to impose administrative penalties. In accordance with Articles 16, 17, and 18 of the Administrative Penalty Law, whether an organisation has power to impose an administrative penalty is primarily a matter decided by the State Council, provincial or autonomous region governments. The relevant organisation must have a function to administer public affairs. See the Administrative Penalty Law (promulgated by the National People’s Congress on 17 March 1996). Also see article 5 of the Circular of the Supreme People’s Court on Issues Concerning Filing of Tort Cases Resulting from False Statement on the Securities Market.
33 See the 1996 Criminal Procedure Law.
36 There are four elements of the requirement: (1) plaintiffs are natural persons, legal persons or other organisations whose interests are directly affected by the action; (2) defendants are identifiable; (3) there are specific claims, facts, and reasons; (4) cases are within the civil litigation scope of the courts and within the jurisdiction of the accepting courts.
37 Article 6 of the SPC rules.
38 Article 53 the 1991 Civil Procedures Law.
39 See articles 13, 14, 15, and 16 of SPC Rules.
E. 2005 Securities Law Amendments

The 2005 Securities Law reinforces the SPC Rules and subjects directors to joint and several liabilities of compensation for making false records, misleading statements or major omissions which result in losses to investors unless they can prove absence of any fault on their part. However, its enforcement may be problematic as proof of fault is difficult where there are no detailed rules on the elements of fault.

III ROLE AND FUNCTIONS OF REGULATORS

Given legislative development has lagged behind rapid economic development in China, the scope and level of regulation provided by major legislation quickly become inadequate for real regulatory imperatives of the market. Such dynamic circumstances have propelled the creation of a powerful and active market regulator — the CSRC. The CSRC has the mandate of ‘carrying out supervision and administration of the securities market’ and investigating and punishing any violations of the securities laws. It has the power to supervise and inspect information disclosure of listed companies in relation to offering and trading of securities. With its rule-making power, the CSRC has played a vital role in bridging gaps between legislation and filling in loopholes in the regulatory system of the securities market.

The CSRC issued numerous rules governing information disclosure in response to widespread misconduct of listed companies in the 1990s involving fraudulent accounting and false statements. The CSRC also made efforts to transplant the Anglo-American system of continuous information disclosure as China’s increased participation in the world economy has necessitated its conformation to international rules and practices. However, the borrowed system, detached from its source country’s historical framework, is hardly compatible with the receiving country’s existing legal infrastructure at micro level and with its existing political and economic institutions at macro level. Enforcement is difficult despite CSRC’s attempts to crack down and punish companies engaged in misconduct. Many companies and directors engaged in false or misleading information disclosure were disciplined by the CSRC through administrative sanctions.

41 Article 69 of 2005 Securities Law states that a listed company shall be subject to compensation liabilities if it makes any false record, misleading statement or major omission, and causes losses to investors in the ordinary course of securities trading. Directors and other officers held directly responsible shall be subject to the joint and several liabilities of compensation unless they can prove absence of any fault on their part.

42 See articles 178 and 179 of 2005 Securities Law.

43 Article 179 of the Securities Law.


47 For example, one of the biggest fraudulent disclosure cases in corporate China, the Yinguangxia case, was exposed in 2000. The Yinguangxia company inflated its export income to Germany for the year 2000 in its annual report to as high as Deutschmark 180 million, whereas the actual figure was less than U.S. $30,000. The serious and widespread practice of false disclosure or major omissions in the disclosure documents of listed companies prompted the CSRC to conduct a vigorous campaign in 2001, naming that year as a year of Regulation Storm. Statistics indicate that about 50 listed companies received an inspection, warning, criticism or fine from the CSRC, SETC, or other regulatory bodies. See ‘Corporate Governance Measures on Noncompliance Issues of Companies as the Discipline of Securities Market Enters the Final Stage’, China Business Post (Beijing), 25 October 2002.

48 For example, Hongguang Company made its public offering in June 1997 by issuing 70 million A shares and raised 410.2 million RMB yuan. There was a huge gap between its projected profits in the prospectus and profits actually generated after its IPO, which raised suspicion. The CSRC investigated and found that the company, at the time of the listing, falsely reported its 1996 profits and covered up a major event relating to a key production line. In October 1998, the CSRC imposed sanctions on the company and 13 directors for defrauding investors by under-reporting company's losses in its 1997 interim and annual reports and misusing raised capital. The CSRC fined Hongguang Company 1 million RMB Yuan and confiscated 4.5 million RMB Yuan. It also banned the chairman of the board of directors, He Xingyi, from serving any listed company or securities company at senior management level. See the Penalty Decision [Chufa jueding] of the CSRC [1998] 75, available at China Securities Regulatory Commission.
Administrative sanctions of the CSRC that may be imposed on listed companies and directors include reprimand, warning, fine, suspension and banning from the market.⁴⁹ For minor misconduct, the CSRC may issue reprimands (including correction orders and notices of criticism)⁵⁰. For more serious violations, the CSRC use formal warnings or fines (for companies ranging from 300,000 to 600,000 RMB Yuan and for persons directly in charge and, for the other persons directly responsible, ranging from 30,000 to 300,000 RMB Yuan).⁵¹ Companies and directors subject to formal warnings and/or administrative fines as a result of making false statements may potentially bear compensation liability under 2003 SPC Rules.

Table 1 below indicates the number of directors sanctioned by the CSRC for making false statements from 1995 to 2006 and the types of penalties made against them. It is interesting that the number of administrative sanctions issued by the CSRC against directors from 1995 to 2006 is very small compared to voluminous penalty decisions against listed companies,⁵² and against the background that misleading and false statements have been widespread on China’s securities market and investors have been calling for tough sanctions on directors who are seen as the chief architects of information disclosure of listed companies, as well as CSRC’s own efforts to make directors of listed companies accountable.⁵³ This indicates that directors were, in practice, unlikely to be held liable for false statements of the company. Enforcement bottleneck has been a long standing issue in China. There has only been a modest increase of numbers of sanctions against directors since 2003 when the SPC allowed false-statement cases to be accepted on the condition that the alleged persons were subject to an administrative sanction by the CSRC or convicted of a crime.

⁵⁰ Correction orders are issued to compel a company or individual to correct certain conduct. Notices of criticism are publicly circulated to deter a company or individual from further violations due to reputational damage such criticism may cause.
⁵¹ See article 191 and 193 of 2005 Securities Law.
Table 1[^1]  

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of directors Penalised</th>
<th>Types of Penalties</th>
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<tbody>
<tr>
<td></td>
<td>Public Criticisms</td>
<td>Warning</td>
</tr>
<tr>
<td>1995</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>1996</td>
<td>4</td>
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<tr>
<td>2005</td>
<td>11</td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td>25</td>
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</tr>
</tbody>
</table>

Similarly, stock exchanges play their role in monitoring information disclosure of listed companies.[^55] The stock exchanges may impose sanctions on listed companies and directors including oral warnings, notices of criticism and public criticisms.[^56] The exchanges may issue these sanctions against companies and directors involved in false or misleading disclosure and inaccurate profit forecasts.^[57]

**IV. DIRECTORS’ LIABILITY FOR THE FALSE STATEMENTS MADE BY THEIR COMPANIES**

Directors exercising decision-making powers of the company are accountable to those who are affected by their decisions, including the company, shareholder and other constituents.[^58] Making directors accountable requires rigorous regulatory regimes and


[^55]: Article 115 of the Securities Law.


[^57]: Ibid.

imposition on directors of duties to their companies. Historically directors’ duties in both Chinese legislation and academic literature have been limited. As China has traditionally been a civil law country, directors’ liabilities arise from breaching their statutory duties and contravening laws and the company constitution. The 1993 Company Law imposed certain duties on directors in very general terms without concrete provisions on their liabilities. The 2005 Company Law amendment dedicated a new chapter to qualifications and duties of directors. It provides that directors owe a duty to act in good faith and a duty of care to companies. However, the meaning of ‘good faith’ and ‘standard of care’ are not clearly elaborated, which may again affect enforcement outcomes. The law prohibits directors from engaging in seven types of conduct deemed in breach of director’s duties, and imposes compensation liability on directors in general terms without providing procedural details.

The 2005 Securities Law amendment reinforces the SPC Rules and it also provides that directors of a listed company shall give their opinions in writing on the periodic report of the company and guarantee the authenticity, accuracy and integrity of the information disclosed by the company. Directors shall be given a warning or fine if they are directly in charge of, or otherwise directly responsible for, information disclosed by the company containing false and misleading statements. Directors in contravention of the law are subject to both civil compensation liability and a fine, and if their assets are sufficient to pay both, then civil compensation must be paid first. The CSRC may ban persons in serious contravention of laws and rules from serving as a director of a listed company and participating in the securities markets. In terms of criminal liability, the 1997 Criminal Law and its recent amendment imposed criminal liability on directors involved in false statements but penalties are quite light.

In fact, directors have been more frequently punished administratively by the CSRC and the stock exchanges for their own wrongdoing or for the fault of a company of which they are in charge. However, these sanctions are top-down disciplinary sanctions and do not concern direct remedies to investors. Directors sanctioned by the CSRC or other regulatory bodies for false statements of their companies may potentially lead them to pay civil compensation to investors under 2003 SPC Rules.

The SPC Rules elaborate more specifically in terms of directors’ civil liability. According to the SPC Rules, parties involved in making false statements concerning securities face civil liability for the loss suffered by investors resulting from those statements. Where a plaintiff wins a civil suit, the defendant shall bear all or part of the costs of the suit. If the defendant’s assets are inadequate to meet the compensation liability, the defendant’s personal assets shall be used to meet the compensation liability. If the defendant is a company, the whole compensation liability shall be met by the assets of the company. Where a director is no longer in charge of a company, the compensation liability may also be met by the assets of the company. If the assets of the company are inadequate to meet the compensation liability, the compensation liability may be met by the director’s personal assets.

59 While external regulation is important, directors’ duties play a larger role in preventing corporate misconduct in the long run. This is because, although the power of a director can be demonstrated by exercising decision-making power collectively with other directors of the company, his or her duties and responsibilities can only be borne individually. If duties and responsibilities were to be borne collectively by the directors, this would lead to a situation in which nobody will be held accountable for anything. For a recent discussion, see John Armour, and Joseph A McCahery, ‘After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US’ (Working Paper No 2006-2007, Amsterdam Centre for Law and Economics, 2006).

60 For a historical account on the development of company law in China, see Chenxia Shi, ‘Commercial Development and Regulation in Late Imperial China: An Historical Review’ (2005) 35 Hong Kong Law Journal 481.

61 See chapter 6 of 2005 Company Law.

62 See Articles 148, 149, 150 and 151 of 1993 Company Law.

63 See articles 147, 148 and 149 and generally Chapter 6 of 2005 Company Law.

64 Article 148 of 2005 Company Law.

65 See article 149 of 2005 Company Law.

66 Article 68 of 2005 Securities Law.

67 Article 193 of 2005 Securities Law.

68 Article 232 of 2005 Securities Law.

69 Article 233 of 2005 Securities Law states: ‘If laws, administrative regulations or relevant provisions of the State Council’s securities regulatory authority are violated and the circumstances are serious, the State Council’s securities regulatory authority may take the measure of banning the relevant persons responsible from the securities market. ‘[B]an from the securities market’ means the system wherein the affected person may not engage in the securities business or is prohibited from serving as a director, supervisor or senior officer in a listed company for a certain period of time or for life.’

70 Directors can face up to three years imprisonment or between 20 000 to 200 000 RMB Yuan fine, or both. See article 161 of the Criminal Law.

71 See article 191 and 193 of 2005 Securities Law.
They include companies, promoters, controlling shareholders and actual controllers of the company; directors, supervisors and senior managerial personnel of the issuers, securities underwriters, or securities listing sponsors. Investors can bring action against any one of them or all of them.

The circumstances under which the directors are jointly liable with companies for making false statements include circumstances where directors: participate in making false statements; know or ought to know about the false statement and do not oppose to it; and other situations where directors should assume responsibility for the false statement and its effects, which is in fact a ‘catch-all’ clause giving courts discretion over directors’ liability for false statements made by companies. Directors’ liabilities are limited to actual losses suffered by investors.

Therefore only those investors who purchase affected securities after a false statement is made, and before the false statement is exposed or rectified, and who then sell the affected securities or continue to hold securities after the exposure or rectification of the false statement, are entitled to seek compensation for their loss. So the compensation coverage is quite narrow, excluding indirect loss or other expenses incurred by investors.

The SPC Rules also instruct courts to use mediation as a method of resolving cases concerning false statements in accordance with principles and procedures of mediation set out in the Civil Procedure Law. The courts may conduct mediation before trial or any time prior to delivering decisions. Mediation is a traditional method of resolving conflicts in China but its usage for compensation cases against directors may diminish the importance of tough legal liability as deterrence for directors. As successful mediation results in settlement of the case under the guidance of the courts, the settlement is paid by the company as the party to the mediation. Directors therefore do not bear personal liability for their involvement in making false statements.

An encouraging development in the 2005 Company Law amendment is that the concept of lifting the corporate veil has been introduced. However, the circumstances under which the corporate veil can be lifted are extremely limited. It provides that if the sole shareholder of a one-member company is unable to prove that the company assets are separate from their own assets, he or she shall be jointly liable for the debts of the company. If shareholders use the company form to defraud or avoid an existing legal obligation, particularly to creditors, then the corporate veil may be lifted to make them personally liable for company’s debts. This was mainly targeted at controlling shareholders of listed companies who evaded debt repayment by transferring assets between entities, mixing company assets with personal assets or otherwise siphoning off company assets to the detriment of the company, minority shareholders and creditors. Clearly, lifting the

72 See articles 7, 21, 22, 23, 24, 25, 26, 27 and 28 of the SPC Rules.
73 Article 7 of SPC Rules.
74 Article 12 of SPC Rules.
75 See Article 28 of the SPC Rules and article 63 of the 1998 Securities Law; also see Zhennan Cui and Mingsheng Ma, ‘Directors’ Liability to Shareholders in Cases Concerning False Statements’ (‘xu jia chen shu zhong dongshi dui gudong zeren yanjiu’) (2003) 2 China Legal Studies [Zhongguo Fauxe] 96.
76 See articles 30 of the SPC Rules.
77 According to article 18 of the SPC Rules, the causation between the false statement and investors’ loss can be found by referring to the following elements: the investments were securities directly affected by the false statement; the affected securities are purchased between the date on which the false statement is made and the date on which the false statement was exposed or rectified; and investors suffered loss from selling securities on or after the date on which the false statement was exposed or rectified.
78 Such as the litigation costs, travel expenses and the lost wages for days in court.
79 See article 4 of the SPC Rules.
80 See articles 85, 86, 87, 88, 89, 90 and 91 of 1991 Civil Procedures Law.
81 See article 128 of 1991 Civil Procedure Law.
82 See article 64 of 2005 Company Law.
83 Article 20 of 2005 Company Law states that where any of the shareholders of a company evades the payment of its debts by abusing the corporate separate legal personality and the protection of limited liability, it shall bear several and joint liabilities for the debts of the company if it seriously injures the interests of creditors.
84 ‘A Comparison Between the Old and New Company Law: 30,000 Yuan is now the threshold of Incorporating A Company’, China Legal Daily (Beijing), 1 November 2005.
corporate veil should be extended to directors in certain circumstances, for example, where
directors participate in the wrongdoing of the company, causing damages or loss to third
parties.

V. COMMENTS AND CRITIQUE ON DIRECTORS’ LIABILITY FOR
COMPANIES’ FALSE STATEMENTS AND RECOMMENDATIONS FOR REFORM

A. Comments on the SPC Rules
The SPC Rules marked the beginning of civil compensation actions for investors who have
suffered loss as a result of false statements in the information disclosure of listed
companies. This was a significant step forward in investor protection in China. However,
conditions attached to investors’ rights to take such action make the protection rather
limited.

Firstly, the prerequisite rule discussed above 85 effectively limits the scope of cases to be
accepted and heard by the courts. The SPC Rules directing designated courts to only accept
cases concerning false statements ruled out investors' chances for suing directors for other
securities-related misconduct of listed companies. Keeping many other actionable cases
out of the gates of the court fails fair and just principles of the law.

Secondly, the requirement of causation between the false statement and investors’
actual loss limits the number of eligible investors to sue. Investors who purchase or sell
affected securities at times other than those specified by the SPC Rules are effectively
excluded from compensation even if they suffered loss as a result of the false statement.
This is again contrary to the fairness principle upheld by the law and championed by the
regulator.

Thirdly, the SPC Rules fail to provide investors with a helpful and effective procedure
by which they may get access to the courts and judicial remedies. There are also limited
numbers and locations of courts to which investors can bring the cases. Intermediate
people's courts designated by the SPC as courts of first instance to accept such actions are
those located in provincial capital cities, metropolitan cities, cities under separate zoning
and cities of special economic zones. 86 Investors residing in places other than these
locations of the courts face practical difficulty in taking the action.

Hence limitations of the SPC Rules make it difficult for investors to actually obtain
compensation for losses suffered as a result of false statements. These limitations are also
due to inadequacy, gaps and loopholes of existing primary legislation. As China has no
common law tradition, only statutes have the effect of law 87 and the SPC Rules are either
supplementary to the law or constitute further interpretations of the law. Without detailed
provisions in primary legislation on civil penalties against directors for the courts to refer
to in handling cases, the legal standing of compensation orders imposed by the courts on
directors in accordance with the SPC Rules lacks a solid base, thereby affecting the vigour
of the enforcement. Hence, the improvement of the situation will depend on the further
reform and improvement of the Securities Law, the Company Law, Civil Procedures Law
and Criminal law, as well as on the meaningful consultation, coordination and cooperation
between the legislature, courts and regulators.

B. Comments on Statutory Liabilities of Directors
The 2005 Company Law amendment and Securities Law amendment improved provisions
in many areas requiring regulation or demanding regulatory changes. However, they failed
to make headway in building up a strong civil penalty regime in China. Like previous laws,
the amendments only provide directors’ civil liability in general terms without providing

85 See above n31.
86 Article 8 of the SPC rules.
87 Zhonghua Renmin Gongheguo Lifafa [Legislation Law of the People’s Republic of China] (promulgated on 15
March 2000 and effective from 1 July 2000) (PRC), art. 2.
details on substantive and procedural requirements, leaving effective exercise of investors’ statutory rights in question. 88

The 2005 Company Law amendment provides a right for shareholders to commence a derivative action, 89 which has been seen in other jurisdictions as an important mechanism for holding directors accountable and reducing agency costs. 90 This is the first time in China that shareholders’ derivative action is allowed in circumstances where directors violate the laws, administrative regulations or company constitution during the course of discharging their duties, and cause losses to the company. 91 However, the law does not stipulate detailed procedures for taking such an action, nor does it elaborate on the types of remedies available to shareholders, apart from compensation. There are also limitations on the eligibility of shareholders to take such action. 92

The criminal liability imposed on directors for false statements is not adequate and tough enough to deter wrongdoings. The 2006 Criminal Law (Sixth Amendment) states that where companies and enterprises, which are subject to obligations of information disclosure in accordance with law, provide shareholders and public investors with false accounting reports or reports in which material information has been concealed, or fail to disclose other important information, thereby seriously harming the interests of shareholders and others, the person in charge of the company or other persons directly responsible shall be subject to up to three years imprisonment and/or a 20 000 to 200 000 RMB Yuan fine. 93 A managing director is certainly the person in charge of the company, and other persons directly responsible for information disclosure are mostly directors, so this criminal sanction applies to directors, but the penalty is too light to exert real punishment and deterrence power, particularly in the context of the widespread occurrence of false statements in China’s fledging securities market. Even developed markets with relatively enhanced information disclosure and mature regulatory systems impose tougher criminal sanctions on false statements. 94 Furthermore, this sole provision dealing with criminal liability for false statements does not clearly define circumstances under which imprisonment and/or fines shall be imposed, which gives rise to enforcement difficulties.

Administrative sanctions of the CSRC against directors are therefore the dominant sanctions. Apart from warnings and fines, public criticism makes the criticised party feel humiliated and shameful, a complete ‘loss of face’ in Chinese society. 95 As good name and reputation are traditionally held high by Chinese people throughout history, reputational damage may deter some companies and directors from engaging (or continue to engage) in activities which may attract public criticism from either stock exchanges or the CSRC. However, it may mean little to unscrupulous ones. Hence, the overall deterrent effect may not be significant enough to curb or constrain misconduct and violations of law.

In short, while administrative and civil penalties are imposed to deter, compensate or remedy certain unlawful activities, criminal penalties are mainly for punishment purposes. The social stigma carried by the criminal convictions can be a strong deterrent. Currently,

89 See Company Law, ch. 3, art. 111.
91 See article 153 of 2005 Company Law.
92 See articles 152 and 153 of 2005 Company Law. The shareholders holding one per cent or more of the total shares, either separately or collectively, may request in writing the supervisory board to institute an action on behalf of the company. If the supervisory board refuses to bring such requested action or fails to take action within 30 days of receiving the request, or in urgent circumstances if the failure to immediately initiate the action may result in irreversible damages to the company, the shareholders may institute derivative action.
93 See article 5 of 2006 Criminal Law (sixth amendment).
94 Up to $5 000 000 fine and up to 20 years imprisonment under the Sarbanes-Oxley Act in the United States; and up to 7 years imprisonment under the Prevention of Fraudulent Investment Act in the United Kingdom.
in the regulation of the securities market, administrative penalties are overused, whereas civil penalties and criminal penalties are underdeveloped.

VI. RECOMMENDATIONS FOR STRENGTHENING DIRECTORS’ LIABILITY

A. Future amendment of the Securities Law should expand application scope of civil liability against directors. The law should provide detailed rules on civil penalties imposed on directors and civil remedies available to investors. For investors to effectively exercise their rights, both well-considered substantive and procedural requirements for directors’ civil liability should be provided. The Civil Procedures Law should also be amended to reflect consistency in terms of procedures for civil actions on the securities market. The current limitations of the SPC Rules on investors’ civil action for companies’ false statements should be removed. Tougher criminal liability should be imposed on directors. A lengthy imprisonment is mostly likely to deter serious offences.

B. Class action should be introduced to provide investor protection. Class actions and contingency fees play an important role in the enforcement of securities law in the United States. Class actions allow numerous individual investors ‘who have been harmed by the same securities violation to pool their claims together into a single action.’ The combined recovery of losses is sufficient to make the action financially viable. Also, contingency fees allow lawyers to be paid only if the action is successful, which enables investors to attract lawyers to represent them without the investors incurring a financial burden if they lose their case. Thus, class actions and contingency fee arrangements deter violations of securities law by companies. Of course, the direct transplantation of the U.S. class action to China will not be entirely feasible due to embedded differences in legal culture, law enforcement and corporate governance regimes. However, class action as an effective tool for investor protection should be designed according to current market conditions and capacity of the courts, and gradually expanded and developed or reformed in tandem with the development of the market, the courts and laws. In addition, provisions on shareholders’ derivative action need to be improved, both in terms of substantive requirements and procedures. The current simplistic provision in the law creates a situation where investors have a right, but they can hardly exercise that right.

C. The corporate veil should be lifted to make directors personally liable for corporate fault in circumstances where directors are controllers of the company and acting in their own interests at the expense of company’s interest or in serious breach of their duties. For example, failure to discharge their duty to guarantee the authenticity, accuracy and completeness of information disclosed by the company should give rise to their personal liability for compensation to investors who suffered loss as a result of false or misleading information provided by the company. Moreover, direct and independent liability should also be imposed on directors for corporate fault areas of environmental law, taxation law and labour law. For example, failure to discharge their duty to remit company taxes should result in them being personally liable for such taxes owed. Uniform standardisation of directors’ liability across legislations will provide a solid

97 Ibid 7-8.
98 It was feared, given the vast number of Chinese investors, that class actions may expose listed companies, the majority of which are state-owned, to massive compensation actions that would potentially increase conflict between investors and the state, destabilising economic and political order. See Benjamin Liebman, ‘Class Action Litigation in China’ (1998) 111 Harvard Law Review 1523.
VII. CONCLUSION

The rapid development of the securities market in China has not been matched by an appropriate level and scope of regulation. Uncertainty and grey areas in laws and regulations have always been a problem. In particular, directors’ liability for corporate fault is under-regulated generally. Only a few general and succinct provisions have been provided by amended Securities Law, Company Law and Criminal law in relation to directors’ liability for false statements made by their companies. And directors are only liable to pay compensation to investors who are harmed by the company’s false statements if they are directly in charge or otherwise directly responsible for the company’s information disclosure. The SPC Rules allowing investors’ civil action against directors for false statements set a high threshold for most investors to actually get access to justice they are seeking. In practice, there are not many cases where directors have been held liable.

Further reform is required to strengthen directors’ liability, both civil and criminal liabilities. While administrative sanctions have been extensively used by the CSRC to rein in market misconduct, such a direct interventionist approach should be moderated with the progress of rule of law in China. The emphasis should now be shifted to building a strong civil liability regime. A robust directors’ civil liability system will improve investor protection and corporate governance in China.
EMERGENCY POWERS AND CARETAKER GOVERNMENT IN BANGLADESH

A.K.M MASUDUL HAQUE*

The present caretaker government, seemingly backed by the military, has been running Bangladesh under a state of emergency since early January 2007. Like the constitutions of most countries, the Bangladesh Constitution contains provisions for a state of emergency to deal with natural disasters, civil unrest or outbreak of war or war-like situations. After the events of September 11, 2001, many developed countries have passed laws, for example, extending powers to arrest, search, detain and interrogate suspects, which are normally associated with a state of emergency, as a tool to combat terrorism. During the period of emergency, certain protections guaranteeing fundamental rights are either restricted or suspended, or even compromised. In many countries, including Bangladesh, a state of emergency is often used as a tool to suppress criticism and opposition to the regime in power. It is mostly used for political persecution, including torture, in gross violation of human rights. Consequently, imposition of a state of emergency has serious political and legal ramifications. It transcends various branches of law, especially, international law, constitutional law and criminal law. This paper will analyse the declaration of a state of emergency from a constitutional law point of view and discuss whether this is an abuse of constitutional power and the political process. The aim of this paper is to argue the case for strengthening the political constitution by devising institutions and developing certain international standards to prevent future abuses, given the wide use of emergency powers throughout the world.

I. INTRODUCTION

This paper analyses the declaration of a state of emergency in Bangladesh from constitutional law and human rights perspectives. The Bangladesh Constitution, like most written constitutions, contains provisions for a state of emergency to deal with situations which either affect, or are likely to affect, a large number of people or their property, posing thereby a threat to public safety or the national economy. The salient feature of the emergency regime is the suspension of some fundamental human rights including normal protections under the criminal law, and the extension of police power to search, detain and interrogate, compromising the normal standards. However, this paper will not deal with the theoretical aspects of emergency powers.1

The declaration of a state of emergency or the use of extraordinary powers undermines certain fundamental rights including basic due process rights and, as such, raises a number of legal and political concerns regarding the violation of human rights, more so in a country which has experienced substantial periods of military rule. The aim of the paper is to argue for strengthening the political constitution from future abuse in the name of an emergency. Another aim is to generate further academic discussion, in the light of lessons from Bangladesh, with regard to the violation of human rights, to highlight the urgency and importance of having a fresh look at the emergency provisions, and to help develop a new jurisprudence of emergency. As a tool against terrorism, many developed countries have passed laws somewhat similar to laws in countries with a state of emergency. Given

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its wide use and abuse worldwide, the paper thus suggests developing an international standard to deal with emergency powers. Wide discussion about emergency regimes is essential because public education and awareness is an important safeguard of civil liberties. This paper further argues for the upholding of a strict protection of fundamental human rights at all times and argues for designing a constitutional framework for a temporary state of emergency while upholding individual rights. Without the effective constraint of the rule of law, there is a real apprehension that the emergency regime may gradually give rise to a permanent police state.

II. NEED FOR AN EMERGENCY CONSTITUTION

It is recognised that extraordinary situations necessitate empowering the executive to take extraordinary measures to deal with the crisis, thereby raising public awareness with regard to the seriousness of the situation. More importantly, through this, the government tries to demonstrate that it is in full control of the situation and should be seen as taking action in dealing with the crisis. During periods of emergency, certain provisions of the constitution guaranteeing fundamental rights are either restricted or suspended. However, in many countries, including Bangladesh, a state of emergency is often used as a vehicle to remain in power by suppressing the opposition and mostly used for political persecution, including torture, in gross violation of human rights.

However, sometimes it may be difficult to adequately deal with situations within the framework provided by the existing law, especially criminal law. This likely inability to effectively deal with the crisis clears the conceptual path for another way to confront the problem: the “state of emergency.” The reason for allowing a declaration of a state of emergency has been an imminent threat to the wider society, which necessitates empowering the government to take extraordinary measures to protect lives and property. Thus, the emergency constitution should contain provisions to detain suspects threatening national security, without the criminal law’s usual protections. Given the fact that the scale and nature of the future emergency are unknown, the government should have all tools at its disposal, including the declaration of a state of emergency, to deal with the crisis as it comes. Efforts to deprive the government of the power to declare a state of emergency altogether may limit its ability to respond to the situation. At the same time, giving a blank cheque to the government may result in the abuse of this extraordinary power. Consequently, most postwar constitutions provide for a declaration of a state of emergency with wide protection of core civil and political liberties during even the most severe crises. The purpose of the declaration of a state of emergency should be to reassure the public that the situation is under control, and that the state is taking effective short-term actions to normalise the situation. However, the declaration of a state of emergency in a way is an expression of no-confidence in the existing laws and the government’s general capacity to discharge its functions by utilising existing laws. The declaration of a state of emergency in situations other than natural disasters is also an admission by the government of its failure to perform its functions to prevent events, or minimise their effects, leading to such a declaration. A distinctive interest may come into play when the government fails to perform its functions and the level of confidence is eroded in the government’s ability to deal with a situation. In the face of such a failure, the government tends to become authoritarian and the norms of human rights are compromised. The abuse of fundamental rights during a state of emergency thus necessitates a re-look at the constitution and the development of new constitutional and other measures to deal with the protection of civil liberties. There is a need to establish a uniform procedural framework for the future exercise of all such powers.

Following the events of September 11, 2001, emergency powers are being widely used,

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3 Ibid 1031.
or where a state of emergency is not formally declared, law enforcement agencies are provided with extraordinary powers even in some developed countries. The worry is whether these restrictive laws over the years lead to the creation of a permanent system of criminal justice for terrorism suspects. The pertinent question is how little evidence or mere suspicion is enough to justify how much detention? Consequently, the way in which these powers are structured is a matter of great importance. The manner in which emergency powers are structured is as much a product of the fundamental structures of political power and only a small part flows from the Constitution's texts or judicial precedents. Likewise, the role of the judiciary during the emergency is also influenced by political expediency. The role of the judiciary in this situation is relatively limited for reasons connected less to concerns about judicial capacity than to the political structures more directly. Any actual test of power is likely to depend on the imperatives of events rather than on abstract legal theories. The actions of the executive government will depend on the interplay of contingent political forces far more than on whatever constitutional interpretations the courts offer. Everything will 'depend on the imperatives of events and contemporary imponderables,' not 'law' in the usual sense. In the words of Mark Tushnet, 'the interplay of events and contemporary imponderables — that is, politics — is constitutional law in this domain.'

The extraordinary powers granted during the emergency create a possibility that interested parties may have the temptation not to give up this new-found power. There is a danger that the government machinery will exploit the extraordinary powers to create too many 'emergencies', using a wide range of repressive measures, despite the adequacy of the more standard framework involving the criminal law.

The current war on terror or Bangladeshi particularities should not be allowed to divert attention from the more important task of institutional design to prevent future abuses of human rights. An elaborate set of emergency provisions in the Constitution is required. However, it is difficult to design a constitutional regime for a limited state of emergency, given the exact nature of emergency and response required to deal with it is unpredictable. It will then simply be a case of one size fitting all. Nonetheless, 'self-conscious design of an emergency regime may well be the best available defense against future breaches of human rights.'

The judiciary, especially the higher judiciary, is expected to act as a watchdog to control panic-driven responses of the government to crises resulting in gross violations of human rights. However, sole reliance on judiciary without a detailed set of principles may not be enough. Judges should, and can, play a fundamental role in upholding fundamental rights and consequently can minimise further abuse. Their opposition to the continuation of the emergency regime will transform the nature of the political battle. Bypassing or ignoring the decisions of the court or even trying to manipulate the judiciary will seriously undermine the moral standing of the government and affect its ability to effectively govern. The government will then be seen as an enemy of the entire constitutional order. Consequently, an independent judiciary, willing to protect fundamental rights and constitutional order, acts as a deterrent against gross violations and reckless behaviour of the executive government.

If torture, abuse in the use of preventive detention powers, custodial deaths and extrajudicial killings are allowed unchecked then there is a danger that the law-enforcement agencies accused of violations will themselves be likely to become a pressure group in order to protect themselves from likely future retribution once the state of emergency is withdrawn. These officials may become sufficiently desperate to destabilise the situation and would have little motivation to bring normalcy sooner. On the contrary,
they may sabotage the efforts of the government so that order is not restored.

III. BACKGROUND TO THE DECLARATION OF EMERGENCY IN BANGLADESH

Bangladesh became independent from Pakistan in 1971, following a bloody war. The indefinite postponement of the summoning of the National Assembly and the refusal of the Pakistani military government to hand over power to the elected representatives following the general election resulted in mass protests. The use of military might in dealing with political problems led to the bloody war that cost the lives of millions of people and also resulted in the surrender of Pakistani forces on 16 December 1971, and the creation of Bangladesh. One of the reasons for the creation of Bangladesh was the aspiration of the people to establish a democratic society. Conversely, it may be said that Bangladesh became an independent country as a protest against military rule. Ironically, between 1975 and 1991, the country was either under direct or indirect military rule. Since independence, two presidents have been killed in military coups, martial law has been imposed three times and thrice a state of emergency has been declared.

Like many developing countries, in Bangladesh the holding of free, fair and credible elections remains a big legal and political challenge despite the existence of all formal institutions including an apparent independent Election Commission. Those in power have always manipulated the rules and institutions concerned with the election process. Consequently, the innovative idea of holding the election under a non-party caretaker government was conceived as a solution. It was perceived that the non-party neutral caretaker government would have no motivation to manipulate the electoral process as the members of this government are barred from contesting the election. Thus, the Constitution (Thirteenth Amendment) Act 1996 was passed, requiring all future general elections in Bangladesh to be held in accordance with this amendment. Under this arrangement, the government, at the end of its tenure, rather than going into a caretaker mode should hand over power to a non-party caretaker government.

The amendment provided that after the resignation of the government, before a scheduled general election, the president shall invite the immediate past chief justice of the country to become the chief adviser (CA), or head of the caretaker government. These changes provided for the formation of a non-political caretaker government headed by the CA with the status and privileges of the prime minister. Article 58C(1) says that, the ‘Non-Party Care-taker Government shall consist of the Chief Adviser at its head and not more than ten other Advisers.’ The advisers are to be appointed by the president on the advice of the chief adviser. The CA would exercise the executive power of the republic during the tenure of the caretaker government. The tenure of the CA commences from the moment of taking the oath of office and ends when a new prime minister is sworn in after the general elections. The amendment, in clear terms, made it mandatory to hold the general election within 90 days.

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7 The elections in Kenya and Zimbabwe are recent examples of the problems associated with holding credible elections.
8 Article 58C(7) of the Bangladesh Constitution requires that the members of the caretaker government not be ‘members of any political party or of any organisation associated with or affiliated to any political party’ and not permitted to be a candidate for the ensuing election’.
9 For a critical analysis of various provisions of the Thirteenth Amendment, see M Rafiqul Islam, ‘Free and Fair General Elections in Bangladesh under the Thirteenth Amendment: A Political-Legal Post-Mortem’ (July-December 1996) 26 Politics, Administration and Change 18.
10 Bangladesh Constitution, art 58C(3).
11 ‘The Chief Adviser shall have the status … and privileges, of a Prime Minister and an Adviser shall have the status … and privileges, of a Minister.’ See Bangladesh Constitution, art 58C(11)
12 Bangladesh Constitution, art 58C(8).
13 Ibid.
14 ‘A general election of members of Parliament shall be held within ninety days after Parliament is dissolved, whether by reason of the expiration of its term or otherwise than by reason of such expiration.’ See Bangladesh Constitution, art 123(3). This clause was substituted for the former clause (3) by the Constitution (Thirteenth Amendment) Act 1996, (Act 1 of 1996), s 6.
Two general elections were held under the Constitution (Thirteenth Amendment) Act 1996. Both these elections were widely accepted as reasonably free and fair, and resulted in a change of government in a peaceful manner. An international election observer team comprising the representatives of the United States and the European Union, headed by former US President Jimmy Carter, monitored the poll and expressed their satisfaction over the holding of the election in 2001. For detailed comments of the international observer team see the Bangladesh Observer (Dhaka) 23 June 2001.

This majority was enough to amend the constitution. For details of election manipulations in Bangladesh see A K M Masudul Haque, ‘Free and Fair Elections in Bangladesh and the Illusion of a Neutral Caretaker Government’ (Paper presented at ALTA 62nd Annual Conference, University of Western Australia, 22-23 September, 2007) at 27 November, 2008.

The Election Commission was filled with hardcore government supporters. The Election Commission appointed 345 new sub-district (upazila) election officers from amongst the cadres of the governing parties. Administratively, Bangladesh is divided into 6 divisions, 64 districts and 464 upazila (sub-districts).

Officials perceived to be supporters of opposition parties were removed from their jobs or given less important assignments, while the supporters of the party were promoted. Officers who were perceived to be non-political were either denied promotion or were not given any responsibility and made an ‘officer-on-special duty’. Over 300 deputy secretaries were made ‘officers on special duty on political grounds’. See ‘Posts do not exist, still 332 more promoted’, Daily Star (Dhaka), 16 October 2006 <http://www.thedailystar.net/2006/10/16/d6101601149.htm> at 27 November, 2008.

‘A study by the U.S. National Democratic Institute has apparently found 13 million more names on the voter’s list than would be eligible according to Bangladesh’s population; election officials had, in spite of repeated urging, failed to correct the list. There had also been allegations that many eligible voters from minority religious communities had been left out of the registration process’. Quoted from UK Home Office RDS-IND, Country of Origin Information Service, Country of origin information bulletin: Bangladesh, Bulletin No: Bangladesh 1:2007 cited from US Commission on International Religious Freedom; ‘Bangladesh: Decision to Postpone Election Offers a Second Chance’, 12 January 2007, <http://www.uscirf.gov> at 27 November, 2008.

In Bangladesh, the Supreme Court is the apex court of the country. The Supreme Court is divided into two divisions, High Court Division and the Appellate Division. The Appellate Division is comprised of seven judges. The judges of the High Court Division are appointed by the president on recommendation by the chief justice. However, between 2001 and 2006, there were many instances when judges were appointed by the President on advice from the government without the recommendation of the Chief Justice. If any vacancy arises in the Appellate Division then the most senior judge (in terms of seniority of service as a judge) of the High Court is elevated to the position. Again, this norm has been violated by appointing junior judges, superseding the seniors. The chief justice is generally the senior most judge of the Appellate Division.

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amended the constitution\textsuperscript{22} by extending the retirement age of judges from 65 to 67 so that the newly appointed chief justice would retire after the formation of the caretaker government. Thus, the amendment made sure that Mr Justice K.M Hasan remains as the immediate past chief justice so that he can assume the office of the chief adviser of the caretaker government.\textsuperscript{23}

IV. THE DECLARATION OF EMERGENCY AND THE ROLE OF THE PRESIDENT

On 20 October 2006, the 14-party opposition alliance declared that it would launch massive street agitations, indefinite strikes and blockades to protest against the handover of power to Justice K M Hasan after the completion of the government’s five-year term of office.\textsuperscript{24} On 27 October, Justice K M Hasan indicated his unwillingness\textsuperscript{25} to be appointed as chief adviser. On 29 October 2006, the government completed its five-year tenure and resigned. The parliament was also dissolved on its expiration of tenure. Without exhausting other options available under the Thirteenth Amendment Act 1996, the President assumed the office himself.\textsuperscript{26} So he was the President and, at the same time, also the Chief Adviser (Prime Minister). Thus, the very purpose of the Thirteenth Amendment to establish a neutral non-party caretaker government to hold a free, fair and credible election was defeated, with the titular President, being a nominee of the previous political government, assuming the role of the real head of the caretaker government. The assumption of the role of prime minister by the titular President, combining the two roles, was also against the principles of parliamentary democracy and, as such, was also against the basic structure of the Constitution.\textsuperscript{27} This combination of two separate constitutional positions by the President without exhausting other options stipulated in the Constitution, has unexpectedly created a number of controversies including a challenge as to its validity in the Supreme Court. The way the Chief Justice interfered in the proceedings of this challenge, and in another case concerning various disclosures by the candidates before the election, created widespread resentment and even violent outbursts both inside and outside the court.\textsuperscript{28} These unprecedented interventions of the Chief Justice in judicial proceedings

\textsuperscript{22} See the Constitution (Fifteenth Amendment) Act 2005.
\textsuperscript{23} For a discussion on the appointment of the Chief Justice and other judges, and the manipulation of judiciary during this period, see Haque, above n 17.
\textsuperscript{26} The President then assumed the office of the Chief Adviser (CA) of the caretaker government and at the same time retained his position as the President. The Constitution (Thirteenth Amendment) Act 1996 provided for a number of options to appoint the chief adviser of the caretaker government.
\textsuperscript{27} For discussion on the basic structure theory of the constitution and the rulings of the Bangladesh Supreme Court, see A K M Masudul Haque, ‘State, Law and the Emergence of Public Enterprises in Bangladesh’ in Critical Reflections on Law and Public Enterprises in Bangladesh (PhD Thesis, Warwick University, 1992) 54. The authority to change the basic structure of the court by the parliament was an issue in Anwar Hossain Chowdhury and Others v Bangladesh, BLD (SPI) Volume IX, 1989. In this case, the Appellate Division decided that the Eighth Amendment of the Constitution decentralising the High Court Division constituted a change in the ‘basic structure’ of the constitution. In 1981, the Supreme Court in the case of Hamidul Hug Chowdhury v Bangladesh, 53 DLR (1981) 394, observed that by incorporation of a provision relating to the proclamation of emergency by introduction of the Fourth Amendment to the Constitution by Act II of 1975, the basic and essential features of the constitution were altered and destroyed. The court observed: ‘These alterations and amendments of the Constitution reduced the Constitution out of recognition. It was in our opinion, beyond the powers of Parliament as the donee of prescribed powers under a controlled Constitution to alter the essential features and basic structure of the Constitution.’ These judgements were very much in line with article 7 of the Bangladesh Constitution proclaiming the supremacy of the Constitution.
\textsuperscript{28} The response to the Chief Justice’s unprecedented interference in the proceedings of the court and the pro-government bias by the higher judiciary infuriated the lawyers. Lawyers attacked the Supreme Court building, damaged courtrooms and the Chief Justice’s chamber. The car of a former state minister for law, parked outside the court building was set on fire. Twelve eminent Supreme Court lawyers were later charged with vandalism. The Chief Justice was seen as very partisan because the legislation enforcing separation of judiciary from the executive had been ‘stalled by pro-government legal factions, led by the chief justice,’ writes Mute magazine. The magazine further quotes a retiring High Court judge who commented on the blatant political corruption of the legal system: ‘I have seen during my long 13 years in judicial career how the evil partisan political influence engulfed the sacred institution…’. See Marut Ret, ‘Bangladesh: ‘State of Emergency’ Powers Extended and Tightened — Strikes and Demonstrations Banned, Media Gagged’, Mute
of direct public interest precipitated the problems.

After assuming the office of Chief Adviser to the caretaker government, the President then appointed a 10 member advisory council. The general election was scheduled to be held on 22 January 2007. The failure of the President, as the Chief Adviser of the caretaker government, in maintaining neutrality (the very basis of the Thirteenth Amendment) further worsened the crisis. Apart from the legality of the combination of presidential and prime ministerial powers in one hand, the President often ignored the advice of the advisers. Consequently four advisers resigned in protest. As a result of the opposition’s demand for a reorganisation of the Election Commission, the government then appointed two new election commissioners. These two new commissioners were also known supporters of the BNP. There were a number of newspaper reports that the President was acting under advice from the outgoing government. Thus, the new appointments further exposed the political bias of the President. Once more, almost all major opposition parties decided to boycott the general election as they feared that free and fair elections were not possible under that caretaker government headed by the partisan President, acting in favour of a political party, in breach of the oath of office. Moreover, on 11 January 2007, the majority of his advisers decided not to support a decision to go ahead with the election on 22 January without the participation of opposition parties. In this situation, the international community was also urging to postpone the election as, in the absence of the opposition parties, the election would not be a credible one and, given the political history of the country, it would be likely to lead to serious destabilisation and civil unrest. The European Union and other international observers decided to withdraw from monitoring the election. The President ‘focused more on the timeliness of the elections...
than on their fairness, ignoring many signs that their credibility was eroding’. 37

The agitation and protests of the opposition parties were gradually becoming violent, resulting in 40 deaths and causing anarchy. The President, under pressure from the armed forces and international community, 38 declared a ‘state of emergency’ under article 141A of the constitution 39 on the night of 11 January 2007 (that is, 11 days before the scheduled general election of 22 January 2007). The scheduled general election was postponed and the President resigned from the post of Chief Adviser of the caretaker government but retained the position of the President. Declaring an emergency, in addressing the nation over radio and television, the President finally admitted flaws in the process of updating the voter list and acknowledged that ‘any election without the participation of all the parties will not be acceptable at home and abroad.’ 40 The following day, a former governor of the Bangladesh Bank (the central bank of the country) and former official of the World Bank was appointed as the Chief Advisor to the caretaker government to head a 10-member caretaker government comprising a group of bureaucrats and retired military generals. The new government is fully backed by the armed forces.

V. EMERGENCY POWER ORDINANCE AND EMERGENCY POWER RULES 2007

The declaration of the state of emergency was followed by the promulgation of the Emergency Powers Ordinance 2007 (EPO) and the Emergency Powers Rules 2007 (EPR). 41 The EPO and EPR have suspended many fundamental rights. It also suspended the rights of freedom of movement, 42 freedom of assembly, 43 freedom of association, 44 freedom of thought, conscience and speech, 45 freedom of profession and occupation, 46 freedom to own property, 47 and protection of home and correspondence. 48 All political activities, both private and public, including activities of the trade unions, were banned. Political parties were required to close their offices and small private meetings at private residences were also banned.

Section 3 of the EPR prohibits any kind of association, procession, demonstration or rally without special permission from the authorities, and under section 3(4) any person found guilty of holding any meeting or demonstration faces two to five years of rigorous imprisonment. Additionally, Section 5 completely prohibits the publication of any criticism of the activities of the government that is deemed to be ‘provocative’ by the authorities, in news bulletins, video footage, talk shows, features, articles, editorials or further warned that ‘this may have implications for Bangladesh’s future role’ [in UN peace-keeping Missions]. Somini Sengupta, ‘Bangladesh Leader Declares State of Emergency’, The New York Times (New York), 11 January 2007, <http://www.nytimes.com/2007/01/11/world/asia/11cnd-benga.html?_r=1&scp=1&sq=... at 27 November, 2008.

37 Crisis Group, Restoring Democracy in Bangladesh, above n 30, 7.
38 The reports of Bangladeshi and foreign news media made it clear that the armed forces forced the President to declare a state of emergency and to postpone general elections scheduled to be held on 22 January 2007. See, eg, The Prothom Alo (First Light) in its leading article on the first anniversary of the declaration of emergency, 'Bangla Bhabhan ey shomoy ja ghatechilo' ['What happened then at the Bangla Bhabhan']. Note, the Bangla Bhabhan is the official residence of the president: Prothom Alo (Dhaka) 11 January 2008 <http://prothom. alo.com/archive/news_details_home.php?dt=2008-01-11&issue_id=185> at 27 November, 2008. The declaration of emergency also had the backing of so-called ‘Tuesday Group’. Amongst the Tuesday Group, the prominent are the embassies of the United States, High Commissions of Great Britain, Australia and Canada.
39 The president may proclaim a state of emergency in accordance with article 141A of the Bangladesh Constitution. The article says that when ‘a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbance, he may issue a Proclamation of Emergency.’
40 The full text of the President’s speech was reported in all dailies published from Bangladesh on 12 January 2007.
41 For the full text of the EPO, see Bangladesh Gazette Additional Issue, 12 January 2007; and for the details of the EPR see Bangladesh Gazette Additional Issue, 21 March 2007.
42 Bangladesh Constitution art 36.
43 Bangladesh Constitution art 37.
44 Bangladesh Constitution art 38.
45 Bangladesh Constitution art 39.
46 Bangladesh Constitution art 40.
47 Bangladesh Constitution art 42.
48 Bangladesh Constitution art 43.
Section 16(2) of the EPR authorises any member of the ‘law and order maintaining force ... to arrest any person on suspicion without a warrant’. Section 20 authorises the use of force to execute any order and grants immunity to the government from any prosecution. This section also authorises the ‘law and order maintaining forces’ to use force in order to execute any order issued under the EPR. Section 21 authorised the government to detain any person indefinitely without any charge under the Special Powers Act 1974. Above all, section 10 denies the right to apply for bail if detained under the Emergency Rules. This provision is emphasised by section 19d, which states that regardless of sections 497 and 498 of the Code of Criminal Procedure (the sections dealing with bail), if any inquiry, criminal investigation or trial is in progress under sections 14 and 15 of the EPR, the accused persons shall not obtain bail before any court or tribunal. These provisions thus threaten everyone with indefinite detention, without the traditional safeguards developed over many centuries of difficult struggle.

The government later amended the EPR by adding new clauses. Section 18A(1) states that regardless of the provisions which exist in other laws or in the rules in question, the government or the Anti-Corruption Commission, in the public interest, may withdraw any case from the Sessions Court, Magistrate’s Court, Special Judges’ Court or Tribunal in any part of the country and transfer the case to a Special Judges’ Court for trial. Furthermore, section 18A(2) adds that the subsequent trial of any such transferred case shall be conducted under the EPR and the Criminal Law Amendment Act 1958. According to section 18B(2) the Special Judge is authorised to try any cases concerning all crimes under the EPR. The territorial jurisdiction of the Special Judges’ Courts have been widened to cover whole of Bangladesh. Section 21A(1) empowers the government to introduce any kind of administrative measures to assist inquiries, investigations, trials and any other actions it undertakes concerning crimes under the EPR. This is, in effect, a blank cheque to enable the government to carry out arbitrary arrest and detentions and then implicate them using fabricated charges while they are in detention. The police have now added section 16(2) by default to any complaints, meaning that the alleged accused has breached the EPR 2007. This has been done to instil greater fear in the minds of the accused and give the police a carte blanche to arrest and detain anyone without serious reason.

For discussion on imposing control over the media, see Mahfuz Anam, ‘Gagging the Media is Not the Answer’, Daily Star (Dhaka) 12 January 2007 
For further details, see ‘HR Violations Widespread in Bangladesh’, The South Asian (Washington), 25 February 2008 <http://www.thesouthasian.org/archives/2008/hr_violations_widespread_in_ba.html>
authorities unjustifiable powers over these persons.

Under these rules, the accused is subject to summary investigation and trial. The courts are required to finish all legal proceedings including trial and sentencing within 45 days of the commencement of the trial, unless ‘unavoidable circumstances’ require an extension for a further 30 days. Generally, investigations by the police, prosecution and subsequent trials take on average 5-7 years due to inefficiency, political interference and corruption. Under the circumstances of Bangladesh, completion of the investigation and subsequent trial within 45 days raises many questions as to the credibility of those trials. These courts are seen like ‘kangaroo courts’, i.e., justice is meted out summarily.

Thus, by these amendments, the government has effectively bypassed the regular courts and ensured that the Special Judges’ Courts, under the control of the specially appointed judges, are able to take over any case selectively transferred to them. This ensures that people who are being targeted by the government can be convicted under the arbitrary sections of the EPR. Special Judges’ Courts have been established in dormitories located within the greater compound of the national parliament, a restricted zone for general public, in order to try people targeted by the government. Access to these Special Judges’ Courts is restricted for common citizens. It may be mentioned that article 141B does not empower the president to suspend all fundamental rights in Chapter III of the Bangladesh Constitution during emergency. The authority of the president during emergency to suspend fundamental rights is limited to suspension of fundamental rights mentioned only in articles 36-40 and 42. In other words, the Constitution does not empower the president to suspend other fundamental rights apart from these articles. However, these trials clearly violate the inalienable right of every citizen to the protection of law under article 27 and to open and public trial guaranteed under article 31(3) of the Constitution.

VI. THE EPO AND EPR — A POLITICO LEGAL ANALYSIS

The EPR and the EPO, by suspending the safeguards from arrest and detention, effectively legalise arbitrary arrests and detention. The implications of the current laws are that everyone is subject to the risk of endless detention without any legal avenues of redress. According to the information collected by local and international human rights groups, over 250,000 people have been arbitrarily arrested and detained in the country during the first 13 months of the state of emergency, with a high proportion of them having been subjected to ill-treatment or torture — sometimes resulting in death — which remain endemic in the country. These laws have in reality facilitated the process of torture of persons by the police, the armed forces, and paramilitary forces such as the Rapid Action Battalion (RAB) and the Bangladesh Rifles (BDR). Coercion, including torture, is used to make arrested persons sign blank documents, which the authorities then complete in order to suit any needs they may have, including exonerating themselves from wrongdoing, justifying their actions of falsely incriminating the concerned persons. Statements are also being forcibly extracted from victims and recorded using audiovisual equipment for the same reasons. This ‘evidence’ is then used against persons in court and, under the provisions of the emergency, cannot be challenged. Victims of torture or relatives of people who die in custody never receive any reparation or justice.

The country’s prisons are overcrowded to the point that the government recently

53 This part is written based on various sources, including newspaper reports, Human Rights Country Report prepared by US the State Department, Amnesty International’s Report, Asian Legal Resource Council, informal discussions with many Bangladeshi politicians and civil servants, all of whom understandably wish to remain anonymous.

54 The Hong Kong based Asian Legal Resources Centre estimates that between 11 January 2007 and 11 January 2008 ‘over 250,000 have been arbitrarily arrested and many such detainees have been tortured during this time.’ (The Asian Legal Resources Centre is an independent regional non-government organisation holding general consultative status with the Economic and Social Council of the UN. It is also the sister organisation of the Asian Human Rights Commission).

However, there were many reported deaths in custody and often with marks of severe torture. The number of people arrested just within a span of a month (between 28 May 2008 and 30 June 2008) is reported to be 50,215. Out of these, arrest warrants were issued only against 34,249 and others were arrested without any warrant. See Daily Ittefaq (Dhaka), June 30 2008 <http://www.ittefaq.com/content/2008/06/30/news0463.htm> at 27 November, 2008.
released several hundred detainees who were either convicted of lesser crimes, such as theft, or had been detained for lengthy periods during their trials. The authorities have begun using public and private houses, declaring them as ‘sub-jails’, in order to accommodate high-profile prisoners such as former ministers, law-makers, editors of newspapers and businessmen arrested under the government’s so-called anti-corruption drive.

Custodial deaths resulting from torture at the hands of the law-enforcement and security forces continue to occur, with over 126 deaths reportedly occurring in the first six months of the declaration of emergency. This practice is reminiscent of the ill-famous ‘Operation Clean Heart’ in late 2002. Impunity has been legislated in the past in Bangladesh. For example, the government passed the Joint Drive Indemnity Ordinance 2003 following the disastrous Operation Clean Heart, ensuring impunity for the perpetrators of torture and killings committed under this operation. Article 46 of the constitution empowers the government to extend immunity from prosecution to any state officer on any grounds. This provision was originally intended with reference to the 1971 Liberation War for independence from Pakistan. However, it is now used to protect law enforcing agencies including the armed forces from prosecution for human rights abuses. Notably, the Joint Drive Indemnity Ordinance 2003 removed from the hands of victims and their families the right to take legal action against members of the armed forces responsible for gross abuses, including many deaths in custody that occurred from 16 October 2002 to 9 January 2003 under Operation Clean Heart.

Human rights activists are becoming vulnerable in Bangladesh. Numerous human rights defenders have been threatened and intimidated, arbitrarily arrested and detained for months at a time, tortured and/or implicated in fabricated cases. As a result, most human rights organisations have put a halt to most investigative work, such as fact-finding missions to ensure the documentation of cases of human rights abuses. This could give rise to a situation where human rights abuses are increasing, but fewer reports are surfacing, which could send an erroneous signal to the outside world that the human rights situation is improving, while in reality it is getting worse.

Furthermore, Bangladesh had no national human rights commission, although the present government has formed a committee comprising bureaucrats to draft a concept paper for establishing such a commission. Recently the government announced the establishment of a National Human Rights Commission but it will take some time before

55 During ‘Operation Clean Heart’, 58 persons died in suspicious circumstances in detention when armed forces were called in by the four-party led coalition government for day-to-day policing to improve the deteriorating law and order situation in the country.
56 Impunity has been legislated in the past in Bangladesh. For example, the government passed the Joint Drive Indemnity Act 2003 following the disastrous Operation Clean Heart, ensuring impunity for the perpetrators of torture and killings committed under this operation. Article 46 of the constitution empowers the government to extend immunity from prosecution to any state officer on any grounds. This provision was originally intended with reference to the 1971 Liberation War for independence from Pakistan. However, it is now used to protect law enforcing agencies including the armed forces from prosecution for human rights abuses. Notably, the Joint Drive Indemnity Ordinance 2003 removed from the hands of victims and their families the right to take legal action against members of the armed forces responsible for gross abuses, including many deaths in custody that occurred from 16 October 2002 to 9 January 2003 under Operation Clean Heart.
57 For example, on 23 August 2007, some 12 journalists were arrested in trying to report an incident involving watching a game at the sports arena of the Dhaka University. The news of the incident soon spread to other universities. The students from Rajshahi University also started protesting the presence of the army in the campuses of various universities. The authorities firmly handled the situation by resorting to force, imposition of a curfew and by arresting a number of university teachers, students and journalists for violation of various provisions of the EPR. Teachers and students were later prosecuted and sentenced to various terms of imprisonment (between one year and five years). However, under pressure from various quarters, some of the teachers were later released on presidential pardon but with a record of conviction against them.
58 For example, on 13 June 2007, Noor Ali, managing Director of Unique Group of Companies, filed a case accusing Sheikh Hasina (Prime Minister between 1996-2001) and her two relatives of extortion of Tk 50 million from him in exchange for mediating a power plant deal in 1997 between the Power Development Board (PDB) and his firm. On the same day, another businessman, Azam J Chowdhury, filed another extortion case against Sheikh Hasina and her cousin. There were three other extortion cases against her filed in the same month, one by another businessman and two by the Anti-Corruption Commission. All these allegations relate to events at least 7 years prior to the declaration of the emergency. The timing of these cases and the use of emergency powers rather than using the provisions of the penal code clearly speak of misuse of emergency power for political reasons. Moreover, the retrospective use of EPR and EPO violates article 35(1) and (3) of the Bangladesh Constitution. For a summary of these five cases against Sheikh Hasina, see ‘Hasina cleared of Noor Ali’s extortion case’, The Daily Star (Dhaka), 6 November 2008, http://thedailystar.net/story.php?nid=62069 at 27 November, 2008.
the commission becomes operative.

Provisions contained in the EPO and EPR are contrary to various national, municipal and other international human rights norms and standards. For example, article 35(5) of the Bangladesh Constitution prohibits torture. It may be mentioned that international law strictly prohibits arbitrary detention. Article 9 of the International Covenant on Civil and Political Rights (ICCPR), to which Bangladesh is a state party, guarantees ‘the right to liberty and security of person’. Particularly, article 9(4) mentions that those arrested or detained are entitled to take proceedings before a court without delay to review the lawfulness of their detention and order their release if the detention is not lawful.

Bangladesh has ratified the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT). However, there is as yet no law that prohibits and criminalises the practice, as well as no means to lodge a complaint. The Bangladesh Government at the time of ratification assured that it would apply article 14(1) of the UN Convention — stipulating the right to redress, compensation and rehabilitation for victims — in accordance with existing laws. However, no step was ever taken to pass laws for redress, compensation and rehabilitation. The practice of torture and custodial deaths has never been specifically criminalised. Above all, the government has always protected the perpetrators by granting immunity from future prosecution. Thus it seems that torture and extrajudicial killings are deliberate government policy in Bangladesh, in spite of Bangladesh being a member of the UN Human Rights Council as well as a party to key international human rights covenants such as the CAT. Bangladesh is also in breach of its international law obligation in failing to submit any periodic reports to the CAT Committee.

VII. CONCLUSIONS AND SUGGESTIONS

In Bangladesh, an emergency was declared after the elected 2001-06 government resigned at the end of its tenure and the parliament was also dissolved to pave the way for an election to be held within 90 days from the day the caretaker government entered into office. The election was scheduled to be held on 18 December 2008. The Election Commission has already prepared a voter list with photo identification and brought some electoral reforms. However, the Speaker of the Parliament termed this government an irregular one. Some consider the government unconstitutional given that the constitution requires the caretaker government to hold the election within 90 days. However, the government can always find lawyers to provide legal justification for its actions. Legal arguments for and against the constitutional legality of the government will only confuse the general public. They are more likely to be impressed by the arguments in favour of the government given its control over the media. In the absence of the parliament, and with the government being unelected, the question of legitimacy remains a fundamental one. In such a situation the normal checks and balances envisaged in the constitution are totally absent. The imposition of restrictions on the media and the suspension of certain

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60 For example, section 5(1) of the Emergency Powers Ordinance 2007 declares that ‘No question should be raised before any court regarding the orders passed on the basis of this ordinance or by the authority of this ordinance’. Furthermore, section 5(2) declares, ‘If it is deemed that any order has been passed or signed by any authority according to the power delegated under this ordinance, that order, passed or signed by that authority, shall be deemed admissible under the definition in the Evidence Act-1872 (Act X of 1872) in the courts.


62 The Speaker was quoted as saying that ‘The Caretaker Government (CG) is a creation of the Constitution. The priority of this Government is to do routine works and assist the Election Commission (EC) for holding a general election within 90 days.’ See ‘Present govt irregular, but not illegal, says Speaker’, New Nation (Dhaka) 17 March 2008. <http://nation.ittefaq.com/issues/2008/03/17/new01309.htm> at 27 November, 2008.

63 Ruling on a writ petition, the High Court bench of Justice Mohammad Abdur Rashid and Justice Mohammad Ashfaqul Islam ruled that, ‘As per article 123(3) of the constitution, the Election Commission is bound to hold the election within 90 days after parliament is dissolved. The constitutional provisions are self-executing, and the commission has no right to avoid or violate those.’ The ruling further made it clear that ‘The Election Commission has no discretion to extend the time beyond 90 days.’ See ‘EC violated constitution’, The Daily Star (Dhaka), 23 May 2008, http://thedailystar.net/story.php?nid=37802 at 27 November 2008.

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fundamental rights, especially political rights, run contrary to the principles of public accountability and contrary to any democratic norms.

The situation gives rise to a number of questions about the capacity of the current provisions concerning emergency to protect civil liberties while also responding to the circumstances of an emergency. When the emergency comes to an end, the constitution should require a legislative post-mortem, involving parliamentarians, judges and representatives of wider civil society, on the administration of the entire emergency. A public report with formal recommendations should then be widely debated and discussed to enhance public awareness and to achieve some sort of consensus and, consequently, legitimation and wider acceptability. The inquiry should be a meaningful one and not just a witch-hunt, and the people in violation of the constitution should be brought to justice so that it becomes a lesson for the future. This broader inquiry should also look into the conduct of the higher judiciary so as to restore confidence in the judiciary.

The post-mortem should look into whether the political constitution has been effective in regulating the way in which an emergency has been met. The new parliament, after the promised general election on 18 December 2008, must consider a doctrine that allows short-term emergency measures but draws the line against prolonging restrictions. Though the Bangladesh Constitution allows for a declaration of emergency by the president, it sets a number of procedural limitations. The exercise of the power of the president in a parliamentary system of government, like in Bangladesh, is contingent upon the advice of the prime minister. Upon promulgation, it has to be presented to the parliament for approval. If the parliament is not in session, then the president is required to present emergency measures before the new parliament in its first session and must obtain approval within the first 30 days. Failure to comply with these conditions would make the proclamation of an emergency unconstitutional. The president, being the nominee of the party in government, has no popular accountability. Consequently, in exercising the power, the president is required to do so in a manner that would be acceptable to the elected prime minister and parliament, had they been functioning.

Above all, people in power must be prevented from exploiting situations or creating themselves emergency-like situations to impose long-lasting limitations on liberty. The post-mortem should also consider ways to control/guide the executive government in continuing the emergency beyond agreed time frameworks. Each renewal must make it harder and harder for the continuation of emergency rule. The Constitution must make it difficult for emergency actions to destroy the framework of the government that they were supposed to protect. The overriding constitutional aim is to create an emergency regime that remains subordinate — both in symbol and in actual fact — to the principles of liberal democracy.

In light of the above discussion, the fundamental question is what should proper emergency constitution contain? Professor Bruce Ackerman presents some suggestions for the redesign of constitutions in order to increase a government’s ability to deal with future emergencies and, at the same time, protect individual freedom. He takes a three-dimensional approach. The first dimension focuses on an innovative system of political checks and balances and he makes specific suggestions with regard to constitutional mechanisms that enable effective short-run responses without allowing states of emergency to become permanent fixtures. His second dimension integrates economic incentives and compensation payments into the systems. In his third dimension, he proposes a framework that permits courts to intervene effectively to restrain predictable abuses.

Judges can play very important roles during emergency in protecting the detainees’ core rights to decent treatment. ‘Decency, not innocence, should be their overriding concern,’”

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64 Bangladesh Constitution art 141A(1) and 141C.
65 Ackerman, above n 2, 1031. Akerman’s suggestions are specific to the US. Nonetheless, it seems to have some merit worth exploring in other countries as well.
writes Ackerman.\(^6\) Judges should enforce it rigorously in cases involving torture against detainees. The fact that many of the detainees are almost certainly innocent makes the ban more pressing. Mass preventive detention during emergency has violated the rights of thousands of innocent people and, in the name of emergency, they have been deprived of enjoying the rights guaranteed to the normal criminal defendant. It is impossible for them to get any legal relief or to gain quick release by establishing their innocence. Arbitrary arrest on mere suspicion, especially when it is followed by months and years of detention, is a very traumatic experience, especially when the person is innocent. Though nothing can compensate for the loss of freedom and the traumatic experience of victims and their families, a financial payment is the least the state should do to minimise the harmful effects. Awarding compensation to people wrongly detained would discourage future abuse of power. So it is not only simple justice that requires compensation, but bureaucratic efficiency as well. Given the dependence of most developing countries, including Bangladesh, upon other developed countries and donor agencies controlled by them, an international consensus must also be developed so that, irrespective of the nature and extent of an emergency, certain universal standards are maintained.

\(^6\) Ibid.
THE ONLINE MEDIATION FISHBOWL:
LEARNING ABOUT GENDER AND POWER IN MEDIATION

KATHY DOUGLAS* AND BELINDA JOHNSON**

In this paper, the authors discuss a design for the teaching of gender concerns in mediation through the use of online learning. The authors describe and discuss e-learning approaches they have used to assist students to understand how issues of gender and power can impact on negotiation in mediation. A blended learning design is suggested to allow students to learn theory and skills in both face-to-face and online contexts. The design allows students to consider complex theoretical issues, such as those relating to gender and power, in a self-paced manner through the use of an online fishbowl role-play. In this design students jump ‘in’ and ‘out’ of role online and concurrently debate role-players’ choices and interventions in a threaded discussion board. The teacher moderates participation and also can jump into roles allowing for the modelling of ‘best practice’ for the mediator and the legal representative.

I. INTRODUCTION

The increased utilisation of mediation as an adjunct to our court and tribunal systems and the continued rise of mediation as a conflict resolution option in business, community and interpersonal contexts reflects the wide adoption of this dispute resolution option in Australia.1 Legal students and practising lawyers2 need to understand about the various options in alternative dispute resolution (ADR),3 including mediation, and the various contexts of practice. For example, family law practitioners need to understand about the wide range of family dispute resolution options, including mediation, in family law parenting disputes, given the prioritising of family dispute resolution over litigation.4 Mediation is important as it is now one of the most widely accepted ADR options and has been institutionalised in the Australian legal system. However, in our eagerness to embrace many of the benefits of mediation we are sometimes slow to address the difficulties that it poses.5 These include such issues as standards and ethics,6 mediator liability,7 the desirability of mandatory mediation,8 issues relating to justice and fairness9 and mediation

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1 Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002) ch 1.
3 There are a number of ADR options, including: facilitative processes, i.e. negotiation, facilitation, partnering, conferencing and mediation; advisory processes, i.e. conciliation, neutral evaluation, case appraisal, dispute counselling and expert referral; and determinative approaches, i.e. expert determination, independent fact-finding and mini-trial, arbitration: Tania Sourdin, *Alternative Dispute Resolution* (2nd ed, 2005) 20. Arguably, this list would now include the recent process of collaborative law: see Anne Ardagh and Guy Cumes, ‘The Legal Profession Post-ADR: From Mediation to Collaborative Law’ (2007) 18 Australasian Dispute Resolution Journal 205.
5 For example, sometimes ADR, and in particular mediation, may not be appropriate to deal with a conflict. This may be for a range of reasons, for instance, when violence is part of the relationship between disputants — a severe imbalance of power. There may also be a need to provide a legal precedent to set norms in society. A matter may need to be litigated in order to debate a contentious issue in the public arena, rather than pushing a concern into a private ordering option: Astor and Chinkin, above n 1, 9-10.
8 Ibid.
accreditation and training. Many of these issues are interlinked. It is the important issue of gender and power, a subset of issues relating to justice and fairness, and the concern of teaching about gender and mediation in universities that will be the focus of this discussion. In particular, the authors explore utilising online learning as one possible method of teaching about gender, power and mediation.

Online education is increasingly being adopted in university education and one option in e-learning is blended learning, where parts of a course are taught face-to-face and other parts are delivered online. In the teaching of ADR, or similar content courses, blended learning has been used by some teachers through the adoption of online negotiation simulations generally undertaken in combination with face-to-face classes. Strategies have included web-based negotiation simulations, including negotiating with participants from other countries, using web-based streaming video to provide visual cues, and using email or instant messaging to conduct the negotiation. Some benefits of these strategies include the opportunity to:

- plan strategy by meeting with similar role-players in a private electronic chat room;
- reflect prior to action in the simulation;
- trace back the moves in the negotiation through the printing and review of a transcript of the simulation;
- reflect upon cultural and communication approaches in negotiation in an online environment (where many negotiations are now carried out); and
- access the role-play at times convenient to the participant due to the asynchronous nature of the negotiation. The negotiation can be held in specified periods of time or be synchronous to avoid delays in completing the task.

In the context of teaching about mediation, online mediation role-plays, which seek to explore theory issues such as gender concerns in mediation, are one way to approach this

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9 According to a report from the National Alternative Dispute Resolution Advisory Council, Issues of Fairness and Justice in Alternative Dispute Resolution, Discussion Paper (1997), these include issues relating to gender, minority cultural groups in Australian society, age, disabilities, minority sexual preference, geographic location and socio-economic power differences.

10 Many of these issues are addressed in the new national voluntary mediator accreditation system: see generally, Australian National Mediation Standards, Practice Standards: For Mediators Operating Under the National Mediator Accreditation System (September 2007); Australian National Mediation Standards, Approval Standards: For Mediators Seeking Approval Under the National Mediator Accreditation System (September 2007); Tania Sourdin, Australian National Mediator Accreditation System: Report on Project (September 2007).

11 An issue is the promotion of understanding of marginalised ‘others’ in dispute resolution, such as Indigenous groups: see National Alternative Dispute Resolution Advisory Council, Indigenous Dispute Resolution and Conflict Management (2006).


20 Weiss, above n 18.


22 Ibid 310.
area. However, role-plays of this kind, and many negotiation simulations online, can be
time consuming and suffer from the difficulty of occasional tardy responses from role-
players. Potentially, the approach of an online mediation fishbowl role-play addresses these
corns by ensuring a swift-paced unfolding of the scenario, with volunteer students
progressing the storyline and thereby avoiding the difficulty of non-responsive students
delaying completion of the learning task.

In this paper, the authors explore gender concerns in mediation and highlight the need
for students to understand mediation practice that engages with concerns relating to gender
and power. The strategy of using an online mediation fishbowl role-play in the teaching of
ADR, or similar content courses, in universities is canvassed in order to promote
understanding of issues relating to gender and power. This learning and teaching approach
can also be utilised to teach about other marginalised groups such as indigenous24 or
cultural minorities. 25 Notably, women may experience a combination of identity issues,
such as for an indigenous woman involved in negotiation. 26 The online component is
undertaken contemporaneously with face-to-face classes, thereby utilising a blended
learning design. After reading and discussing articles dealing with gender concerns,
students jump ‘in’ and ‘out’ of an online fishbowl in turn and therefore engage in active
learning. The students have the opportunity to consult relevant literature before deciding
upon mediator interventions — an option not generally available in face-to-face role-plays.
Concurrently, other students in the class debate the role-players’ choices and interventions
in a threaded discussion board online. The online mediation fishbowl role-play is an
authentic learning27 activity that has the benefit of allowing students to witness the
modelling of appropriate mediation and legal practice by the teacher, who can also jump
into role to demonstrate ‘best practice’ in dealing with gender issues. This modelling is
generally not available in the more widely adopted strategy of online negotiation
simulations.

This paper has a design focus, outlining relevant educational theory and options for
using an online mediation fishbowl role-play. As such, it does not include an evaluation of
this learning and teaching strategy. The following section of this paper provides detail
relating to gender concerns and mediation. The next section discusses the e-learning theory
used in developing the online mediation fishbowl, focusing on blended learning and Diana
Laurillard’s ‘conversational framework’. 28 The last section of this paper provides a number
of design issues for consideration when implementing the online mediation fishbowl.

II. GENDER AND MEDIATION

There are many potential benefits for women and other groups when utilising mediation in
conflict situations, including the opportunity for party empowerment and storytelling. 29
However, the experience of women in the mediation process may differ from the
experience of men. 30 Mediation may present particular difficulties for some women and
these difficulties can sometimes result in women entering into agreements that are not in

23 For a discussion regarding the training of mediators and the use of online learning, including four possible models of
online role-plays, see Kathy Douglas, ‘Mediator Accreditation: Using Online Role-plays to Teach Theoretical Issues’
Resolution Journal 198.
26 Astor and Chinkin, above n 1, 133–134.
27 Anthony Herrington and Jan Herrington, ‘What is an Authentic Learning Environment?’ in Anthony Herrington and Jan
28 Diana Laurillard, Rethinking University Teaching: A Framework for the Effective Use of Learning Technologies (2nd ed,
2002).
29 See, eg, Carrie Menkel-Meadow, ‘Portia in a Different Voice: Speculations on a Women’s Lawyering Process’ (1985) 1
Berkeley’s Law Journal 39. See also Marsha Lichtenstein, ‘Mediation and Feminism: Common Values and Challenges’
2 Law and Inequality 21.
their best interests.\(^{31}\) To some extent, women’s experiences of mediation are tied to their experience of society generally. Historically, the law has discriminated against women in particular areas, such as the right to contract and hold property and areas such as rape and domestic violence.\(^{32}\) Additionally, the law discriminates against some women because of its failure to see the world from a woman’s point of view. Instead, the law will often begin any discussion of rights and obligations under our legal system with the perception of the male experience as the norm.\(^{33}\) Similar to the discrimination experienced by women in the law is the discrimination possible in the mediation process. Specific areas of dispute commonly mediated that can relate to women include equal opportunity, sexual harassment and disputes relating to the family. Some writers maintain that women can be disadvantaged in the mediation process due to the socialisation of male and female roles in our society, whilst others argue that it is important not to ‘essentialise’ women and other groups.\(^{34}\)

Power is often a key issue when considering the difficulties women may face in mediation and is important in deciding whether mediation is appropriate for the dispute, the way that the mediation is conducted and the possible need to terminate the mediation due to imbalances in power.\(^ {35}\) Issues of power in mediation occur between participants and also between the participants and the mediator. At play in a mediation is not only the details of the conflict that has brought the parties to the mediation table but also wider societal discourses that affect the way that the stories of conflict are constructed.\(^ {36}\) Conflict is a by-product of the types of power in our modern society, including gender and culture.\(^ {37}\) According to Hilary Astor, mediation is a storytelling process where dominant narratives may colonise alternative narratives.\(^ {38}\) Mediators can act reflexively to address power issues in the mediation to ensure the hearing of diverse voices in the process. Dale Bagshaw argues that reflexive practice requires mediators to reflect regarding their own personal and political history and their interaction with the parties.\(^ {39}\) The issue of power affects many women but also many marginalised or ‘othered’ groups such as indigenous groups, cultural groups that are not part of the dominant Anglo-Celtic group, those with a disability and those with a differing sexual orientation to the dominant heterosexual norms.\(^ {40}\)

Of particular concern to women is the issue of violence and mandatory mediation. Under s 60I of the *Family Law Act 1975* as amended by *Family Law Amendment (Shared Responsibility Act) 2006* (Cth), family dispute resolution (which includes mediation) is now compulsory prior to litigation in matters dealing with children. Victims of domestic violence are exempt from attending mediation, although screening processes may fail to identify some women who have experienced violence and, thus, women in this situation may still end up sitting opposite the perpetrators of the violence against them. These women may not notify the system that they are victims of violence due to feelings of shame and due to the fact that they may fear the high cost of litigation.\(^ {31}\)

Power imbalances in mediation can be engaged with by employing a number of strategies. Some strategies relate to the organisation of mediation within our justice system

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\(^{32}\) Regina Graycar and Jenny Morgan, *Hidden Gender of Law* (2nd ed, 2002).

\(^{33}\) Ibid.


\(^{36}\) Ibid 41.


\(^{38}\) Bagshaw, above n 34, 3.

\(^{39}\) Ibid.

\(^{40}\) See NADRAC, above n 9.
and in the community generally, for instance, the provision of a lawyer to attempt to address issues of power or the screening of participants for domestic violence prior to the commencement of mediation. Some strategies can be utilised by the mediator in the mediation process, ranging from advising parties to obtain advice to actively advocating one party’s position or employing shuttle mediation. In relation to concerns over the mediators’ impact upon mediation and whether he or she can adversely affect women’s interests in the mediation, strategies can be utilised by mediators to reflect upon their performance and the possibility of co-mediation can be explored.

The kinds of strategies that mediators are prepared to utilise can well depend upon their view of mediator neutrality in the mediation process. Many mediators take the view that neutrality requires mediators to be objective in their conduct of the mediation process. Like judges, they must be capable of an unbiased approach to the process. However, there is a difference between a mediator who attempts to be ‘neutral’ and a mediator who is able to keep the dynamics of mediation even. Critics of the concept of neutrality state that we are never able to be truly neutral, that our backgrounds and personal biases will affect our choices as mediators. Some mediators, acknowledging the inability of a mediator to be neutral in the objective sense, will be more open to intervention strategies. Other practitioners adhere to the concept of neutrality and value the legitimacy that this supposed attribute of mediation provides. An attempt at even-handedness can always be made to try to ensure the participation of all parties in the mediation process. It may be a question of which model of mediation is adopted, as some models may better meet feminist concerns regarding mediation and allow the benefits of party empowerment and storytelling to be enjoyed by women. Focusing upon the mediator interventions does not address institutional issues relating to mediation, but it does arguably allow women to enjoy the benefits of mediation while minimising the dangers. Mediators wield the potential for enormous power, through suggestion, through private meetings, through the setting of agendas, summarising, reframing and various other strategies. If women are to


45 Ibid.


be given the benefits of mediation, they need a well-trained and thoughtful mediation practitioner to ensure the fairness of the process and a legal representative that understands gender concerns. In particular, in the context of negotiations where there has been a history of domestic violence between the parties, a woman may need a legal representative that understands the need for an advocate who can empower and protect them in the mediation process.

Legal subjects dealing with ADR will often include mediation. Many will deal with the issue of gender in the third-party facilitation of conflict. There are a range of feminist views regarding the impact of gender upon negotiations and to effectively teach about gender and mediation there is a need for a learning and teaching design that incorporates the diverse range of theories in this area and provides the opportunity for student reflection.

If legal students are to understand and respond to women’s issues and concerns in mediation, they must fully appreciate theoretical issues relating to women. Arguably, what we want from any learning experience is to engender a thoughtful legal practitioner who is able to appreciate the nuanced issues relating to gender. Therefore, it is necessary not to teach in such a way that a student can leave at the conclusion of a course having heard of the negative experiences of women in mediation, but not understood the feminist theories which explain these experiences or learned the mediator and legal practitioner strategies and skills to ensure that mediated outcomes for women are fair and just.

Paul Ramsden notes that ‘learning is applying and modifying one’s own ideas’. In the context of teaching about gender and mediation, lecturers would wish students to come to know about feminist issues and mediation. Ideally, students would learn how to identify and analyse situations involving inequality in power relating to women, assess proposed intervention strategies critically, recognise the style and persuasiveness of concepts relating to feminist literature and be able to apply these ideas as a mediator or understand these issues as a lawyer representing a client in mediation. There would be an expectation that students would reflect on and, if necessary, change their interpretation of the world through their understanding of feminist theory as it relates to mediation. The learning and teaching strategy of using an online mediation fishbowl aims to bring about this understanding in students through participation in online learning.

In the next section of this paper, the authors discuss the e-learning theory that has assisted in the design of the online mediation fishbowl role-plays: blended learning and Laurillard’s ‘conversational framework’.

III. SELECTED E-LEARNING THEORY

There is a range of choices when considering which technology to incorporate in teaching and learning strategies. For instance, computer tutorial programs can be utilised or developed to assist student learning. These programs provide problem-solving opportunities, with the student’s answer compared with a model answer and discrepancies reported back to the student. Multimedia can be used to allow for self-directed learning, usually by development of CD-ROM packages, with the student travelling through a world of information and interacting with carefully constructed activities. A virtual classroom

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55 See Douglas, above n 23.
56 Field, above n 42.
58 See, eg, the course at La Trobe University, entitled Dispute Resolution; Fisher et al, above n 12, 70.
62 Multimedia can include audio and video, can link in with the internet, and can incorporate modelling and microworlds.
For an analysis of the attributes of various media, see Laurillard, above n 28, ch 7.
can be adopted where all the material and teaching and learning occurs online or in adjunct mode. However, this choice of pedagogy allows for only limited integration of the online learning with the rest of the material delivered in a subject. In contrast, another option, which has been adopted in this learning and teaching strategy, is blended learning. This option combines two or more learning mediums. More specifically it is the integration of online teaching and learning with the face-to-face classroom experience. The best medium for achieving a particular learning objective should direct how the learning modes are blended. If the pedagogical implications of blended learning are not thought through, it risks incorporating the worst aspects of each of the learning mediums utilised, the opposite of the intended outcome. Face-to-face environments may be the best for spontaneous interaction, however where 'control of pace' is beneficial to the learning goal — for instance, where theory is being introduced into practice — an online learning experience will arguably offer a better environment.

One major benefit of an online discussion environment is that it allows greater time for reflection during the discussion process. As Charles Graham notes, when engaged in an online interaction, ‘learners have time to more carefully consider and provide evidence for their claims and provide deeper, more thoughtful reflections’.

In a blended learning design for teaching mediation, students can develop and transfer skills between different parts of the process. Communication skills such as active listening and mediator interventions such as reframing are developed through role-plays in the face-to-face classes. The greater time for reflection that the online environment offers means that theoretical concerns may be better learnt online through the active learning option of an electronic role-play.

A theorist who explores methods of ensuring ‘deep’ learning in the online environment is Diana Laurillard. Her work provides us with a framework to utilise when teaching online and developing online role-plays. It is dialogue with a student that allows a teacher to ensure deep learning in the online environment. There is no certainty that utilising rhetoric will produce learning, but it is a principled approach that provides the best opportunity to give birth to learning. A ‘conversational framework’, which is best carried out on a one-to-one basis between tutor and student, provides the opportunity for dialogue that gives descriptions of the second-order nature of learning that is academic learning, and involves a partnership of learning. This approach rejects didactic approaches to teaching where there is little opportunity for student input or for the teacher to listen to what students are saying and to check on their understanding of concepts. Laurillard offers a ‘conversational framework’ of four parts to help us teach with technology. These parts are described as discursive, adaptive, interactive and reflective. Drawing directly from Laurillard’s work, she describes these elements in the following manner:

**Discursive**

- teacher’s and student’s conceptions are accessible to the other and the topic goal is negotiable;
- students must be able to generate and receive feedback on descriptions appropriate to the topic goal;
- the teacher must be able to reflect upon students’ descriptions and adjust their own descriptions to be more meaningful to the student;

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63 Ibid ch 3.
64 Graham, above n 14.
65 Ibid.
66 Ibid 18.
67 Laurillard, above n 28.
Adaptive

- the teacher can use the relationship between their own and the student’s conception to set up and adapt a task environment for the continuing dialogue in light of the topic goals;
- the students must be able to use their existing conceptual knowledge to adapt their actions in the task environment in order to achieve the task goal;

Interactive

- the students can act within the task environment to achieve the task goal;
- they should receive meaningful, intrinsic feedback on their actions that relate to the nature of the task goal;
- something in the environment must change in a meaningful way as a result of their actions;

Reflective

- teachers must support the process by which students link the feedback of their actions to topic goal, i.e. link experience to descriptions of experience;
- the pace of the learning process must be controllable by the students, so that they can take the time needed to reflect on the task goal-action-feedback cycle in order to develop their conception in relation to the task goal.68

The next section of this paper provides detail of the design utilising the selected e-learning theory.

IV. THE ON-LINE MEDIATION FISHBOWL

There are three main parts to the design of the online mediation fishbowl and each will be discussed in turn. These are:

- the discussion board, where the theoretical issues such as gender and power imbalances are engaged with;
- the role-play simulation of the online fishbowl; and
- a reflective journal.

A. Discussion Board: Discursive and Adaptive Elements

The first element of the design, the discussion board, is discursive in that students and teacher are able to interact regarding gender issues through the discussion of a number of articles.69 Discussion boards are a form of computer conferencing that allows for asynchronous discussion. Students, or participants, have the opportunity to read other people’s contributions to a discussion and then (i) respond to a particular posting, or (ii) respond generally. There is the possibility of dialogue, but by text alone,70 and because the conversation is asynchronous there is a gap in time between the contributions to the conversation. This kind of computer medium arguably facilitates the interactivity of a group. There is a shared topic focus, which gives each participant the opportunity to share ideas and reflect on those ideas. Due to the fact that discussion boards are independent of time and location, there is the chance to communicate over distance and at any hour of the day. It is possible to call up past as well as new contributions and thereby maintain a visual record of the discussion. During the discussion, participants can break into smaller groups

68 Ibid 83-84.
69 Articles could include Bagshaw, above n 34; Astor, above n 38; Kelly, above n 24; Brigg, above n 25; Field, above n 31; Field, above n 42; Kolb, above n 60.
70 This kind of media is, of course, bereft of the kinds of facial and body language cues that occur in everyday conversations.
where appropriate, for example when subtopics are generated or where there are tasks set to complete.

The advantage of discussion boards over face-to-face learning can lie in the potential for more active learning to occur. In some face-to-face strategies the teacher can dominate the teaching and learning dynamic. Research into computer conferencing shows that the volume of teacher contributions is much lower than face-to-face teaching and there is the added benefit of high student-to-student interaction. However, the potential for active learning can be very much linked to the skill of the teacher (or other) as moderator. The degree to which interactivity is facilitated can be crucial. This therefore has implications for the time invested by a teacher into the discussion.

The benefits of asynchronous discussion-board posting centre on the opportunity for reflection upon the dialogue. Students have the opportunity to consult relevant literature, they can respond at their own pace and there is time to compose a response of some length. When considering which medium to utilise for online learning, discussion boards are particularly appealing as they incorporate the opportunity for a discursive element. When combined with the reading of literature, such as articles relating to gender and power in mediation practice, there is the opportunity for participants to describe their understanding and articulate their views. The teacher can then take note of the postings and offer her views, so that there is a dialogue and a redescription of views through increased understanding. This part of the design meets the discursive element of Laurillard’s ‘conversational framework.’

An online discussion board does not of itself, however, provide enough interaction for students to have an optimal opportunity to learn through e-learning. It is not supportive of task-based activities. The only activity that it supports is the description and re-description of the students’ views. Arguably, a combination of learning activities best assists a student to learn in this environment. In the online mediation fishbowl, the discussion board is followed by the teacher developing and adapting the role-play scenario to meet the needs of the particular group engaged with the learning and teaching design. Particular issues, relating to power, such as concerns in mediation relating to abusive language or an imbalance of access to knowledge and resources, are highlighted to meet the needs and concerns of students. This part of the design meets the adaptive element of Laurillard’s ‘conversational framework’. The adapted scenario becomes the basis of the next element of the design, the interactive element, through the playing out of the simulation.

**B. Role-play Simulation: Online Fishbowl — Interactive Element**

Asynchronous role-plays can allow a better opportunity for participants to reflect on learning from relevant literature. Without being constrained by time, participants can play out the full potential of the role-play and consult the literature as issues arise, for example those relating to gender and power, and design and discuss possible intervention strategies. The design of the activity allows students to act as mediators, parties, support people, experts or lawyers, to the dispute via the fishbowl arrangement. Students jump ‘in’ and ‘out’ of roles on a self-selecting basis and can elect to act as mediators, a party, support people, experts or a lawyer, with the teacher acting as moderator to stagger roles. Students receive intrinsic feedback regarding mediator interventions through the responses of the parties in the role-play. These interventions and responses are discussed and debated by the other students on the discussion board in a separate thread. In face-to-face mediation role-plays, frequently the focus is on skill development, but observation may also assist a

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72 Laurillard, above n 28, 169.
73 The issue of the investment of time would be an important issue for a lecturer’s work plan.
74 Laurillard, above n 28.
participant’s learning. Observation of the online fishbowl role-play and discussion of interventions can be a powerful tool for learning about gender issues.

Players can include:

- mediator or co-mediators;
- parties;
- support people or ‘experts’; and
- lawyers representing the parties.

Students are engaged actively in roles for short periods, but are constantly reflecting and debating about mediation practice and choices of the mediator on the discussion board. Students can experience different perspectives by changing roles. Their engagement is maintained by the potential for them to make the next intervention.

One of the benefits of this approach is the modelling of practice that the teacher can give by playing the role of mediator, or other roles such as the lawyer, for brief periods. In the context of mediation practice, the teacher can model reflexive practice that takes into account gender and power concerns in the mediation. The teacher might model strategies such as reiterating the ground rules where bullying behaviour occurs or including a support person or expert to provide advice. The teacher might also draw from a variety of approaches, to mediation to model interventions. For example, she may model mediator interventions drawn from narrative mediation that include mapping the history of the dispute, curious questioning, externalising the problem and naming sexist behaviour in the mediation.

Similarly, when dealing with the approach of lawyers representing women in mediation, the teacher can model ‘best practice.’ Where there has been a history of domestic violence, Rachael Field outlines an approach to legal representation in family mediation that ensures that the lawyer advocates for the women’s interests. Field suggests three stages of support and assistance that the lawyer can provide: (i) in pre-mediation; (ii) in advocacy and support; and (iii) in post-mediation. In the first stage, the lawyer can assess the risk posed by engagement with the mediation, ensure informed consent by education about process and power concerns, coach the woman regarding participation skills and strategies, and assist with consideration of options. During the mediation, the lawyer can provide advocacy when required, assist with power concerns by providing legal advice, contextualising the perpetrator’s claims as needed and asking for time out when her client is showing signs of distress. The lawyer can also provide a critical audience to the process and content, draw upon her formal authority, reality-check for her client and provide ‘on the spot’ assistance for the final agreement. Post-mediation, the lawyer can ensure her client’s safety as she is leaving, assist with post-legal issues and advise as to enforcement.

The aim here is not for the teacher to dominate the interventions in the fishbowl role-play but to make a contribution when ‘best practice’ needs to be modelled. On many occasions, by consulting the set literature, students will be able to implement the relevant interventions in the role-play or suggest the strategies by engaging in the discussion board. The opportunity for students to develop appropriate professional interventions is provided by a combination of the reading of the literature, action, intrinsic feedback and reflective dialogue. A reflexive teacher will keep her contributions to a minimum to encourage students to engage actively with the learning task.

An additional feature of the online fishbowl, which promotes the development of appropriate professional interventions, is that individual students can be ‘coached’ by the teacher.

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76 Field and Brandon, above n 44.
77 Winslade and Monk, above n 36, 37-47.
78 Field, above n 42, 85.
79 Ibid 86-88.
81 Ibid 90-91.
teacher via email. Many short courses and academic subjects in the area of mediation use coaches in conjunction with role-plays. By utilising email, the teacher can coach during the role-play and may also coach students who post to the discussion board when discussing the role-play interventions.

C. Journal Writing: Reflective Element
Journal writing provides the opportunity for students to engage in the last part of Laurillard’s ‘conversational framework’; the reflective element. Students can be asked to e-mail the teacher with journal entries demonstrating reflection upon the online mediation and this journal can form part of the assessment for the course. They can link their actual experience with the topic goals and write of their insights garnered from both the discussion board and the role-play. Students can refer to the theory discussed in both parts of the exercise and comment upon the interventions that were tested in the role-play. They also can comment upon their experience of the learning process.

V. DESIGN OPTIONS
The use of online role-plays is not widespread in tertiary teaching, but this learning and teaching strategy has been successfully utilised in politics, economics, psychology, engineering, history and education. Research into online role-plays in university settings points to the need for careful planning to ensure that learning objectives are achieved. There is also a need to manage the threaded discussions as large amounts of postings can be distracting to students. The teacher must be skilled in facilitation to manage disputes between students, briefing and de-briefing, providing advice and adjusting the simulation where appropriate. Other concerns with online role-plays relate to: (i) assisting students with developing reflective practice from the online experience; (ii) the skills set that students bring to the task; and (iii) relationship-building in the online environment. These last three concerns can be addressed by the use of face-to-face classes combined with the online simulation. To address these concerns, blended learning allows for the opportunity to have face-to-face interaction to support the online role-play where: (i) reflection upon practice can occur in face-to-face classes; (ii) mediation and legal skills can be developed in face-to-face classes and these skills can be utilised in the online environment; and (iii) relationships can be built in face-to-face classes that support the online simulation. However, there are a number of important issues relating to the way that the blending of the two mediums is achieved. The teacher needs to consider the following issues:

- placement;
- context; and
- length of activity and size of the group.

In considering the placement of the online mediation role-play in a subject, there is a need to consider how to blend the simulation with the rest of the course work. Student timetabling will be an issue as the teacher needs to ensure that students have the optimum opportunity to reflect through engaging in this learning and teaching strategy. Placement options include:

85 Ibid 306.
86 Ibid 308.
87 Ibid 306-308.
online in tandem with face-to-face classes;
• online in between two intensive periods of the course; or
• online after an intensive.

In the first option there is the benefit of students being able to learn face-to-face skills in mediation and also legal skills and apply these in the online environment. Once the online component has begun, students attending weekly classes can discuss the online role-play and thereby blend the two approaches. Due to the time spent on online interactions, a reduction in face-to-face class time is desirable.

In the second approach, a substantial amount of the course is taught in intensive mode in day-long classes for three to six days. The online component may begin after the first two or three days of the intensive mode and continue for two or three weeks, and then the final days of the intensive can be undertaken by students. The advantages of this approach are that theoretical issues can be canvassed and assessed in the online environment and the focus of the face-to-face classes can be largely (but not exclusively) upon skills development. In the later part of the intensive mode, students can refer back to the online component, allowing for the greater blending of the two approaches.

The final option of undertaking the online fishbowl role-play after an intensive class provides students with an opportunity for engaging with theoretical issues after completing skills-focused face-to-face classes. In this option, there is no opportunity for the students to refer to the dynamics of the online role-play in class. However, it is possible for the students to reflect back upon the face-to-face class activities in their discussion board threads.

In all of the above placement options there is no suggestion that the face-to-face classes would solely deal with skills development as it is desirable for theory and practice to be integrated in the teaching of this area of study. However, where specific issues that require deep reflection are a priority in the curriculum, such as gender and power issues in mediation, the online environment provides the opportunity for self-paced learning and student consultation with the literature during the course of a fishbowl role-play. Clearly, though, opportunities to learn about gender can also occur in the classroom and the teacher can model ‘best practice’ in the face-to-face environment.

The next design choice relates to the context of the scenario used for the online mediation role-play. Teachers may use a variety of contexts, including commercial, family law and workplace contexts. One scenario utilised by the authors centred upon a dispute regarding a domestic building contract. The rationale for the use of online dispute resolution was the fact that the woman participant was living on the Mornington Peninsula and the male participant, the builder, had relocated to Queensland. In the scenario, students are asked to negotiate in relation to an allegedly faulty building of a family home.

The role-play activity has been conducted over 2-6 weeks, but potentially could be shortened for intensive courses. The group size for the fishbowl can be large, around 30, or small, around 10 in each group. This group size is important in terms of the teachers’ time commitment to the various groups. Where there are numerous groups, students can be asked to review each other’s threaded discussions to identify common issues and concerns. The role-play can be conducted through email, threaded discussions, or by using software such as the Fablusi role-play platform.

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88 Jennifer Butler, ‘Mediator Ethics: To Teach or Not to Teach’ (2007) 18(2) Australasian Dispute Resolution Journal 119.


90 This software is available on the internet: see Fablusi, The Online Role-play Simulation Platform <http://www.fablusi.com/> at 27 November 2008.
VI. CONCLUSIONS

The online fishbowl mediation role-play described in this paper provides the opportunity for mediation teachers to use a blended learning design to teach about issues arising in mediation such as gender and power. In this paper, the authors have described a particular design that they have utilised and have offered the e-learning theory to support their approach. Design elements are provided and discussed to assist other teachers in this area to adopt and adapt those parts of the design that they may find helpful. E-learning is an important part of learning in university education and the online mediation fishbowl approach outlined in this paper offers one way to utilise this medium for teaching mediation theory and skills and the role of legal representatives in mediation.
THE TASMANIAN WILDERNESS WORLD HERITAGE AREA: PROTECTED BY THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999?

TOM BAXTER*

The theme of the 2008 ALTA Conference, ‘The Law, the Environment, Indigenous Peoples: Climate for Change?’ is timely indeed.1 Twenty-five years ago, in July 1983, the High Court handed down its landmark judgment in Commonwealth v Tasmania.2 Consequently, the Franklin River continues to flow free, past ancient Aboriginal caves and through the heart of the Tasmanian Wilderness World Heritage Area (‘TWWHA’).

The Environment Protection and Biodiversity Conservation Act 1999 (Cth) (‘EPBC Act’) has since rewritten Federal environmental law and now, inter alia, implements the World Heritage Convention in Australia. This paper examines key EPBC Act provisions applying to the TWWHA.

In this context, the provisions of the EPBC Act regarding regional forest agreement (‘RFA’) forestry operations are a major concern. These provisions effectively exempt RFA forestry operations from the Act. Law reform is needed.

I. INTRODUCTION

Environmental law matters. On 1 July 1983, the High Court of Australia delivered its much-anticipated decision in the Tasmanian Dam Case, upholding by the narrowest of majorities the Commonwealth’s right to prevent the State’s dam. Consequently, the Franklin River and its Aboriginal caves, such as the famous Kuta Kina, escaped submersion.

Further World Heritage cases followed, demonstrating the considerable extent of the legislative power vested in the Commonwealth through the external affairs power.

Publicly funded construction of inappropriate dams still continues in Tasmania3 and other States such as Queensland. However, the most controversial industry in Tasmania today is forestry. Yet RFA forestry operations are exempt from the nation’s pre-eminent environmental statute, the EPBC Act. This is particularly problematic in Tasmania where an RFA applies across the State.

Part II of this paper considers the primary obligations under the Convention Concerning the Protection of the World Cultural and Natural Heritage.4 Part III notes the High Court cases regarding the TWWHA, confirming the Commonwealth’s power to implement the Convention. Part IV examines how, and the extent to which, this is now done through the EPBC Act. Part V considers exemptions in the Act for RFA forestry operations. It is argued that these exemptions undermine the Commonwealth’s responsibility, and hard won capacity, to protect those parts of Australia’s natural and cultural heritage which are today threatened by forestry operations.

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2 (1983) 158 CLR 1 (‘Tasmanian Dam Case’).

3 See, eg, the Meander Dam Project Act 2003 (Tas) which, inter alia: overrides the rejection of the Meander Dam by Tasmania’s Resource Management and Planning Appeal Tribunal; rules out any review or appeal of the dam under any Tasmanian law; and prevails over any other Tasmanian law.

4 Convention Concerning the Protection of the World Cultural and Natural Heritage, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) (‘World Heritage Convention’).
II. WORLD HERITAGE CONVENTION OBLIGATIONS

A. Primary Obligations Under the Convention — Articles 4 and 5

The preamble to the *World Heritage Convention* notes that ‘deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world’. 5

Therefore, the *World Heritage Convention*, art 4, imposes a duty on each State Party to ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated within its territory.

In addition, art 5 provides:

To ensure that effective and active measures are taken for the protection, conservation and preservation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country … to take appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage.

B. The World Heritage List

The *World Heritage Convention* provides for the World Heritage Committee 7 to establish, keep up to date and publish a ‘World Heritage List’, being ‘a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which [the Committee considers have] outstanding universal values in terms of such criteria as it shall have established.’ 8

C. Nomination of Properties to the World Heritage List

A property may only be included in the World Heritage List if it is nominated by the national government of the country where the property is located. Thus, an Australian property can only be put on the World Heritage List if the Commonwealth submits a nomination to the World Heritage Committee recommending that the property be listed.

The *World Heritage Convention* requires each State Party, ‘in so far as possible, [to] submit to the World Heritage Committee an inventory of property forming part of the

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5 Ibid 1.

6 Ibid arts 1-2, which define ‘cultural heritage’ and ‘natural heritage’ as follows:

**Article 1**

For the purposes of this Convention, the following shall be considered as “cultural heritage”:

- monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
- groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
- sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

**Article 2**

For the purposes of this Convention, the following shall be considered as “natural heritage”:

- natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
- geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
- natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

7 Ibid art 8, which provides for establishment of an Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage (‘the World Heritage Committee’) made up of 21 of the State parties to the Convention. Countries are elected to the Committee for terms of approximately three years. The Committee’s role includes deciding if a property is to be added to the World Heritage List.

8 Ibid art 11(2.)
cultural and natural heritage, situated in its territory and suitable for inclusion in the [World Heritage List].

The final decision as to whether a nominated property is inscribed on the list rests with the World Heritage Committee.

III. HIGH COURT CASES REGARDING THE TASMANIAN WILDERNESS WORLD HERITAGE AREA

Australia ratified the World Heritage Convention in 1974. When inscribed on the World Heritage List in 1982, the TWWHA met all four of the (then) criteria for natural heritage and three of the six criteria for cultural heritage. This represented the greatest number of World Heritage criteria satisfied by any listed property.

Controversy over the Tasmanian Government’s scheme to dam the Franklin River for hydro-electric power contributed to the election of the Hawke Labor government, which had promised to stop the dam. The World Heritage Properties Conservation Act 1983 (Cth) (‘WHPC Act’) was enacted, then unsuccessfully challenged by Tasmania. The 4-3 High Court decision of 1 July 1983 was the first of a series of significant World Heritage cases which represented ‘some of the most contentious disputes in recent Australian legal history.’ The cases clearly established the right of the Commonwealth to implement treaty obligations under the external affairs power, overriding recalcitrant States where necessary.

The cases also had significant implications on the ground. For example, following the Lementhyne and Southern Forests (Commission of Inquiry) Act 1987 (Cth) and the High Court’s ruling in the Tasmanian Forests Case, the TWWHA was expanded in 1989.

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9 Ibid art 11(1).
14 Commonwealth of Australia Constitution Act 1900 (Cth) s 51(cxix).
IV. APPLICATION OF THE EPBC ACT TO WORLD HERITAGE PROPERTIES

A. EPBC Act Applies Cooperative Federalism to World Heritage

Australia’s constitutional battles over World Heritage properties were won by a Labor Commonwealth government against conservative State governments. Roles were reversed during the decade of the Howard Government, which opted for an omnibus environmental statute heavily reliant on cooperative federalism (in contrast to that Government’s approach to, say, industrial relations). The WHPC Act and a suite of other Commonwealth environmental statutes were replaced by the EPBC Act,\(^{17}\) which now governs Australian World Heritage properties.

A cooperative approach permeates the EPBC Act, even extending to matters of international agreement. For example, one object of the EPBC Act is ‘to assist in the cooperative implementation of Australia’s international environmental responsibilities’ (emphasis added).\(^{18}\) In the context of Australian World Heritage litigation, this goal represents a substantial departure from previous practice. The various cases fought under the WHCP Act demonstrated little by way of cooperation from the States in ‘implementation of Australia’s international environmental responsibilities’.

The EPBC Act lists World Heritage first in its ‘matters of national significance’, clearly identifying its protection as a Commonwealth legal responsibility. Even in this area, however, the Act provides mechanisms for Commonwealth accreditation (eg, through bilateral agreements)\(^ {19}\) of State and Territory environmental assessment and decision-making processes.

B. Nomination of World Heritage Properties Under the EPBC Act

The EPBC Act, pt 15 div 1, imposes specific requirements on the Commonwealth government in relation to the nomination of World Heritage properties.

Before a property is submitted to the World Heritage Committee for inclusion in the World Heritage List, the Commonwealth Environment Minister (‘the Minister’) must be satisfied that the Commonwealth has used its best endeavours to reach agreement on the proposed nomination and management arrangements for the property with:

1. the owners or occupiers of any land to be included in the proposed nomination; and
2. the relevant State or Territory.\(^ {20}\)

The Minister must notify various decisions regarding World Heritage nominations in the Gazette.\(^ {21}\)

C. A ‘Declared World Heritage Property’ Under the Act

Under the EPBC Act, all properties that have been inscribed on the World Heritage List are automatically ‘declared World Heritage properties’.\(^ {22}\) Under s 14, the Minister also has the power to declare other properties where:

- the Commonwealth has nominated the property for inclusion on the World Heritage List, but the property has not yet been inscribed on the list;\(^ {23}\) or

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17 The WHPC Act was repealed by the Environment Reform (Consequential Provisions) Act 1999 (Cth) sch 6, item 1. Schedule 6, items 2-4, contain savings and transitional provisions. The World Heritage Convention is now implemented in Australian legislation through the EPBC Act.
18 Environment Protection and Biodiversity Conservation Act 1999 (Cth) para 3(1)(e).
19 See Environment Protection and Biodiversity Conservation Act 1999 (Cth) ch 3: Bilateral agreements. See specifically s 51: Agreements relating to declared World Heritage properties.
20 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 314. However, a failure to comply with s 314 does not affect submission of a property for inclusion in the World Heritage List or the status of a property as a declared World Heritage Property: s 314(3).
21 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 315.
22 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 13(1).
23 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 14(1)(a).
the property has not been nominated for World Heritage listing but the Minister believes that the property contains world heritage values and that some or all of those values are under threat.24

Before making a declaration under s 14, the Minister must give the appropriate State or Territory Minister a reasonable opportunity to comment.25 However, if satisfied that the threat is imminent, the Minister is under no obligation to consult the State or Territory Minister.26 A declaration under s 14 comes into force when it is published in the Gazette.”27

Where the Minister makes a declaration under s 14 concerning a property that is not included on the World Heritage List, the declaration must specify the period for which the declaration will remain in force.28 Where the Commonwealth has submitted a nomination in respect of the declared property to the World Heritage Committee, the Minister may specify the period that the Minister believes the Committee will need to decide whether or not to include the property in the World Heritage List.29 If no nomination has been submitted, the Minister may only specify such a period as the Commonwealth needs to decide whether or not the property has world heritage values and to submit a nomination to the World Heritage Committee.30 This period must not be longer than 12 months.31

A declaration relating to a nominated property must not specify the property after the Commonwealth has withdrawn the nomination.32 A declaration in relation to a property that has not been nominated must be amended or revoked if the Minister has decided it does not have world heritage values or that the values are not under threat.33

Section 14 is a valid exercise of Commonwealth power under the principles of the Tasmanian Forests Case.34 However, stronger protection could be provided by adding a provision enabling extension, in appropriate circumstances, of the 12-month time limit imposed by s 14(7).

D. Meaning of ‘World Heritage Values’ Under the Act

Under the EPBC Act, the world heritage values of a property are ‘the natural heritage and cultural heritage contained in the property’.35 The terms ‘natural heritage’ and ‘cultural heritage’ have the same meaning in the Act as in the World Heritage Convention.36

The Australian Government’s Department of the Environment, Water, Heritage and the Arts has published a Values Table for each declared World Heritage property in Australia. The Values Table sets out an indicative list of the property’s world heritage values, grouped under the World Heritage Convention’s natural and/or cultural criteria for which the property was inscribed on the World Heritage List.37 The Values Tables’ lists of world heritage values are non-exhaustive since the EPBC Act’s protections extend to all ‘world heritage values’ as that term is defined in the Act, even if not included in the Values Tables.

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24 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 14(1)(b).
26 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 14(3).
27 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 14(5)(a).
28 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 14(6).
31 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 14(7).
32 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 15(1).
33 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 15(3).
34 Richardson v Forestry Commission (1988) 164 CLR 261. See above n 16 for articles discussing the case.
35 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 12(3).
36 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 12(4). In this respect, the Act retains the definitions of ‘natural heritage’ and ‘cultural heritage’ that applied under s 3(1) of the WHCP Act, which also gave these terms the same meanings as in the World Heritage Convention.
E. Prohibited Actions Relating to Declared World Heritage Properties

The EPBC Act, in s 12(1), provides that a person must not take an action that:

a) has or will have a significant impact on the world heritage values of a declared World Heritage property; or
b) is likely to have a significant impact on the world heritage values of a declared world heritage property.

Maximum civil penalties for breaches of s 12(1) are about $550,000 for individuals and about $5,500,000 for corporations.

F. Offences Relating to Declared World Heritage Properties

Furthermore, the EPBC Act makes it an offence for a person to take an action that results in, or will result in, a significant impact on the world heritage values of a declared World Heritage property.

Criminal penalties for individuals breaching s 15A are imprisonment for up to seven years and/or a fine.

G. Defences

There are certain circumstances in which a person may lawfully take an action that has, will have, or is likely to have, a significant impact, despite ss 12(1) and 15A. These circumstances include:

- Where the person has obtained approval from the Commonwealth Environment Minister for the taking of the action.40
- Where the Minister has decided that the action is not a ‘controlled action’ for the purposes of this section (and hence does not require approval).41
- Where a bilateral agreement, ministerial declaration, accredited management arrangement or authorisation process provides that the action does not require approval.
- Where the person undertakes RFA forestry operations in accordance with a regional forest agreement.44
- Where the action is taken in the Great Barrier Reef Marine Park and the person is authorised to take the action in the place where he or she takes it by an instrument made or issued under the Great Barrier Reef Marine Park Act 1975 (or under an instrument [including regulations] made or issued under that Act).45
- Pre-existing uses.46
- Where the action is an action described in s 160(2) (foreign aid or aviation operations subject to a special approval process).47

H. Where World Heritage Triggers EIA Under the Act

The environmental impact assessment (‘EIA’) and approval provisions of the EPBC Act applying to declared World Heritage properties are outlined below.

38 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s15A(1).
39 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s15A(2).
43 Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 12(2)(b), 15A(4)(b),32-37M.
44 Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 12(2)(b), 15A(4)(b), 38-42. ‘RFA forestry operations’ and ‘regional forest agreement’ have the same meaning as in the Regional Forest Agreements Act 1999: s 38(2).
An action is a ‘controlled action’ requiring approval if it would otherwise be prohibited by Part 3;48 i.e. actions that have, will have, or are likely to have, a significant impact on a matter of national environmental significance.

A person or government agency proposing to take an action can refer the proposed action to the Minister to obtain a decision on whether the action requires approval. For example, if a person proposes to take an action that is likely to have a significant impact on the world heritage values of a declared World Heritage property, they must first refer the action to the Minister for a decision on whether an approval is required.59

Where a person proposes to take an action that they believe may need approval, they must refer the proposal to the Minister.50 If the person believes the action will not require approval, they can still refer the proposal to the Minister for a determination on whether or not approval is required.51

A referral of a proposed action by another party can be made by a State or Territory52 or government agency53 that has administrative responsibilities relating to the action. A person may also receive a request from the Minister to make a referral.54

If the Minister decides that the action is a ‘controlled action’, then it is subject to EPBC Act assessment and approval requirements. If the Minister decides that the action is not a ‘controlled action’, then the action may lawfully be taken without such assessment or approval.


The EPBC Act does not expressly state the constitutional heads of power under which it is enacted. There is no constitutional requirement that an Act do so:

A law enacted by a Parliament with power to enact it, cannot be unlawful. The question is not one of intention but of power, from whatever source devised. ... [A provision of a statute] can be justified, in my opinion, if it is competent under any of the powers vested in Parliament, whatever the title of the Act, and whatever indications there are in the Act as to the precise power under which it may be suggested that Parliament purported to act.55

The EPBC Act contains plenty of indications that it is intended, inter alia, to constitute the primary56 Australian statute for domestic implementation of the World Heritage Convention (and various other conventions). In addition to the reference in its objects to ‘Australia’s international environmental responsibilities’,57 the EPBC Act contains multiple express references to relevant conventions.

The Commonwealth Parliament is empowered to enact legislation that conforms to and gives effect to a bona fide treaty to which Australia is a party, irrespective of whether failure to do so would have constituted a contravention of the treaty.58 However, Commonwealth legislation enacted pursuant to the external affairs power must be reasonably appropriate and adapted to implementing the treaty.59

The World Heritage Convention, eg, art 4, imposes a stringent environmental duty on Australia which, as a well-resourced, developed nation with considerable experience and

48 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 67.
49 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 67A.
50 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 68(1).
51 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 68(2).
52 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 69.
53 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 71.
54 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 70.
55 Ex parte Walsh and Johnson; Re Yates (1925) 37 CLR 36, 135 (Starke J).
56 Some World Heritage properties are also governed by other specific statutes: see, eg, the Great Barrier Reef Marine Park Act 1975 (Cth) and the Wet Tropics of Queensland World Heritage Area Conservation Act 1994 (Cth).
57 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 3(e).
58 Tasmanian Dam Case (1983) 158 CLR 1, 131, 170, 219, 258-9 (Mason, Murphy, Brennan, Deane JJ).
59 Tasmanian Dam Case (1983) 158 CLR 1, 131 (Mason J).
expertise in World Heritage management, could reasonably be expected to pursue the highest level of protection for its World Heritage properties. Given its circumstances, this high level of environmental obligation applies to Australia even in respect of those obligations which allow a certain level of discretion as ‘appropriate’ for each country.

If the EPBC Act fails to discharge all of Australia’s obligations under the World Heritage Convention, this would not of itself invalidate the Act. Failure to comply with all of the obligations assumed under a treaty only prevents a law being supported by the external affairs power if the deficiency is sufficiently substantial to prevent the law being properly characterised as implementing the treaty.

Accordingly, given High Court precedents, it is submitted that the World Heritage Convention and the external affairs power provide ample Commonwealth legislative power to support full implementation of the Convention. In addition to the external affairs power, World Heritage (and many other) provisions of the EPBC Act can also find support from other heads of power, eg, the corporations power.

The live question regarding the EPBC Act’s World Heritage provisions is whether they go far enough to fully implement the Convention and its stringent protective obligations.

J. Limits in the EPBC Act for World Heritage Protection

One limitation of the EPBC Act in respect of World Heritage is that its protections apply only to a significant impact on the ‘world heritage values’ of a ‘declared World Heritage property’. Subsections 12(3)-(4) of the EPBC Act provide:

(3) A property has world heritage values only if it contains natural heritage or cultural heritage. The world heritage values of the property are the natural heritage and cultural heritage contained in the property.

(4) In this section:

- cultural heritage has the meaning given by the World Heritage Convention.
- natural heritage has the meaning given by the World Heritage Convention. [emphasis in original]

Thus, the EPBC Act does not protect all the area of a ‘declared World Heritage property’, nor even all of its values. The Act protects only the ‘natural heritage’ or ‘cultural heritage’ contained in the property. Given the definitions of these two terms in the World Heritage Convention (including the requirement that they be of outstanding universal value from a specified point of view), the Act’s limitation to the ‘world heritage values’ of a declared World Heritage property (instead of protecting the property itself) can leave much of a property unprotected.

Australia’s ‘values approach’ to the World Heritage Convention and its Operational Guidelines has been rejected by the expert advisory body the International Union for the Conservation of Nature (IUCN), and by the World Heritage Committee. David Haigh argues that the embodiment of the ‘values approach’ in the EPBC Act renders its World

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61 See, eg, the World Heritage Convention, opened for signature 16 November 1972, 1037 UNTS 151, art 5 (entered into force 17 December 1975).
64 Commonwealth of Australia Constitution Act 1900 (Cth) s 51(xx).
65 As defined in Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 12(3).
66 As defined in Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 13.
67 World Heritage Convention, opened for signature 16 November 1972, 1037 UNTS 151, arts 1-2.
70 Haigh, above n 60, 390-392.
Heritage provisions unconstitutional insofar as they fail to implement the Convention and the Operational Guidelines.71

Similarly unprotected are ‘natural heritage’ or ‘cultural heritage’ that is not ‘contained in’ a declared World Heritage property. Unless the Minister chooses to make and act upon a temporary declaration under s 14 of the EPBC,72 this leaves areas of outstanding universal value outside the boundaries of a declared World Heritage area unprotected.73

It is difficult to see how the Act’s limitations to World Heritage protections comply with Australia’s obligations under the World Heritage Convention, eg, arts 4 and 5, and the Convention’s requirements for sympathetic management of World Heritage buffer zones. Even without determining Haigh’s argument as to the constitutionality of the EPBC Act, his case for amendment of its World Heritage provisions to expressly protect the whole of, and the integrity and/or authenticity of, each declared World Heritage property74 is persuasive.

K. Too Much Reliance on State and Territory Law?

It could be questioned whether the EPBC Act’s considerable scope for reliance on State or Territory laws through bilateral agreements and bilaterally accredited management plans is a valid exercise of Commonwealth legislative power. However, in the Port Hinchinbrook Case, the Full Court of the Federal Court held that the Minister had not erred in being satisfied of certain matters under the WHPC Act by reason of arrangements that had been put in place under Queensland legislation.75

Justice Branson considers it ‘doubtful the provisions of the [EPBC] Act concerning bilateral agreements are accurately described as provisions allowing the Commonwealth to delegate its environmental assessment powers to the States and Territories.’76 Rather, Her Honour suggests, the EPBC Act provisions allowing bilateral agreements and bilaterally accredited management plans

may well be regarded by the courts as a legislative framework not for delegation of the Commonwealth’s environment assessment powers but rather as a legislative framework within which the Commonwealth may fulfil its duty under Article 4 of the World Heritage Convention by a means other than itself conducting an environmental assessment.77

If the courts follow Her Honour’s approach and construe bilateral agreements and bilaterally accredited management plans as a legislative framework within which the Commonwealth may fulfil its duty under art 4 of the World Heritage Convention, then relevant provisions of the EPBC Act (and indeed, bilateral agreements and management plans) should be judicially interpreted so as to fulfil Australia’s stringent obligations under art 4. Otherwise, Australia could be in breach of the Convention.

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71 Ibid 393-395.
72 See above Part IVC for discussion of the Minister’s power to temporarily declare a World Heritage property under s 14.
73 Note, however, that in Booth v Bosworth [2001] FCA 1453 (the ‘Flying Fox Case’), the killing of spectacled flying foxes when they ventured outside the boundaries of the Wet Topics World Heritage Area was held to constitute a significant impact on the world heritage values of that declared World Heritage property.
74 Haigh, above n 60, 395.
75 Friends of Hinchinbrook Society Inc v Minister for Environment (1997) 77 FCR 153 (Northrop, Burchett and Hill JJ) (Full Court of the Federal Court), and see the High Court’s refusal of the applicant’s special leave application: Friends of Hinchinbrook Society Inc v Minister for Environment [1998] 6 Leg Rep SL8a (Gaudron and McHugh JJ, 13 March 1998).
77 Ibid.
V. Exemption of RFA Forestry Operations

A. RFA Forestry Operations Exempt from the EPBC Act

The EPBC Act exempts from its protection regimes forestry operations undertaken pursuant to the Regional Forest Agreements Act 2002 (Cth) regime. The previously mentioned civil penalty provisions and offences are contained in pt 3 of the EPBC Act, along with similar provisions designed to protect other matters of national environmental significance. However, s 38 of the EPBC Act provides:

(1) Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

(2) In this Division:

RFA or regional forest agreement has the same meaning as in the Regional Forest Agreements Act 2002.

RFA forestry operation has the same meaning as in the Regional Forest Agreements Act 2002.

Subsection 40(1) provides:

(1) A person may undertake forestry operations in an RFA region in a State or Territory without approval under Part 9 for the purposes of a provision of Part 3 if there is not a regional forest agreement in force for any of the region.

Note 1: This section does not apply to some forestry operations. See section 42.

Note 2: The process of making a regional forest agreement is subject to assessment under the Environment Protection (Impact of Proposals) Act 1974, as continued by the Environmental Reform (Consequential Provisions) Act 1999.

In s 40(1):

forestry operations means any of the following done for commercial purposes:

(a) the planting of trees;

(b) the managing of trees before they are harvested;

(c) the harvesting of forest products;

and includes any related land clearing, land preparation and regeneration (including burning) and transport operations. For the purposes of paragraph (c), forest products means live or dead trees, ferns or shrubs, or parts thereof.\(^\text{78}\)

Thus, all such ‘forestry operations’ are exempted from the pt 3 prohibitions and offences, without requiring EPBC Act approval — even where such operations significantly impact on matters of national environmental significance (eg, nationally listed threatened species).\(^\text{79}\)

They are also exempted from the EPBC Act’s environmental assessment and approval processes by s 75(2B). This prohibits the Minister, in deciding if an action is a controlled action, from considering ‘any adverse impacts of’ any RFA forestry operation exempted by s 38. Subsection 75(2B) was applied by then Environment Minister Malcolm Turnbull in his assessment of Gunns’ proposed pulp mill to avoid considering any adverse impacts of RFA forestry operations to supply woodchips to the mill. The lawfulness of this approach was upheld by majority in the full Federal Court.\(^\text{80}\)

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\(^{78}\) Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 40(2).


\(^{80}\) The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources [2007] FCAFC 175 (‘Pulp Mill Case’).
B. Potential Impacts of the RFA Exemptions on the TWWHA

The example of Recherche Bay, in Far South Tasmania, demonstrates how a National Heritage-listed cultural landscape, of arguably World Heritage significance, could have been logged after its National Heritage listing — due to the EPBC Act’s exemption for RFA forestry operations.\(^81\) It is submitted that Recherche Bay should now be added as an extension to the TWWHA.

The ss 38 and 75(2B) exemptions do not apply to forestry operations ‘in a property included in the World Heritage List’\(^82\) Such operations would require ministerial approval under the EPBC Act and do not currently occur in declared World Heritage properties. However, RFA forestry operations just outside the boundary of such properties are exempt from the Act under s38 — even if they significantly impact on world heritage values of the declared World Heritage area, or areas of ‘natural heritage’ or ‘cultural heritage’ outside the boundary.\(^83\)

The Australian Government’s February 2008 state of conservation report for the TWWHA referred inter alia to the *Wielangta* litigation\(^84\) and Gunns Limited’s Tamar Valley pulp mill proposal, noting that neither location was near the TWWHA.\(^85\) However, the report did not detail the extent to which legislative amendments\(^86\) relevant to these cases\(^87\) have exempted RFA forestry operations from the EPBC Act.

In March 2008, a three-member World Heritage monitoring mission visited Tasmania to view forestry operations adjoining parts of the eastern and northern boundaries of the TWWHA. The mission consisted of a representative from the UNESCO World Heritage Centre, the International Council of Monuments and Sites (ICOMOS) and the IUCN. Groups making representations to the mission included a number of environmental NGOs and the Tasmanian Aboriginal Land and Sea Council. They argued that RFA forestry operations adjacent to these boundaries were compromising (eg through edge effects, the risk of regeneration burns escaping, etc) natural heritage and cultural heritage, just outside the TWWHA boundaries, and also the integrity of the TWWHA itself. Industry organisations and the Tasmanian and Commonwealth governments denied this, arguing that the TWWHA and adjacent forestry operations were well-managed.

In July 2008, the twenty-one member World Heritage Committee (currently including Australia), held its 32nd session in Quebec City, Canada. The meeting’s business included consideration of the TWWHA monitoring mission’s report and subsequent advice from the IUCN. In its decision on the TWWHA, the World Heritage Committee takes note of the monitoring mission’s findings and, inter alia:

Reiterates its request to the State Party to consider, at its own discretion, extension of the property to include appropriate areas of tall eucalyptus forest, having regard to the advice of IUCN; and also further requests the State Party to consider, at its own discretion, extension of the property to include appropriate cultural sites reflecting the wider context of Aboriginal land-use practices, and the possibility of re-nominating the property as a cultural landscape.\(^88\)

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82 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 42(a).

83 See *Flying Fox Case* [2001] FCA 1453, which, inter alia, held that an action taken outside the boundaries of a declared World Heritage property could significantly impact the world heritage values of the property.

84 *Wielangta Case* [2007] FCAFC 186.


86 The insertion of *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 75(2B) and the amendment of the Tasmanian Regional Forest Agreement following the judgment of Marshall J in *Brown v Forestry Tasmania* [2006] FCA 1729. See <http://www.on-trial.info> at 18 December 2008 for details of the latter.

87 Pulp Mill Case [2007] FCAFC 175; and *Wielangta Case* [2007] FCAFC 186.

The decision was seized on by environmental NGOs which demanded
a moratorium on logging … while a proper process is enacted to ensure areas such as the
Weld, Styx and Upper Florentine Valleys and the Great Western Tiers are protected and
incorporated as part of the WHA.89

Environment Minister, Peter Garrett also welcomed the World Heritage Committee’s
consideration of the mission’s report on the TWWHA but stated, inter alia, ‘The Australian
Government has no plans to extend the current boundary into production forests.’90

VI. CONCLUSION

The World Heritage Convention imposes stringent obligations on State parties, particularly
a developed nation such as Australia which possesses considerable expertise in natural and
cultural heritage management. In the past, Commonwealth implementation of obligations
under the World Heritage Convention was a source of high-profile constitutional
controversy, with a succession of High Court cases confirming the breadth of the
Commonwealth’s external affairs power.

The EPBC Act is now the primary legislation for domestic implementation of
Australia’s obligations under the World Heritage Convention (and various other treaties).
Given the stringency of World Heritage Convention duties and the extent of
Commonwealth constitutional power in this area, the EPBC Act should be amended so as to
further and better implement convention obligations. For example, the EPBC Act’s
focus on ‘world heritage values’ needs to be addressed as Haigh suggests.91

Of major concern in the Tasmanian context are ss 38-42 and s 75(2B) of the EPBC Act,
which exempt RFA forestry operations from the Act’s environmental assessment and
approval requirements. These exemptions enable RFA forestry operations to significantly
impact matters of national environmental significance, be they: world heritage (as arguably
occurs adjacent to parts of the TWWHA’s eastern and northern boundaries); national
heritage (eg, Recherche Bay); or nationally listed threatened species (as in the Wielangta
Case92). Such forestry operations can legally occur without even requiring the
Commonwealth ministerial approval which the EPBC Act would demand of any other
industry having such significant impacts.

A further problem is that the Australian Labor Party’s National Platform, passed at its
2007 National Conference, promises, inter alia, that:

Labor will introduce a climate change trigger in the Environment Protection and
Biodiversity Conservation Act so that major new projects are assessed for their climate
change impact as part of any environmental assessment process.93

Since being elected in November 2007, the Rudd Labor Government has said little about
such a climate change trigger — despite Labor having introduced a Bill for such a trigger
when in Opposition.94 Presumably the Government has been pre-occupied with the
development of its ‘Carbon Pollution Reduction Scheme’.

89 The Wilderness Society (Tasmania) Inc, ‘World Heritage Committee calls for increased protection of Tasmania’s
calls-for-increased> at 18 December 2008.
90 The Hon Peter Garrett MP, Minister for the Environment, Heritage and the Arts, ‘International Experts Conclude
Tasmanian Wilderness is Well-Managed’ Media Release, 7 July 2008,
Matthew Denholm, ‘Peter Garrett rejects heritage call to protect eucalypt forests’, The Australian, 8 July 2008
91 Haigh, above n 60, 395.
94 Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005 (Cth). See also Commonwealth
parliamentary debates regarding the Environment and Heritage Legislation Amendment Act 2006 (Cth).
When the Government does progress the important issue of a climate change trigger, it should ensure that the EPBC Act’s exemptions for RFA forestry operations do not apply to the climate change trigger in the same way that RFA forestry is exempted from the Act’s other triggers (ie ‘matters of national environmental significance’).

Through ss 38-42 and 75(2B), the EPBC Act has largely abandoned the field in the regulation of RFA forestry operations, precluding the proper protection which the EPBC Act purports to provide for matters of national environmental significance. This situation is untenable and should be addressed by forthcoming Senate and statutory inquiries into the operation of the Act.

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96 Environment Protection and Biodiversity Conservation Act 1999 (Cth) 522A.
IDENTIFICATION EVIDENCE — PROOF AND DOUBT: 
AN EXPERIENTIAL TEACHING AND LEARNING STRATEGY 
TO PROMOTE DEEP ANALYTICAL UNDERSTANDING 
COMBINED WITH INCREMENTAL DEVELOPMENT OF 
PRACTICAL LEGAL SKILLS

JOHN ANDERSON

I. INTRODUCTION

Identification of a defendant is a complex and fascinating issue that frequently arises in 
criminal trials. Important rules apply in relation to the admissibility, and warnings as to the 
use, of identification evidence in criminal proceedings. In other litigation contexts, issues 
of identification are less often encountered and the evidentiary rules are not as stringent. 
Notwithstanding that, it is apparent that similar considerations as to questions of weight 
and the making of rational inferences from facts leading to proof of, or doubt about, 
identity arise in all such contexts.

In contemplating student learning in this difficult area of evidence law, it is important 
to employ teaching strategies that promote deep learning through analysis and synthesis of 
facts in the specific legal context, and also to allow students the opportunity to learn by 
doing. At the same time, such strategies must be designed to provide for and foster the 
transfer of this learning to similar but different situations, as ‘knowledge of evidence will 
help [students] in almost any function they may perform as lawyers, since so much 
depends, in shaping any legal transaction, upon what the parties contemplate would happen 
if the matter went to court … and a careful lawyer always has an eye on what could be 
proved.’

A problem scenario relating to the commission of crimes and the evidentiary rules 
applying to identification of a defendant in criminal proceedings is used for the 
experiential teaching and learning strategy devised for the identification evidence topic in 
the author’s Evidence course. This is a compulsory course within the Bachelor of Laws 
(LLB) program at the University of Newcastle. The analytical and advocacy skills that are 
developed by students through this experience as they ‘get a feeling for how evidence 
actually plays out in the courtroom and in other stages of litigation’ will be readily 
transferable to different legal contexts. This transference has become apparent in the skills 
exercises completed by some of the same students in the Trial Process course, a subsequent 
practical skills course focused on advocacy in both criminal and civil litigation contexts 
undertaken by those students in their final year of study.

II. THE NATURE OF IDENTIFICATION EVIDENCE 
AND THE LEGAL CONTEXT

When identification evidence is given by an independent eyewitness, it has the feature of 
apparent reliability. However, this feature must be evaluated in light of the inherent 
dangers related to the subjective experience of human perceptions. It has been remarked 
that ‘human perception is not always accurate or complete, and this is so even when there

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author would like to thank Sher Campbell for her invaluable research assistance in helping to devise and compile the 
material to include in the first Evidence in Context Seminar Workbook in 2006 for the LAWS4004 Evidence course, 
including the problem used in the ‘identification evidence’ topic .
1 Stephen Nathanson, ‘Designing Problems to Teach Legal Problem Solving’ (2001) 34 California Western Law Review 
101, 116.
3 Ibid 1000.

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is no question but that the witnesses are seeking to tell the truth as they perceived it to be.\(^4\) When recalling an event or image, human beings trigger a memory of their subjective experience of the event or image, which impacts upon the reliability of that memory. The experience may have been ‘impure’ to some extent ‘because of personal and environmental factors present at the time of the event and which, in the interval that has elapsed between the event and the recollection of it, will probably have undergone further distortion and recreation … an act of memory is an act of reconstruction.’\(^5\) Such evidence may then be ‘as dangerous as it appears reliable’,\(^6\) although jurors as fact-finders tend to place great weight on eyewitness accounts relating to the identification of people, particularly the defendant in criminal proceedings. As mistaken identification has been largely recognised as the one of the most significant causes of miscarriages of justice,\(^7\) it must lead a lawyer to carefully analyse and synthesise all the factors surrounding and impacting upon the identification made by the eyewitness in order to develop a strategy directed to either enhancing reliability or raising a doubt about reliability, depending on which party to the proceedings is calling the eyewitness.

In undertaking this analysis of the various factors affecting the cogency of an eyewitness’s identification evidence, attention must be directed to the environmental and personal factors operating on the occasion of the initial observation, such as natural or other obstructions to the view of the witness and the health and emotional state of the witness. Other factors impacting on the force and reliability of such evidence are the time gap between the event perceived and any formal identification of a person associated with this event, plus the circumstances of the formal identification at an identification parade or by another method. Such factors become highly relevant in proving, or raising doubts about, the identity of the perpetrator of a criminal offence and, thus, will generally become the focus of the questions to be asked in cross-examination of an ‘identification witness’ in the adversarial trial process.\(^8\)

The complexity of, and dangers associated with, the process of identification has resulted in a number of rules governing the admissibility of, and warnings to be given about, identification evidence when used in proof of a key fact in issue in criminal proceedings. This issue will invariably be whether the accused was the person who perpetrated the acts constituting a crime. These rules and judicial warnings have been developed at common law and further refined in statutory form. In the Commonwealth and NSW jurisdictions, where the ‘uniform’ \textit{Evidence Act 1995} operates,\(^9\) students must learn and apply the provisions in Part 3.9 of the Act. In other jurisdictions, an important body of common law from which the legislative provisions in NSW and the Commonwealth are derived must equally be learned and applied by law students in those jurisdictions. These rules restrict the logical scope of information that can be admitted as evidence in criminal proceedings. At the same time, however, scope for analysing and synthesising the various potentially admissible facts leading to proof of, or doubt about, a witness’s identification evidence is accommodated through the oral testimony emphasis in the trial process where the evidence is fully tested in cross-examination.

In the abstract, the \textit{Evidence Act 1995} Part 3.9 provisions relating to identification evidence in criminal proceedings are complicated and prolix. Even the most enthusiastic and intelligent law students will encounter difficulties in comprehension of these provisions upon simply reading the legislation. The questions of admissibility and the contents of any warning in application of the rules and doctrinal principles of identification

\begin{itemize}
\item Ibid 568.
\item Graham Roberts refers to these factors as ‘pressure points in identification evidence’: see Roberts, above n 5, 571-576.
\item Any reference hereafter to the \textit{Evidence Act 1995} includes both the NSW and Commonwealth Acts. The \textit{Evidence Act 2001} (Tas) omits some of the provisions that are contained in Part 3.9 of the NSW and Commonwealth Acts relating to identification evidence, but it does include s 116.
\end{itemize}
evidence, together with assessing the weight and reliability of such evidence, are, it is strongly contended, best understood by an experience in the process, albeit simulated and circumscribed, of an oral witness examination involving ‘identification’ as a significant and disputed issue; ‘a limited “how to do it” exposure.’

III. EXPERIENTIAL LEARNING, PROBLEM-SOLVING AND SIMULATIONS

In his illuminating essay, ‘Teaching Evidence Scholarship: Evidence and the Practical Process of Proof’, Australian evidence scholar Andrew Ligertwood contends that ‘within the discipline of law, evidential issues are most effectively analysed and understood in the context of the practical legal process within which they arise … Ultimately, it is the instrumental ends of that legal process which determine when evidential issues arise, and the content of any applicable evidentiary rules.’ Ligertwood goes on to say that

abstract exposition [of evidentiary rules] does not really capture the complexity of the situations in which evidential decisions are made. Nor does abstract exposition ever really convey why the proof of facts within the common law adversarial oral trial is so elusive. These complexities are best and most profoundly appreciated by first-hand exposure to the practical processes of adjudication, or to the next-best-thing in the classroom: student role-play in mock trials.

Abstract exposition must, therefore, largely give way to a simulation of process in what effectively amounts to a hands-on experience of evidence in action incrementally calibrated to the specific stage of student learning. An excellent topic area to use this simulated process to give students the opportunity of experiencing and appreciating these complexities is that of identification evidence in a criminal proceeding. Significant potential for transferring the learning gained from the experience to other and different contexts also clearly exists.

The theoretical underpinning of experiential learning techniques is found in constructivism, and theorists such as Philip C Candy emphasise that the focus of constructivism in education is on the learner and their construction of knowledge into ‘systems, structures or schemata, using both cognitive and affective processes’. Such techniques are student-centred and require the teacher ‘to take a “back seat” to the learning activities so that the students are fully engaged in the process.’ Thomas J Shuell’s simple formulation of the constructivist framework for teaching and learning is pertinent and instructive.

[I]f students are to learn desired outcomes in a reasonably effective manner, then the teacher’s fundamental task is to get students to engage in learning activities that are likely to result in their achieving those outcomes … it is helpful to remember that what the student does is actually more important in determining what is learned than what the teacher does. (emphasis added)

Importantly, the experiential learning process involves the learner moving through a learning cycle of four stages: forming principles through information gathering about a skill; planning in the context of certain materials which will be used to demonstrate development of the skill; performing the skill as an experiential exercise by work placement, role-play or other simulation; and reflecting by keeping a journal, watching a video of the exercise and/or discussion with the teacher or peers about what happened in

10 Rothstein, above n 2, 1000.
12 Ibid 251.
the experience of demonstrating development of the skill. Ultimately, student learning is achieved ‘by actively reflecting on experience, translating that reflective observation into a ‘theory from which new implications for action can be deducted’, and then testing those theories as a guide to creating new experiences.’ This can be a debriefing session where the students involved in the simulation and those observing discuss the experience and particular aspects of the conduct demonstrated in the simulation. As Marlene Le Brun and Richard Johnstone emphasise:

Reflective discussion helps students learn to generalise from, and think beyond, their particular experiences. If the role play or simulation is video-recorded, we can lead the class through a discussion of the different types of interaction displayed in the role play.

Therefore, analysing and synthesising facts in a specific legal context, using that as a basis for formulating questions to ask a witness in a simulated cross-examination, and conducting that cross-examination in front of an audience of observers who will assist with reflection when the simulation exercise is completed, is the cycle learners are able to use to construe meaning from their knowledge of that legal context. It is ‘learning by doing’ in a holistic sense, as espoused by David A Kolb, and it is clear that ‘learning from experience must involve links between the doing and the thinking.’ ‘Reflecting-in-action’ is a most significant part of the experiential learning process and, in training professionals such as lawyers, this reflection on an experience ‘is central to the art through which practitioners sometimes cope with the troublesome “divergent” situations of practice.’

In employing the experiential learning technique to engage students, encourage effective reflection and achieve the desired learning outcomes in the specific context of the identification evidence topic, it is essential to use a well-designed problem. This requirement is clearly emphasised in the work of leading international clinical legal scholar Stephen Nathanson, where he draws out the following principles of problem design for legal-skills teaching and especially in legal-skills simulations: (1) user-friendly; (2) realistic; (3) relevant; (4) consistent with objectives; (5) similar, but different; and (6) challenging. Accordingly, a problem using a criminal case where identification is the central issue must be developed so that it is easy to read and use, keeping factual and documentary detail to a minimum, and resembles real life to provide motivation for students to want to solve the problem. Further, the problem scenario must be relevant to what could be expected in practice in the real world, and meet the objectives of encouraging deep analysis and synthesis of factual and evidential issues as well as incrementally developing basic advocacy skills. Finally, the problem must be designed to enable learning that is transferable to different legal contexts, and so that it presents ‘an interesting puzzle that the student knows something about but cannot solve right away’, thus balancing both ‘linearity and flexibility.’

The solving of such a problem, designed in accordance with these principles, through both deep analytical thinking and effective advocacy skills, supports the specific student learning outcomes stated for the author’s Evidence course. The course objectives, which translate into student learning outcomes, are to develop knowledge and understanding of specific rules and principles relating to evidence law, to further develop core skills of

17 Ibid 63.
18 Le Brun and Johnstone, above n 14, 305.
19 Kolb, above n 16, 20-21
22 Nathanson, above n 1, 104-106. See particularly the table, ‘Six features of Good Problems’ on page 106 for a precis of the enumerated features.
23 Nathanson, above n 1, 117. Nathanson describes these features of problem-solving: ‘[l]inearity is the step-by-step aspect of problem solving that requires familiarity with routines and precedents applicable to the legal context. Flexibility is the higher-level skill needed to modify the routines and precedents or to create something novel to solve the problem.’ He emphasises that to make a problem appropriately challenging for students, ‘[p]roblems should be designed somewhere in the middle of these extremes, balancing the two’ (118).
problem-solving and oral communication in the context of the rules of evidence, and to develop a critical appreciation of the operation of the rules of evidence in the process of fact-finding in an everyday practical context.24

The use of role-plays or simulations as a useful experience for student learning have been promoted by leading American scholar in clinical legal education Professor David Chavkin, who highlights ‘simulation’ as one of the pivotal features of a ‘meaningful clinical legal education’ for students, in that

[s]tudents need to have an opportunity to ‘try on’ skills and values in a context in which no one will be harmed by mistakes and in which they can take some risks that they would not take if real-life client interests were at stake. Simulation exercises provide a tool for giving students these opportunities.25

A simulation provides students with a unique opportunity to experience the different processes existing within the complex and dynamic legal system.26 Le Brun and Johnstone emphasise that role-plays and simulations can be used effectively in different ways in the classroom. There must be sufficient time given to students to prepare for their roles and they must be given ‘clear and detailed, but sufficiently flexible, instructions so that they know what they are required to do and yet are able to be creative.’27 This echoes the ‘linearity and flexibility’ of Nathanson’s well-designed problems in creating the conditions for effective simulation.

One form of the simulation method is the ‘fishbowl’ approach, where a small group of students conduct a simulation exercise in front of the rest of the class and teacher, who then provide feedback ‘using the simulation as a springboard for discussion.’28 Another form is where all students perform the simulation in small groups at different locations inside or outside the classroom and ‘report their experiences to the class.’29 The form chosen will depend on a variety of factors including time constraints, numbers of students, nature of skill and mode of assessment.

An overriding consideration in using the simulation method is that ‘we must be sensitive to signals of discomfort from students who are reluctant to be involved in such activities’ and it may be that ‘some students cannot or will not participate.’30 In this way, it must also be acknowledged that ‘an aspect of good teaching is the adoption of teaching and learning processes that accommodate a variety of learning strategies’31, ‘particularly if we are interested in educating lawyers who can assume diverse roles in a complex, post-industrial world.’32 As far as participation in the actual simulation is concerned, this may be offered to students as an option and the student group undertaking the simulation will make a deliberate choice for this form of learning and assessment. The rest of the class will then have the opportunity for observation, a number of whom may keenly participate in this way, and then provide feedback to the group presenting the simulation, encouraging ‘reflection-in-action’ proximate to the experience.33

A number of other methods of learning used in the course will not require the students to simulate a witness examination but to accommodate other learning styles within student groups whilst also challenging students to ‘broaden the range of their learning preferences’.34 For example, a group may be required to engage in analysis and synthesis

24 See University of Newcastle, School of Law, Course Outline — LAWS4004 Evidence (Semester 2, 2008) 4-5.
27 Le Brun and Johnstone, above n 14, 306.
28 Ibid.
29 Ibid.
30 Ibid.
31 Kift, above n 13, 63.
32 Le Brun and Johnstone, above n 14, 82.
33 Schon, above n 21, 128-136.
34 See Kift, above n 13, 63-64, and Figure 5 for a description of the four learning styles from Kolb’s inventory and the association of these learning styles with different stages of the learning cycle. See also Le Brun and Johnstone, above n 14, 82.
of a problem question by an oral presentation of their analysis of the issues, alternative arguments and conclusions, at the same time as attempting to promote a full class discussion of the issues raised by the problem. This also involves a reflective component in ensuring that the learning transferred in this process is accessible to other students in the same way that it must be in the professional-client relationship in practice.35

The author has used an experiential learning framework together with applying the principles of well-designed legal problems in developing a strategy based on a simulated witness cross-examination to promote effective student learning of the identification evidence topic and incremental development in the practical legal skill of advocacy. The strategy adopted is also clearly influenced by evidence scholars, notably William Twining and Andrew Ligertwood, in the use of ‘role-plays and advocacy exercises [to] bring Evidence doctrine to life’36 in order to promote deep learning and scholarly understanding of evidential issues through a unique insight gained by participating in the process (albeit a simulation). The ‘deep’ approach to learning is a most valuable attribute in teaching as it promotes learning in a holistic sense of encouraging students to examine facts in the specific context of qualitative legal concepts. John Biggs exemplifies the educational value of the ‘deep’ approach to learning generally in stating:


When using the deep approach in handling a task, students have positive feelings: interest, a sense of importance, challenge, even of exhilaration. Learning is a pleasure.37

Below is an outline of the specific strategy being used in teaching the identification evidence topic.

A. The Experiential Teaching and Learning Strategy

The identification evidence topic area is the penultimate topic in the semester-long (13 week) Evidence course taught by the author in the School of Law at the University of Newcastle. This compulsory course is offered to students in the second semester of the fourth year of study for undergraduates completing a combined law degree program and the second semester of the second year of study for graduate students in the LLB degree program. By the time the identification evidence topic is reached in the course, students have completed set readings, received instruction and participated in seminar classes covering the law and process relating to the proof of facts in issue, examination and cross-examination of witnesses, and all other evidentiary exclusionary rules found in the Evidence Act 1995. This reading, instruction and participation takes place as a result of private study, a series of weekly lectures, oral group presentations by students of case analyses and problem-solving exercises in weekly 2-hour seminar classes. There are two seminar classes with approximately 40 students in each class.

Students form their own groups of four members at the beginning of the semester and each group is allocated a name related to evidence law, such as ‘identification’, ‘hearsay’, ‘tendency’ and ‘circumstantial’. Depending on overall numbers in the seminar classes, there are a minimum of 10 and a maximum of 12 student groups formed in each of the two seminar classes. In the first three weeks of classes, the groups are given the opportunity to choose the topic areas for their presentations to the class from the full range of topics covered in the course. This includes the identification evidence topic, which involves the simulated advocacy skills exercise of cross-examining an eyewitness who has identified a defendant in a criminal proceeding. Accordingly, there is ample preparation time available to the student groups. The groups then take it in turns to present a case analysis or a review problem in each of the nine seminar classes, following modelling of presentation techniques by the teacher in the first three seminar classes. Each group is assessed in relation to their presentation by reference to published criteria in three principal areas:

35 Schon, above n 21, 290-295.
36 Ligertwood, above n 11, 259.
37 John Biggs, Teaching for Quality Learning at University (1999), 16-17. Also, see Ramsden, above n 26, 40-61.
research of relevant primary and secondary sources; understanding, depth of analysis and synthesis of facts and evidential issues; and effective presentation skills including stimulation of class discussion.

The seminar class for the identification evidence topic includes a problem question where the student group has to identify the issues, engage in analysis and synthesis of the facts, apply the relevant law, and then present a cross-examination of the eyewitness who identifies the defendant, linking him to a particular crime. The rules relating to identification evidence and the associated analysis and synthesis of the factual issues are put into action by the students. This incorporates the planning and forming stages of the learning cycle before the ‘doing’ stage of a simulated witness cross-examination. The assessment criteria in relation to effective presentation skills is modified to reflect the objective of incremental development of advocacy skills in cross-examination, particularly taking into account that it is likely to be the student group’s first experience with this practical skill. In assessing this incremental skill development, observance by the group of specific rules relating to the conduct of cross-examination, such as s 41 of the Evidence Act 1995 dealing with improper questions, is considered. A ‘fishbowl’ approach is implemented for this simulation exercise as the rest of the class and the lecturer watch the performance by the student group. At the conclusion of the simulation, there is time allocated for reflection and discussion of the performance, with the whole class encouraged to participate in feedback and critical appraisal. This incorporates the final and important reflection stage of the experiential learning cycle.

The case of *R v Ben Lewis*, set out below, was specifically created as a legal problem to provide students undertaking the author’s Evidence course with an experience which places the law relating to identification evidence squarely into a practical context. A primary aim of this student experience is to enhance their understanding of the legal rules of admissibility and the content of an appropriate judicial warning about identification evidence in a criminal proceeding. At the advanced stage of student learning within the overall law degree program, and the late stage of the Evidence course when this problem is confronted by students, they are expected to have developed some understanding of a range of evidentiary principles and rules, skills in problem-solving techniques, and to have had exposure to the procedural components of the trial process. There has also been some modelling and experimentation with examining and cross-examining witnesses by other student groups in earlier seminar classes related to the ‘examination of witnesses’ topic.

Allied to the aim of enhancing legal understanding of identification evidence through problem-solving, the experience also aims to give students the opportunity to develop advocacy skills through cross-examining a witness in a role-play and simulation of the witness examination process. This particular skill was chosen because of the broader scope available to the students to experiment with techniques in questioning and to ask questions deeply probing the issues raised. Specifically, this involves one student taking the role of the defence advocate, one student taking the role of the prosecution eyewitness, and the other two group members involved in the preparation and presentation of a commentary to the rest of the class and teacher. Ultimately, students are encouraged to engage in a deeper analysis and synthesis of the facts and applicable legal rules to formulate and present an effective cross-examination. There are several parts to the legal problem designed for this specific student experience in seminar classes, which students must ultimately synthesise in their simulated witness cross-examination. The identification-evidence problem-solving and experiential task utilising the case of *R v Ben Lewis* is as follows:

Ben Lewis is charged with ‘break, enter and steal’ as well as ‘steal motor vehicle’. You represent him at trial in the District Court. The prosecution case is that the residence at 10 Marks Point Road was broken into at approximately 9.00pm on 8 March (Yr-0) and various valuable personal items were taken. In addition, a car was earlier stolen for use in the break and enter at 10 Marks Point Road. The prosecution alleges that Ben Lewis is responsible for these crimes. Ben Lewis denies that he committed these crimes.
The prosecution intends to call Kim Thurlow, whose statement says s/he saw a man getting into a red Holden Commodore with an ‘M’ registration number plate at about 9.20 pm on 8 March (Yr-0) just outside the house at 10 Marks Point Road. This man was about 25-30 metres from Thurlow when s/he saw him getting into the car. Thurlow was standing across the street, which s/he says was well lit by both the street lights and the full moon apparent in the clear skies that night. S/he initially saw the man emerge from a water access lane between 10 and 12 Marks Point Road and then quickly walk about 20 metres, get into a red Holden Commodore and drive off away from where s/he was standing. The man s/he saw was wearing a blue jacket, dark trousers and ‘some sort of woolly hat’, which s/he said s/he thought was odd because it was warm on that particular night. Thurlow noticed that the man was carrying a bag in his left hand. From this sighting of the man, Thurlow estimated that he was about 20 years of age, approximately 180cm tall, average build, and he had a pockmarked face with no facial hair. The ‘woolly hat’ covered the man’s head so Thurlow could not say whether he had hair. Thurlow asserts that s/he had never before seen this man.

Thurlow produced a plan of the street (not to scale - see below). The point marked with an ‘X’ indicates where s/he was standing at the time s/he observed the man emerge from the water access.

Subsequently on 11 March (Yr-0), Thurlow was contacted by Sgt Boots and attended the local Police Station to view a parade of eight men from which s/he was asked if s/he could identify the man s/he had seen getting into the car outside 10 Marks Point Road on 8 March (Yr-0). The parade had been arranged by Sgt Boots following a request from the detectives investigating the case. The men in the parade were all aged between 19 and 23 years, of average build, had no facial hair, ranged in height from 175cm to 182cm, and four of the eight men had pockmarked faces. Each man held a number from 1 to 8 on a large piece of cardboard in front of him. Thurlow selected number 3 as the man s/he had seen on 8 March. This was the number which Ben Lewis was holding in the parade. Thurlow made another statement to the detectives following this identification procedure.

Thurlow’s friend, Sam Sanderson, also witnessed the incident but was not invited to participate in an identification procedure. S/he was, however, able to identify the man as s/he recognised him from having seen him around the local neighbourhood. Sanderson and Thurlow are also friends with Chris Massey, who is currently serving a prison sentence for a ‘break and enter’ offence that he says he didn’t commit but that he was ‘set up’ by Ben.
Lewis. The prosecution intends to call Sanderson to give evidence and identify Ben Lewis at the trial.

A police witness, Detective Reg, says in his statement that he found the red Commodore vehicle, registered number ZMM-581, stored in a garage belonging to a man named Alan Grayson. He searched the car and found a balaclava in the passenger side floor of the front seat. There is also a statement from Alan Grayson which states he received a telephone call from Ben Lewis at 10.30pm on 8 March (Yr-0), and was asked to look after a car for him. Lewis then arrived at approximately 11 pm and left the Commodore in Grayson’s garage. Before doing so, he took a heavy bag out of the front passenger seat. Grayson noticed that Lewis was wearing a black leather jacket and dark jeans at the time. Grayson was not asked to identify Lewis at an identification parade.

The car had been stolen on 7 March (Yr-0). The unused material that the prosecution has revealed to the defence shows that Alan Grayson has numerous prior convictions including three ‘break, enter and steal’ offences that all took place in the last eight years. It also reveals that the police attended Alan Grayson’s property as the result of an anonymous phone call from a phone box, the message being: ‘If you’re looking for the car what done a house in Marks Point Road you should go to Grayson’s place.’

Ben’s instructions to you are that he was nowhere near 10 Marks Point Road that night. He does know the road. It is generally well lit and there are lots of cars parked on it even late at night. Also, there are lots of trees along the road of various heights but they are largely bushy and over 2 metres tall. Your instructing solicitor instructs you that s/he has visited the street and thinks that the laneway down to the water would have been in darkness and that there are two trees between the street lights on either side of number 10, one just outside number 10 and slightly to the right. Ben knows Alan Grayson. Alan does occasionally store cars for Ben (who buys and sells cars). He also says that Alan occasionally breaks in and steals from houses. Ben knows Chris Massey and is aware of rumours circulating that Ben had ‘framed’ Massey for another ‘break and enter’ offence in Marks Point for which Massey is currently serving a prison sentence. Ben denies that he ‘framed’ Massey. Ben knows that Massey has a lot of friends in the Marks Point area and had seen him with Thurlow on a few occasions (although Ben only knew Thurlow by sight not by name). As to the identification parade, Ben says that the other men in the parade didn’t really look like him. Although a couple of the others had pockmarked faces their markings were not as clearly pronounced as those on Ben’s face. He believes it wasn’t a fair procedure.

(i) Prepare and present the cross-examination of Kim Thurlow concerning the identification of Ben Lewis. What parts of the Evidence Act would you need to consider?

Initially, students need to determine that the fact in issue is whether it was Ben Lewis who committed the break, enter and steal offence at 10 Marks Point Road and that he was the person that Kim Thurlow saw getting into the red Holden Commodore vehicle at about the time the offence was committed. Having done that, students must consider the following provisions of the Evidence Act 1995 set out in Table 1 below:
### Table 1 – Parts of the *Evidence Act* to be considered in the experiential learning exercise

<table>
<thead>
<tr>
<th>SECTION / PROVISION OF EVIDENCE ACT 1995</th>
<th>REASON FOR CONSIDERATION IN PREPARING CROSS-EXAMINATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘Identification Evidence’ definition in Dictionary, Part 1</td>
<td>To determine whether the witness has observed the person at or near a crime scene at approximately the time a crime was committed and the witness has subsequently made an identification of the defendant as that person or resembling the person who was observed on the earlier occasion.</td>
</tr>
<tr>
<td>Part 3.9 – s 114</td>
<td>Visual identification evidence of a witness is not admissible unless an identification parade that included the defendant was held or an exception applies, such as it was not reasonable to hold a parade in the particular circumstances or the defendant refused to take part in a parade.</td>
</tr>
<tr>
<td>Part 3.9 – s 116</td>
<td>‘If identification evidence has been admitted, the judge is to inform the jury (a) that there is a special need for caution before accepting identification evidence; and (b) of the reasons for that need for caution, both generally and in the circumstances of the case.’</td>
</tr>
</tbody>
</table>

The problem is designed to engage students in deep thought about the identification evidence of Thurlow by examining the circumstances of the formal identification of the defendant at an identification parade, so that the focus is on the operation of s 114. As a result of this thought process, students then proceed to formulate lines of cross-examination linked to the admissibility provisions in the Act. In addition to prescribing the necessity for an identification parade, s 114 provides that the identification must be made ‘without the person who made it having been intentionally influenced to identify the defendant’, which requires the students to analyse the circumstances of the conduct of the parade and the persons involved in this event. The mode of conducting an identification parade is not regulated by the *Evidence Act 1995*. In the NSW context, however, Sheller JA in *R v Fisher* referred to the reliability of an identification parade depending ‘in part, on ensuring that as far as possible those who parade are of the same age, height and general appearance as the suspect’.  

This common law statement is supplemented by guidance to NSW police officers in the *Code of Practice for CRIME* where it is provided that: there should be a minimum of seven other persons of similar age, height, and appearance as the suspect; the parade must be arranged and conducted by an officer independent of the investigation; the witness should be given the option of viewing the parade through a one-way mirror if s/he has declined to view the parade ‘face to face’; and the entire procedure is to be video and audio recorded.  

Accordingly, students must analyse and synthesise the

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38 *R v Fisher* [2001] NSWCCA 380, [17]. Also it should be noted that for Commonwealth matters, a regulatory framework for the conduct of identification parades by police officers is provided for in the *Crimes Act 1914* (Cth) ss 3ZM, 3ZN, 3ZP.

facts available as to who conducted the parade, the manner in which it was conducted, the
number and appearance of the foils to the defendant in the parade, and all the
circumstances under which the witness made the identification, including what was said to
them by the police or others involved in the conduct of the parade.

Secondly, if the identification evidence is admissible under s 114, students must
progress to analyse the matters that might affect the weight to be given to this evidence in
light of the fairness of the conduct of the parade and the overall reliability of this
identification process. Insights into determining the weight of evidence are provided
through the tangible experience of putting the problem into action rather than considering
the concept of ‘weight’ in the abstract. Also, students should come to realise ‘that
arguments first addressed to admissibility may be recycled later in slightly altered form to
bolster or undermine the weight a jury might assign to the piece of evidence if it is
admitted’, 40 utilising their overall synthesis of the facts.

Thirdly, students must carefully analyse and synthesise the factors surrounding the
event when the eyewitness first observed the person later identified as the defendant and
what effect those factors have on the reliability of the evidence of the eyewitness. Matters
relating to distance, duration of observation, visibility, lighting, location of obstructions,
and any other distractions present at the time, will be important to consider for cross-
examination of the eyewitness.

Fourthly, some personal characteristics of the eyewitness are specified to engage
students in devising lines of cross-examination related to the credibility and truthfulness of
the witness as a person, as distinct from the reliability of the observations made at the time
of the event. This draws on some earlier learning in relation to credibility of witnesses and
is linked to the weight of the evidence once admitted and the specific content of a judicial
warning under s 116 Evidence Act 1995 allowing students to synthesise the various aspects
of the eyewitness’s evidence. As to the content of the warning relevant to an assessment of
the probative value of the identification evidence in the circumstances of the particular
case, it should range across a synthesis of the particular conditions under which the
identification was made, including the time available to accurately perceive the
characteristics of the person identified and the time between the initial observation and the
subsequent formal identification at a parade. 41

The skills part of the task is that of cross-examining the eyewitness, Thurlow. Firstly, in
preparing for the execution of the cross-examination at trial, the students need to formulate
an objective. Essentially, the defence are aiming to raise a reasonable doubt about the
prosecution case that it was Ben Lewis who committed the ‘break and enter’ offence at 10
Marks Point Road. Therefore, in cross-examining Thurlow, the defence objective is for
evidence to be adduced to assist in raising that doubt in the mind of the tribunal of fact to
support the eventual submission that the prosecution have not proved its case beyond
reasonable doubt. In order to achieve this objective there are several strategies that could
be employed by the defence, starting with the possibility of demonstrating that Thurlow
made a mistake in the identification and, even if s/he is being honest, the evidence of
identification is not reliable. This will be likely to involve incidental attacks on Thurlow’s
credibility in relation to the reliability of the observations made as a consequence of the
lighting, any obstructions to Thurlow’s line of vision such as the tall bushy trees and other
cars which she did not mark on his/her plan of the street, the distance s/he was from the
person s/he has identified as Ben Lewis, and the time s/he had to notice the distinguishing
aspects of his appearance to support the subsequent identification s/he made at the parade.
There might be particular focus on the clothing worn, having regard to what the police
found in the car and the clothing that the defendant was seen to be wearing by Alan
Grayson.

40 Rothstein, above n 2, 1001.
ALR 547 are important for students to consider in relation to the specific content of any warning given under s 116
Another strategy could be to attack Thurlow’s honesty and credibility as a witness — perhaps s/he is not being truthful because of prior local knowledge and sightings of Ben Lewis, through Sam Sanderson, Chris Massey or otherwise. Is there a potential for bias as a result of a particular relationship, such as the friendship with Massey, who alleges Ben Lewis ‘framed’ him? This may be apparent through the eagerness s/he demonstrates to identify Lewis as the man s/he saw on that particular evening and the detailed description given despite the objective evidence of visual impediments. There is clear scope to explore the potential for bias through a synthesis of all the relevant facts.

As to the identification of Lewis by Thurlow at the police station, assuming this evidence has been admitted, the strategy must be directed to diminishing the weight of the evidence by raising a doubt as to the accuracy of the identification through this method. Cross-examination might be directed to the lack of similarity of appearance of each of the participants in the parade — few pockmarked faces and no others with comparable markings to that apparent on Ben Lewis’ face, plus the fact that the men in the parade were not wearing hats or similar clothing. There may also be questions directed to any differences in the clarity of the lighting at the parade compared to when Thurlow made the observation of the man getting into the car in Marks Point Road.

As a group, the students usually divide the presentation so that an introduction and commentary is provided by one or two students as to how they prepared for the cross-examination, by reference to the parts of the Evidence Act 1995 that had to be considered, and then the facts in issue and strategies utilised to raise a doubt about Thurlow’s identification evidence. Depending on the number of other students in the group, one student then takes the role of the defence advocate who cross-examines another student from the group acting as the witness, Thurlow. Although the students in the group know each other well and there is potential for a softening in the cross-examination, it is an incremental step in student learning and this familiarity is not a barrier to achieving the modest aims of the exercise. The students then present a conclusion as to why they asked certain questions and the success or otherwise of their strategy. The whole class then discusses the effectiveness of the group’s analysis of the available information in light of the applicable rules of evidence and of the effectiveness of the questioning in cross-examination to achieve the stated objective. This immediate reflection and class discussion is a significant part of the experiential learning cycle and encourages the students to think deeply about the transfer of thought into action in the context of this particular task.42

The R v Ben Lewis problem has been designed to be realistic and challenging in providing the opportunity for students, relative to the advanced stage of their learning, to develop analytical problem-solving skills in dealing with the complexities and vagaries of identification evidence. In addition, an important opportunity is provided to the students to transfer the analytical process into a circumscribed practical experience by developing oral advocacy skills in formulating effective questions and conducting a simulated cross-examination of an eyewitness. The author’s Evidence course is not designed to be a course in advocacy. Its primary focus is on the law relating to the rules of evidence. However, as a form of procedural law it also must necessarily involve an exposure to the process that brings ‘[e]vidence doctrine to life … [and provides] a fundamental insight not only for the student of Evidence who aspires to practice but also for anyone seeking scholarly understanding of evidential issues within common law process.’43

A significant number of the students in the author’s Evidence course will go on to study the Trial Process course in the following semester. Trial Process is an introductory advocacy course in the Diploma of Legal Practice program at the University of Newcastle and initially focuses on preparation for, and techniques used in, a trial in the criminal jurisdiction, particularly examination-in-chief and cross-examination of witnesses. The course then moves on to other litigation contexts, principally civil and family law. One of

42 Kift, above n 13, 67-69.
43 Ligertwood, above n 11, 259.
the skills exercises in this course involves the students conducting a simulated witness examination and cross-examination in a mock courtroom before a visiting criminal law practitioner acting as the magistrate. These criminal matters contain various substantive law and evidential issues, including one case where the primary issue is ‘identification’. In these witness examination skills exercises, an incremental increase in difficulty is provided as the witnesses for these exercises are volunteers from the first-year student cohort and are all strangers to the fifth-year student advocates. This incremental increase in difficulty is a shift towards practical reality in the simulated court exercises, which the students have been prepared for from their experiential learning in the Evidence course.

Also, whilst studying for the Diploma of Legal Practice and undertaking the Trial Process course, students are involved in live-client experiences in the clinic at the University of Newcastle Legal Centre, under the supervision of legal practitioners. These placement experiences, concurrently with the study of substantive law courses and skills-based courses, incrementally enhance the development of a number of practical legal skills in the students. In particular, there is clear scope for transfer of learning from the simulated experiences to the interviewing of real clients in the clinic. Oral communication, analytical skills and critical evaluation of information are all used by students in these learning processes.

Overall, this teaching and learning strategy combines legal problem-solving with an experience in developing some advocacy skills through role-play and simulation. The pivotal role that such an experience plays in the learning process has been highlighted by educational theorists, including Kolb. The author’s own teaching experience has confirmed the utility of this strategy.

B. Evaluation of the Teaching and Learning Strategy

The evaluation of this experiential teaching and learning strategy, conducted in the author’s Evidence course in 2006 and 2007, has been limited by the short time frame over which it has been conducted. There is little comparative data available. On the basis of the data and other indicators readily available, a preliminary evaluation of the teaching and learning strategy has been made, the results of which may be confirmed with more extensive and specifically targeted data to be gathered in the future.

At this stage, the evaluation has been carried out on the basis of the author’s observation and professional assessment of the student group performances of the task in the classroom, the assessment of subsequent examination question responses, anecdotal evidence of student appraisal, general written feedback from the students at the completion of the course, and by observation of the same students undertaking more difficult practical skills exercises before experienced barristers and solicitors in the Trial Process course.

Firstly, assessment of the student group performances was based on published criteria provided to all students at an early stage of the course. The criteria were divided into three principal areas: research of relevant sources, analysis of issues raised by the problem, and presentation skills (including advocacy skills in exercises where this particular task is included). Within these principal areas more specific statements were made in a rubric as to what was assessed, including the depth of thinking in analysis through a logically developed answer and the clarity of the presentation, together with stimulation of class discussion and meaningful reflection on the presentation.

Students undertaking this experiential problem-based exercise in the identification evidence topic have performed at very high standards, as judged against the set criteria. In 2006, the task was prepared and presented by student groups in each of the two seminar classes with marks of 85% and 87% awarded respectively. The average mark in all student group presentations of review problems in the nine seminars, including one other simulated advocacy exercise in another topic area, was 78% in both seminar classes. Accordingly, a mark well above average was achieved for the identification-evidence experiential task

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44 See Kolb, above n 16.
presentation in both seminar classes. This assessment indicates a very high level of sophistication in analysis and synthesis of the problem and a very high skill standard achieved in the simulated witness examination relative to the limited experience students have with this particular skill. With a new cohort of students in 2007, the task was prepared and presented by student groups, again in each of the two seminar classes, with marks of 82% and 75% awarded respectively. The average mark in all student group presentations of review problems in the nine seminars, again including one other simulated advocacy exercise in another topic area, was 75% in both seminar classes. A mark well above average was achieved by the student group in the first seminar class and the average mark was achieved by the group in the second seminar class. This assessment again indicates a high to very high level of sophistication in analysis and synthesis of the problem, particularly by the group in the first seminar class. It also indicates a very high or sound achievement in the incremental development of advocacy skills in the simulated witness examination.

Secondly, students provide valuable information about the effectiveness of teaching and the achievement of learning objectives. The findings of research into student evaluations indicates that, generally, students are sound judges of different aspects of good teaching … [t]heir judgments are robust, consistent, and are the best validated of all the practical sources of relevant data about the effectiveness of teaching."45 Both anecdotal appraisals by students and written feedback over the two years this problem-based strategy was used in seminars has been very positive in relation to the group presentations generally, and to this particular experience in using an aspect of the trial process to demonstrate the operation of evidentiary rules and fact-finding. The different demands of this exercise, in terms of a difficult analysis and synthesis of the evidence, plus the formulation of appropriate questions for actually presenting the cross-examination as an advocate, was welcomed as a challenging learning experience by the students.

In 2007, the author administered a formal Student Evaluation of Teaching instrument to students in the final seminar class. This was the first time the author had used this formal survey instrument and 79 of the 93 students enrolled in the course responded to the survey. In relation to specific questions about seminars and the teaching in this course, the following table is a summary of the 2007 individual student responses:

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Table 2: Student Evaluation of Seminars and Teaching in LAWS4004 Evidence 2007

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>I am encouraged to participate in seminars</td>
<td>35.4%</td>
<td>45.6%</td>
<td>13.9%</td>
<td>5.1%</td>
<td>4.1</td>
</tr>
<tr>
<td>Seminar discussion has been interesting</td>
<td>24.4%</td>
<td>57.7%</td>
<td>11.5%</td>
<td>6.4%</td>
<td>4.0</td>
</tr>
<tr>
<td>The seminars helped me learn the course material</td>
<td>34.2%</td>
<td>36.7%</td>
<td>16.5%</td>
<td>12.7%</td>
<td>3.9</td>
</tr>
<tr>
<td>I have been well prepared for each seminar session</td>
<td>7.8%</td>
<td>51.9%</td>
<td>33.8%</td>
<td>6.5%</td>
<td>3.6</td>
</tr>
<tr>
<td>I have developed an ability to solve problems in this field</td>
<td>17.9%</td>
<td>71.8%</td>
<td>10.3%</td>
<td>0</td>
<td>4.1</td>
</tr>
<tr>
<td>This teacher motivates me to extend my learning</td>
<td>50%</td>
<td>44.6%</td>
<td>4.1%</td>
<td>1.4%</td>
<td>4.4</td>
</tr>
<tr>
<td>This teacher clearly explained what I was required to do in assessment items</td>
<td>55.4%</td>
<td>40.5%</td>
<td>4.1%</td>
<td>0</td>
<td>4.5</td>
</tr>
<tr>
<td>This teacher helped me to understand the importance of the content to my program</td>
<td>41.9%</td>
<td>50%</td>
<td>5.4%</td>
<td>2.7%</td>
<td>4.3</td>
</tr>
</tbody>
</table>

This data shows a strong positive response to the seminar teaching and the motivation it provides to student learning of the course materials, with mean results approximating the ‘agree’ response of 4.0 or above. Although there was no specific question as to the identification-evidence experiential learning exercise, it is possible to extrapolate from this data that there are clear benefits to the students in terms of learning outcomes, motivation to extend learning, and understanding of the practical application of the course content, as a result of the teaching and learning methods utilised in seminars, including the experiential learning through simulation and role-play of a witness cross-examination. This extrapolation is fortified by specific comments in feedback from students to the open-ended question about the utility of the seminar classes, which was another part of this formal evaluation instrument. Comments were generally very positive. Illustrative of the general feeling of the students in this regard are the following comments: ‘The seminars are very informative and support my learning a lot’; ‘I thought that the presentations provided an interesting and interactive way to enhance our learning’; ‘The seminars were very useful and fun to participate in. The group exercises were interesting and useful’; ‘The seminars have been a great way of learning all the relevant cases and ensures that the class participates. The course content has been challenging!’; and ‘Seminars link very well
to the material discussed in lectures. Dr John has really inspired me to take part and want to learn more.46

Thirdly, student understanding was clearly demonstrated and transferred to the subsequent and final assessment task in the course, a formal open-book examination. As part of this examination, students were required to answer a problem question raising, among other issues, issues of admissibility and use of identification evidence. Since implementing the experiential exercise in 2006, the results for this examination problem question have significantly improved, with an average mark of 71% in the 2006 examination and 70% in the 2007 examination. This compares favourably with the 2005 examination, when this teaching strategy was not used and the average mark for the problem question was 66%. Arguably, this increase of 4-5% represents enhanced understanding of the identification evidence topic area by those students who had the opportunity to participate in, or observe and give feedback in reflection on, the experiential learning task.

Fourthly, incremental skill development has been clearly evident when these students have come to undertake the Trial Process course in the following semester, where a simulated court hearing using a criminal case is an assessable skills exercise. This exercise involves both examination-in-chief and cross-examination of a witness, played by a volunteer from the first year Criminal Law and Procedure class. These exercises are conducted as full hearings in a mock courtroom with a visiting barrister or solicitor acting as the magistrate. These visitors are very experienced Crown Prosecutors, criminal defence barristers and solicitor advocates. The feedback given by these visiting practitioners following the completion of these exercises has been very positive, with all students assessed by reference to published marking criteria as performing with satisfactory development in advocacy skills and some students performing at a very high level of skill development. The author is in a unique position to observe student performances in these exercises and this has confirmed that the limited exposure to practical advocacy skills in the Evidence course has been a beneficial incremental learning experience for these students.

Further and more sophisticated evaluation is currently planned or being undertaken following completion of the author’s teaching of the Evidence course in the second semester of 2008. In addition to the data that will be collated through assessment and feedback mechanisms, a peer review of the identification-evidence experiential task presented by students in the seminar class has been conducted by an academic colleague of the author. Further, a focus group discussion will be arranged in 2009 involving approximately five students who have completed both the Evidence and Trial Process courses with specific discussion about the benefits or otherwise of the identification-evidence experiential task and simulated witness cross-examination.

46 A selection of student comments about the seminars from the 2007 Student Evaluation of Teaching for the LAWS4004 Evidence course.
IV. CONCLUSION

Ligertwood highlights the valuable ‘fundamental insight’\(^{47}\) gained by introducing students of Evidence to the trial process through role-plays and advocacy exercises integrated with their substantive learning of the rules of evidence. It is clear that tasks such as the one described above relating to identification evidence are integral to both engaging students of Evidence in their learning as well as promoting the depth of understanding needed to effectively apply their learning in practice. Rules of evidence are seen and effectively experienced in ‘their wider context’.\(^{48}\) Although this teaching and learning strategy is at a relatively early stage of implementation and further evaluation is required, the experience has been most encouraging for both the students and the teacher.

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\(^{47}\) Ligertwood, above n 11, 259.
\(^{48}\) Ligertwood, above n 11, 258.
BEYOND SYMBOLISM: ABORIGINAL SOVEREIGNTY AND NATIVE TITLE

FRANCESCA DOMINELLO*

I. INTRODUCTION

In Members of the Yorta Yorta Aboriginal Community v Victoria¹ and Western Australia v Ward,² the High Court clarified the concept of native title by reference to the statutory version enacted by the Native Title Act 1993 (Cth) (‘NTA’). The first part of this paper will outline the High Court’s interpretation in both these cases of the definition of native title in the NTA. In relation to Yorta Yorta, the focus will be on the Court’s interpretation of ‘traditional’ as it relates to the nature of the laws and customs of the Aboriginal peoples or Torres Strait Islanders in section 223(1) of the NTA. In relation to Ward, the focus will be on the apparent adoption of a ‘bundle of rights’ approach to the content of native title.

The focus of their treatment in this paper will be to illuminate the High Court’s understanding of the acquisition of British sovereignty and its impact on native title recognition. Indeed, as the discussion of the case law will reveal, the emphasis that the Court has placed on the acquisition of sovereignty has placed further limitations on native title recognition and, thus, further undermined the protection afforded to native title under Australian law. The second part of the paper will outline how, in principle, the recognition of Aboriginal sovereignty could overcome the impact that this emphasis has had in these cases.

II. THE CONCEPT OF NATIVE TITLE IN WARD AND YORTA YORTA

A. The High Court in Yorta Yorta

According to section 223(1) of the NTA, ‘native title’ is defined as

the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

Of greatest significance for the final resolution of the issues in Yorta Yorta was the joint majority judgment of Gleeson CJ, Gummow and Hayne JJ, which focused on the meaning of the word ‘traditional’ in section 223(1)(a) as it relates to ‘the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders’. In the lower courts the Yorta Yorta Community’s claim over their traditional lands (which lie across the border of New South Wales and Victoria) had failed because they had failed to prove their continued observation and acknowledgement of the ancestral laws and customs that demonstrated their connection to their lands. It was accepted that the Aboriginal community inhabiting the area had experienced great change during European settlement through colonial expansion onto their lands and the operation

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¹ (2002) 214 CLR 422 (‘Yorta Yorta’).
² (2002) 213 CLR 1 (‘Ward’).
of colonial policies and practices on members of the community. At the heart of the claimants’ case was the question of the group’s ‘adaptation and change’ in response to these external forces. Their argument was that their ‘society, whose laws and customs had adapted and changed over time, continued to exist and … continued to occupy the claim area, or large parts of it, from before European settlement to the date of the claim’.  

According to the claimants, the reference to traditional laws and customs in section 223(1) should be interpreted in the present tense so that they relate to ‘traditional laws currently acknowledged and currently observed’. Ultimately, this formulation was rejected by the High Court majority.

For the purposes of interpreting ‘traditional’ as it relates to the traditional laws and customs referred to in the NTA, the joint majority judgment took as its starting point the understanding that ‘the origins of the content’ of these traditional laws and customs ‘are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are “traditional” laws and customs’. Moreover, their Honours found that the NTA requires ‘that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty’. The continued existence of this ‘body of norms’ depended on an inquiry into whether the society of the claimant group had continued to acknowledge and observe those laws and customs. According to the joint judgment, ‘laws and customs and the society which acknowledges and observes them are inextricably interlinked’, so that if the society ceases to acknowledge and observe its laws and customs, it follows that the society (and its laws and customs) have ceased to exist. In the context of native title, the change of sovereignty meant, however, that ‘the only native title rights or interests in relation to land or waters which the new sovereign order recognised were those that existed at the time of change in sovereignty. Although those rights survived the change in sovereignty, if new rights or interests were to arise, those new rights and interests must find their roots in the legal order of the new sovereign power’. Thus, a native title determination requires us to conduct an inquiry about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs.

However, the joint judgment did concede that ‘some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not necessarily be fatal to a native title claim’. How much adaptation or interruption would be acceptable was not entirely clear. On the issue of adaptation, the joint judgment found it was a ‘question’ of whether the law and custom can still be seen to be traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests

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4 Ibid.
5 Ibid 424.
6 Ibid 444.
7 Ibid.
8 Ibid 445.
9 Ibid 447.
10 Ibid 446.
11 Ibid 447.
12 Ibid.
13 Ibid 454. See also 443.
14 For a more recent exposition of this formulation in Yorta Yorta, see especially, Bodney v Bennell (2008) 167 FCR 84, See also Western Australia v Sebastian (2008) 248 ALR 61.
asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples…?

On the issue of interruption, the joint judgment was of the view that a claimant group must establish that ‘acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty’. This was a necessary requirement as the rights and interests which are said now to be possessed must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. … Were that not so, the laws and customs acknowledged and observed now could not properly be described as the traditional laws and customs of the peoples concerned.

Ultimately, the claim in *Yorta Yorta* failed as it was held that the claimants ‘had ceased to occupy [their] lands in accordance with traditional laws and customs and there was no evidence that they continued to acknowledge and observe those laws and customs’.

**B. The High Court in Ward**

The native title claim in *Ward* was in relation to the region known as the East Kimberley and covered lands and waters in northern parts of Western Australia (the Miriuwung and Gajerrong claim) and adjacent lands in the Northern Territory (the Ningarmara claim). Due to the existence of competing rights and interests over the claimed land, the issue of whether native title rights and interests could be subject to partial extinguishment, and the general principles applicable to the issue of extinguishment, were crucial in this case. However, in order to determine those issues, it was first necessary to consider what exactly might be subject to extinguishment; that is, the nature of native title as defined by the NTA. It is on this issue that the following discussion will focus.

On this issue, the Miriuwung and Gajerrong claimants adopted the ‘occupation approach’ that Lee J had applied at first instance, and rejected the ‘bundle of rights’ approach subsequently taken by the majority of the Full Federal Court. According to a ‘bundle of rights’ approach, native title rights and interests are severable from each other. As thus understood, native title as a ‘bundle of rights’ is susceptible to partial extinguishment, However, as a title based on occupation, it is not.

In fact, Lee J (applying the decision of the Supreme Court of Canada in *Delgamuukw v Queen (in right of British Columbia)*) had treated native title as a communal ‘right to land’ and had found in relation to the circumstances of this case that ‘the right … to “speak for” that land, in particular to “speak for” its use … justified the finding that there was possession, occupation, use and enjoyment of the traditional homelands of the applicant group’. In this way, the claimants posited native title as analogous to a title in fee simple

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16 Ibid 456. Notably, in *De Rose v South Australia* (2003) 133 FCR 325 (‘De Rose’), Wilcox, Sackville and Merkel JJ [at 418] confirmed the Full Federal Court’s view taken in *Ward v Western Australia* (2000) 99 FCR 316 (‘Ward’) that physical presence is not essential in circumstances where it is no longer practicable or access to traditional lands is prevented or restricted by European settlers’. Their Honours further noted that this approach was not dissented from in the High Court on appeal in *Ward* (2002) 213 CLR 1. See also *Daniel v State of Western Australia* [2003] FCA 666, [421-422] (Nicholson J) (‘Daniel’).
18 Ibid 423.
21 *Ward v Western Australia* (1998) 159 ALR 483 (‘Ward’).
22 *Ward v Western Australia* (2000) 99 FCR 316 (‘Ward’).
23 [1997] 3 SCR 1010 (‘Delgamuukw’).
as proprietary in nature. It followed from this characterisation of native title that ‘there
cannot be partial extinguishment of native title’. Native title could only be extinguished
by a grant of fee simple.

The High Court, however, rejected this conceptualisation of native title. In their joint
majority judgment, Gleeson CJ, Gaudron, Gummow and Hayne JJ stressed the requirement
under section 223(1) of the NTA that the relevant native title rights and interests are only
those ‘in relation to land or waters’: they are the ‘rights and interests which are “possessed
under the traditional laws acknowledged, and the traditional customs observed”, by the
relevant peoples’ and who ‘by those traditional laws and customs … “have a connection
with” the land or waters in question’. In this way, they limited native title rights and
interests to those arising out of the traditional laws and customs that demonstrated the
claimant group’s connection to their lands and waters.

Moreover, according to the joint judgment, the change in sovereignty meant that the
right to speak to country — ‘the right to be asked for permission to use or have access to
the land — was inevitably confined, if not excluded’. The change in sovereignty meant
that new rights to control access to land were created. The rights of traditional occupiers to
control access to the land may have been affected, but the joint judgment opined that
‘because native title is more than the right to be asked for permission to use or have access
(important though that right undoubtedly is) there are other rights and interests which must
be considered, including rights and interests in the use of the land’.

Overall, the joint judgment preferred the ‘bundle of rights’ approach to the occupation
approach. It follows from a ‘bundle of rights’ approach to the content of native title that
native title rights and interests can be subject to partial extinguishment. In fact, the joint
judgment found that certain provisions of the NTA ‘mandate entire and partial
extinguishment’. On this basis, they opined that it was not appropriate to view native title
rights and interests as ‘a single set of rights relating to land that is analogous to a fee
simple’. To do so ‘assumes, rather than demonstrates, the nature of the rights and
interests that are possessed under traditional law and custom’.

Their Honours, however, did not seem to rule out altogether claims for rights of control
over traditional lands arising from the right to speak for country. However, in terms of the
‘bundle of rights’ approach, such a right could only be one among many of the rights that
comprise native title. In fact, a determination under section 225(b) of the NTA is required
to state ‘the nature and extent of the native title rights and interests in relation to the
determination area’; and for anything less than ‘a right, as against the whole world, to
possession, occupation, use and enjoyment of land or waters’, their Honours opined that ‘it
will seldom be appropriate, or sufficient, to express the nature and extent of the relevant
native title rights and interests by using those terms’. When no such right of exclusive
possession exists as native title, ‘it will be preferable to express the rights by reference to
the activities that may be conducted, as of right, on or in relation to the land or waters’.
Furthermore, the majority’s construction in Ward of the connection which Indigenous
peoples have with the land — ‘country’ — as essentially spiritual led them to question

25 Ibid 12.
26 Ibid 11.
27 Ibid 12.
28 Ibid 66.
29 Ibid 94.
30 Ibid.
31 Ibid 95.
32 Ibid 89.
33 Ibid 93.
34 Ibid 91.
36 Ibid 82. But see, eg, Neowarra v Western Australia [2004] FCA 1092 and Sampi v Western Australia (No 2) (2005)
224 ALR 358.
whether native title could ever amount to the same entitlements as under the common law.38

Adopting the ‘bundle of rights’ approach, the joint majority judgment confined its enquiry to those rights and interests of the claimant group that might demonstrate their connection to the claimed area. In this regard, the Court, agreeing with the Full Court majority, rejected the proposition that control of traditional cultural knowledge was a native title right: the ‘recognition’ of this right would extend beyond denial or control of access to land held under native title.39 According to the joint judgment, a connection must be made between the rights and interests claimed and the land in question. That connection was missing in relation to these rights. Such rights might involve, for example, the restraint of visual or auditory reproductions of what was to be found there or took place there, and this would fall outside the definition of native title rights and interests in the NTA.40

Furthermore (and foreshadowing the joint judgment’s approach in *Yorta Yorta*), the right to use the resources on the land was limited to a right to use the traditional resources of the land.41 Thus it was held that no native title right or interest in minerals was established.42 Moreover, the bundle of rights approach to native title supported the application of the ‘inconsistency of rights’ test for extinguishment. As applied to various parts of the claimed land, the joint judgment found that the claimants’ rights to control access and make decisions about these areas had been extinguished, although that did not necessarily extinguish all aspects of native title.43 Notably, such a dissection of the claimants’ rights would not have been possible if the occupation approach had been adopted.44

### III. THE CASE FOR LEGAL RECOGNITION OF ABORIGINAL SOVEREIGNTY

From the foregoing, the effects of the change in sovereignty are clear. As the joint majority judgment in *Yorta Yorta* put it:

> the assertion of sovereignty by the British Crown necessarily entailed … that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and … that is not permissible.45

In the absence of a parallel Aboriginal law-making system, the emphasis on the change in sovereignty has put drastic limits on the recognition of native title. In particular, the effect of the decision in *Yorta Yorta* has been to limit successful native title claims to those where claimants can demonstrate that the rights and interests in relation to their lands and waters were in existence at the time of the acquisition of sovereignty and that the laws and customs under which they currently acknowledge and observe these rights and interests have remained ‘substantially uninterrupted’ since that time. Only those laws and customs are ‘traditional’ for the purposes of the NTA. The result has been particularly unfortunate for Indigenous claimant groups as it could lead to their being subjected to discrimination: the drawing of distinctions between them (and worse still the risk that their societies may be deemed no longer to exist, as was the case in *Yorta Yorta*)46 according to how well they
prove that the laws and customs they currently acknowledge and observe in relation to their lands and waters are ‘traditional’ as understood by the High Court. It is a particularly problematic formulation in its failure to accommodate change that may have occurred within Indigenous communities since the acquisition of sovereignty. This is an especially difficult problem when that change has been wrought upon Indigenous peoples against their will as a consequence of colonisation practices and policies.57 Indeed, in Bodney v Bennell,58 Finn, Sundberg and Mansfield JJ in the Full Federal Court criticised Wilcox J, at first instance,59 for trying to accommodate the effects of colonisation too much in favour of the claimants. The Full Court found that recognition of these effects had been accommodated by the High Court’s own formulation in Yorta Yorta that ‘acknowledgement and observance must have continued substantially uninterrupted’. According to the Full Court, ‘European settlement is what justifies the expression “substantially uninterrupted” rather than “uninterrupted”. It explains why it is that the common law will recognise traditional laws and customs that are not exactly the same as they were at settlement’.50 But that was as far as the Full Court would go to accommodate the effects of white settlement. The Full Court found that:

if … there has been a substantial interruption, it is not to be mitigated by reference to white settlement. The continuity enquiry does not involve consideration of why acknowledgment and observance stopped. If this were not the case, a great many Aboriginal societies would be entitled to claim native title rights even though their current laws and customs are in no meaningful way traditional. Yorta Yorta … would have been decided differently …51

The effects of the decision in Ward have been no less devastating. Native title recognition has been limited by the ‘bundle of rights’ approach adopted by the Court in that case. On this approach, native title does not have the same status or protection as a fee simple title to the land; and the adoption of the bundle of rights approach rather than an occupation approach also militates against any claim to exclusive use and occupation of the land as understood by the common law. The bundle of rights approach requires a court to examine each and every right claimed. This leads to a greater likelihood of findings of partial extinguishment — since, once native title rights and interests are separated from each other, they can be extinguished one by one. Moreover, no new rights will be recognised that were not in existence at the time of sovereignty, and those rights that can be

47 Whether the formulation reflects geographical divisions (north v south or rural v urban) or is simply the product of history remains to be seen. See Alexander Reilly, ‘How Mabo Helps Us Forget’ (2006) 6 Macquarie Law Journal 25; Zoey Irvin, ‘Wilcox J and Oney J: A Comparative Analysis of Historical Assumptions in the Yorta Yorta and Single Noongar Decisions’ (2006-07) 6(24) Indigenous Law Bulletin 24. More recently, this issue arose in Risk v Northern Territory of Australia (2006) FCA 404; aff’d (2007) 240 ALR 75. In that case, Mansfield J affirmed the High Court’s decision in Yorta Yorta. In his summary of his reasons for this decision, Mansfield J noted (at para 12) some of the effects of colonisation on the claimant group. These effects led him to conclude (at para 13) that ‘the current Larrakia society, with its laws and customs, has not carried forward the traditional laws and customs of the Larrakia people so as to support the conclusion that those traditional laws and customs have had a continued existence and vitality since sovereignty’. Cf Bennell v Western Australia (2006) 153 FCR 120 where Wilcox J found that the Noongar people held native title over the claim area. Justice Wilcox [at 265-6] distinguished the facts in that case to the facts in Yorta Yorta, noting that ‘unlike the Yorta Yorta people … the south-west community did not suffer a cataclysmic event that totally removed them from their traditional country. Families were pushed around, and broken up … [h]owever, people continued to identify with their Aboriginal heritage’. See also De Rose 133 FCR 325, 418 and Daniel [2003] FCA 666, [421-422]. Cf Lamer CJ in Delgamuukw v Queen in right of British Columbia [1997] 3 SCR 1010, 1103, where he comments: ‘To impose the requirement of continuity too strictly would risk “… perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect” aboriginal rights to land’.

49 Bennell v Western Australia (2006) 153 FCR 120.
51 Ibid.
52 For an examination of the attendant problems inherent in the bundle of rights approach to native title, see Lisa Strelein, ‘Conceptualising Native Title’ (2001) 23 Sydney Law Review 95, 103-104.
recognised are only those that demonstrate the claimants’ continuing connection to their lands. Also, as the Full Federal Court in *Bodney v Bennell* made clear, the evidentiary standards required to be satisfied by native title claimants in order to prove continuing connection to their lands and waters are far from easy:

> [T]he laws and customs which provide the required connection are “traditional” laws and customs. For this reason, their acknowledgment and observance must have continued “substantially uninterrupted” from the time of sovereignty … and the connection itself must have been “substantially maintained” since that time. [references omitted]53

It would appear from the case law that the only meaningful concession that has been made to accommodate the effects of colonisation on the ability of native title claimants to maintain their connection to their lands is that, in certain limited circumstances, the courts have not required continuing physical presence on the land.54 However, this concession has often depended on the characterisation of the connection that Indigenous peoples have to land as ‘spiritual’: a characterisation that was applied in *Ward* to preclude analogies being made between native title rights and interests and common law proprietary interests.

For native title claimants, the decisions in *Yorta Yorta* and *Ward* have been a devastating blow signalling that there still has not been an end to the history of their dispossession and discrimination, as had appeared to be the promise underlying all the majority judgments in *Mabo v Queensland (No 2).*55 When *Mabo* was decided, it was heralded as a turning point towards reconciliation between Indigenous and non-Indigenous peoples in Australia. As former Prime Minister of Australia Paul Keating, put it:

> *Mabo* is an historic decision. We can make it an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians. The message should be that there is nothing to fear or to lose in the recognition of historical truth, or the extension of social justice, or the deepening of Australian social democracy to include indigenous Australians. There is everything to gain.56

Similarly, at the time that the *NTA* was enacted, Paul Keating identified ‘twin goals … to do justice to the *Mabo* decision in protecting native title and to ensure workable, certain land management’.57 Justices Gaudron and Kirby in dissent in *Yorta Yorta* also stressed the protection afforded to native title within the *NTA* itself. In fact, they disagreed with the majority’s interpretation of the *NTA*, insisting that it did not fully appreciate the intention of Parliament to acknowledge a history of dispossession and give protection to native title rights and interests:

> So much was impliedly recognised in the Preamble to the Act which ‘sets out considerations taken into account by the Parliament’, including that Aboriginal people and Torres Strait Islanders had been ‘progressively dispossessed of their lands’.58

Evidently, as the case law reveals, we still have a long way to go in this area. The results in *Ward* and *Yorta Yorta* both show that protecting native title is not the same as preventing dispossession. In fact, the joint majority judgment in *Ward* made it clear that “[t]he assertion of sovereignty marked the imposition of a new source of authority over the land”59 to the exclusion of the authority of native title claimants over their traditional lands when such rights conflict. It would seem from these decisions that the High Court’s focus on accommodating the rights of the new sovereign has undermined the protection that

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54 Ibid 129-30. The Full Court in *Bodney v Bennell* provides a summary of the case law on this point.
55 (1992) 175 CLR 1 (‘Mabo’).
could have been afforded to native title under Australian law. Thus, the history of dispossession is being repeated.

Following Yorta Yorta and Ward, the High Court was criticised for abandoning what has been described as ‘the time-honoured methodology of the common law’ in its approach to native title in these cases. There were calls for the NTA to be amended so that it would more clearly reflect the occupation approach to native title in the common law. In particular, it has been argued that the occupation approach to native title as developed at common law (in Australia and especially in Canada) would have produced a more just outcome for the claimants in these cases. According to the occupation approach, native title is construed as a right to land — as akin to a proprietary interest to land. As was stated in Delgamuukw in relation to what is known as Aboriginal title in Canada:

Aboriginal title is a right to land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need to be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title.

In Ward, Lee J at first instance (and North J in dissent in the Full Federal Court) took the occupation approach to native title by which recognition of the claimants’ native title remained intact. Ultimately, this approach was of more benefit to the claimants in that case and, arguably, more in line with the claimants’ own understanding of their relationship to their traditional lands whereby the land itself would be the focal point of any enquiry into native title.

Whether the common law requirements for proving native title could overcome the interpretation given to the word ‘traditional’ in the definition of native title in the NTA by the joint judgment in Yorta Yorta is more contentious. It is to be remembered that at first instance in Yorta Yorta, Olney J seemed to have accepted the occupation approach at common law and relied on a common law formulation of the level of proof required to establish the requisite connection between the claimants and their traditional lands. Among the matters that he identified as requiring proof in a native title claim was ‘that the traditional connexion with the land … has been substantially maintained since the time sovereignty was asserted’. For Olney J, this was a requirement that had derived from the separate judgments of Brennan J — in his (in)famous ‘tide of history’ passage — and Toohey J in Mabo, as well as from overseas authorities. However, the concept of occupation as Olney J employed it did not help the Yorta Yorta claimants, particularly because ‘occupancy’ was to be determined both at the time of settlement and at the time of the claim, with a need to demonstrate substantial continuity between them. Ultimately, the High Court majority, approaching the question as one of statutory construction, reached the same result as Olney J had reached at common law. They agreed with Olney

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61 Ibid 10, 14.
62 Ibid 12.
63 Delgamuukw [1997] 3 SCR 1010, 1016. This view was affirmed by Lee J in Ward v Western Australia (1998) 159 ALR 483, 508 (‘Ward’) and North J in dissent in Ward v Western Australia (2000) 99 FCR 316 (‘Ward’).
66 Ibid [4].
67 Mabo (1992) 175 CLR 1, 59-60.
68 Ibid 192.
69 United States v Santa Fe Pacific Railroad Co 314 US 339 (1941). See also Delgamuukw [1997] 3 SCR 1010, 1098, where Lamer CJ adopted the Mabo requirement that there must be ‘substantial maintenance of the connection between the people and land’, and although he conceded that the nature of the occupation may have changed, he stressed that ‘as long as a substantial connection between the people and land is maintained’ a claim could succeed. Cf Mabo (1992) 175 CLR 1, 61 (Brennan J), 110 (Deane and Gaudron JJ), 192 (Toohey J).
70 Yorta Yorta [1998] FCA 1606 [121].
J’s conclusion that because ‘the forebears of the claimants had ceased to occupy their lands in accordance with traditional laws and customs’, the application must fail.71

The weakening of the concept of native title in *Yorta Yorta* and *Ward* (pursuant to the *NTA* and, in the case of *Yorta Yorta*, the common law as well) demonstrates that a more far-reaching solution is required. Considering the emphasis that the High Court has given to the acquisition of British sovereignty as legitimising the limitations on native title recognition in both *Yorta Yorta* and *Ward*, it may be that such an emphasis can only be matched by revitalising the law-making systems of Aboriginal communities through formal legal recognition of Aboriginal sovereignty.

The High Court’s reluctance to engage with the issue of Aboriginal sovereignty in *Mabo* strongly suggests that it is not the appropriate forum in which to pursue such recognition. However, if such a process of recognition is pursued by the state, whether through a treaty or through formal amendment to the Constitution or even through legislation, the terms of recognition would need to address the very limitations that the High Court’s approach to native title has created, and in ways that would achieve change to that approach. Fundamentally, the High Court’s approach has been inadequate to properly accommodate the changes that have occurred among Aboriginal communities since the arrival of the British. According to the logic in *Yorta Yorta*, that is when the Aboriginal law-making system came to an end. No new rights to land may be claimed under the native title regime and recognition of those that may be claimed is limited by stringent standards of proof relating to the laws and customs of claimant groups and maintaining continuity to lands. Restoring a measure of sovereignty to Indigenous peoples would restore their capacity to make and change their own laws. In the context of native title law, that would mean that it would suffice that the society of the claimant group has continued to acknowledge and observe laws and customs that demonstrate their connection to the claimed area. The focus of the enquiry would be on laws and customs that are currently acknowledged and observed, not on those that existed at the time of the acquisition of British sovereignty. Moreover, adaptations alterations, modifications or extensions made in accordance with the shared values or customs and practices of the claimant group could also be accepted as proof of their continuing connection with their traditional lands.72

Recognition of Aboriginal sovereignty would also mean that the Court could no longer maintain the conceptualisation of native title as a bundle of rights. As the Aboriginal and Torres Strait Islander Social Justice Commissioner, William Jonas, has noted:

> The construction of native title as a bundle of rights and interests, confirmed in the *Miriawung Gajerrong* [*Ward*] decision . . . reflects the failure of the common law and the [*NTA*] to recognise Indigenous people as a people with a system of laws based on a profound relationship to land. Native title as a bundle of separate and unrelated rights with no unifying foundation is a construction which epitomises the disintegration of a culture when its law-making capacity, that is its sovereignty, is neatly extracted from it.73

By contrast, the recognition of Aboriginal sovereignty would provide the unifying factor required to restore Indigenous peoples’ relationships to their lands, and thereby their title to their lands, in a similar manner to the way that Aboriginal title is understood in Canadian law. Restoring sovereignty to Indigenous peoples would restore their ultimate authority — their right to speak for country — over their lands.

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72 This was, in fact, the formulation adopted by Gaudron and Kirby JJ in dissent in *Yorta Yorta* (2002) 214 CLR 422, 464. In their view [at 465], there was also scope for change within the social organisation of a claimant group to ‘dispers[ing] and regroup’ and upon regrouping, continue to acknowledge traditional laws and customs. See also Ben Golder, ‘Law, History, Colonialism: An Orientalist Reading of Australian Native Title Law’ (2004) 9 Deskin Law Review 41, 53-55, 58.
The limitations that have been placed on native title recognition may be understood in legal terms as being the legal consequences of the acquisition of British sovereignty of the Australian territories. It was established in Mabo that at the time of the acquisition of sovereignty the English feudal tenure system came into operation. The radical title to all the land was vested in the Crown and native title was found to exist as a burden on that title. But if native title is to be construed as a burden, the more recent cases have made it the least burdensome kind with its scope and content basically confined to what it was at the time of the acquisition of sovereignty. Does it necessarily need to be so?

It is to be remembered that law does not operate in a vacuum and that the limitations on native title recognition also reflect the dominant social and political forces at work in this area. These forces were obviously at play during the time the NTA was debated in 1993, and later when amendments to that Act were debated in 1998. They are also obvious in the extensive resources that are poured into defending native title claims by public and private bodies alike, leaving some to wonder who are the real beneficiaries of the regime.

Native title may exist as a burden on the radical title of the Crown, but it has been well established within Australian law that native title is not a common law right: it has its origins in the laws and customs of the Indigenous inhabitants. In the absence of any legal system of their own to protect their native title rights and interests, Indigenous peoples are left to depend on non-Indigenous institutions for protection. If these institutions have placed native title in a subordinate position to other proprietary titles, this may just be a reflection of the subordinate place of Indigenous peoples in Australian society. It may be that the attempt in Mabo to overcome the subordination of Indigenous peoples at least in the area of property law was doomed to fail. But it was not a complete failure.

Importantly, the decision in Mabo illustrates how values play a vital function in judicial decision-making: in order to bring the Australian common law into conformity with contemporary values, Brennan J rejected the doctrine of terra nullius as forming any part of Australian law. In rejecting that doctrine, Brennan J found that native title recognition was of more benefit than detriment to the Australian legal system and the skeleton of principle from which it derives. A similar approach may need to be adopted in order to achieve the legal recognition of Aboriginal sovereignty. First, there needs to be awareness raised about the legal impediments facing Indigenous peoples in their claims for native title; secondly, there needs to be renewed commitment to address the discrimination, and the resulting dispossession, being experienced within the system; and, thirdly, there needs to be understanding that the recognition of native title for those Indigenous communities who have survived colonisation and have continued to maintain their connection to their lands and waters through the laws and customs they currently acknowledge and observe, will not dismantle the Australian legal system, but could be beneficial for the entire nation — at least in the creation of a just Australian nation.

Calls for the recognition of Aboriginal sovereignty and the implementation of the policy of self-determination in relation to issues affecting Indigenous peoples have been high on the agenda of Indigenous activists in Australia.74 No doubt, any movement towards

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such change would need to be guided by Indigenous leaders, especially in conceptualising the scope and content that recognition of sovereignty would require, as well as establishing the organisational structures needed to accommodate such recognition. Of immediate concern in the legal context, the recognition of Aboriginal sovereignty would require the resolution of competing rights that may arise in a plural system of laws in ways that would achieve just outcomes for Indigenous peoples — the just resolution of competing rights over the land being just one example.

At present, however, such change is not on the horizon. Indeed, the former Howard government stifled this movement when it rejected recommendations to implement a treaty and adopted the neoliberal policy of practical reconciliation instead. The government’s position at the time was that ‘a legally enforceable instrument, as between sovereign states would be divisive, would undermine the concept of a single Australian nation’. Of course, such an attitude masks the deep divisions that exist in Australia that are known all too well to Indigenous peoples:

It is an historical fact that from the very inception of British colonisation, the indigenous people of this country have been treated as a separate society. However, when we project this fact in our aim of achieving sovereignty and of our struggle for compensation for dispossession and for economic independence that will allow us to run our own affairs, people say ‘You can’t do that — it’s divisive’.

As long as these divisions remain, the status quo will continue. But if the momentum in the movement towards legal recognition of Indigenous peoples’ rights, self-determination and sovereignty has been put on hold in recent years, the purpose of this paper is to contribute to the enlivening of these issues in public debate and to show that there is a practical need for formal recognition of Aboriginal sovereignty in Australia, if indeed these divisions are to be overcome. So far as native title law is concerned, the desired effect would be to change the way that the High Court has conceptualised native title in Yorta Yorta and Ward as limited by the ‘change in sovereignty’ that took place at the time of ‘settlement’. In many respects, the effect would be consistent with common law developments in the area of native title. In particular, the effect would be consistent with the ‘occupation’ approach, treating native title as akin to a proprietary right, as it has developed at common law. Such recognition, as was evident in the discussion of the Yorta Yorta litigation above, might also help to clarify certain aspects of the common law approach.

IV. CONCLUSION

The recognition of Aboriginal sovereignty could have far-reaching effects. The discussion in this paper has been confined to the effects such recognition could have on the High Court’s approach to native title in Yorta Yorta and Ward. Such recognition may not be able to overcome past dispossession. However, if properly implemented, it could ensure that native title is properly protected now and into the future. Ultimately, the issue becomes one of history — the end of a history of dispossession.

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CLIMATE CHANGE AND HUMAN RIGHTS: PERSPECTIVES OF ENVIRONMENTAL AND INDIGENOUS RIGHTS

BRIDGET LEWIS*

I. INTRODUCTION

Climate change is an issue that confronts us everywhere we turn. It is one of the greatest challenges facing mankind and has the potential to impact on almost all aspects of our lives. The challenge of climate change is made more difficult by the fact that its causes are so central to the values, and the economies, of Western society, and because the appropriate responses to climate change will require cooperation from all nations, especially developed nations. From an environmental perspective, it is challenging because of the complexity of the science involved, the complex relationships of cause and effect, and the time frame over which both problem and solution will be played out. At the same time, climate change is a significant issue for human rights because it has the potential to affect the lives of so many people, and because it raises a significant issue of justice: that it is wealthy countries that are most responsible for the problem, while poor states will suffer most.

The most recent report of the Intergovernmental Panel on Climate Change (IPCC) illustrates that the impact of climate change is already being observed in the form of changes in sea levels, temperatures and precipitation. It is expected that these changes will lead to decreased soil fertility, loss of species, floods and droughts, and other extreme weather events. On a human level, these effects are expected to cause displacement, loss of livelihood and income, spread of disease and other health implications. It is indigenous groups who have been the first to feel the impact of these changes. While this paper looks in most detail at an example from the Northern Hemisphere, we are already beginning to see the effects of climate change in Australia and the South Pacific region. Rising sea levels, increased severity and frequency of storms, and changes to ocean temperatures and salinity are already affecting small-island developing states in the South Pacific. Similar effects are being observed in the Torres Strait, with significant consequences for the Indigenous communities who live there.

This paper highlights the benefits of recognising climate change as a human rights issue, rather than merely as an economic or environmental issue. It will give an overview of the principles of human rights law which relate to the environment and to indigenous peoples. By demonstrating how climate change can impact on environmental and indigenous rights, which are already guaranteed under international human rights law, it will show the possible ways that climate change can be positioned within that legal framework. The paper will also present a case study of the experiences of Inuit peoples, which illustrates how climate change impacts upon human rights, and how human rights law can be used to help address the problem.

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2 Ibid 1-2, 10-12, 20

3 Ibid 10-12.


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II. THE BENEFITS OF CONSTRUCTING CLIMATE CHANGE AS A HUMAN RIGHTS ISSUE

To date, climate change has been addressed primarily as a problem of science, diplomacy or economics. We are only just beginning to see the topic being tackled seriously as an issue of human rights. While there has been increasing academic focus on the status and content of environmental and indigenous rights (discussed in more detail below), the particular question of whether climate change can be addressed as a human rights issue has only recently drawn attention. 6

The benefits that human rights law offers us as a framework within which to formulate our responses to climate change, and the inevitable impact of climate change on human rights, make it a necessary discipline to engage when searching for solutions.

One of the benefits of constructing climate change as a human rights issue is that we can bring it within the framework of existing human rights obligations. Generally speaking, under international law, governments are under a duty to respect, promote and protect human rights. While the obligations of states and the mechanisms of enforcement vary,7 if we can find a way to bring climate change within the scope of human rights law in some manner, governments can be placed under at least some obligation to take steps to address the problem and failure to do so could be seen as a breach of their human rights obligations. The normative framework provided by human rights law can therefore serve as a basis for setting priorities and developing and evaluating policy. Criticism from the international community for a state’s failure to address climate change could be supported by the force of international law, and we may be able to establish a legal basis for holding states responsible for damage to the environment caused by inadequate regulation of greenhouse gas emissions. 8

Furthermore, dealing with climate change as a human rights issue allows us to view the issue through a new lens. While the perspectives of economics, science or diplomacy remain necessary, it is also essential that we focus on the people who are most immediately affected and most in need of support. Not only does this allow us to better address the concerns of the people who will be most directly affected, but it also puts the issue in a context which has more resonance for the wider community. Through human rights, we can hope to achieve a broader community understanding of the human impact of climate change, an objective which may be more difficult to realise if we frame the issues exclusively in scientific or economic terms which may seem remote and difficult to follow.

By adopting a human rights approach we can enrich our response to climate change and we can hope to address an inequity that is one of the fundamental challenges of climate change — that it is the most vulnerable who will suffer most when they have contributed the least to the problem.

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7 For example, by ratifying the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR), states agreed to take necessary steps to give effect to the rights in the covenant. The standard of implementation expected is lower for the International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICESCR), which requires that states take steps, individually and with international assistance, and to the extent allowed by their available resources, with a view to achieving progressive realisation of rights in the ICESCR. In addition, both covenants require that states submit periodic reports on the steps they have made towards realisation of human rights, but only the ICCPR allows individuals to make complaints about alleged violations; see First Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 16 December 1966 (entered into force 23 March 1976).

CLIMATE CHANGE AND HUMAN RIGHTS

III. POSITIONING CLIMATE CHANGE WITHIN THE FRAMEWORK OF INTERNATIONAL HUMAN RIGHTS LAW

In order to bring climate change within the framework of international human rights law, we need to examine how the issue fits within existing human rights jurisprudence. The two branches of human rights law which this paper examines are the emerging areas of environmental rights and indigenous rights. The two areas are very closely linked, as environmental degradation often impacts on indigenous peoples more acutely than it does other groups, while at the same time indigenous peoples can often make a unique and valuable contribution to environmental management. The special relationship between indigenous peoples and the environment has been recognised at international law, and increasingly as a subject of human rights law. Climate change, as a particular cause of environmental degradation, engages both these areas of human rights law and provides an excellent illustration of how closely the two are interrelated. Examining the experiences of indigenous communities whose lives are already being affected by climate change, such as Torres Strait Islanders or the Inuit peoples of the Arctic region, can illustrate the threat that it poses to their human rights. We can also see some of the ways in which human rights law can be, and has already been, utilised to help address the problem, and consider what might be required to ensure that our responses to the challenge of climate change are consistent with human rights.

A. Environmental Rights

We can begin with an examination of the development of environmental rights to investigate how this area can be expanded to include climate change. We need to consider whether international human rights law recognises the right to a clean and healthy environment as a separate right or whether environmental protection is viewed only as a necessary precondition to the enjoyment of other human rights.

1. The Link Between the Environment and Human Rights at International Law

It is recognised that environmental factors can be crucial to the enjoyment of human rights. For example, environmental degradation can cause violations of rights such as the right to health, the right to safe and healthy working conditions, the right of peoples to dispose of their natural wealth and resources, to freedom from arbitrary interference with privacy and home, and freedom from arbitrary deprivation of property, and the right to life. Environmental protection can therefore be seen as a precondition to the enjoyment of these rights. Several international and regional treaties recognise this causal link in their own thematic context. For example, the Convention on the Rights of the Child guarantees all children the right to the enjoyment of the highest attainable standard of health. As part of this guarantee, state parties undertake to provide, among other things, clean drinking water, and to take into consideration the impact of environmental pollution.

However, increasingly, the link between environment and human rights has been explicitly recognised, if not in binding treaty law, then at least in statements of ‘soft law’. In 1972, the United Nations held a Conference on the Human Environment in Stockholm. The outcome of that conference was the Stockholm Declaration, a set of ‘common
principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment. 15 That document recognised that the natural environment is essential to man’s wellbeing and to the enjoyment of basic human rights, including the right to life itself. 16

The principles of the Stockholm Declaration were affirmed and developed at the United Nations Conference on Environment and Development in Rio de Janeiro in 1992. The Rio Declaration, which emerged from that meeting, set out a range of principles aimed at promoting sustainable development and protection of the global environment. While it fell short of mentioning human rights explicitly, it did recognise that ‘[h]uman beings are at the centre of concerns for sustainable development’ and acknowledged that ‘[t]hey are entitled to a healthy and productive life in harmony with nature.’ 17

In 1994, the United Nations released its Draft Declaration on Human Rights and the Environment, which set out in explicit terms the link between human rights and the environment, and demonstrated that accepted environmental and human rights principles operate together to guarantee to everyone the right to a secure, healthy and ecologically sound environment. The Draft Declaration articulates the environmental dimensions of a range of recognised human rights, such as the right to life, the right to health and cultural rights. It also illustrates the duties placed on individuals, governments, transnational corporations and international organisations which correspond to these rights. While the Draft Declaration is merely an instrument of ‘soft law’, and therefore has limited binding force, it is an important step in articulating the important links between environmental protection and human rights. 18

The jurisprudence of regional human rights bodies has also increasingly recognised the link between the environment and human rights. In 1997, the Inter-American Commission for Human Rights released the Ecuador Report. 19 The report followed a petition by one of the indigenous groups inhabiting the interior of Ecuador. Activities associated with oil development in that area had led to severe contamination of water, soil and air, and the inhabitants claimed that this pollution prevented them from enjoying their rights to life, to health and to physical security. The report formally recognised the connection between the right to life and the right to a healthy environment, and acknowledged that a human rights claim in the inter-American system could be based on environmental harm. In the report, the Commission recommended that the government take steps to remedy current environmental degradation, and to regulate oil development activities in a way which could prevent future contamination.

Several other claims have been brought in the Inter-American Court of Human Rights by communities arguing that their human rights have been negatively affected by environmental degradation, including deforestation, mining and pollution. Many of these cases have been brought on behalf of indigenous communities and they stress the particular link between the environment and indigenous rights. 20 Cases have also been brought in the European Court of Human Rights, where claimants have argued that environmental degradation is the cause of human rights violations. For example, it has been successfully claimed that industrial air pollution amounted to a violation of the right to enjoy private and family life. 21

The approach taken in these cases has been to regard the environment as a precondition of other rights and environmental protection as a tool to promote those rights. What is less

17 Doelle, above n 6, 210.
evident in the jurisprudence of these human rights bodies is a willingness to recognise environmental protection as a human rights objective in its own right, independent from other specific human rights goals.

2. The ‘Right to a Healthy Environment’

Several authors have argued in favour of the recognition of a separate ‘right to a healthy environment’. In the lead up to the Rio Declaration in 1992, Shelton argued in favour of the recognition of a clearly defined ‘right to a safe and healthy environment’, not reliant upon other existing human rights.22 This proposed addition to the catalogue of human rights has been supported by Sumudu Atapattu, who argues that recognising a separate right to a healthy environment would allow individuals or communities to bring a claim under existing human rights regimes where a state’s activities have led to an unhealthy environment, without having to establish damage to other rights such as the right to health, which may take years to materialise.23 Steve Turner presents a ‘Draft Human Right to a Good Environment’24 and argues that recognising such a right would be a useful practical tool in protecting both human rights and the environment itself, and in ensuring sustainable development.25

The recognition of this independent ‘right to a healthy environment’ would help address some of the arguments against taking a human rights approach to environmental protection. One of these arguments is that the focus that human rights places on individuals and groups means that environmental protection will only be pursued where doing so will serve some identifiable human benefit; where such a connection cannot be located, environmental protection will slip through the cracks.26 This is a valid concern, especially with regards to climate change, as the very nature of the problem means that we may yet see effects that, at this stage, we cannot foresee, and we may not always be able to identify a particular group who will suffer or the particular rights which are at risk.

Identifying an independent, clearly defined right to a healthy environment helps address this concern as it ensures that the inherent worth of a healthy environment is recognised and protected independently from other rights.27 At the same time, we can point out that taking a human rights approach does not require that other disciplines be abandoned. Environmental, scientific and economic responses ought to be pursued simultaneously to ensure that we maximise our capabilities to deal with the problem, with human rights providing a necessary additional focus. These other fields of endeavour help ensure a comprehensive response.

While none of the major international human rights treaties acknowledge an independent ‘right to environment’, some of the regional human rights treaties include something similar to a ‘right to environment’. For example, the African Charter on Human and People’s Rights28 provides that people should have a ‘general satisfactory environment favourable to their development’.29 The Protocol of San Salvador to the American Convention on Human Rights30 grants that individuals have a right ‘to live in a healthy environment’ and places an obligation on states to ‘promote the protection, preservation

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26 Atapattu, above n 23, 71; Turner, above n 24, 284.
27 Turner, above n 24, 285.
and improvement of the environment. The right to a clean, healthy environment ought to be incorporated into international human rights law, in acknowledgement not only of the various ways that the environment impacts on other human rights, but of the inherent value of the environment to humanity. Such a right could then be used to protect against the effects of climate change as a particular form of environmental degradation.

**B. Indigenous Rights**

Over recent decades, indigenous rights have been developing as a distinct group of human rights — a group of what is called third-generation or collective rights. We can tap into this branch of human rights law in order to find a place for climate change within the human rights framework. We can also use indigenous communities’ experiences of climate change as a valuable case study to examine the benefits of constructing climate change as a human rights issue.

We can find recognition of indigenous human rights in the *International Covenant on Civil and Political Rights (ICCPR)*, and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. Article 1 of each of the two covenants guarantees peoples the right to self-determination and the right to control their own natural wealth and resources. Article 27 of the ICCPR protects the rights of minorities, including indigenous minorities, to enjoy their own culture, religion and languages.

Indigenous rights are also acknowledged in the *Rio Declaration*, which recognises the importance of participation by indigenous groups in environmental management. Principle 22 of the *Rio Declaration* requires that states recognise and support indigenous peoples’ identity, culture and interests, and enable their effective participation in the achievement of sustainable development.

The recently adopted *United Nations Declaration on the Rights of Indigenous Peoples* also recognises that respect for indigenous cultures and knowledge contributes to sustainable development and proper management of the environment. It also guarantees to indigenous communities the right to manage and develop their own territories, and the right to conservation of their environment.

There is, therefore, an existing framework of human rights law which protects indigenous peoples’ rights with respect to their environment. It is both feasible and appropriate that we expand this framework to include indigenous rights with regard to climate change, since indigenous communities have been among the first to feel the effects of climate change.

In Australia, communities in the Torres Strait Islands are already experiencing the effects of climate change, most notably in the form of saltwater inundation caused by rising sea levels, combined with increased frequency and severity of extreme weather events. These events have damaged infrastructure such as airstrips, jetties, sewage plants and waste dumps, and affected potable water supplies and soil fertility. Changes in ocean temperature and salinity have also damaged fish stocks in the region, affecting both

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34 ICESCR, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
36 See also the Convention on Biodiversity, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993), which stresses that indigenous peoples are entitled to contribute to environmental management and sustainable development.
38 Ibid. See preamble.
39 Ibid art 29.
40 Green, above n 5, 8.
subsistence and commercial fishing practices. Islanders are also reporting decreases in dugong and sea turtle populations in the Torres Strait, species which have important totemic significance, due to diminishing seagrass beds and damage to turtle nesting beaches. Similar impacts have been reported in other parts of the South Pacific, affecting the economic and social situations of many small island states.

For these communities, the problems of climate change are very real indeed, and are already requiring adaptation measures to be put in place, including constructing or strengthening sea walls, raising houses and other buildings onto stilts to allow them to withstand future inundations, and even relocating entire townships and villages.

Not only is it the case that indigenous communities have, in many cases, been the first to feel the effects of climate change, but also, for various reasons, indigenous communities are often more vulnerable to the effects of environmental degradation, making them more at risk of human rights violations.

Across the world, indigenous groups are more likely to rely on the environment for subsistence. This places them at risk of a wider variety of human rights violations, with potentially far greater impact. The environment also often plays a more significant role in the social and cultural lives of indigenous communities than it does for the rest of the population, so there are often risks to a range of other important social and cultural rights particular to that community.

Further, due to economic constraints, indigenous peoples can have a restricted capacity to adapt to rapid changes in the environment. Where adaptation would entail relocation, this can have a significant cultural impact, with people forced to move away from traditional country.

IV. THE INUIT CASE

An example of the impact that climate change is having on indigenous peoples, and of the way that human rights can be used to address the problem, comes from the Inuit peoples of North America.

In March 2007, a petition was made to the Inter-American Commission of Human Rights on behalf of the Inuit peoples of North America. The petition sought a declaration from the Commission recognising the relationship between climate change and human rights, and calling on nations, in particular the United States, to take appropriate action to mitigate the impact of climate change.

A. Arguments Presented to the Commission

The Commission heard testimony from representatives of Inuit peoples indicating the ways that climate change is affecting their lives. The Inuit have lived in the Arctic for many thousands of years. They rely on their environment for subsistence hunting and gathering, and depend heavily on being able to travel on the sea ice to reach hunting grounds. The hunt represents a very important cultural and social activity for the Inuit as sharing in the hunt helps strengthen community ties and pass on traditional knowledge from one generation to the next.

The petitioners spoke of the fact that the melting sea ice, caused by rising temperatures, is limiting the Inuit’s ability to hunt and travel on the ice. The melting sea ice is also putting greater pressure on ice-dependent animals like seals, walruses and polar bears.
which the people rely on for food and other materials, while thawing permafrost is changing the nature of tundra and forest ecosystems. At the same time, coastal communities are being exposed to storms, erosion and rising sea levels, which are forcing some communities to uproot themselves and move further inland. 49

It was argued before the Commission that these effects amount to violations of rights guaranteed under the *American Declaration of the Rights and Duties of Man*, 50 and the *American Convention on Human Rights*, 51 the two primary human rights instruments of the Organization of American States (OAS). These documents guarantee a range of human rights, including the right to life, to freedom of residence and movement, the right to the inviolability of the home, the right to the preservation of health and wellbeing, and the right to enjoy the benefits of culture. 52

As we’ve seen, the Inter-American Commission and Court of Human Rights have already recognised in previous cases the impact that environmental damage can have on indigenous peoples, agreeing that such damage could amount to violations of rights protected under the Declaration. 53 The Inuit argued that these previous decisions could provide a basis for the Commission to extend its understanding of human rights and acknowledge that climate change is, in fact, a human rights issue. 54

**B. The Possible Outcome**

The Commission has yet to issue its report in response to the Inuit petition. In 2004, Meinhard Doelle predicted that a case such as this could be brought within the inter-American human rights regime. He argued that, based on previous decisions of the Inter-American Court of Human Rights, it is likely the inter-American regime would recognise the link between climate change and human rights, and the potential for climate change to impact negatively upon human rights. 55 Previous decisions of the Inter-American Court have upheld claims for future harm, as well as present harm, so it is likely that the Commission will recognise that climate change poses a threat to the rights of both present and future generations. 56 The Inuit peoples are hopeful that the Commission will recommend that the United States government take steps to cut greenhouse gas emissions in order to protect the Arctic environment and Inuit culture. 57

While a report or a recommendation from the Commission wouldn’t be binding, it would be a very important step in recognising climate change as a human rights issue and in articulating the link between climate change and human rights violations. It would be an acknowledgement that climate change is not simply a matter for future concern, but that it is already having very real and immediate effects on human rights, particularly on the rights of indigenous peoples. It would also serve as a crucial step towards having states recognise that their human rights obligations require that they take action now to mitigate both present and future impacts, and that failure to do so may result in similar claims being


53 Doelle, above n 6, 212.

54 Doelle, above n 6, 205.

55 Ibid 212;

56 *Tingni Community*, Inter-Am. Court HR (Ser C) No 79; Doelle, above n 6, 202.

57 Wagner, above n 52, 86.
brought in various human rights organisations around the world, with significant prospects of success.

V. CONCLUSION

This paper has discussed some possible ways to view climate change as a human rights issue, by demonstrating the links between climate change and both indigenous and environmental rights. It has demonstrated some of the benefits that may be gained from addressing climate change as a human rights issue. The discussion would not be complete, however, without considering what is required of us to ensure our responses to climate change are consistent with human rights.

A human rights approach to climate change requires that at all times we consider the impact that will be felt by the people who are most directly affected. This entails considering not only the impact of climate change itself, but also the impact of our responses. In striving to mitigate or prevent the problems caused by climate change, we must ensure that we are not creating or exacerbating other problems.

Further, our responses to climate change must be non-discriminatory, transparent and inclusive. We must be open to consultation with all stakeholders, especially indigenous communities, to ensure that their interests are properly represented, and to avail ourselves of the wealth of traditional knowledge and experience that indigenous communities can contribute. We must recognise that many indigenous communities have already lived through, and successfully adapted to, previous incidents of environmental change, and our responses to the current challenges of climate change can benefit from their contributions. By tackling the problem of climate change in a way which includes indigenous peoples, we can hope to address the disproportionate impact that climate change has on those who are already the most vulnerable.
I. INTRODUCTION

In recent years, there has been much speculation about the benefits of communal land ownership. Proponents for individual property rights claim that communal title has entrenched poverty and discouraged individual enterprise within Indigenous communities. Their detractors, however, have argued that land tenure reform in itself is no answer to the underlying causes of socioeconomic disadvantage. This paper will not consider the merits of such arguments. Rather, it takes the position that the debate over Indigenous land tenure is problematic because it masks the reality that Australian parliaments are yet to genuinely engage with the Indigenous land question.

To date, the recognition of Indigenous rights to land has been largely confined to remote areas, leaving the majority of Indigenous Australians without a land base. But even the minority who are able to benefit from native title and land rights regimes often find themselves in a legal quagmire, made all the more arduous by the reluctance of Australian parliaments to respond in a meaningful way to their claims.

This obstructive approach came to light when the Federal Court recognised the Noongar people’s native title over Perth. In spite of an expressed preference for mediated outcomes, both the State of Western Australia and the Commonwealth immediately announced their intention to appeal. The former Commonwealth Attorney-General, Philip Ruddock, went so far as to claim that the decision was untenable because it would block public access to beaches and parklands; an assertion that appeared to have no foundation in Wilcox J’s judgment.

This paper will argue that such ambivalence is part of an historical continuum. Throughout the past two centuries, Indigenous rights to land have been recognised, but only ever to the extent that such recognition has reinforced dispossession. Early colonial authorities made provision for land to be granted to, or for the benefit of, Indigenous people. Such gestures were neither compensatory nor attempts to recognise customary land titles, but incidental to European settlement. Consequently, early Indigenous property rights tended to be ad hoc and vulnerable to manipulation as tools of social regulation. This paper argues that contemporary Indigenous interests in land share those characteristics.

This paper is divided into six parts. Part II discusses 19th century Indigenous property rights. Part III draws commonalities between native title and early Indigenous interests in land. Part IV applies the same analysis to the Aboriginal Land Act 1991 (Qld). Part V discusses the Aboriginal and Torres Strait Islander Land Amendment Act 2008 (Qld).

II. INDIGENOUS PROPERTY RIGHTS IN THE 19TH CENTURY

According to conventional legal thought, recognition of Indigenous rights to land is a creature of the late 20th century. While this is true in respect of land rights and native title regimes, it is only half the story of the history of Indigenous people’s interaction with the construct of real property. Throughout the 19th century, practices of granting land to, or for

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3 *Bennell v Western Australia* (2006) FCA 1243.
the benefit of, Indigenous people operated throughout Australia. In the minds of some colonial officials, Indigenous people’s salvation was dependent upon the adoption of idealised attributes of the Europeans, such as agriculture and Christian marriage. Assimilation also offered the advantage of quelling resistance to dispossession.

This approach of pacification through assimilation was favoured by Governor Lachlan Macquarie. In 1816, he proclaimed that he would

always be willing and ready to grant small Portions of Land, in suitable and convenient Parts of the Colony, to such of them as are inclined to become regular Settlers and such occasional Assistance from Government as may enable them to cultivate their Farms.5

Coinciding with Macquarie’s plan to transform Indigenous people into yeoman farmers was the establishment of the Blacktown Native Institution. Indigenous parents were told to relinquish their children to the Institution with the promise that they would be reunited at an annual event, always falling on 28 December.6 The links between civilisation, land and Christian marriage were highlighted by an account of the celebration of two marriages at the Institution:

With the Reverend Richard Hill, secretary to the Native Institution, performing both ceremonies by special licence — Michael Yarringguy, an Aboriginal constable from Richmond, was married to Polly, and Robert (Bobby) Nurrangingy … to Betty Fulton. Two members of the committee gave the girls away, and the rest of the students attended the ceremony. Shortly after the marriages, the two couples set off, accompanied by the deputy surveyor-general, to have their respective farms beside Richmond Road measured. There, in a short time, comfortable huts would be erected and furnished with the necessary fittings, and supplied with domestic and farming utensils. Each family would be allocated 10 acres (4 ha) of land and given a cow, all provided at the government’s expense.7

As European settlement progressed, Aboriginal reserves were created throughout Australia. Some commentators have pointed out that the original purpose of the reserves was compensation, which had its origins in the British anti-slavery movement.8 However, in the eyes of the settlers, Aboriginal reserves were born out of benevolence rather than entitlement. Consequently, they could be revoked in order to accommodate settler demands.9

The impacts of the civilisation project were gendered. Indigenous women were alternatively caricatured as jezebels and the insipid chattels of black men.10 In some instances, there were attempts to ‘save’ Indigenous women by solemnising interracial unions and, once again, land played an integral role. Between 1848 and the 1900s, plots of Aboriginal reserve lands in South Australia were granted to Aboriginal women who married European men. What began as an informal policy matured into the (Aboriginal Marriage) Licence to Occupy Waste Lands of the Crown. Mandy Paul and Robert Foster have described the rationale behind such interests:

The (almost literally) paternal state provided Aboriginal women with a dowry to encourage marriage, to a non-Aboriginal person, and through it settlement of the land and the ‘civilisation’ of its people.11

The first was granted to one Kudnarto, who married an English shepherd, Thomas Adams, in 1848. The licence was granted in order to ‘encourage the adoption of settled habits and

7 Brook and Kohen, above n 5, 83.
Aboriginal marriage licences could be revoked for bad behaviour or upon the death of the wife. In the case of Kudnarto’s licence, the land reverted to the Crown upon her death in 1855. Finding himself destitute, her widower placed their children into an institution.

There was an element of Indigenous agency to the civilisation project. Some groups petitioned colonial authorities for land, presumably in order to overcome their dispossession and impecuniosity. For example, Aboriginal people of Cumeragunja petitioned for ‘a sufficient area of land to cultivate and raise stock … that we may form homes for our families … and in a few years, support ourselves by our own industry.’ Such gestures were often fruitful, with 32 Aboriginal reserves being created in New South Wales between 1861 and 1884. However, like the Aboriginal marriage licences, such interests were vulnerable to revocation. At the turn of the 20th century, many Aboriginal farmers found themselves dispossessed once again, by not only neighbouring usurpers, but also the Aborigines Protection Board. In Cumeragunja, for example, lands that Aboriginal people had farmed for two decades were seized by the Board in 1907.

By the time the farmers of Cumeragunja were dispossessed, protectionism had become the dominant paradigm in Indigenous policy. Although protectionism originated in Victoria, the Aboriginals Protection and Restriction of the Sale of Opium Act 1897 (Qld) was the most popular model for Australian protectionist legislation. As a consequence of this Act, all Indigenous people in Queensland were deemed to be wards and as such became vulnerable to removal to isolated reserves, where they were detained indefinitely. Once incarcerated, most aspects of their lives, including employment, marital status and even child rearing, were subject to official regulation.

One of the few decisions to consider the nature of Indigenous interests in land during the protectionist era was Bray v Milera. The regulations of the Aborigines Act 1911 (SA) empowered the Chief Protector to remove an Indigenous person from any institution if he was of the opinion that the individual’s presence was ‘inimical to the maintenance of discipline or good order’. The Chief Protector issued a notice to Milera forbidding him to be in any Indigenous institution in South Australia.

Milera argued unsuccessfully that the regulations were ultra vires and deprived him of natural justice. The brief judgment of the South Australian Supreme Court makes few references to the facts, but one paragraph illustrates the precariousness of life as a ward:

Mr Penhall, the Protector of Aborigines for the Central District, was called. He said that he was acquainted with the Point Pearce Mission Station; that the respondent was occupying a cottage there with his family, and was employed on the station when there was work available; that the buildings on the station are Government property, and the Superintendent of the station allots the cottages, and can eject the occupants at will; that they are not granted any lease, not even a weekly or daily tenancy. I see no reason to suppose that any aboriginal or half-caste inhabitant, as such, has any right to be in an institution. Having regard to the nature of the places coming within the definition of “aboriginal institution” and to the term “institution” itself, it does not seem likely that the aboriginals and half-castes in them would, as such, be more than bare licensees.

In summary, 19th century Indigenous property rights existed primarily to serve European settlement. As a consequence, they were ad hoc and invariably expired when the land was required by Europeans. Once Indigenous resistance to dispossession had been broken and protectionism entrenched, Indigenous property rights disappeared into the ether of history.

12 Ibid 55.
13 Ibid 56.
15 Ibid 85.
16 Ibid 126.
20 Ibid 216.
III. THE NATIVE TITLE ACT 1993 (CTH)

The invisibility of Indigenous rights to land was maintained during the assimilation era and it was not until the advent of the Whitlam Government that there was significant change. Whitlam’s election promise of national land rights legislation culminated in the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (‘ALRA’). The ALRA transferred ownership of former reserves to Aboriginal land trusts and established a process for Aboriginal people in the Northern Territory to claim freehold title over Crown lands. Although the ALRA would result in almost half of the Northern Territory being returned to Indigenous ownership, national land rights legislation never became a reality.

At the State level, land rights regimes began to emerge in the 1960s. These developments were followed by the enactment of the Native Title Act 1993 (Cth) (‘NTA’); the Commonwealth’s response to Mabo v State of Queensland.21 Together with the ALRA and State land rights regimes, the NTA forms the matrix that is the foundation for contemporary Indigenous interests in land.

Essentially, the Mabo decision recognised the continuing existence of native title as a burden on the Crown’s radical title. The concept of a radical or ultimate title arose as a result of both the acquisition of sovereignty and the doctrine of tenure. Upon the change in sovereignty, the Crown became the Paramount Lord of all who held an interest in land in the colony. The radical title enabled the Crown to grant interests in land to others, and for itself to acquire an absolute beneficial interest in land. But the Crown’s radical title did not in itself extinguish the native title of the Indigenous inhabitants.22 This watershed decision has been described as Australia’s version of Brown v Board of Education because it forced the nation to confront its history of brutal repression of a racial minority.23 That similar aspirations were held for the NTA was evident in Prime Minister Paul Keating’s second reading of the Native Title Bill:

For today, as a nation, we take a major step towards a new and better relationship between Aboriginal and non-Aboriginal Australians. We give the indigenous people of Australia, at last, the standing they are owed as the original occupants of this continent, the standing they are owed as seminal contributors to our national life and culture … and the standing they are owed as victims of grave injustices, as people who have survived the loss of their land and the shattering of their culture … Today we offer a modicum of justice to indigenous Australians because we have reached an understanding of their experience—and our responsibility. Today we move that much closer to a united Australia which respects this land of ours, values the Aboriginal and Torres Strait Islander heritage and provides justice and equality for all.24

Those ambitions would remain largely unfulfilled by the NTA. Popular culture, epitomised by films such as Crocodile Dundee, commonly positions Indigenous people in the exotic and sparsely populated outback. In reality, however, the majority reside in Australia’s major cities, with only 24 per cent of the Indigenous population located in remote and very remote areas.25 These facts find little reflection in the NTA because, to date, the recognition of native title has been concentrated in northern Australia.26

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In the main, the Act preserved the immense power imbalance between Australian parliaments and Indigenous communities. The *NTA* purports to protect native title by way of s 11(1), which provides that ‘Native title is not able to be extinguished contrary to this Act.’ However, the protection offered by s 11(1) is meagre in light of the future act regime. A ‘future act’ is an act that may impact upon the enjoyment of native title. Part 2, Division 3 prescribes conditions for the validity of future acts which, for the most part, allow minimal procedural rights for native-title holders. By way of example, native-title holders only have a right to comment on legislation relating to the management of water and airspace.

The inferiority of 19th century Indigenous property rights finds resonance in the extinguishment and validation provisions of the *NTA*, that give primacy to virtually all other interests in land over native title. That native title occupies the lowest rung on the hierarchy of Australian property rights is borne out by provisions concerning ‘previous exclusive possession acts’ (‘PEPA’). If an interest falls within the definition of a PEPA, it is deemed to have extinguished native title. The definition includes interests listed in the first schedule of the Act. Among them are leases granted under the *Land Act 1994* (Qld) for the purposes of mere recreational pursuits, such as archery clubs and basketball clubs.

For the minority of Indigenous Australians whose native title may still exist, the processes for recognition are rigorous and painfully slow. The unwieldiness of the native title system attracted the censure of McHugh J in *Western Australia v Ward*:

> At present the chief beneficiaries of the system are the legal representatives of the parties. It may be that the time has come to think of abandoning the present system, a system that simply seeks to declare and enforce the legal rights of the parties, irrespective of their merits.

**A. The Test of Continuity of Traditional Connection**

The historical use of Indigenous interests in land as tools of social regulation finds resonance in the test of continuity of traditional connection. The test is rooted in the definition of native title in s 223 of the *NTA*, which relevantly provides:

> (1) The expression native title ... means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

> (c) the rights and interests are recognised by the common law of Australia.

In *Members of the Yorta Yorta Aboriginal Community v Victoria*, the majority of the High Court interpreted ‘traditional laws’ and ‘traditional customs’ as those of the society that existed prior to the acquisition of British sovereignty. In order for native title claimants to satisfy the test, they must establish that their traditional laws and traditional customs have been practiced continuously since the change in sovereignty.
Application of the test necessarily involves intense scrutiny of the beliefs and actions of native title claimants and their ancestors, which is problematic for various reasons. Only those whose ancestors escaped the carnage of invasion and then protectionism are likely to be able to satisfy the test, creating arbitrary distinctions between Indigenous people. The test also dehumanises native title claimants because the scope of customs and traditions considered is so wide that it can extend to matters of great sensitivity. For example, in the Single Noongar Claim, the Court received evidence on customs and traditions relating to marriage, burial, religious beliefs and male circumcision. Arguably, it is necessary for Courts to consider such matters because of their nexus with the rules pertaining to land ownership in Indigenous societies. However, it is difficult to imagine a contest over non-Indigenous property rights ever hinging upon such an invasive examination.

In common with early Indigenous interests in land, the test buttresses dispossession in two ways. Firstly, the test accommodates popular myths that ‘real’ Aborigines live only in remote locations, effectively erasing the claims of urban Indigenous communities from the public consciousness. Secondly, by placing the actions of native title claimants and their ancestors under the microscope, the test enables those of colonial authorities to escape scrutiny. Such an approach replaces the fiction of terra nullius with another that is equally accommodating of Indigenous dispossession. Most notoriously, a petition seeking land that was signed by the Yorta Yorta people’s ancestors, in which they claimed to have abandoned ‘the old ways’, was interpreted as confirmation of the cessation of their traditional law and custom. The desperate circumstances of the petitioners were irrelevant.

IV. THE ABORIGINAL LAND ACT 1991 (QLD) (‘ALA’)

In common with the NTA, the ALA emerged as a result of a seismic event in Australian history. After three decades in the political wilderness, the Queensland Labor Opposition seized power from the Coalition in 1989. Two years later, the Goss Labor Government delivered its election promise of land rights legislation with the enactment of the ALA. The development of the legislation was controversial primarily because consultation with Aboriginal stakeholders had been minimal. In contrast, the Queensland Cabinet Office consulted extensively with representatives of the mining and pastoral sectors whose interests were largely contained from the legislation. As parliamentarians were deliberating on the legislation, Aboriginal people engaged in heated protests outside.

The Preamble of the ALA refers to Parliament’s intention to ‘foster the capacity for self-development, and the self-reliance and cultural integrity, of the Aboriginal people of Queensland.’ Under the Act, Aboriginal reserve lands and other lands held for the benefit of Aboriginal people became ‘transferable’ with the aim that inalienable freehold titles would be granted to Aboriginal land trusts. Available Crown land could also be declared ‘claimable’ by regulation. Since the enactment of the ALA, 1.1 million hectares of transferable land have been granted to Aboriginal land trusts. Some 2500 hectares of claimable land have also been granted. Those lands have been located almost exclusively in north Queensland.

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36 Bennell v Western Australia [2006] FCA 1243.  
40 Aboriginal Land Act 1991 (Qld) s 18(1)(a).  
42 Ibid.  
common with the NTA, the ALA has had no real impact on the lives of the majority of Indigenous people in Queensland, who live in urban areas. Crown land in towns and cities cannot be declared claimable, and transferable land is unlikely to exist outside of the former missions and settlements established during the protectionist era.

V. THE ABORIGINAL AND TORRES STRAIT ISLANDER LAND AMENDMENT ACT 2008 (‘ATSILA’)

In May 2008, the Queensland Parliament passed the ATSILA. The object of the Act is ‘to improve the lives of Indigenous Queenslanders, through Indigenous land tenure reform.’

The predominant means of achieving this object is the creation of a property market through long-term leases. Members of Aboriginal communities will now be able to purchase leases over Aboriginal lands for private residential purposes, or other purposes as determined by the Minister. Governments may also acquire 99-year leases for the purpose of providing social housing, infrastructure and accommodation for public servants. Non-Indigenous entities will also be able to secure long-term commercial leases over Aboriginal lands.

Although the object of the Act presumably encompassed all Indigenous people in Queensland, the amendments did not address the inability of Aboriginal communities in urban and metropolitan areas to gain land under the ALA. In common with earlier Indigenous property rights, the ALA has always fallen short of being a comprehensive response to dispossession.

In common with earlier Indigenous property rights, Aboriginal people are being encouraged to adopt an idealised attribute of mainstream society — home ownership — and presumably, the qualities of the ideal mortgagee, such as financial prudence, individualism and the protestant work ethic. But unlike the mainstream property market, the ALA leaves little room for choice. In fact, the process of acculturation is to be micromanaged by the State. By way of example, a lease for private residential purposes must be for 99 years. The consideration, which will be a lump sum payment equivalent to the value of the land, is to be determined by a valuation methodology selected by the chief executive and the benchmark purchase price as prescribed by regulation.

The State’s micromanagement of discrete Indigenous communities extends from the accumulation of property to what actually goes on inside private dwellings. The ATSILA was only one element of a legislative package designed to transform social norms in Indigenous communities. Others were the Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Act 2008 (Qld) (‘ATSIJLAA’) and the Family Responsibilities Commission Act 2008 (Qld) (‘FRCA’).

The ATSILA and the ATSIJLAA were not only passed on the same day, but were also considered in the same parliamentary debate. The ATSIJLAA is concerned primarily with the tightening of alcohol restrictions in discrete Indigenous communities in north Queensland. Alcohol Management Plans were introduced in those communities in 2002. A review last year found that in spite of the Plans, the communities still experienced high rates of alcohol-related harm, hence additional measures in the legislation that are designed to secure enforcement of alcohol restrictions. It is beyond the scope of this paper to discuss the ATSIJLAA in any depth. Of relevance to this paper is the extension of alcohol

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44 Aboriginal Land Act 1991 (Qld) s 19(1)(b).
45 Explanatory Notes, Aboriginal and Torres Strait Islander Land Amendment Bill 2008 (Qld) 1.
46 Aboriginal Land Act 1991 (Qld) ss 40D(1)(a), 40E(1)(a).
47 Aboriginal Land Act 1991 (Qld) ss 40D(1)(a), 40E(1)(b).
49 Aboriginal Land Act 1991 (Qld) ss 40D(1)(c).
50 Aboriginal Land Act 1991 (Qld) s 40(1)(a)(i).
51 Aboriginal Land Act 1991 (Qld) s 40(1)(iii).
53 Queensland, Parliamentary Debates, Legislative Assembly, 29 April 2008, 1243 (Lindy Nelson-Carr, Member for Mundingburra).
restrictions to private dwellings; a step that would never be contemplated in mainstream suburbs. Of particular concern are amendments to the *Police Powers and Responsibilities Act 2000* (Qld) that will enable police officers to conduct searches of private dwellings without first obtaining warrants. 54

The *FRCA* was passed by the Queensland Parliament in April 2008. Its objects include the restoration of ‘socially responsible standards of behaviour’ in discrete Indigenous communities in north Queensland. 55 They are set to be achieved through the establishment of the Family Responsibilities Commission. 56 The Commission has the powers that are ‘necessary or convenient’ to discharge its functions. 57 Its authority over welfare recipients will be triggered by events that include the breach of a residential tenancy agreement. 58

The nexus between morality and reverence for the home is one in which 19th century Indigenous property rights find particular resonance. There is also an echo of the historical surveillance of the Indigenous domestic sphere that characterised the protectionist era. For example, if a lessor believes that rental premises are being used for an illegal purpose, the lessor must provide a notice to the Commission. 59 It is not clear what amount of proof is required for the lessor to form the requisite opinion and it is possible that a visit by a relative with a criminal history would suffice.

On the one hand, it is commendable that the Queensland Parliament has responded to problems that have been exacerbated, if not caused, by prolonged neglect of Indigenous communities. However, there is an element of social engineering to the reforms. Like the Blacktown Native Institution, discrete communities have become laboratories for attempts to transform the fabric of Indigenous societies and, once again, land will play an integral role.

In common with earlier Indigenous property rights, the above legislative package surreptitiously reinforces Indigenous dispossession in two ways. Firstly, the ultimate outcome of the package is the merging of Indigenous communities into the mainstream and the corresponding loss of their cultural distinctiveness. Secondly, it conveniently overlooks the majority of Indigenous people, who live in urban areas. Such schemes give the illusion that the Indigenous land question has been resolved and, therefore, remain attractive to Australian parliaments.

**VI. CONCLUSION**

Throughout our shared history, the measure of recognition of Indigenous entitlement has always been compatibility with the interests of the colonisers. In the 19th century, Indigenous property rights were incidental to European settlement; whether by transforming Indigenous men into farmers, or encouraging interracial marriage. In common with their forebears, contemporary Indigenous interests in land remain ad hoc and vulnerable to manipulation as tools of social regulation. The test of continuity of traditional connection is an exercise in diagnosing ‘real’ Aborigines, while rendering those in urban areas invisible. Reforms embodied by the *ATSILA* are part of a larger project to transform social norms in Indigenous communities. No doubt some individuals will sincerely embrace 99-year leases and more power to them for doing so. However, scattered pockets of Indigenous mortgagees will never be a substitute for meaningful engagement with the Indigenous land question. After 220 years, the nation’s oldest elephant in the corner can no longer be ignored.

54 *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Act 2008* (Qld) pt 7.
55 *Family Responsibilities Commission Act 2008* (Qld) s 4(1)(a) and Dictionary for definition of ‘welfare reform community area’.
56 *Family Responsibilities Commission Act 2008* (Qld) s 4(2).
57 *Family Responsibilities Commission Act 2008* (Qld) s 11(1).
58 *Family Responsibilities Commission Act 2008* (Qld) s 44.
59 *Family Responsibilities Commission Act 2008* (Qld) s 44(1)(a).
I. INTRODUCTION

This paper considers the scope for registration as trade marks of signs that include or constitute words or characters of foreign language origin, and particularly words or characters of non-Roman languages, such as Chinese or Arabic. It argues that there are challenges in establishing comprehensive benchmarks for the registrability of such signs as trade marks, which are not adequately addressed by a conventional or conservative judicial and administrative approach of applying literal translations and transliterations of the foreign marks into an English language context.

The growing internationalisation of trade and the consequent import into the domestic market of merchants and their goods and services of foreign origin together raise a number of unanticipated legal and linguistic issues in respect of the registrability of their trade marks in the local jurisdiction. In this new global marketplace, traditional notions of geography, language and origin of goods will need to evolve and harmonise. The explosion of global trade and commerce in the digital environment, transcending national boundaries, contradicts the traditional concept of a trade mark which is based in large part on a conventional assumption that a mark has meaning essentially within geographical and local-language contexts.

In considering the full acceptance and transfer of foreign language marks into a domestic jurisdiction, the question arises as to the essential elements of the mark to which attention should be given by the Australian Trade Mark Office (ATMO) and the courts, and the respective weight of those elements, namely:

- the visual appearance of the word, sign or character;
- its meaning in the original context;
- the meaning when the letters or character elements are transliterated from the original non-Roman language form into English (notwithstanding that there may not be a direct transliteration);
- the meaning in English translation, (notwithstanding that there may not be a convenient and direct translation meaning);
- the sound or aural characteristic of the word, sign or character; or
- a combination of all of the above.

There is also the issue of pronunciation, particularly with tonal and dialectical languages such as Chinese, and the proper transliteration of meanings into a non-tonal language such as English.

A number of recent judicial and Australian Trade Mark Office (ATMO) determinations illustrate the linguistic and legal issues that can, and do, arise in respect of the registrability of these foreign language marks, and particularly marks that are derived from non-Roman languages. Challenges may also arise not only in respect of the distinctiveness requirements of s 41 and s 43 of the Trade Marks Act 1995 (TMA), but also in respect of the potential for infringement based on all or some of the visual elements, the aural or phonetic elements, and the general meanings of the mark in question. Furthermore, words
in any foreign language which may sound or appear within normal societal bounds in their original form, may take on an entirely different complexion and phonetic meaning when they appear in a purely English language context, to the extent that they may not then be registrable as marks.\footnote{As illustrated by the trade mark registration application by Kuntstreetware below.}

I. THE ATMO POSITION

The position of the ATMO in respect of marks comprised in part or whole of foreign language words, letters or characters is that such marks are subject to the same principles that apply to English words. Hence, foreign language marks may be registrable if the words, letters or characters would not be understood as to their original meaning by a significant proportion of the general population.\footnote{IP Australia, \textit{Trade Marks Office Manual of Practice and Procedure}, pt 22 [11].} By the same token, an application for registration of a mark that consists of foreign letters and characters which are translations of English words may be rejected, or at least offer grounds for opposition, on the grounds that the mark is not capable of distinguishing pursuant to s 41 of the TMA.\footnote{Ibid pt 22 [11].} An area of uncertainty in this regard is whether the ‘general population’ encompasses the Australian population as a whole, or is limited to the population that may understand the meaning of the mark, or the population that may constitute the potential market to utilise the goods or services which the marks in question are meant to distinguish.

Where a trade mark application includes words in a language other than English, the ATMO may require the applicant to file an English translation in support of the application if requested to do so by the Registrar.\footnote{Ibid pt 22 [11].} However, if a trade mark includes characters constituting words or characters that are not Roman letters, the applicant must provide a transliteration of the characters into Roman letters (if any) and a translation of the words into English.\footnote{Ibid pt 22 [4.1].}

Words consisting of obvious phonetic equivalents, simple combinations, misspellings, minor changes or trifling variations of descriptive words are not \textit{prima facie} capable of distinguishing.\footnote{Ibid pt 22 [10].} However, foreign phonetic equivalents of English words (and vice versa) may still be considered to have sufficient inherent capability of distinguishing.\footnote{Ibid pt 22 [4.1].} And words which constitute or include some element of unusual grammatical construction, whether by way of creative or different form of composition, construction or other presentation, including inversions, word-plays and words telescoped together, may be registrable.

Marks using words derived from foreign language sources that are likely to be well known or familiar across a broad spectrum of the general community, and contain words which, if in English, would not be sufficiently capable of distinguishing, would not meet the distinctiveness requirement in respect of the applicant’s goods or services.\footnote{Ibid pt 22 [10].} However, such marks may have a strong likelihood of being registrable in Australia, following UK law, if the foreign language elements within the mark are derived from more than one language source.\footnote{Ibid pt 22 [11].} It follows, then, that marks derived from words in a language that is not likely to be well known in a broad spectrum of the general community are likely to possess the capacity to distinguish and thereby to be registrable.

The ATMO approach is not all that dissimilar to a legal analytical tool for foreign language terms doctrine which the US courts and the US Patents and Trademarks Office have developed to handle foreign language trade mark interpretation, namely, the ‘doctrine

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\footnote{Smitsvonk NV’s Appn [1955] 72 RPC 117; Goodyear Tire & Rubber Coy’s Appn [1957] RPC 173 and Wacker-Chemie GmbH’s Appn [1957] RPC 278.}
of foreign equivalents’. 11 Under this doctrine, a foreign language term used as a mark is translated into its closest English equivalent prior to the courts or the USPTO determining whether the term meets the distinctiveness requirements for registrability as a mark or a component of a mark. One outcome of the application of this doctrine is that a foreign language term that is merely descriptive or generic in its original context would be deemed to be no more than equally descriptive or generic in the United States context. Accordingly, the foreign language term would not have any greater likelihood of registrability because of its foreign language characteristic unless it could demonstrate that it had acquired some form of distinctiveness or secondary meaning.

The ATMO provides an illustration of the application of its approach to foreign language words used as marks, drawn from UK and Irish examples. In its procedures manual, it notes that, in an early United Kingdom case, the word ‘Oomoo’, subject of an application for wines and spirits, was held to designate ‘choice’ in an Australian Aboriginal language. 12 Nevertheless, when the case came before the court, Chitty J was of the opinion that the trade mark signified nothing to the ordinary Englishman. 13 Similarly, in a much later Irish case concerning ‘Kiku’, the Japanese word for chrysanthemum, the mark ‘KIKU’ was found to be registrable in Ireland for perfumes and cosmetic preparations as the ordinary person would not know its meaning unless it was translated from the Japanese. 14

Hence, the ATMO places strong emphasis on the translation and transliteration where necessary in the examination of foreign language words or characters as marks. In essence, it applies an English-language benchmark to the meaning of the foreign mark, word or character, even in circumstances where such a benchmark may not be necessary or appropriate, it is suggested.

The application of this benchmarking, along with a pressing imperative for greater standards of scrutiny in respect of foreign language-derived marks, is revealed in the application by a foreign company, Aceto Balsamico, for protection in Australia of its trade mark ‘Squizito’ and device by way of an International Registration designating Australia (IRDA). 15 The application and the opposition it encountered, also reveals that foreign-registered trade marks may encounter problems gaining registration of their marks in their original format in the local market.

In a hearing before a Delegate of the Registrar of Trade Marks 16, the IRDA application was opposed by a local company (P & T Basile Imports) pursuant to s 44 of the TMA on the grounds that the application was deceptively similar to the registered mark comprising ‘Squisito’ and ‘Orecchiette’, and that the registered mark carried an earlier priority date. 17 Revocation of the IRDA application was also sought under s 38 of the TMA on the grounds of perceived shortcomings of the examination process in respect of the full investigation of the significance of the foreign words constituting the two marks. The opponent postulated that this earlier registration and the particular foreign language characteristics of its mark appeared not to have been considered by the examiner.

The essential feature of the two marks was the use of the word ‘Squizito’ for the IRDA application and the word ‘squisito’ in respect of the opponent’s registered trade mark. Both words have essentially the same meaning, namely ‘delicious’ or ‘exquisite’ in Italian, with one being a mere spelling variant of the other. In addition, both terms are essentially

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13 ‘Burgoyne’s’ Trade Mark (1889) 6 RPC 227; TLR vol 5, 326.
15 Australian Trade Mark Office (ATMO), Re: International registration designating Australia (IRDA) (International Registration No. 913154) (30), SQUIZITO & DEVICE — in the name of Aceto Balsamico Del Duca di Adriano Grosoli Srl, ATMO, Application No. 1165188, priority date 11 October 2006.
17 ATMO, Trade mark registration No. 714911 in the name of P & T Basile Imports Pty Ltd, in class 29 and class 30.
phonetically identical, or at worst very similar, and both words convey the sense of a similar European origin. Hence, the marks would have to be considered deceptively similar to the majority of the market for the goods in Australia.

Although the Delegate was satisfied that the two marks contained graphical elements that provided significant visual differences between them, notably because of different fonts, colours, individual dominant letters, and descriptive devices and elements, these visual differences did not overcome the otherwise strong visual and aural similarities in the predominant words ‘squisito’ and ‘squizito’, coupled with the idea that both marks would be seen and remembered as words of foreign origin. Applying the misleadingly deceptive test laid down in the Shell case, the Delegate concluded that opponent’s registered trade mark and the IRDA application mark were deceptively similar.

However, rather than proceed to determine the grounds of opposition to the registration of the IRDA application pursuant to s 44, the Delegate revoked acceptance application under the provisions of s 38 of the TMA and ordered that it be returned to an appropriate examination section for re-examination. Central to the decision to revoke was the Delegate’s view that the examiner should have conducted an assessment as to any significance of any foreign language meanings of both of the marks, but that no assessment appeared to have been made.

III SOME AUSTRALIAN DETERMINATIONS ON FOREIGN LANGUAGE MARKS

Australian courts appear to place a greater reliance on a combination of a greater number of factors in determining foreign language mark registrability including, but not limited to, the visual and aural characteristics of the foreign word, its graphical representation, its status as a real or invented word, and likely perceptions in the marketplace of the meanings of the mark. Hence, registrability of a foreign version of an ordinary English word will not amount to registration of the ordinary English word or of all foreign equivalents of it. Nor will an established reputation or understanding in a foreign language version of an ordinary English word amount to gaining a reputation or an understanding for the ordinary English word or of all foreign equivalents of it.

In Clinique Laboratories Inc v Luxury Skin Care Brands Pty Ltd, the Federal Court considered an appeal by Clinique Laboratories from a decision of a delegate of the Registrar of Trade Marks (the Registrar) to allow registration of the mark ‘LA CLINICA’. The appeal by Clinique Laboratories was brought pursuant to s 56 of the TMA, and relied on the deceptive similarity and identical marks provisions of s 44 and the well-known marks provisions of s 60 in respect of its well-known ‘CLINIQUE’ trade mark and its variants.

Central to the consideration of deceptive similarity was the degree of distinction between the marks and their respective foreign meanings — which at first glance would appear to be little more than notional. As discussed in the case, ‘clinique’ is a French noun meaning ‘clinic’ or adjective meaning ‘clinical’, whereas ‘clinica’ can be either a Spanish or an Italian noun, but also meaning ‘clinic’. Just because the marks may convey the same idea did not create a deceptive resemblance between them as such. Registration of marks including the word ‘clinique’ did not amount to registration of every derivation of the
English word ‘clinic’. Hence, any such resemblance would not necessarily be the result of deceptive similarity between the marks but, rather, the association of ideas based upon the word ‘clinic’.

Gyles J saw little visual similarity, considering that the ending of each word was distinct, and more importantly, ‘clínica’ was used in conjunction with ‘la’ as a composite phrase.22 The layout and other features of the marks were also different; the only perceived similarity being between the first part of the words ‘clínique’ and ‘clínica’. The look of the marks would not cause confusion even with imperfect memory.

Equally, His Honour opined that the sound of the respective words was also held as unlikely to cause confusion.23 The presence of ‘la’ and the hard second ‘c’ in ‘clínica’ were quite different sounds from the ‘ique’ ending of ‘clínique’. ‘La clínica’ would be perceived as an Italian or Spanish phrase whereas ‘clínique’ would be perceived as a French word.

In summary, even though the aural, visual and meaning differences between the two words would appear at first glance to be slight — in essence, a single final letter — the differences when considered in conjunction with the graphical representations and the likelihood of confusion being minimal, was sufficient to allow registration of the applicant mark.

A similar approach is revealed in the ‘QUANTA’ trade mark application.24 The case further demonstrates that differences that would otherwise seem to be largely insignificant, when taken in conjunction with both aural and visual appearances can be sufficient to establish that the opposing marks are not deceptively similar.25 Quante AG, owner of the registered trade mark ‘QUANTE’, opposed the application for registration of the mark ‘QUANTA’, pursuant to the provisions of s 44 of the TMA.

In contrast to the position taken in the ‘Squisito’ case, the Delegate found that, although the marks differed in their spelling only with respect to their final letters, that difference was a significant difference.26 Again applying the ‘standard test’ on deceptive similarity as laid down in Shell Company (Aust) Ltd v Esso Standard Oil (Aust) Ltd27, the Delegate found that the trade marks were not substantially identical. The application mark was a word which would be recognised by those in the electronics industry as indicating ‘bundles of energy’. It also had another well-known meaning of ‘amounts’ or ‘quantities’. The opponent’s registered mark was an invented word, and therefore had no apparent meaning.

The status of the core prefix of each mark also received some attention in examining the issue of deceptive similarity. While both enjoyed different suffixes, albeit comprising only one letter in each case, they shared the same prefix ‘quan’. In determining if any significance existed in the identical prefixes, the Delegate noted with interest that there were a further fifteen other registrations to different traders in the class in question (class 9) with the prefix ‘quan’.28 This would seem to indicate that consumers would not necessarily assume that the two marks in question had a common origin. The question of whether or not the trade marks as wholes were sufficiently alike to cause deception and/or confusion needed to take into account the visual and aural impressions likely to be formed of each trade mark.

The visual impression of the applicant’s mark was of an ordinary English word with a well known meaning/s. The visual impression of the registered trade mark was not just that of an invented word, but an invented word depicted in a fanciful way. The visual impressions created by each mark were sufficiently different for them to be distinguished by consumers. Similarly, in terms of the aural impressions, the Delegate noted that ‘quantas’, being a recognised word, would also have a dictionary recognised pronunciation.

22 Ibid, 134.
23 Ibid.
24 ATMO, Trade Mark Application No. 922942 for classes 9, 16, 35, 38, 41 & 42, 13 August 2002.
25 ATMO, Decision Of A Delegate Of The Registrar Of Trade Marks With Reasons, Re: Opposition By Quante Ag To Registration Of Trade Mark Application 922942 ‘Quanta’, 17 November 2004.
26 Ibid 5.
27 See above n 19.
28 ATMO, above n 25, 8.
'Quante', being an invented word, did not appear in the dictionary. Hence, the two words would not necessarily be pronounced in the same way and were therefore not aurally substantially identical. While both aural and visual differences were important factors in the Delegate’s determination, the fact that one mark was a foreign language word with recognised meaning while the other mark was an invented word without any recognised meaning was not without significance.

Taking into account the different meanings of the trade marks, their dissimilar appearance and sound and the likelihood that the goods would not be purchased in haste, the Delegate found that the trade marks were not deceptively similar and the applicant mark was cleared to proceed to registration.

However, in a case on arguably less familiar and comfortable ground, involving the use of Chinese characters, the courts appear to have adopted a much more conservative and critical position. In so doing, it has given little attention to the transliterated and translated meanings of the foreign language forms of the characters concerned. In Australian Chinese Newspapers Pty Ltd v Melbourne Chinese Press, the Federal Court considered a claim by the applicant that the respondent had infringed both the applicant’s copyright and registered trade mark, being the masthead of the applicant’s Chinese-language daily newspaper, in the publication of its competing Chinese-language daily newspaper. Both the applicant’s and the respondent’s mastheads, which formed the basis of the respective trade marks, were composed of four Chinese characters, three of which were identical. The applicant claimed that that the respondent’s logo was deceptively similar to its logo with respect to the distinctive combination of the characters used and a distinctive calligraphy style - Li Shu – that was used.

In arriving at its judgment restraining the respondent in continuing to use its masthead, the Court took account of the following factors:

- the logos were of similar size and colour;
- the only visually distinguishing feature was the third of the four Chinese characters;
- both logos owed their origins and historical to the Li Shu style of font;
- Chinese buyers tend to look at the impact of the image of the whole layout of the characters, and not character by character — thus the logos look similar; and
- the goods and services in respect of which the applicant’s mark is registered is the same as the respondents.

While this case has characteristics which must be considered very similar to the ‘Clinica’ and ‘Quanta’ cases, to the extent that the goods of the applicants and respondents in each case were within the same classes, and the words or characters had similar appearances, the courts took opposing positions. In the ‘Clinica’ and ‘Quanta’ cases the differences phonetically, visually and aurally were marginal. The courts also took stock of the English translated meanings of the contending marks in considering whether the marks were deceptively similar, and opined that the strong similarities were by virtue of mere association of ideas rather than deceptive similarity. When viewed in a local English language context, the few differences were of sufficient significance to allow registration of the application mark. The Chinese Newspapers case, on the other hand, was considered in the original foreign language context and the nature of possible deceptive similarity considered on that basis. Had the approach generally advocated by the ATMO and adopted in the ‘Clinica’ and ‘Quanta’ cases been pursued by taking account of the English translated and transliterated meanings, the outcome might very well have been different,
and the registration of the defendant’s mark allowed. The third of the four Chinese characters was different by virtue of its appearance, sound, transliteration and translation.

Finally, the ‘Budweiser’ beer case demonstrates that disputes over ownership of trade marks and brand names of foreign origin can be protracted and extremely challenging to fully resolve.

Proceedings through the Australian courts have been brought by the Anheuser-Busch Corporation of the United States, brewers of the internationally known ‘Budweiser’ and ‘Bud’ beers (foremost amongst a number of other beer brands), against a small Czech beer producer, Budejovický Budvar over the use of the trade mark ‘BUDWEISER’ and its variations. The Australian litigation is one of a number of proceedings around the world in which the applicant and the respondent have fought in various jurisdictions for nearly a century, with each side achieving only partial successes.

The proceedings before the Federal Court in 2002 were concerned with respondent’s rights to legitimately sell its beer under the brand or label ‘Budejovický Budvar’ and variations thereof. The applicant claimed that the labels used on bottles by the respondent infringed the applicant’s trade marks. It alleged that the respondent’s conduct contravened both sections of the TMA relating to deceptive similarity and s 52 of the Trade Practices Act 1974, and amounted to passing-off.

Allsop J held that neither ‘Budejovický Budvar’ nor either of the words alone was substantially identical to any of the applicant’s marks, and therefore did not infringe them. The syllable ‘Bud’ introduced each word, but it was the first syllable in two obviously foreign words, complete with diacritical elements, and did not retain a separate identity as the distinguishing or essential feature of the impugned mark. However, an abbreviation of the mark and composite marks to ‘Bud’ or ‘Budweiser’ in isolation, or ‘Budweiser Budvar’ would give the impression that they were being used to distinguish goods from those of the applicant. They were thus substantially identical with, or deceptively similar to, the applicant’s trade mark ‘Budweiser’. The respondent’s use of similar forms of words on internal catalogues and invoices was trade mark use that infringed the applicant’s marks. In particular, his Honour made various orders restraining the respondent from using the particular label ‘Budweiser Budvar’, even though it formed part of the respondent’s name ‘Budweiser Budvar, National Corporation’.

In the sense that the judgment of Allsop J in the Budweiser case essentially laid down rules of local demarcation and form of usage as part of a broader ongoing litigious campaign, it does little to resolve the wider issues of the application of foreign language trade names, particularly when they come into conflict or are confronted by well-known names of originally foreign origin but which have, in essence, become ‘Anglicised’ by customary and common usage over an extended period of time.

While resolution of conflicting or deceptive similarities between words or signs from the same or similar language subgroups may be relatively easily resolved, another challenge arises where a foreign language word, purportedly registrable in its own jurisdiction, takes on an entirely different dimension and character in an English language context.

31 Anheuser-Busch has been brewing since the late nineteenth century, while Budejovický, the respondent, has been brewing for seven centuries. Both have been marketing their products under a number of different brand names in a large number of countries for over a century. Budejovický manufactures beer in a city called Budweis, in German, and České Budějovice, in Czech. In German, the word ‘Budweiser’ is the adjectival form of the proper noun ‘Budweis’, meaning ‘of or from Budweis’. In Czech, the word ‘Budejovický’ is the adjectival form of the proper noun ‘Budíjovice’, meaning ‘of or from Budíjovice’. The respondent has various versions of its name – including ‘Budweiser Budvar, National Corporation’ and ‘Budejovický Budvar, Národní Podnik’.


33 Ibid, 215.

34 Ibid, 237.
IV. A COMPLICATION: VISUAL EFFECT VERSUS TRANSLATION

A recent application for registration before a Delegate of the Registrar of Trade Marks provides another dimension to the issue of registering a foreign language word as a trade mark. However, it is a dimension that may well arise with growing frequency as the degree of international commerce expands in volume and complexity due to the extension of the complex web of bilateral trade agreements and the progressive removal of barriers to trade. It also demonstrates an inherent difficulty with the comprehensive application of a foreign equivalent or similar to foreign words or words allegedly derived from foreign sources.

In Re: Application by Kuntstreetwear Pty Ltd, the applicant sought to register the mark ‘KUNT’ in class 25 clothing.35 An ATMO examiner had earlier reported that the mark was the phonetic equivalent of an offensive word in English and therefore must be rejected in terms of s 42(a) of the TMA as constituting scandalous matter. The applicant asserted that a slight variation of the application mark, namely the word ‘künt’, carries an umlaut over the ‘u’, is a Dutch word meaning ‘can do, to be able to, capable, to do, ability’, and is pronounced ‘koont’. Notwithstanding the fact that the applicant was using the mark with the umlaut on his products, he sought to retain the application in the form of ‘kunt’ in order to ensure wider ownership of the mark.

In the hearing before the Delegate of the Registrar,36 the applicant submitted that the Registrar had allowed registration of such trade marks as ‘FCUK’37 and ‘CNUT’38, and such marks were commonly used without causing apparent offence. Further, the mark was also an uncommon European surname, the name of a European electrical manufacturer, and used by them as a trade mark.39

However, the applicant’s mark clearly fell into a different category, as the Delegate observed. The trade mark ‘FCUK’ is an acronym not capable of pronunciation in the English language and without conventional meaning, while the word ‘CNUT’ is a surname of which the name ‘CANUTE’ is an Anglicisation.40 Thus, these two trade marks, if they are to be seen as related to scandalous words, are suggestive of those words rather than being transparent copies. However, the applicant’s mark very closely resembles or is identical to the phonetic equivalent of the obscene English ‘c’ word and would be likely to be immediately perceived as such.

The fact that the applicant was using the mark in a different form — that is, with an umlaut over the ‘u’— in a shallow attempt to avoid association only served as both an admission and a reinforcement of this perception. The word without the umlaut has no apparent foreign language meaning, which it might otherwise enjoy with the umlaut in place. Most Australians would be not likely to be aware of any surname significance (as argued by the applicant) or of any possible meanings in a foreign language. Even if a small number of Australians might perceive the mark as a foreign language word, many more would see it only as being a transparent imitation of the ‘c’ word.

Perhaps in anticipation of the objections raised by the Delegate, the applicant canvassed the possibility of amending the mark to reflect its actual mode of use with the umlaut. In terms of s 65 of the TMA, any amendment to a trade mark is impermissible if it substantially alters the identity of the trade mark. The Delegate held that the addition of an

36 ATMO, Decision Of A Delegate Of The Registrar Of Trade Marks With Reasons Re: Application By Kuntstreetwear Pty Ltd To Register Application 999278(25) Kunt, [2007] ATMO 34 (18 June 2007).
37 ATMO Trade mark registration no. 754799, 11 February 1998, in classes 18 & 25. FCUK is an acronym ‘French Connection United Kingdom’, originally the UK trade mark and name for the internationally known clothing company. FCUK has 12 other trade mark registration variants in Australia.
38 ATMO Trade mark registration no. 937891 in class 25, 16 December 2002; ATMO Trade mark registration no. 1039535 in classes 16 & 18, 28 January 2005.
39 The applicant also tried to establish, rather unconvincingly and without success, that the trade mark is an acronym for ‘Kakadu Unspoilt Northern Territory’, thus invoking the ‘acronym’ argument. However, the Delegate held that, to the ordinary person, the trade mark was meaningless as an acronym (whether punctuated by full stops or not) and it was inevitable that the significance of the ‘acronym’s’ resemblance to the ‘c’ word will be immediately understood.
40 ‘Canute’ is the well-known spelling for an early king of Britain, while ‘Cnut’ is now generally accepted as how the name should be more properly spelt.
umlaut to the letter ‘u’, although an apparently minor addition, would alter the word from an imitation of an obscene English word to one which is more apparently a foreign word, and would significantly change its pronunciation. Thus, the Delegate ruled that the amendment in this case was not one which was permissible as it involved a substantial change to the identity of the applicant mark.

The Delegate observed that, had the application mark been in the form in actual use by applicant, namely ‘KÜNT’, it would be immediately identifiable as a foreign language word with merely a coincidental resemblance to the ‘c’ word, and thus would not be objectionable in terms of s 42(a) of the TMA. In other words, it would then fall into the same class as ‘FCUK’ and ‘CNUT’. It should therefore be capable of acceptance for possible registration (if it encounters no objection in terms of other provisions of the TMA), subject to an endorsement which details any meaning it might have in a foreign language. The Delegate also observed that the denotations of some foreign language or slang obscenities may be found to be so obscure in Australia generally, or meaningful only within the subculture which uses and accepts them without shock, that they could be accepted for possible registration. However, it is suggested that the simple device of attaching a grammatical device — in itself obscure in terms of its visual impact and its grammatical and pronunciation implication — would not alone remove the obvious association with a scandalous word in the minds of the general market for the goods for which the mark would be used.

The application in this case was refused, not on grounds relating to the requirements of s 41 of the TMA, but under s 42, on the grounds that the trade mark was held to be scandalous or offensive.

V. CONCLUSION

The ATMO position of foreign language marks aligns itself closer to the US doctrine of foreign equivalents than does the emerging position of the courts by which a broader spectrum of factors are generally taken into account. The ATMO position appears to presume the importance of the local language focal point and, hence, gives an undue emphasis to transliterated forms and translated meanings. The courts, on the other hand, would appear to adopt a more practical, realistic and accommodating approach by placing a greater emphasis on the provisions and opportunities allowed by ss 41, 43 and 44 of the TMA. While mere speculation, it is possible that the Kuntstreetwear application, under these broader considerations, may well have succeeded. The appearance of the umlaut as a transformation of the application mark from an English scandalous word to a perceived foreign word may not have been given the same significance within the court approach as it received from the Delegate — as an aside to the decision, as it eventuated.

The ATMO approach tends to diminish the particular foreign characteristic of a trade mark by, in essence, reducing it to an English equivalence, but in so doing it may overlook the very element that gives the foreign mark its distinctive characteristic and the capacity to distinguish inherently or by use as required by s 41 of the TMA, namely that it is, and is meant to appear as, a mark of foreign origin.

The much broader approach taken by the courts allows for a greater degree of critical scrutiny and judgment, and considers the impact of foreign language marks in a more appropriate and realistic context. The ‘Budweiser’ case, and the other cases discussed above, illustrate that capability to distinguish in respect of foreign language marks derives some of its value and character from the fact that the marks are of foreign origin and meaning and the fact that they have not become well established in respect of their original meaning. However, as community familiarity develops, particularly in a multicultural environment with an increasingly international exposure, the elements of distinctiveness,
under s 41 of the TMA as they particularly relate to formerly unfamiliar foreign language marks, will become increasingly difficult to satisfy. Similarly, arguments of deceptive similarity pursuant to ss 43 and 44 of the TMA will become increasingly more common.

Foreign language marks, which in the past may have enjoyed a limited degree of distinctiveness and exclusivity simply by virtue of their foreign character, will need to be subjected to greater degrees of examination and scrutiny as to their appearance and meanings in both their original and new contexts. As shown by the Kuntstreetwear trade mark application, the differences in the two contexts can be significant to the point that successful registration in one context does not allow similar success in the other.
In recent years, Australian universities have been requiring academics to include graduate attributes in curriculum documentation. This ‘top-down’ approach can lead to ‘tick-box’ mapping exercises where learning goals are matched with attribute categories and assessment processes can remain untouched, inevitably leading students to focus on marks or grades. In these circumstances, assessment rarely provides feedback to students about the progressive development of the very attributes universities claim to instil in their graduates.

This article follows a research-based approach to a law teacher’s journey through various attempts to implement a graduate attributes policy in a business law unit of study offered to non-law degree students. The integration of graduate attributes with assessment tasks and assessment criteria coded to attribute categories was facilitated through a process involving software designed for this purpose.

The strategies used and the lessons learned in this research are relevant for academics, academic developers and academic leadership generally.

I. BACKGROUND

A. Terminology and Definitions – Important Issues

For the past decade, Australian universities have been required to include graduate attributes, generic skills, graduate capabilities, competencies and various other terms in the quality assurance plans they submit to the Commonwealth government.1 These terms are confusing and contested. For example, the word ‘generic’ implies independence from a field of study; ‘skills’ is too narrow to embrace attitudes and values; and ‘competencies’ has been used as a tick list against specific skills.

The term ‘graduate attributes’ seems now to be the most common and has been defined as ‘the skills, personal attributes and values which should be acquired by all graduates regardless of their discipline or field of study’.2 Australian Technology Network (ATN) universities define graduate attributes as:

… the qualities, skills and understandings a university community agrees its students would desirably develop during their time at the institution and, consequently, shape the contribution they are able to make to their profession and as a citizen.3

However, there are problems with both these definitions. The first, in using the phrase ‘regardless of their discipline or field of study’ may imply that graduate attributes are best developed through separate units of study. However, this ‘bolted-on’ approach is not supported by educational research.4 The second, in using the phrase ‘would desirably develop during their time at the institution’ seems to let universities off the hook in regard to any accountability with respect to their involvement in the development of graduate attributes. The view that students will gain attributes by some kind of osmosis is clearly

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 unacceptable as governments, accrediting bodies, professions and society all bring pressure to bear on a higher education sector in which:

[m]ore than ever before universities are being relied upon as a vehicle for the advancement of both the national economy and wider society. They do this through the creation of new knowledge and by preparing graduates with appropriate skills and attributes. It makes sense, then, for them to maintain a focus on keeping graduate capabilities in line with the needs of the economy and society.

The term ‘graduate capabilities’ mentioned in this quote could be used instead of ‘graduate attributes’ in an educational context. However, with both terms, care must be taken in the sense that capability (to do) tends to imply ability in multiple contexts. In an educational setting, assessment can really only identify ‘ability to do’ as evident in work presented in any given assessment task. It is an attribute of a student’s work rather than a judgment about them. In this important distinction between the student and their work, the term ‘attribute’ is a little less problematic than ‘capability’.

The term ‘graduate attributes’ used in this article is intended to include a very broad range of personal and professional qualities and skills, together with the ability to understand and apply discipline-based knowledge.

Having considered the subtlety of terminology and definitions, the question then emerges: how do we achieve consensus about these terms in a university community?

B. Achieving Consensus about Graduate Attribute Frameworks

In an ideal world, a university community should agree on what constitutes the attributes of its graduates. However, the reality is that such understandings often remain implicit and, even when made explicit, individual academics have quite different views of what graduate attributes are and how they can (or cannot) be integrated into the curriculum. These different understandings can cause deep divisions in a higher educational climate in which quality assurance predominates and assurance of learning is required by accrediting bodies. This climate contrasts with the traditional approach in which university teachers devised their own intended learning outcomes and determined how they would be communicated to their students.

For a university community to achieve consensus, it is helpful to consider the different institutional levels at which graduate attributes can be conceptualised: university, faculty, school, department, program of study (or degree) and specific units (or subjects) within which students will be expected to develop these.

At the University of Sydney, for example, three ‘overarching graduate attributes’ have been identified, namely scholarship (students’ attitude or stance towards knowledge), global citizenship (students’ attitude or stance towards the world), and lifelong learning (students’ attitude or stance towards themselves). To be workable at lower levels, the following more specific set of attributes have been articulated: (1) research and inquiry; (2) information literacy; (3) personal and intellectual autonomy; (4) ethical, social and

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7 Bowden et al, above n 3.
8 Barrie, above n 4.
10 Barrie, above n 4, 269.
professional understanding; and (5) communication. To reflect disciplinary differences, faculties have been encouraged to translate these graduate attributes into a set of more specific learning goals and outcomes relevant to the degree programs offered. For example, the Faculty of Economics and Business has the following as a learning outcome for research and inquiry: ‘apply economic, political, legal, commercial and business theories and concepts to problems and practice.’ The translation of graduate attributes into the language of the discipline reflects an approach in which graduate attributes are seen as embedded rather than distinct from disciplinary knowledge.

However, even with strong top-down directives and support from academic development units, boxes can too easily be ticked without change occurring in assessment and feedback to students.

C. The Context and Methodology of this Study

Developing graduate attributes has become a key focal point in professional disciplines, including law. Consequently, legal academics are now grappling with the task of embedding graduate attributes in their courses, and learning and teaching and curriculum development in law schools has become the subject of a number of national initiatives.

Learning and teaching in law is not limited to law schools teaching law degree students. It also includes teaching law to non-law degree students. This article discusses the inclusion of graduate attributes in Trade Practices and Consumer Law (‘CLAW2205’), an elective offered by the Faculty of Economics and Business (the ‘Faculty’) at the University of Sydney to commerce and economics degree students.

The methodology used in this article is that of case-study methodology but is written up as the ‘journey’ of one law teacher attempting to implement not only her own teaching and learning values, but also the university’s requirements and directives in this area. Her journey began with her concerns regarding the way the university graduate attributes policy was initially implemented within the Faculty. These concerns were articulated both within and beyond the university. In collaboration with a Faculty colleague, a model for influencing teaching and learning culture in universities was developed. The journey might have ended there. However, the law teacher (the first author of this article) then heard about a successful graduate attributes project at the Faculty of Design, Architecture and Building at the University of Technology, Sydney, using an online criteria-based assessment system known as ReView. ReView is described in Section A of Part III of

11 See University of Sydney Institute for Teaching and Learning, Graduate Attributes Project <http://www.id.usyd.edu.au/GraduateAttributes/> at 1 December 2008.
12 Barrie, above n 4.
17 Norman K Denzin and Yvonna S Lincoln (eds), Strategies of Qualitative Inquiry (2nd ed, 2003).
19 Ibid.

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this article. The law teacher and the designer of ReView (the second author of this article) met and the law teacher’s graduate attributes journey continued with a new collaboration.

The process of implementing ReView in one business law subject is described in Section B of Part III.21 Discussions between the authors in the context of using ReView, led to the constructive alignment22 of assessment tasks with explicit assessment criteria coded to attribute categories. Student feedback, both quantitative and qualitative, was available in the form of responses to the standard Unit of Study Evaluation (USE) forms.23 This was analysed to determine student views on the implementation of graduate-attribute-coded criteria feedback through ReView and to identify directions for future research.

The formative journey of one law teacher’s attempts to respond to graduate attribute policy initiatives in practical ways is described in the next section.

II. A GRADUATE ATTRIBUTE JOURNEY BEGINS

A. First Attempt to Implement Graduate Attributes Policy

Although general statements about graduate attributes appear on university websites and in documents such as Faculty handbooks and promotional materials, it is in specific unit or subject outlines that the relevant graduate attributes and learning goals are articulated and communicated to students and others. In early 2003, the Faculty identified 25 learning goals that related to the university’s five categories of graduate attributes and mandated the use of a unit outline template that, inter alia, required teachers to select up to six of these learning goals and link these to the assessments in their units.24 This approach was problematic for units such as CLAW2205 because the Faculty list did not include all the first author’s goals for her unit. Another problem was that although the learning goals were linked to assessment tasks, they were not linked to the assessment criteria.25 The first author’s uneasiness about the lack of alignment26 between the learning goals, graduate attributes and assessment criteria and dissatisfaction with the implementation of the graduate attributes policy were raised with the Faculty and have been fully discussed in a previously published article.27

B. The Current Faculty Approach to Graduate Attributes Policy

In October 2003, the Office of Learning and Teaching in Economics and Business (OLTEB) was established to provide learning and teaching support for both students and academics in the Faculty.28 Having demonstrated a commitment to quality learning and teaching, and a willingness to act as a conduit between OLTEB and disciplinary colleagues, the first author was appointed the first Learning and Teaching Associate for the

21 Following this and other pilot studies, ReView is being used as the basis for an Australian Learning and Teaching Council (formerly Carrick Institute for Teaching and Learning) Priority Project entitled Facilitating Staff and Student Engagement With Graduate Attribute Development, Assessment and Standards in Business Faculties Australian Learning and Teaching Council, <http://www.altc.edu.au/carrick/webdav/site/carricksite/users/siteadmin/public/grants_priority_uts_graduate_summary_2007.pdf> at 1 December 2008.

22 For a discussion of a ‘constructive alignment’ approach to teaching practice, see generally John Biggs, Teaching for Quality Learning at University (2nd ed, 2003).

23 See the University of Sydney Institute for Teaching and Learning, About the Unit of Study Evaluation System (USE) <http://www.itl.usyd.edu.au/use/> at 1 December 2008.

24 For further details, see Harvey and Kamvounias, above n 18, 35-37.


26 Biggs, above n 22.

27 Harvey and Kamvounias, above n 18.

Discipline of Business Law.\(^29\) The second author was invited by the Faculty’s Associate Dean (Learning and Teaching) to give a presentation to the Faculty’s Learning and Teaching associates to introduce ReView to academics in economics and business-related disciplines. The first author saw the potential for a new ‘deep’ approach to implementing graduate attributes policy using ReView.\(^30\) She therefore enthusiastically agreed to participate in the semester one, 2007, pilot of ReView in the Faculty along with teachers from the disciplines of Government and Political Economy.\(^31\) In the extended 2008 ReView project, other disciplines within the Faculty and other business faculties at other universities were included.\(^32\) The business law unit that was to use ReView in 2007 and 2008 was CLAW2205, a senior elective with enrolments of about 60 students in each semester.

C. Conversations, Reflections and Implementation

About three months before the start of semester one, 2007, and the use of ReView by the first author, the authors engaged in conversations and reflections about constructive alignment and the importance of writing explicit assessment criteria for business law units. During a series of meetings arranged through the OLTEB, the second author introduced the first author to four basic concepts that underpinned the design of the ReView system and its process of implementation. The first concept relates to the importance of assessment criteria. The anecdotal evidence from university teachers is that students pay little attention to learning goals simply listed in unit of study outlines. However, when learning goals and assessment criteria are linked, the assessment criteria have a crucial role in any attempt to embed graduate attributes within the curriculum. In the view of the second author, assessment criteria become an important ‘fulcrum of engagement’\(^33\) for both teachers and students. Teachers should therefore be encouraged to develop clear and explicit wording for assessment criteria and students should be encouraged to self-assess against these criteria.\(^34\) The second concept relates to the reality that university academics often spend a great deal of time considering the teaching aspects of their work. It is therefore essential that in the development and refinement of explicit criteria linked to relevant attribute categories, teachers’ aims and views be valued and their experiences respected. The third concept relates to the fact that all assessment activities contribute to the development of attributes, even exams. Therefore all types of assessments can be marked using criteria and all assessment criteria can be identified or designated as contributing to the development of a range of attributes. Lastly, whilst it is generally agreed that ‘assessment is the most powerful influence on student learning in formal courses’,\(^35\) this idea can be seriously misinterpreted.\(^36\) It should not necessarily lead to more tests and exams that focus students’ attention on marks or grades. Instead, it should encourage university teachers to value the development of attributes enough to reference them in assessment criteria. In doing this it is more likely students will see attributes as an important aspect of their learning and may have the effect of reducing their focus on marks and grades.

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\(^{30}\) Harvey and Kamvoumas, above n 18, 38-40.

\(^{31}\) For a discussion of the outcomes of the pilot study, see: Darrall Thompson, Lesley Treleaven, Patty Kamvoumas, Betsi Beem and Elizabeth Hill, ‘Integrating Graduate Attributes with Assessment Criteria in Business Education Using an Online Assessment System’ (2008) 5(1) Journal of University Teaching and Learning Practice 34.

\(^{32}\) ALTC Priority Project, Facilitating Staff and Student Engagement, above n 21.

\(^{33}\) For a discussion of the importance of developing explicit assessment criteria using ReView in previous studies see: Darrall Thompson, ‘Integrating Graduate Attributes with Student Self Assessment’, Robert Zehner and Carl Reidsema (eds), Proceedings of ConnectED International Conference on Design Education, University of New South Wales, Sydney (2007) 1.

\(^{34}\) This is easily enabled in ReView.

\(^{35}\) David Boud, Ruth Cohen and Jane Sampson (eds), Peer Learning in Higher Education (2001).

The lively conversations around these concepts elicited many examples from the classroom. Given broad agreement between the authors about these ideas, it was decided that ReView would be used in CLAW2205 using a ‘bottom-up’ approach to graduate attribute development, beginning with the assessment criteria for all assessment tasks.

As a starting point, the following questions were asked of the first author in the context of the intended learning outcomes of CLAW2205 and the broad graduate attribute categories that had been documented by the university:

What skills do you want students to develop, what knowledge do you want them to construct and what qualities do you want them to acquire as a result of their engagement with this particular assessment task you have designed?

Not surprisingly, writing assessment criteria that explicitly describe both the intended range and the level of students’ performance proved to be a complex task. It was therefore helpful for the second author to provide examples of language used in describing aspects of students’ work, such as clarity, thoroughness, accuracy, depth, appropriateness, professionalism and ethical approaches. The suggestion that parts of the task, and the knowledge and concepts, could be referenced in criteria settled concerns that subject matter or content would be lost if graduate attribute development became the focus of assessment.

In order to clarify the relationship between aspects of this ‘learning design’, the first author developed a chart for CLAW2205 that aligned intended learning outcomes with graduate attributes, teaching and learning activities, assessment tasks and assessment criteria. The articulation and refinement of assessment criteria was soon found to be an ongoing process. This can be seen by the subtle yet important differences in the statement of criteria in the initial chart and in the chart appearing in the 2008 unit outline set out below (Table A). For example, there is an indication in the 2008 chart that some criteria are for self-assessment purposes only, but acknowledged as an important part of assessment and enabled by the ReView online system.

Having identified and refined the assessment criteria for all CLAW2205 assessments and linked these to intended learning outcomes and graduate attributes, the first author then proceeded to implement ReView. The next section describes ReView and the implementation process.

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37 The initial chart is available on the Faculty’s website as an example of ‘best practice’. University of Sydney, Office of Learning and Teaching
Table A – Chart showing constructive alignment of the subject with explicit criteria for each task coded to attribute categories (headings also apply to the second page of the chart).

<table>
<thead>
<tr>
<th>Intended Learning Outcomes</th>
<th>University of Sydney Graduate Attributes</th>
<th>CLAW2205 Student Learning Activities</th>
<th>CLAW2205 Assessment Tasks &amp; Assessment Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Upon successful completion of this unit of study, students should be able to:</td>
<td></td>
<td>Participation and engagement 15%</td>
<td>Group research paper 15%</td>
</tr>
<tr>
<td><strong>1.</strong> Identify and analyse legal issues with respect to restrictive trade practices and consumer protection law arising from given fact situations and real-world contexts.</td>
<td><strong>Research and Inquiry (R&amp;I):</strong> Graduates of the Faculty of Economics and Business will be able to create new knowledge and understanding through the process of research and inquiry.</td>
<td>Read text and other materials.</td>
<td>* Clear identification of legal issues in the tutorial discussion questions and thoughtful analysis and application of the relevant law.</td>
</tr>
<tr>
<td><strong>2.</strong> Resolve problems by applying the relevant law, evaluating the possible solutions and developing coherent arguments to support conclusions.</td>
<td>Make own notes and summaries before lectures and tutorials.</td>
<td>* Quality of synthesis of legal materials and information relevant to the research topic.</td>
<td>* Consistent support of written statements with appropriate legal authorities.</td>
</tr>
<tr>
<td></td>
<td>Attend lectures and tutorials.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Participate in tutorial discussions.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>* Consistent support of written statements with appropriate legal authorities.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

ASSESSING GRADUATE ATTRIBUTES IN THE BUSINESS LAW CURRICULUM
### Information Literacy (IL):
Graduates of the Faculty of Economics and Business will be able to use information effectively in a range of contexts.

- Access materials provided online and in library for this unit.
- Undertake own research.
- Evaluate the usefulness of information found.
- Draft/edit/finalise written work for assessment.

### Communication (C):
Graduates of the Faculty of Economics and Business will recognise and value communication as a tool for negotiating and creating new understanding, interacting with others, and furthering their own learning.

- Participate in tutorial discussions.
- Contribute to online discussion forums.
- Plan and rehearse oral presentation.
- Draft/edit/finalise individual assignment.
- Contribute to the drafting/editing/finalising of the group research paper.

<table>
<thead>
<tr>
<th>Information Literacy (IL)</th>
<th>Communication (C)</th>
</tr>
</thead>
<tbody>
<tr>
<td>* Ability to source a range of legal materials relevant to the research topic.</td>
<td>* Clear and concise articulation of ideas about the research topic in writing, using appropriate legal language.</td>
</tr>
<tr>
<td>* Consistent use of appropriate method of legal citation and referencing.</td>
<td>* Careful organisation of ideas so that argument develops logically through the paper.</td>
</tr>
<tr>
<td>* Efficient sourcing of information from own structured notes collated from lectures, tutorials and readings (self-assessment only).</td>
<td>* Correctness of grammar, spelling, etc.</td>
</tr>
<tr>
<td>* Ability to source current news item that deals with the law on restrictive trade practices studied in this unit.</td>
<td>* Quality of engagement with peers.</td>
</tr>
<tr>
<td>* Consistent use of appropriate method of legal citation and referencing.</td>
<td>* Appropriate use of written and/or visual aids.</td>
</tr>
</tbody>
</table>

5. Communicate about the law, orally and in writing, to a professional standard.

- * Clear and concise oral articulation of ideas and responses during tutorial discussions, using appropriate legal language.*
- * Effective interaction with peers and tutor in relation to alternative ideas and legal arguments during tutorial discussions.*
- * Clear and concise articulation of ideas about the news item in writing, using appropriate legal language.*
- * Careful organisation of ideas so that argument develops logically through the paper.*
- * Correctness of grammar, spelling, etc.*
- * Quality of engagement with peers.*
- * Appropriate use of written and/or visual aids.*
- * Clear and concise oral articulation of ideas about the news item using appropriate legal language.*
- * Careful organisation of ideas so that argument develops logically through the paper.*
- * Correctness of grammar, spelling, etc.*
### 6. Plan and achieve goals and meet new challenges and deadlines.

**Personal and Intellectual Autonomy (P&IA):** Graduates of the Faculty of Economics and Business will be able to work independently and sustainably in a way that is informed by openness, curiosity and a desire to meet new challenges.

- Prepare for lectures and tutorials.
- Prepare for test and oral presentation.
- Submit all assessments by due date.
- Consistency of participation in tutorial discussions over the course of the semester.
- Thoughtfulness of approach to self-assessment in all CLAW2205 assessments.
- Management of own workload to meet submission deadline (self-assessment only).
- Appropriate use of the time allowed for the oral presentation.
- Efficient use of time to answer test questions under exam conditions (self-assessment only).
- Management of own workload to meet submission deadline (self-assessment only).

### 7. Work with people from diverse backgrounds with inclusiveness, openmindedness and integrity, and manage the dynamics of working within a team.

**Ethical, Social and Professional Understanding (ES&PU):** Graduates of the Faculty of Economics and Business will hold personal values and beliefs consistent with their role as responsible members of local, national, international and professional communities.

- Attend lectures and tutorials.
- Participate in tutorial discussions.
- Work cooperatively with group members in and out of class.
- Complete/review Faculty of E&B online academic honesty module.
- Respectful interaction with peers and tutor during tutorial discussion.
- Professional approach to tutorial attendance.
- Respectful and professional interaction with group members during group activities (peer assessment).
- Quality and extent of contribution to group activities (peer assessment).
- Adherence to principles of academic honesty (self-assessment only).
- Professional approach to oral presentation arrangements (including submitting news item on time with appropriate referencing and adhering to presentation schedule).
- Adherence to principles of academic honesty (self-assessment only).
- Adherence to principles of academic honesty (self-assessment only).
III. A GRADUATE ATTRIBUTES JOURNEY CONTINUES: IMPLEMENTING THE ReView ONLINE ASSESSMENT FEEDBACK SYSTEM

A. A Brief Description of ReView

ReView is essentially a web-based automated marking sheet for the criteria-based assessment of student work. University or Faculty-level graduate attribute categories are entered on ReView and teachers then enter their assessment criteria, taking care to match each criterion for each assessment task with the relevant attribute. Colour and symbol coding for each graduate attribute category (as shown in Figure 1) makes this alignment process clear to students and users.

![Figure 1 — Screenshot of the criteria coding section where the dropdown menu allows the selection of attribute groups to code all criteria with a colour code and symbol.](image)

Teachers then use the vertical bars on the ‘data-sliders’ shown to the right in Figure 2 to assess each criterion relating to each assessment task (indicated by the vertical black lines in Figure 2). After teachers’ marks are saved, the students’ self-assessments appear against all criteria (indicated by the light blue triangles in Figure 2).

![Figure 2 — Academics’ marking screen: Students are selected on the list to the left and then the colour-coded criteria are referred to whilst sliding the vertical bars to generate percentage marks for criteria. Once marks are saved the students’ self-assessments appear on the top edge of each data slider.](image)

When teachers finish marking and decide to publish their assessments, students see a much simpler screen (Figure 3) that does not show the actual marks, but rather broad grey sliders.

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38 University of Sydney Institute for Teaching and Learning, above n 11.
to indicate their performance against the criteria in terms of grades only. Students also see their own self-assessment indicated by the light blue triangles at the top of each data slider as here in Figure 3.

Figure 3 — Student feedback and self-assessment screen: Students can select each of their assignments on the list to the left and then the colour-coded criteria are referred to whilst sliding the triangles on the data sliders to self-assess. The grey bars on the sliders indicate the tutor’s grading compared to their own.

When criteria for all assessment tasks are entered on ReView, a pie chart and bar chart are generated showing the attributes developed and assessed in the particular unit of study. Figure 4 indicates this for CLAW2205.

Figure 4 — View of criteria weighting for the complete Unit of Study against attribute categories: Personal and Intellectual Autonomy (green), Research and Inquiry (white), Information Literacy (red), Communication (yellow) and Ethical, Social and Professional Understanding (blue).

B. Discussion of Implementation Issues

The word ‘implementation’ implies a simple and mechanistic application of predetermined goals. This may be true in some contexts, but in the case of educational environments the inertia against change can be enormous, and in this pilot project the students demonstrated a fairly conservative reaction. For example, the authors agreed that students’ self-

39 On the ‘data-sliders’ shown to the right in Figures 2 and 3, F indicates a fail grade (0-49 marks); P indicates a pass grade (50-64 marks); C indicates a credit grade (65-74 marks); D indicates a distinction grade (75-84 marks) and HD indicates a high distinction grade (85-100 marks).
assessment against criteria was important for their learning as reflective practitioners. Whilst the authors were keen to use ReView to promote self-assessment to the students for their own educational benefit (as shown in Figures 2 and 3), it was clear from student feedback that not all students were convinced of the value of self-assessment. Although data on the number of students who self-assessed via ReView is yet to be analysed, a small number of students had negative responses as follows:

- ReView was a waste of time;
- Over emphasis of ReView and self assessment;
- I wasn’t aware that participation in ReView would affect our participation mark. Would have been good to have been informed of this.

Another example of student conservatism arose with respect to the way feedback was given by ReView. The idea that percentage marks would not be displayed was challenging for all concerned. However, the authors agreed that a shift towards viewing criteria-based feedback without a percentage mark could be beneficial to students understanding in CLAW2205. The fact that CLAW2205 students were only facing these changes in one of their subjects made it difficult to convince them about benefits to their learning. The following student responses were typical:

- The ReView system was useful but I still prefer marks against a set of criteria;
- I prefer a ‘numerical mark’ on Blackboard for my assessment instead of a ‘letter’;
- ReView was a bit misleading and deceptive.

The technical issues in implementation were also problematic. As this was a pilot scheme, no link with central university systems had been established. Students and staff therefore had to have different login usernames and passwords for this system. When students initially enrolled in or withdrew from CLAW2205, there was no automatic update of the class list on the assessment screen. When marks were required to be exported to the incumbent Blackboard system Gradebook, ideally a macro excel spreadsheet was needed to handle the upload. These issues, together with all the other usual issues that accompany the use of technology, meant that the first author often asked herself why she agreed to participate in this pilot. These technical issues were also of concern to students, some of whom commented as follows:

- I found the feedback for assessments adequate but found the ReView system too complicated and fiddly to be effective;
- ReView needs to be tweaked a bit;
- Blackboard was a useful tool. I would like to have seen the ‘view grades’ sections used and updated throughout the course in addition to ReView.

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41 Students were informed of this in the unit outline. See Table A and the assessment criteria for ‘Participation and Engagement’ that includes ‘thoughtfulness of approach to self-assessment in all CLAW2205 assessments.’
IV. RESEARCH OUTCOMES

ReView has now been used in two semesters for CLAW2205 (2007 and 2008). Students have not been surveyed specifically on their responses to ReView but the standard end of semester Unit of Study Evaluation (USE) surveys have elicited some useful data. Student feedback was available in both quantitative and qualitative form each time ReView was used and compared to that provided in the year preceding the introduction of ReView (2006). The number of students enrolled in CLAW2205 in each of the three years was about 60 and it should be noted that the USE scores in CLAW2205 were already historically high for many of the questions asked.

Table B indicates the percentage of students in 2006, 2007 and 2008 that agreed or strongly agreed with USE questions relevant to assessment processes.

Table B – Chart showing the percentages of students to agree or strongly agree with standard Unit of Study Evaluation questions. (Scores in the 80-90% range are considered to be high ratings).

<table>
<thead>
<tr>
<th>Faculty of Economics and Business Unit of Study Evaluation (USE) CLAW2205 Trade Practices and Consumer Law</th>
<th>2006 Pre-ReView</th>
<th>2007 ReView Pilot</th>
<th>2008 ReView as part of ALTC project</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q1. The learning outcomes and expected standards of this unit of study were clear to me.</td>
<td>strongly/agree: 97.5%</td>
<td>90.9%</td>
<td>90.6%</td>
</tr>
<tr>
<td>Q3. This unit of study helped me develop valuable graduate attributes (eg, research inquiry skills, communication skills, personal intellectual autonomy, ethical, social and professional understandings, information literacy, etc).</td>
<td>strongly/agree: 84.6%</td>
<td>81.8%</td>
<td>88.9%</td>
</tr>
<tr>
<td>Q8. Feedback on assessment assisted my learning in this unit of study.</td>
<td>strongly/agree: 56.4%</td>
<td>73.8%</td>
<td>80%</td>
</tr>
<tr>
<td>Q10. Online learning (eg, with Blackboard) supported my learning in this unit of study.</td>
<td>strongly/agree: 70.3%</td>
<td>79%</td>
<td>90.9%</td>
</tr>
<tr>
<td>Q12. Overall I was satisfied with the quality of this unit of study.</td>
<td>strongly/agree: 97.4%</td>
<td>92.9%</td>
<td>94.4%</td>
</tr>
</tbody>
</table>

It should be noted that the data was provided by three different groups of students, so care needs to be exercised when making comparison between these scores. CLAW2205 was also not exactly the same each year with regard to the configuration of assessment tasks and the instructions given to students about them. However, it is worth noting that the three questions (3, 8 and 10) relating specifically to attributes, feedback on assessment and online learning all show some improvement from 2006 to 2008.
The USE survey questions do not refer expressly to ReView, so student written comments about ReView on the survey forms were entirely unsolicited. As CLAW2205 was the only unit of study in which the students would have used ReView, it is interesting that they mentioned it at all. In the 2007 feedback, there were 10 comments regarding the use of ReView; in 2008 there were 21 comments, indicating perhaps that students were more aware of ReView in its second iteration. In 2007, the comments were almost evenly divided between positive (4) and negative (6), whereas in 2008, the comments were overwhelmingly positive (15).

When asked to comment on whether learning outcomes and standards were clear to them (Q1), student responses that referred to ReView were as follows:

- Extremely so. The learning outcomes were emphasised thoroughly before all assessments and the ReView system emphasised them also;
- The use of ReView clearly demonstrated learning outcomes/graduate attributes and these were reinforced by [lecturer];
- ReView told me, even though @ first I didn’t want to use it.

It is interesting to note that all comments on this point were positive and it would appear that the assessment criteria were identified by students as being descriptive of the learning outcomes.

Also all positive were student comments about whether CLAW2205 helped them develop graduate attributes (Q3): ‘Student ReView was a good example’; ‘ReView made me more aware’; and ‘This was effectively shown through the “ReView” online program.’

Student views on whether feedback on assessments assisted their learning (Q8) were mixed. In addition to the negative comments about the availability of grades only and the problems with the software referred to in Part B of Section III, the following were typical of the positive responses:

- Yes ReView helped me improve on weaker areas.
- ReView was great!! (smiley face).
- Good computer feedback system.
- ReView and good detailed comments on assessments.
- ReView had a nice rating system that covered multiple factors.

As discussed above, there were some technical problems with the interaction of Blackboard and ReView. Nonetheless, when asked whether online learning supported learning in CLAW2205 (Q10), a number of students specifically referred to ReView in the following terms indicating that they see engagement in self-assessment and assessment for each graduate attribute as part of their learning: ‘Really liked online ReView’; ‘Use of ReView was good’; ‘ReView was very helpful.’

**V. CONCLUSIONS FROM THE JOURNEY SO FAR**

As a result of the process that both authors experienced in this case study or ‘journey’, there are a number of important reflections to take us forward in further research.

Students had mixed reactions as to whether feedback on assessment using ReView assisted their learning. Their concerns about the availability of grades only on ReView have prompted further refinement and implementation. For example, in future semesters, marks will be published a few days after the publication of criteria-based feedback on ReView.

The basic idea underlying ReView, namely that assessment criteria are the key to embedding graduate attributes within the curriculum, is clearly an important ‘fulcrum of

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42 It is interesting to compare similar data from other units of study involved in the 2007 pilot study. See Thompson et al., above n 31.
engagement’ for both teachers and students. Assessment criteria therefore need to be relevant, explicit and effectively communicated. It is also clear that the development of criteria should be viewed as an ongoing work in progress, as this has been a significant part of the journey for the first author. A database of criteria for different types of assessments would be a useful resource for teachers when formulating criteria specific to an individual assessment task.

University teachers also need time and opportunities for meaningful discussions to allow them to become clear about the concepts involved in a shift from content delivery to the development of students’ attributes. In a high-pressure university environment where research is given precedence, academic development and other support for teachers is vital in facilitating the integration of graduate attributes into curricula. Whilst this paper refers to a ‘bottom-up’ approach based at assessment task level, it is clear that this would be futile without whole-institution multi-level leadership regarding graduate attribute integration.

Implementing new technology to assist learning and teaching takes time, and both students and teachers need support and clear explanations of why the technology will be useful. ReView assisted with the embedding of graduate attributes in CLAW2205 but could similar results have been achieved without it? Certainly, the first author’s journey could have ended with the development of the chart that aligned intended learning outcomes with graduate attributes, teaching and learning activities, assessment tasks and assessment criteria (Table A). But then, how would students know about their progressive development of graduate attributes and how would teachers be able to evidence and assure their students’ learning? ReView enables this easily and directly. ReView certainly acted as a catalyst to conversations, reflections and implementation stages in this study. It also facilitated student engagement with the curriculum through online self-assessment and delivery of feedback on student assessment.

In regard to further study, two areas emerge. The first relates to benchmarking, standards and mutual understanding of grade descriptors.43 ReView could potentially be used to engage lecturing staff, tutors and students with these issues, and particularly the standards required at different levels or years of study. The second concerns student self-assessment and how students can be encouraged, or perhaps even rewarded, for their engagement with this feature as an important attribute for lifelong learning and reflective practice.44

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44 CLAW2205 students’ experiences with self-assessment using ReView will be discussed and analysed in a future article.
I. INTRODUCTION

The past decade has seen a marked increase in the diversity of the student profile in tertiary study in Australia. For example, up to one third of students at some institutions are international students. At the same time, alternative entry options and pathways linking Technical and Further Education (TAFE) and Higher Education (HE) courses have been increasingly utilised by students from a variety of backgrounds. Language and learning support is crucial for many of these students to enable them to achieve successful outcomes in their studies. This paper outlines the reconceptualisation of a collaborative approach between language and learning practitioners and law staff at Victoria University (VU) to develop and model appropriate teaching and learning pedagogies to meet the needs of an increasingly diverse cohort of students.

As a dual sector institution, VU has students studying law-based subjects in a variety of TAFE and HE contexts. In TAFE, for example, students may be undertaking the Advanced Diploma of Business (Legal Practice) or the Diploma of Business (which includes Business Law). They may be undertaking these onshore or offshore at one of an increasing number of offshore partnership institutions. Many of these students articulate (or ‘pathway’) into the second year of a Bachelor of Business degree. For a variety of reasons, diploma courses do not always cover the foundation concepts that are covered in the first-year bachelor degree subjects, nor the academic skills that are expected in second-year bachelor degree studies. 1 Law teachers struggle with ways to respond to increasing numbers of students who find legal language, related positioning, identity formation, and the rhetorical conventions through which these are realised, a serious challenge.

A variety of projects have been implemented to tackle these challenges at VU. In 2007, a group of language and learning practitioners applied for an internally funded grant to focus on a coordinated approach. The application comprised four linked projects, three focusing on support for students studying in separate law-based areas, and the fourth, a coordinating project that not only aimed to facilitate collaboration among the other three, but also to work towards the establishment of a VU-wide Community of Practice (COP) in relation to law teaching at VU. While previously discrete pockets of language and learning assistance had been provided in law subjects within the institution, these had been conducted in isolation from each other. Further, the arrangements with subject staff had often been dependent on the strong personal commitment and availability of these staff rather than a coordinated team approach. In short, piecemeal efforts led to duplication of effort in some areas while other areas had been overlooked and opportunities had been lost to capitalise on available expertise.

The resulting COP project, which is the focus of this paper, aims to reconceptualise the development of language and learning support in law-based subjects at VU and, through this, provide a more systematic and coherent approach to assist pathwaying students in law subjects from all points of entry.

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2 Etienne Wenger Communities of Practice: Learning, Meaning, and Identity (1998).
II. SCOPE AND AIMS OF THE PROJECT

The aims of the COP project centre on improving the coordination and development of support for students at different points of entry across the entire institution. To achieve this, the focus is on working with teachers of law subjects to collaborate on: a) effective alignment of TAFE and HE curriculum pathways; b) integration of language and discipline-specific (law-specific) skills; and c) development of effective pedagogies for VU student needs.

Points of intervention the project has focused on include English for Academic Purposes (EAP) programs, diploma programs including the Diploma of Business, the Diploma of Business (Legal Service), the Advanced Diploma of Business (Legal Practice), and bachelor degree programs at VU. Approaches at each of these points have varied, and have included the development of additional online materials, the integration of language and skills material into curriculum and tutorial guides, the provision of parallel workshops, and development and teaching of adjunct courses concentrating on writing and academic skills.

Collaboration with law teachers has been an essential component of the COP project. The project’s funding has allowed the project managers to offer funding for staff (both core and sessional) to attend meetings, as well as strategy and information sessions. Workshops have been organised to facilitate collaboration and increase understanding of the issues as identified by both language and learning practitioners and teachers of law subjects. Such interaction has significantly aided language and learning practitioners’ ‘induction’ into legal discourse practices, while at the same time providing impetus for law teachers to reflect on their practice and to consciously articulate what they are looking for in students’ work, and their reasons why. An additional benefit has been an improvement in communication between law staff operating in the dual sectors of the institution — sectors that have historically operated in isolation.

A key advantage of a network of practice is the establishment of a focal point for language learning issues in relation to law teaching. Part of the COP project brief has been to implement forums whereby staff from other institutions share experiences with both the language and learning practitioners and law teaching staff at VU. Another aim of the project is to develop a web-based pool of resources for both language and learning practitioners and law teachers.

This paper concentrates on the conceptualisation of a collaborative approach in the discipline of law, rather than describing the results of the effectiveness of single interventions to enhance students’ learning in law subjects. The project is still in its early stages and, consequently, a comprehensive evaluation has not yet been undertaken. An important aim of this initiative is to evaluate both the effectiveness of the model of collaboration and impact on student outcomes. To date, qualitative feedback from students involved in single intervention programs has been very positive.

III. LAW TEACHING AND LANGUAGE — THEORETICAL UNDERPINNINGS

It is widely accepted by language and learning practitioners that language is central to student participation within specific disciplinary communities and, in this sense, the teaching of language ultimately cannot be separated from content. Whilst academic staff often operate from a view that their responsibility is disciplinary knowledge and that English language is the concern of someone else (‘Fix the grammar. Don’t touch the content’), language practitioners increasingly view the development of discipline-specific language competencies as integral to the process of induction into a discipline. Indeed, it

is increasingly recognised that discipline-specific language and learning skills are fundamental to the construction of meaning within particular institutional contexts as well as to the necessary acculturation into the academic discourse of particular disciplines, and that language and academic programs that teach these skills should be embedded in the content being learned.\(^5\)

The integral relationship between language and content is foregrounded, for instance, when we consider the teaching of formal structure and logical development in a written response to a problem fact situation. This involves identifying the issue and specifying the relevant area of law and the elements, stating the relevant principles, discussing relevant cases and referring to established precedent, and applying tests to reach conclusions. The formal structure and logical sequencing of ideas in such analysis cannot be taught, for instance, without grasping key concepts which underpin the law, such as the relationship between common law and statute law. Issues and arguments are key points of focus in law, and appropriate meanings are realised in very specific ways, following certain conventions.\(^6\) It is not sufficient for students to just construct legal sentences; they need ‘to be aware of the place of such genres in the disciplinary community’.\(^7\) Further, it is in disciplines such as law ‘that teleology (development towards a conclusion), and more importantly, ideology (‘political’ perspective), are deeply inherent to the realisation of meaning in language’. In these cases ‘appropriate “English” cannot be addressed without a thorough understanding of these “deep” characteristics of the target discourse’.\(^8\)

By contrast, views focusing on language primarily as the conduit for content often treat language as invisible, and as something to be learnt separately in a way that fits with an older view of the transmission method of English language learning. The notion that language learning is ineluctably bound up with induction into communities of practice (in this case the legal community) that constitute varying disciplines has replaced this transmission model. From this perspective, teaching and learning needs to be reconceived as participation in social practice in which language and disciplinary knowledge play a significant role,\(^9\) and the challenge is to initiate these students into the legal discourse community while they are still developing their language proficiency skills.\(^10\) For this initiation, the provision of contextualised programs to assist students in their learning is likely to be more effective than generic provision of assistance.\(^11\)

In the formulation of institutional responses to language and learning issues, such theoretical considerations play an increasingly central role, particularly when attention is paid to the diverse student profile of students pursuing law-based studies at institutions such as VU. Typical examples of student groups that the COP project group members are

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\(^6\) Rick A M Iedema ‘Legal English: Subject Specific Literacy and Genre Theory’ (1993) 16(2) *Australian Review of Applied Linguistics* 86, 88.


\(^8\) Iedema, above n 6.

\(^9\) Etienne Wenger *Communities of Practice: Learning, Meaning, and Identity* (1998).

\(^10\) See eg, Candlin, Bhatia and Jensen, above n 7.

currently working with include: 1) recent immigrants from Sudan who wish to gain better understanding of Australian law to assist their immigrant communities in Australia and/or who hope to return to their country of origin to implement ‘western’ legal approaches and models; 2) international students from mainland China studying accounting (onshore or offshore) often with the aim of (re)entering China’s burgeoning economy armed both with a qualification that will give him or her some competitive standing and with discipline knowledge that will allow him or her to contribute to its continued growth; 3) local students from non-English speaking backgrounds who are the first in their family to attend a higher education institution, and who are pursuing a paralegal qualification, often with the aspiration to continue on and become a lawyer.

With little or no exposure to local notions of Australian law and its epistemological foundations (the adversarial system, for example), these students, by and large, expect the institution to guide them explicitly in the relevant processes of discourse acquisition and appropriate identity construction\textsuperscript{12} for them to succeed in their studies and future professions.

**IV. COLLABORATION**

An implication of the notion of centrality of language to content is that collaboration between language and learning practitioners and law teachers is essential. This issue is intensified further at institutions that place a premium on inclusion and are operating across multiple sectors. Difficulties experienced in this area may be mainly attributed to institutional constraints that often work to impede willingness to establish collaborative relationships with relevant language and learning staff. At the same time, however, law teachers routinely identify English language as an issue and also report that they do not know how to go about addressing it.\textsuperscript{13} If English language skills are viewed as the role of the language and learning practitioner exclusively, it can make it difficult to establish the nature of the joint collaboration and how it might function effectively.

In part, the role of the COP group has been to encourage reflection on current and past experiences of collaboration as well as on current needs and challenges. Questions that have been raised for discussion include: How can language teachers teach legal writing without assuming legal expertise? Do we need to rethink embedding? Does it mean phasing out the language teacher? Projects like COP generate a new expertise and knowledge base and the question is: How might these be institutionalised? Do we need to create special structures within the institution to achieve this?

As literature in the area attests, there is no shortage of models for the integration of language and learning support into almost any module of academic study\textsuperscript{14}. Approaches that have been utilised by the language and learning practitioners in the COP project include:

- the design and teaching of adjunct writing and academic skills subjects;
- the embedding of language and skills material into subject readers;
- the embedding of material into tutorial guides;
- the running of parallel workshops;
- team teaching;
- guest lectures within a subject;
- the development of online materials that are either stand-alone or embedded within subject specific WebCT/Blackboard type environments;

\textsuperscript{14} See McLean et al, above n 8; Chanock (ed), Integrating the Teaching of Academic Discourse, above n 15; Devlin above n 15; Helen Murphy and Brendon Stewart ‘The integration of a Language and Learning Program into a Business Law Subject’ (2001) (7)2 The Current Commercial Law Journal.
• collaboration with content lecturers on the development of materials in the English
  language program that address content issues; and
• collaboration with content lecturers to suggest approaches to language and learning
  issues, including:
  o implementation of research and student tracking initiatives,
  o examination of the curriculum with an eye to language as well as
    conceptual scaffolding, and
  o the design and implementation of ‘at risk’ detection tasks.

In collaborating with law staff, members of the COP have found that the most beneficial
interactions occur when there is an openness on both sides. Such interaction reveals the
invisible assumptions contained in their different practices; for example, the law teacher
pausing to reflect for a moment on who actually is the ‘audience’ that they expect the
student to be writing for when giving legal advice on a case problem. Then there is the
realisation that the question is quite problematic. Or, likewise, the language and learning
practitioner suddenly realises that the common law exists in case judgements alone; that
the case judgements are the law, and that this understanding needs to be implicit in any
appropriately written response dealing with case law. Often, effective collaboration also
stems from a shared concern with student learning, which serves to highlight that
pedagogy is a focus common to law teachers and language and learning practitioners alike,
and can also serve to remind that emphasis should not be on language alone.

Furthermore, central to collaborating effectively is sensitivity to boundaries between
expert discipline knowledge and the language and learning domain. While the
accumulation of a certain amount of legal knowledge is necessary to ‘be able to challenge …
students intellectually on matters of disciplinary interpretation and articulation’, it is
important for the language and learning practitioner to refer matters to the law teacher
when appropriate. It is essential, when developing an adjunct subject, to strike an effective
balance between utilising the students’ desire for content and ensuring the focus is on
‘improving students’ ability to apply the appropriate rhetorical-legal reasoning and
argumentative skills to their disciplinary assignments’.

V. CURRENT SUPPORT INITIATIVES

Support initiatives currently being ‘coordinated’ by the COP project include the
development of a 10-week case-analysis skills module that has recently been added to the
English for Academic Purposes (EAP) program at Liaoning University in Shenyang,
mainland China. This module was developed on the basis of feedback from lecturers in the
bachelor degree subject Corporate Law. In this subject, students struggle profoundly with
the ‘application’ of the law in their problem case responses, and often simply describe the
law. Many students are not familiar with the procedure of applying a theory or principle to
a fact situation. To address this issue, the module introduces simple case analysis tasks on
generic subjects and then scaffolds into some basic contract law. For example, topics such
as intention to create a legal agreement are focused on and used to guide students
explicitly through the process of identifying the issue, stating the relevant law, applying the
law to the case, and stating a conclusion. In doing this, the linguistic structures suitable for
carrying out the legal reasoning moves can be highlighted.

Another initiative currently being undertaken is the development of an adjunct writing
skills subject in the Diploma of Business (Legal Practice). This subject develops the
students’ awareness of the requirements of legal writing and the rhetorical conventions that
legal discourse employs when legal reasoning is demonstrated, particularly in relation to
problem fact situations. Specifically, the positioning of the writer as a legal advisor is

15 Nigel Bruce, ‘Dovetailing Language and Content: Teaching Balanced Argument in Legal Problem Answer Writing’
16 Ibid.
17 Ibid: for a detailed example of this.
highlighted, and the types of structures and typical metacommentary employed to signal relevant legal moves are demonstrated and practised. Collaboration between law teachers and language and learning practitioners has been central to determining the learning requirements in the subject. Another important aspect is to align the writing focus with the legal content and assessment tasks. A similar embedded writing skills subject for second-year students in this course is currently being developed as an online subject.

Another writing skills subject has been embedded into the Diploma of Business (Legal Service). This course is tailored to Horn of Africa students in the western suburbs of Melbourne who are interested in gaining better understanding of the Australian legal system to support community development, both locally and in their countries of origin. Again, emphasis is on familiarisation with common legal writing structures through a set of scaffolded writing tasks, and on regular writing practice.

In HE, various initiatives are currently in place, including a focus on language and learning support for students undertaking the subject Corporate Law. Many Corporate Law students bypass the first-year HE subject Business Law on the basis of having completed the Diploma of Business in TAFE. They often struggle with the more challenging requirements of this subject; for example, the extended major research assignment, analysis of a judgement from a case and key conceptual understandings. To address these difficulties, an online transition module has been developed. This module includes materials on the relationship between common law and statute law, and extensive materials on the skills required to complete the major research assignment, with a focus on rhetorical conventions and strategies used in legal writing.

In addition, members of the group are closely involved in rewriting the Diploma of Business at VU. This diploma is being redesigned to explicitly include English language and academic skills as an integral part of the content in the diploma.

VII. CONCLUSION

The Community of Practice initiative described in this paper can be seen as a response to two developments. The first is the move over the past two decades towards more socially inclusive institutions, with an increase in the diversity of the student profile. The second is a reconceptualisation of language as central in the teaching of content. In response to these developments, the COP project at VU is formulating new pedagogies which are institutionally recognised and are being embedded cross-sectorally, to enable students to succeed in their chosen studies. These pedagogies have emerged through the integrated work of the members of the Community of Practice in collaboration with subject staff.

The next step is to extend our COP work by collaborating with language and learning practitioners cross-institutionally to develop models of practice and shared institutional understandings, to construct a formally recognised collaborative, interdisciplinary (community of) practice.
THE RELEVANCE OF MULTIPLE-CHOICE ASSESSMENT IN LARGE COHORT BUSINESS LAW UNITS

JOHN SELBY,* PATRICIA BLAZEY** AND MICHAEL QUILTER***

This is the first part of a multi-part paper which discusses particular issues relating to the successful assessment of large student cohorts in Business Law subjects. This paper discusses assessment concepts, the relevance and value of multiple-choice testing in large student cohorts and the motivations of modern students. It will also assess the costs and benefits of multiple-choice assessment from the perspective of the administration of the Business Law Department at Macquarie University.

Future parts of this paper will discuss statistical techniques which can determine the validity, reliability and effectiveness of multiple choice as an assessment technique before presenting an analysis of the outcome of introducing multiple-choice assessment into core subjects (each with enrolments >800 students) within the Department of Business Law at Macquarie University. Those parts will highlight the evolution of our assessment policy to reconcile two previously conflicting goals: 1) enhancing deep student learning; and 2) managing assessment within workload constraints.

I. INTRODUCTION

The Department of Business Law at Macquarie University is experimenting with introducing multiple-choice assessment into its core subjects. This is the first of a multi-part paper which will detail the Department’s experiences throughout this experiment. We have set out below the rationale for this experiment and the pedagogical basis upon which it is constructed.

II. LEARNING AND TEACHING CHALLENGES IN BUSINESS LAW SUBJECTS

In delivering its course offerings, the Department of Business Law at Macquarie University faces several significant learning and teaching challenges. First, the core subjects have very large enrolments, usually 800-1200 students per subject per semester.1 Second, as a consequence of the Australian tertiary education system’s success in attracting enrolments from outside Australia, over 60 per cent of those enrolments are international students coming from diverse backgrounds such as China, India, Indonesia, Thailand and Korea. Those students find that the common law is alien to the legal system established in their home countries. Also, English is often their second language and many do not have sufficient knowledge of English to deal with complex grammar and general vocabulary, let alone legal vocabulary.

Third, as a service department, the Department of Business Law’s subjects are taught to students enrolled in at least 17 different undergraduate degree programs. Consequently, its subjects are ancillary to the majority of subjects the students study as they pursue their various degrees (the majority of enrolments are by students studying for commerce or business degrees).

Fourth, as a consequence of voluntary student unionism and increased financial pressures on students at the tertiary level, educators must provide interest and focus in an environment where universities have lost their role as social hubs. Increasingly, students spend less time at university and this translates to less time preparing and studying. For

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1  The core subjects are Business Law, Corporations Law and Revenue Law.
many of our students, a university education is only one of several significant goals being simultaneously pursued.

Fifth, the ‘classic’ problems associated with large-group teaching remain. ‘At the risk of being oversimplistic, many of the standard complaints about the large lecture course can be traced to the impersonal nature of the classroom experience. “Ineffective,” “cold,” “distant,” and even “boring” — each of these descriptions can be linked in some way to an impersonal communicative environment’.

Whilst the challenge of delivering interesting classes and engaging students remains a focal point in learning-and-teaching planning, there is an increasing need to consider and enhance the manner of student assessment. In a simple sense, if the student cohort has their focus upon completion of their degree and their professional career, as many of those doing accounting and similar professionally based degrees do, then assessment and assessment procedure are most likely the parts of their university experience that carry most meaning.

III. CHANGING ATTITUDES TOWARDS ASSESSMENT IN LAW

Andrew Ward and Alan Jenkins describe the change in assessment as occurring in different eras. In the 1970s, unseen exams were dominant, forming 100 per cent of assessment in law subjects. By the end of the 1980s, lecturers introduced coursework assessment in the form of essays, class participation, and group and single presentations.

Those traditional forms of assessment within law have a number of drawbacks when applied to large student-cohort subjects. First, problem-solving or essay-based assessments can assess the depth of student learning but neither scale efficiently to assess the breadth of that learning. Whilst it is important to recognise the value of assessing students’ writing ability, it is perhaps less necessary to do so multiple times within one exam.

Second, with 800-1200 students enrolled in a subject, it is impossible to have a single academic mark all of the students’ assessments. When more than one academic marks the same assessment, there is a challenge in ensuring that those academics consistently mark with equal difficulty levels. Preparing detailed, prescriptive marking guides can ameliorate this problem, but not remove it.

Third, the time and resources which must be applied to assessing the students’ output is very significant. The intensity of marking such high volumes of papers within a short period of time often leaves staff physically, emotionally and psychologically drained to the point where their research productivity is reduced during all-too-scarce non-teaching periods.

It is now recognised that no single form of assessment should comprise 100 per cent of the assessment types within a broader course of study. Although multiple-choice assessments have been used in many other areas of academia outside law schools for several decades, professional disciplines seem to have been the most resistant to introducing this form of assessment, although some medical schools have adopted it with the goal of assessing higher-order learning. There is evidence that some law schools have over 60 years history of using multiple choice as a component of their assessments. For

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4 Ibid 33.
6 Ball, above n 5, 568.
7 Daggett, above n 5, 392.
example, the first edition of the *American Journal of Legal Education* from 1948 included a comment article titled ‘The Validity of Objective Examination in Constitutional Law’, which discussed the experiences of academics when introducing multiple-choice assessment at the Ohio State University Law School. Douglas Miller even argues that ‘the validity of multiple-choice testing in the law field has been established by fairly careful study, and there appears to be fairly widespread acceptance of this form of testing not only on bar examinations, but also in law school examinations’. At least one UK law school has reported on its (positive) experience of using Bloom’s *Taxonomy* (discussed in greater detail below) when introducing multiple-choice assessments.

IV. INTEGRATING LEARNING THEORIES THROUGH TEACHING AND LEARNING INTO ASSESSMENT

There are many theories which attempt to describe how learning occurs, both in children and in adults. Many of these theories overlap and many are contradictory. It seems that there is no overarching ‘general theory of learning’ which has gained broad acceptance. One concept that has been accepted for nearly 25 years is that students have the ability to combine both *surface* and *deep* approaches to learning. Nonetheless, student expectations of assessment are relevant to the approach they adopt and ‘the perceptions that students have of assessment even at the end of an exercise will dictate their approach’.

Once a particular learning theory (or theories) has been selected for inclusion within a subject, it is necessary to consider not only how lectures and tutorials will incorporate the theory, but also the impact the theory will have upon both summative and formative assessments in that subject.

A. Bloom’s *Taxonomy of Learning*

Bloom’s *Taxonomy* is a famous structuring of educational objectives, first published in 1956, which has been selected by the Department of Business Law at Macquarie University for inclusion within its subjects. It is not the only taxonomy of learning, nor is it without its faults and criticisms. However, it is still recognised as a useful tool within academic scholarship on learning and has driven much research into attempts to increase deep learning amongst students.

Bloom’s *Taxonomy* contains six major classes of educational objectives:

- **Knowledge**;
- **Comprehension**;
- **Application**;

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11 Edwina Higgins and Laura Tatham, ‘Exploring the Potential of Multiple-Choice Questions in Assessment’ 2(1) Learning and Teaching in Action 1, 6.
12 See, eg, the lengthy list of learning theories at emTech, Learning Theories [http://www.emtech.net/learning_theories.htm](http://www.emtech.net/learning_theories.htm) at 4 December 2008.
18 Bloom, above n 15, 18.
• Analysis;
• Synthesis; and
• Evaluation.

Knowledge involves ‘the recollection of an idea, material or phenomenon in a form very close to that in which it was originally encountered’.19 Comprehension involves ‘objectives, behaviours or responses which represent an understanding of the literal message contained in a communication’, and includes translation, interpretation and extrapolation.20

Application requires students to demonstrate their ability to apply comprehended knowledge to previously unseen types of problems. Reaching a solution to the problem may also require the student to use the other stages of the taxonomy.21 Analysis requires students to be able to demonstrate their ability to ‘breakdown material into constituent parts and then detect relationships between those parts and the way they are organised’. The border between comprehension and analysis is recognised as being porous.22

Synthesis requires students to take separate components and build them together into a coherent whole.23 Evaluation requires the application of criteria and standards in a qualitative or quantitative way so as to ‘make judgments about the value or purpose of ideas, works, solutions, methods, material, etc.’24

B. Why was Bloom’s Taxonomy Selected?

Adopting Bloom’s Taxonomy offered a number of benefits. First, it has been widely used and tested in higher education.25 Second, there is a large body of literature showing strengths and pitfalls when applying the Taxonomy. Third, it is a relatively practical and implementable tool. Fourth, it is structured in a way which the Department believes can be applied to aid our students’ learning. Fifth, and finally, it has been applied by a number of other (mainly US-based) law schools when introducing multiple-choice assessments and, therefore, it is appropriate to be able to compare like with like.26

V. DESIGNING EFFECTIVE ASSESSMENT FOR BUSINESS LAW SUBJECTS

Effective assessment is a complex mix of matters incorporating characteristics of validity, reliability and utility. The dichotomy between measurement and judgment is sometimes also the dichotomy between short-form ‘efficient’ assessment and time-heavy problem-based assessment. However, this is not necessarily irreversible and ‘the issue of whether achievements can be measured surfaces most strongly where the expectations of students include aspects of performance as a beginning professional’.27

Students in Business Law subjects are clearly ‘beginning professionals’ and the task to design an effective measuring process is at the core of any successful large offering. From an academic’s perspective, assessment outcomes can involve many goals, but to students it is their result that is primary. This would suggest that summative assessment characterised by high validity and reliability would be essential to meet their career-focused needs. However, some level of foundation to enable them to meet their future challenges, introduced by way of formative assessment, can still play a part.

19 Anderson and Sosniak, above n 16, 16-18.
21 Ibid 20-21.
22 Ibid 21-23.
25 For an example of research similar to this project, but from a medical school perspective, see Knecht, above n 8, 324.
26 See, eg, Daggett, above n 5, at p408 footnote 49, where she states ‘I generally try to write items that test at the analysis or higher levels of Bloom’s Taxonomy … rather than items which merely ask students to recall concepts or apply them in a simplified manner’. See also Greg Sergienko, ‘New Modes of Assessment’, (2001) 38 San Diego Law Review 463, 495, where he states ‘Using one of the systematic descriptions of intellectual skill levels, such as Bloom’s Taxonomy … helps ensure that questions are drafted to test an appropriate range of skills’.
Assessments that take place within modules may be formative, providing feedback on performance, and summative, in that they count towards the grade to be awarded for performance on the module as a whole. Examples of such assessments are multiple-choice tests. In fact, with the highly specialised ability of information technology to assess and break down multiple-choice results, they have developed into a particularly potent diagnostic tool of overall standards and trends in specific groups of students.

What then is effective assessment? Sally Brown and Peter Knight include clarity of purpose, the ability to review progress by all parties, assessing what is claimed to be assessed, being credible, cost-efficient, having clear outcomes and being subject to quality assurance. A particular factor, if successful assessment is to be maintained, is for assessment to produce usable data. If the data obtained is to fulfil its potential and provide valid performance indicators about the core business of higher education, that is teaching and learning, an essential characteristic of its collection must be its reliability.

In commenting on the results of an earlier study on reliability of assessment, Mantz Yorke stated that ‘the level of consistency was reduced where there was greater latitude for interpretation on the part of the assessors as regards whether the criterion had been met’. In disciplines such as law, responses to problem-style questions vary widely, making parity of assessment difficult. The basic content, the law from which the answer should be drawn, is generally the same amongst examinees. However, writing styles, structure and perceptions of relevance underpin the variance. This creates substantial difficulties in reliability and consistency between examiners and the problem is exacerbated where the student population has differing levels of English language proficiency. There are often errors of fact and law in such pieces of work. Plagiarism is a growing problem and lecturers spend hours on the internet or using software tools to seek out such material.

A. Assessing Deep Learning Through Multiple-Choice Assessment

An obvious criticism of multiple-choice examinations is that in their highly summative role they encourage surface rather than deep learning. However, many factors mitigate this narrow view of multiple-choice examinations. Firstly, not all multiple-choice examinations are the same. There is ample scope for questions to be complex and testing of various levels of content. Secondly, in law units, where students generally receive tutorials revolving around problem-solving, it is acceptable for multiple-choice questions to take similar problem formats requiring examinees to work through a set of facts before being able to approach the weighing of the alternatives provided. Where the examinees are largely non-lawyers doing law units, such as Business Law students, identifying issues and postulating outcomes is perhaps more important than the ability to coherently express such outcomes in written form. Clearly, though, students going on to practise law need this ability. Further, multiple-choice testing will not generally be the sole determinant of a student’s grade and a student will be exposed to a wider group of educational skills throughout their higher education. Diversity in assessment is almost universally accepted and multiple-choice examinations fit into, rather than dominate, this diversity.

Multiple-choice examinations do not have to stifle a deep approach merely because they are efficient to undertake and to grade. In fact, summative examinations such as multiple-choice ‘can have considerable power to encourage learning, partly through providing that extrinsic motivation which is so necessary ... [and] can provide a stimulus

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28 Ibid 12.
30 Ibid 139.
31 Yorke, above n 27, 58. The earlier study was David Baume and Mantz Yorke, ‘The Reliability of Assessment by Portfolio on a Course to Develop and Accredit Teachers in Higher Education’ (2002) 27(1) Studies in Higher Education 7.
32 Search engines such as Google at 4 December 2008, and anti-plagiarism software like TurnItIn at December 4 2008, are commonly used to find evidence of plagiarism.
for understanding to be developed through *deep* learning’. 33 Whereas the format for response varies between written examinations and multiple-choice examinations, the desired attributes, which include a grasp of content, application, interpretation and comprehension, do not. A criticism of multiple-choice examinations is that they encourage study without reflection and an example of this can be seen when students guess answers. However, this is merely an instance of poor strategy which similarly exists in all examination formats. The most common characteristic of poor responses in written examinations is not answering the question — this, like guessing in multiple-choice examinations, is simply an inappropriate approach to the task. Even detractors of the multiple-choice format concede that ‘when multiple-choice questions are used in the more formative ways they have great potential as a learning and teaching tool’.34

Multiple-choice examinations should not be seen as substitutes for those parts of student assessment requiring expression such as presentations and class performance. They are, however, alternatives to traditional problem-solving formats where essay-style answers are required. An inherent difficulty with written response examinations is that because a student’s time during the examination is largely taken with writing, the scope or coverage of the examination is limited. Further, student perceptions of the need to digest large amounts of material (because they have an expectation that large amounts must be disgorged in their answers) results in overloading, sometimes confusion, and often cramming. Multiple-choice examinations on the other hand can cover unit content widely without the need to emphasise or specialise. This can counter cramming as the foundation of the multiple-choice examination relates to the overall delivery of the unit and the overall grasp of the material. Accordingly, because multiple-choice examinations involve a large number of discrete questions, they not only can directly assess intended learning outcomes of the whole unit but, importantly, ‘many of the individual learning outcomes can be addressed in a single assessment’.35

Enhancing student perceptions of their tasks in examinations is an important aspect of worthwhile assessment practice. The best assessment strategy can fail if it does not take account of how students see and approach examinations. Accordingly, successful multiple-choice testing of large groups of students requires educating academics about new approaches for assessment. Multiple-choice examinations can be complex and demanding, and issues can be raised requiring several levels of content. It is not really a question of ‘choice’ at all sometimes but a question of ‘exclusion’. In the past, the perception of multiple-choice testing as addressing *surface* learning has meant that the format has been regarded as superficial. However, that is not necessarily the case and

‘multiple-choice questions need not be limited merely to testing knowledge; tests can include more challenging comprehension/application-based questions … and it is only if they are inappropriately used or poorly designed that there is a risk of ‘dumbing-down’.36

It is even suggested that well-designed multiple-choice examinations are useful in distinguishing the *surface* learner from the *deep* learner.37 This will be achieved if analysis and evaluation are built into the assessment.

Although successful multiple-choice questions are often difficult to draft there, is a substantial benefit in time saved by freeing academics from marking. This is imperative in large undergraduate units and results in a value-based assessment process. The corollary of this is time to attend to students. In large units, finding ways to assess students that save academic time are positive factors in student welfare. Provided multiple-choice assessment is predictable, consistent, relevant and equal for all students, it serves a summative, and

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33 Brown and Knight, above n 29, 67-68.
36 Higgins and Tatham, above n 11, 1.
37 Ibid.
possibly a formative, purpose. If thereby academics have more time to advise and counsel the large number of students’ dependent on them, the process of education is enhanced.

Another advantage of multiple-choice assessments is that feedback to students can be given much faster than traditional forms of assessment. Robert Wood38, Greg Sergienko39, Steven Friedland40 and Lynn Daggett41 all note the widespread survey evidence that prompt feedback has a significant impact on increasing student learning, especially in helping students to self-identify and rectify under-performance midway through the semester.42

**B. Incorporating Bloom’s Taxonomy When Designing Multiple-Choice Assessments?**

Designing multiple-choice exams is much harder than creating a problem-based combination essay examination. This is because multiple layers of difficulty and analysis can and need to be incorporated into questions.43 The level of difficulty will depend on the type of student, the level they are at and the subject itself.

There are two different assessment goals for which multiple-choice assessments can be used: 1) Norm-referenced evaluation; and 2) Criterion-referenced evaluation. The design and types of questions used within a multiple-choice assessment will vary depending upon which goal is to be achieved.

Norm-referenced evaluation seeks to distinguish between high-performing and low-performing students (in terms of their mastery of the subject area) and, therefore, a multiple-choice assessment designed around this goal would contain questions which have various levels of item difficulty and which are highly statistically discriminatory.44 Criterion-referenced evaluations seek to assess whether students have mastered specific concepts and skills45 (eg, pass/fail) and, therefore, the questions will be less likely to be statistically discriminatory and fewer questions would be at the highest or lowest difficulty levels.

Both norm-referenced and criterion-referenced assessments should be based upon the learning objectives of the subject.46 Edwina Higgins and Laura Tatham recommend a strategy of providing advance notice to students of sample multiple-choice questions or formative quizzes to overcome any student aversion to that form being used in summative assessment.47

**C. Assessing Knowledge through Multiple-Choice**

Possessing knowledge is an important precursor to higher levels of learning and, therefore, it is still appropriate to ask knowledge-focused multiple-choice questions on an assessment. However, knowledge questions should only form a minority of the total questions asked.48

Knowledge questions should not attempt to assess obscure trivia, for example, ‘In what year was the Civil Liability Act passed in NSW?’ Questions should instead focus on

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38 Wood, above n 17, 201.
39 Sergienko, above n 26, 471.
41 Daggett, above n 5, 398.
42 Sergienko, above n 26, 486.
44 Daggett, above n 5, 401.
45 Ibid.
47 Higgins and Tatham, above n 11, 4-5.
demonstrating knowledge of, for example, the most important case in a specific area of law; the meaning of a legal term; or ‘Which of the following legal propositions is false?’

**D. Assessing Deep Learning Beyond Knowledge-focused Multiple-Choice Questions**

1. **Assessing Comprehension**

This type of multiple-choice question is designed to assess each student’s ability to grasp the meaning of written or visual material (e.g., a court hierarchy). Creative examples of this type of question include: showing a timeline of a significant/fictional case as it progressed through the appeal system and asking students to identify certain aspects of that process, or giving a short quote from a judgment and requiring students to identify which sentence was the ratio/obiter, etc.

2. **Combination Questions**

Another type of complex question, which can be used to test recognition of legal principles and the ability to identify the relevant legal principles in a factual scenario, presents students with a fact scenario and a series of potential legal principles. The students are first asked to identify which of those potential legal principles are correct legal principles. The follow-up question asks students to identify which of the principles are most relevant to the factual scenario,50 assessing analytical skills.

3. **Assessing Application**

This is a fertile area to assess law student’s problem-solving abilities because questions can require students to apply a stated legal principle to a short fact scenario and to decide which conclusion would most likely be supported on those facts.

4. **Assessing Analysis**

Multiple-completion questions can be used to assess analysis skills. Such a question provides students with a short story and a series of related statements.51 The students are then required to select which of those statements can best achieve a certain outcome. In testing higher level skills in law, for example, such a question could contain a fact scenario and a series of additional facts from which the students must choose the combination which, if assumed, would most likely lead to an increased likelihood of a particular legal conclusion being reached. Similar structured questions can be used to test students’ ability to identify relevant legal issues, remedies available or applicable case law.52 Miller does caution that the item discrimination level of these types of questions does need to be monitored carefully.53

5. **Assessing Synthesis**

Kathryn Knecht admitted finding it difficult to construct questions to assess synthesis amongst medical students, though her research showed success in the other five stages of Bloom’s *Taxonomy.*54 The Centre for Instructional Technology at the Massachusetts Department of Higher Education argues that ‘by definition, synthesis cannot be assessed using multiple-choice questions’.55

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49 Knecht, above n 8, 326, 333: Knecht argues that ‘negative stem questions unnecessarily complicate test questions’ and increase the difficulty level of the question as compared to a positively-phrased but otherwise identical question. She argues that such questions should be restricted to situations where reinforcement of the need to avoid common mistakes is the goal.

50 Ball, above n 5, 570. It is worthwhile reviewing the helpful examples in the appendix to Ball’s article on pp573-577.

51 Wood, above n 17, 213-5.

52 Sergienko, above n 26, 492-3.

53 Miller, above n 10, 234-5.

54 Knecht, above n 5, 327.

6. Assessing Evaluation

Evaluation requires students to demonstrate the ability to judge the value of material for a given purpose.\(^{56}\) One possible way to assess evaluation skills is to provide students with an answer to a short answer question from a previous year and to have the students evaluate the correctness, or identify the weaknesses, in that answer. Alternatives include having the students critique sample answers to problems, advice to partners in a law firm, pieces of legislation or topical newspaper articles discussing legal issues.

E. Challenges When Using Bloom’s Taxonomy in Multiple-Choice Assessments

Using Bloom’s Taxonomy to assess and revise the questions asked in multiple-choice assessments encourages academics to move beyond the common critique that such assessments ‘only test recall of basic knowledge’ and it is the goal of the Business Law Department to progressively increase the rate at which it assesses higher levels of learning in the taxonomy through multiple-choice assessment. The outcomes of such changes to the assessment process will be monitored and assessed.

Placing specific assessment tasks into the different classes within Bloom’s Taxonomy requires academics to firstly be aware of the differences between those classes.\(^ {57}\) The challenge is to try to get consistent consensus about which class a particular assessment task falls within.

Lorin Anderson argues that asking only lower-order questions of students is an ‘effective way of producing lower-order learning’. Consequently, it is important to structure multiple-choice examinations to ensure that both lower and higher level learning is assessed.\(^ {58}\) Unfortunately, surveys of examinations suggest that most items (80 per cent in some studies) are poorly designed and assess only the lowest level of the taxonomy, knowledge.\(^ {59}\) The difficulty of an assessment task is independent of the class within which it falls.\(^ {60}\)

It is important not to simply increase the length and complexity of knowledge-based questions in an attempt to force students to engage in analysis, evaluation or synthesis. Complex wording in questions can be used to test some aspects of students’ comprehension skills, but Wood argues that it is not the best way to assess higher level learning.\(^ {61}\)

VI. COSTS AND BENEFITS OF INTRODUCING MULTIPLE-CHOICE ASSESSMENTS INCORPORATING BLOOM’S TAXONOMY OF LEARNING INTO BUSINESS LAW SUBJECTS AT MACQUARIE UNIVERSITY

There are a number of benefits expected from the introduction of multiple-choice assessments incorporating Bloom’s Taxonomy of learning into Business Law subjects at Macquarie University. First, greater breadth of student learning will be assessed. Second, student objections regarding inconsistency in marking between academics will be reduced through objective computerised marking.\(^ {62}\) Third, the incorporation of software-based, customised student feedback systems will address one of the primary frustrations of recent student cohorts, namely lengthy delays between assessment pieces being sat and feedback being received. Fourth, a reduced emphasis (i.e. reduced from 90 per cent to 40-50 per cent) on writing traditional extended essay and problem-solving assessment tasks should

\(^{56}\) Carneson, Delpierre and Masters, above n 48, 2.  
\(^{57}\) Amelia Kreitzer and George Madaus, ‘Empirical Investigations of the Hierarchical Structure of the Taxonomy’ in Lorin Anderson and Lauren Sosniak (eds), Bloom’s Taxonomy: A Forty-Year Retrospective (1994) 68.  
\(^{59}\) Anderson, above n 58, 138.  
\(^{60}\) Kreitzer and Madaus, above n 57, 70.  
\(^{62}\) Yorke, above n 27, 22.
provide opportunities for students with various levels of English-language proficiency to
display their abilities at both surface and deep levels. Fifth, academic staff stress levels
during assessment periods should be reduced. Sixth, academic staff should have greater
opportunities for productive research which will increase the overall research productivity
of the department. Seventh, the department expects to reduce its expenditure on casual
marking by tens of thousands of dollars per semester. Those funds can then be redeployed
to hire more academics/research assistants and for conference travel. Finally, once a
sufficiently large and validated bank of multiple-choice questions has been developed,
such a bank may be licensed to Business Law departments at other Australian universities.

It must be recognised that there are also costs which will be incurred to achieve these
benefits. The largest cost is the investment made by subject coordinators in learning how to
incorporate Bloom’s Taxonomy into their subjects and how to write effective multiple-
choice assessments which test both surface and deep learning. The present workload model
within the department arguably does recognise sufficiently the time required to build and
maintain a sufficiently large item bank of validated multiple-choice questions suitable for
use in assessments. It is also necessary for the department to invest in software suitable for
constructing and statistically validating multiple-choice assessments (textbook publishers
have provided some software to assist in this task) and for providing automated feedback
to students. It is hoped that there may be scope for collaboration with Business Law
departments at other Australian universities to defray and distribute some of these
expenses.

VII. CONCLUSION

We have argued in this paper that there is a place for using multiple-choice assessment
within the Business Law curriculum. However, such examinations are only capable of
effective assessment when based on firm pedagogy. There are various benefits from
introducing this form of assessment, ranging from increased reliability in marking, more
efficient delivery of feedback to students and greater cost-effectiveness. It is important that
academics fully understand the complexity and costs of introducing and validating
multiple-choice assessments before pursuing this path.

Future parts of this paper will detail the techniques used by the Department of Business
Law when constructing multiple-choice assessments and the statistical techniques used to
assess reliability, validity and effectiveness of particular questions and entire exams, before
reporting on the effectiveness of the introduction of this assessment form at Macquarie
University.
AIR GONDWANA: TEACHING BASIC NEGOTIATION SKILLS USING MULTIMEDIA

DES BUTLER

The first year units Contracts A and Contracts B at the Queensland University of Technology (QUT) Faculty of Law are assigned the task of teaching the skill of negotiation at a basic level as part of an integrated graduate capabilities program. Until 2008, this was done using a traditional approach involving a lecture, print materials and role-plays. In 2008, this traditional approach was replaced with a multimedia program created by the author, Air Gondwana, which is centred on the dealings of a fictional airline. It utilises video, online modules and ‘machinima’ — movies made using a virtual environment, in this case the Second Life online virtual environment. Air Gondwana is founded upon a range of learning theory including social constructivism, the ‘cognitive apprenticeship’ learning model and Diana Laurillard’s model for successful learning of law. This article discusses the development of the Air Gondwana program and its pedagogical underpinnings.

I. INTRODUCTION

In the 1990s, concerns were expressed both overseas and in Australia about the quality of legal education being provided in law schools. Specifically, it was thought that law schools were overly focused on teaching legal content without paying sufficient attention to the teaching of legal skills. Instead, it was suggested that there should be greater focus on ‘what lawyers need to be able to do, [rather than being] anchored around outmoded notions of what lawyers need to know.’ Many schools have since responded to this call by including in their curricula programs aimed at developing the skills of their students. At the Queensland University of Technology Law School, this followed a seminal report by Sharon Christensen and Natalie Cuffe. This report led to the introduction of an integrated program of graduate capabilities. Under this program, particular skills are developed to different degrees of attainment according to the stage in the degree. For example, the skill of negotiation is taught at a basic level in the first-year units Contracts A and Contracts B. It is then developed to a higher level in the later unit Trusts, and further still in the elective unit Mediation.

For several years, Contracts A and Contracts B adopted a traditional approach to teaching negotiation skills at a basic level. This included a lecture providing instruction in negotiation principles, print materials and role-plays. On the whole, this was well received by students. However, such a traditional approach has deficiencies. As Williams observed:

Asking a new negotiation student to conduct a full negotiation is like asking a new violin student to play a complete musical piece on the violin — it calls for the performance of a
large number of underlying skills, many of which have not yet been adequately developed.\(^6\)

Air Gondwana is a multimedia program created by the author that is designed to teach negotiation theory and practice to a basic level of attainment. Its five modules are accessed via the unit’s Blackboard learning management system website and provide instruction, and the opportunity for students to practise the principles of negotiation, across a range of fact scenarios. It also facilitates a face-to-face role-play. It is therefore an example of what has been described as ‘blended learning’.\(^7\)

II. AIR GONDWANA: THE PROJECT

The literature suggests that effective negotiation training includes the following elements:

- an instruction on the principles of negotiation
- a demonstration of negotiation in practice
- a role-play conducted by the participants; and
- a debriefing.\(^8\)

The challenges posed by Contracts A and Contracts B are that these units have enrolments in excess of 500 students annually, and must cater for different modes of study including full-time, part-time and distance/external. This has implications for matters such as providing a demonstration of negotiation. The unit also has a large teaching team which includes both full-time and sessional staff, not all of whom are comfortable teaching and/or assessing negotiation when it did not form part of their own legal education. Air Gondwana has been designed to meet these challenges.

The program was created with the assistance of a $20,000 QUT Small Teaching and Learning Grant. It is a multimedia program which combines real-life video, modules produced using Adobe Authorware software,\(^9\) video using computer graphics, stills and a face-to-face role-play. The majority of the budget was committed to the production of the real-life video and for a learning designer to create the necessary Authorware modules.

Costs were otherwise kept to a minimum by the author using freely available software including:

- the Second Life online virtual environment, for which the author obtained a free account;\(^10\)
- FRAPS, a free-to-download video capture program;\(^11\)
- Microsoft MovieMaker, a video editing program generally pre-installed on Windows PC computers or available free-to-download from the Microsoft website;\(^12\)
- Microsoft PowerPoint, a program freely available as part of the Microsoft Office suite of programs;
- Audacity, a free-to-download audio editor;\(^13\) and

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\(^9\) Adobe Authorware is software used to create interactive programs featuring multimedia content. See <http://www.adobe.com/products/authorware/> at 3 December 2008.

\(^10\) Second Life is a virtual environment which enables stills and video to be made of the images of the characters on screen. The program may be accessed via a free account obtained from Second Life <http://www.secondlife.com> at 3 December 2008.

\(^11\) Available for download from <http://www.fraps.com/> at 3 December 2008. The free version of this software imprints the video it captures with a small “FRAPS” watermark at the top of the screen. Purchase of the program for a low fee (less than A$50) allows video capture without the watermark.

• *Freesound*, a website allowing the download of sound effects subject to Creative Commons licence.\textsuperscript{14}

Also, where possible, members of faculty staff were used as on-screen talent and for providing voices for characters in ‘machinima’\textsuperscript{15} segments.

The program is based upon the contractual dealings of a fictional airline, Air Gondwana.\textsuperscript{16} The program follows a story-line which involves, in essence, a wealthy industrialist who wishes to eventually leave his business empire to his three children. However, one of the children, while not a fool, has preferred to lead a playboy lifestyle. The father therefore allows the son to take over the running of one of his companies, the airline Air Gondwana, as a test of his business acumen.

**A. Module 1: The Introduction and Instruction**

Module 1 of the program comprises two videos. The first is a short introduction to the airline and the story-line of the father entrusting management of the airline to his son. The second is a 20-minute instructional real-life video. It provides first a demonstration of a negotiation done poorly, provides instruction on negotiation theory and practice, illustrating points by short vignettes, and finally demonstrates the same negotiation done well.

![Figure 1: Scenes from the instructional video](image)

The program adopts the Harvard Negotiation Project as its basis for teaching the principles of negotiation.\textsuperscript{17} In particular, for a basic level of instruction, students are introduced to the notions of focusing on underlying interests rather than up-front positions, creating opportunities for mutual gain, using objective criteria, and BATNA (Best Alternative to a Negotiated Agreement — or ‘Plan B’) and WATNA (Worst Alternative to a Negotiated Agreement — or worst-case scenario).

**B. Modules 2 and 3: Practising the Principles**

Modules 2 and 3 utilise *Authorware* software to present a range of fact scenarios involving the airline, including: the commissioning of a new wardrobe for cabin staff; purchase of computer software; catering and maintenance contracts; recovery of outstanding freight


\textsuperscript{15} ‘Machinima’ may be defined as ‘production techniques whereby computer-generated imagery (CGI) is rendered using real-time, interactive 3-D engines, such as those of games, instead of professional 3-D animation software’: see Wikipedia, *Machinima* *[http://en.wikipedia.org/wiki/Machinima](http://en.wikipedia.org/wiki/Machinima)* at 3 December 2008. It therefore involves video produced using virtual actors and virtual scenes without the expense of professional animation.

\textsuperscript{16} The name derives from the main business of the airline: flying to the countries that comprised the former Gondwanaland supercontinent (including Australia, New Zealand, South Africa, South America, the Middle East and India).

charges; and charter contracts. The text of these scenarios is accompanied by images created either using the Second Life virtual environment or the Microsoft Flight Simulator X program.18

Figure 2: Example of Flight Simulator X aircraft in the Air Gondwana livery, typical of the images used throughout the program (with the permission of Microsoft).

Students are asked questions addressing the application of the various principles of negotiation and provided space in which to enter their answers. Feedback is then provided on the question against which students may compare their own answers.

Figure 3: An example of the scenarios in Modules 2 and 3 including an image generated using the Second Life virtual environment

In all, there are 13 scenarios spread across the two modules. This requires a commitment by students of about two hours in total. The program is opened in week 4 of semester, providing time for students to become acclimatised to the other aspects of the unit, and is

18 Microsoft Flight Simulator X is a commercially-available computer game that allows users to simulate flying a variety of aircraft. The game permits users to apply their own liveries to the airframes of the various aircraft. The author negotiated with Microsoft for permission to use the game for the purposes of this program and for publications and promotions of it, and then designed and applied a livery for the Air Gondwana fleet.
closed in week 10 so as to prevent the program intruding upon end-of-semester study time. One week of the regular program (week 8) is left free of formal classes to allow students to undertake a program at that time, if they wish.

C. Module 4: Refresher Quiz

Modules 1-3 are undertaken in Contracts A. The remaining two modules are undertaken in Contracts B. For most students, therefore, there will be an intervening break. This may mean that their recollection of what they have learnt to that stage may fade. Module 4 allows students to review the instructional video from Module 1 before they undertake their face-to-face role-play in Module 5. But it does more. Module 4 of the program provides a further opportunity for students to apply the principles that they have learnt in a practical situation. Whereas Modules 2 and 3 cover the application of negotiation theory across a range of scenarios, Module 4 takes the form of a single fact situation in which all of the negotiation principles that the students have learnt may be applied. It therefore serves as useful preparation for the role-play in which the students are similarly expected to apply what they have learnt in a single fact situation.

Module 4 utilises a similar interface to those appearing in Modules 2 and 3. However, rather than text describing a scenario which is accompanied by an image produced using Second Life or Flight Simulator X, Module 4 features a window in which video portraying the story-line of the purchase of an aircraft from a foreign owner is played. To assist students to situate the story in the context of the overall learning experience, two of the actors who appeared in the real-life instructional video in Module 1 reprise their roles by providing the voices for computer characters ('avatars') which resemble them.

At various points, the video stops and the student is asked a question concerning the application of negotiation theory. The student is required to enter an answer to the question and is provided feedback against which he or she may compare his or her answer. In this way, the student works his or her way through the story.

The story-line in Module 4 is linear in nature. In other words, the story unfolds in the same way irrespective of the answers that a particular student may enter. Providing feedback on the question, against which the students may compare their answers, enables all students to obtain the same directed learning experience without requiring a more complex multi-branched story that depends upon individual student responses.
D. Module 5: The Role-Play

The final module includes the face-to-face role-play that students undertake during one of their regular tutorial classes (or, in the case of external students, during their compulsory attendance school). The role-plays in previous years involved providing students with single-page, double-sided briefing sheets that described the problem to be negotiated and the perspectives of the two sides to the negotiation. The students were therefore unaware of the content of the negotiation until they attended class and then had only five or so minutes to absorb the facts of the scenario. This in turn meant that there was a limit to the kind of facts that could be portrayed and the detail that could be provided. Better students sometimes found this frustrating because their negotiation may have moved in a direction requiring further detail, about which they could only guess.

However, this was a necessary step to preserve the integrity of the exercise. Had briefing sheets been distributed prior to the role-play, a number of difficulties could have arisen. There would have been no way of knowing whether students had collaborated outside of class by joining forces with other students who had been issued with the briefing sheet for the same party. Further, if a student was ill, or for some other reason did not appear at the role-play, there could be the problem of having an uneven number of students acting for one side of the role-play. In such a case, it would be unfair to reassign a student from representing one side of the negotiation to the other side in order to even up numbers since not only would the reassigned student have less time to master the perspective of the side that he or she was now representing, but he or she would know all of the information provided to the party he or she was now opposing.

By contrast, the Air Gondwana role-play involves briefing sheets and a ‘corporate video’ — once again machinima created using Second Life — distributed in advance via the online program to provide general background detail for the fact scenario that is the subject of the negotiation. The Air Gondwana role-play concerns an island which the airline wishes to turn into a tropical holiday resort but which an environmental group wishes to keep as an undisturbed nature sanctuary. If the briefing material were restricted to single-page double briefing sheets distributed at the beginning of the role-play, there might be only sufficient space to describe this broad scenario, explain briefly the airline's plans for the island and describe which side of the role-play the student was to represent. By utilising general background briefing sheets and the corporate video, Air Gondwana provides detail on the island, such as the fauna that inhabits it and the family trust that owns it. The video portrays the island in its present state and enlarges upon the type of developments that the airline plans. The single-page, double-sided briefing sheet provided at the beginning of the role-play is now utilised more effectively to provide greater focus on specific issues to be addressed in the negotiation, and to provide more specific information concerning the motivations and perspectives of the particular party being represented by the student.
Figure 5: Examples of the advance briefing material providing background information concerning the subject of the negotiation

Figure 6: Excerpts from ‘corporate video’ providing further background information

This has enabled a more detailed and better rounded problem to be set. It has addressed the previous problem posed by the limited amount of space available in the single-page, double-sided briefing sheets handed out at the beginning of the role-play and the limited time available for students to digest the information in those sheets. Better students have more background detail to work with, and a richer learning exercise which reflects real-life experience may therefore be enjoyed. 19

In previous years, a debriefing was conducted by tutors reading out the types of issues that ought to have been addressed by students in their negotiations. Individual comments were also made on the negotiated agreements, which were marked and then returned to students. The debriefing in Air Gondwana is done by machinima, featuring the son who is in charge of the airline speaking to the students from various locations on the island. This video has been burned to CD and is distributed to all tutors to be displayed at the beginning of the class in the week following the role-play. In addition, individual feedback is still provided on the marked negotiated agreements.

19 See also Tyler and Cukier, above n 8, 73.
E. The Unofficial Module 6: The Skill in Context

The online *Air Gondwana* program has five modules which culminate in the role-play undertaken in class. The opportunity is taken in a subsequent tutorial class to make a link between the skill of negotiation and the law governing negotiation. This includes, for example, the legal position in relation to facts known by one party but not disclosed during the course of negotiation. In addition to re-examining the possible effect on the contract, it also provides an avenue for discussion of the ethical issues raised and encourages reflective practice for deep learning.20

III. DISCUSSION

Reference has already been made, in the course of the description of the project, to the various deficiencies in a traditional form of negotiation training and the aspects of the *Air Gondwana* program which address those deficiencies. It has also been explained how *Air Gondwana* addresses the elements identified in literature as constituting effective negotiation training. Other considerations informed and supported the design of the *Air Gondwana* program.

It has been noted that part of the challenge facing negotiation training in the Contracts A and Contracts B units is the large number of students studying in different modes, and the large number of teaching staff with different degrees of familiarity and/or comfort with teaching negotiation. This makes it impracticable to, for example, expose all students to a live demonstration of a negotiation. It is also difficult to maintain a consistency in the quality of feedback on students’ attempts.

It has been recognised that technology may be an effective means by which instruction may be given in negotiation skills and a positive model of negotiation practices may be demonstrated.21 *Air Gondwana* utilises technology to address many of the challenges posed in these two units. By embedding the program in QUT’s *Blackboard* learning management system, the program provides the same learning experience regardless of the number of students and irrespective of whether these students are studying full-time, part-time or from a distance. The student is able to undertake the training at his or her own pace, at his or her own convenience and in a non-threatening environment. This is an important feature, especially for so-called ‘millennial students’, whose lives have been said to be characterised by ubiquitous information, merged technologies, blurred social-study-work boundaries, multitasking and hyperlinked online interactions.22

*Air Gondwana* reflects elements of the learning model that Collins and his colleagues called ‘cognitive apprenticeships’. These elements include modelling, coaching, scaffolding, reflection and exploration.23

Module 1 of the program provides not only instruction in negotiation skills and a demonstration of a positive model of negotiation practice, but also includes a depiction of a negotiation done poorly so that students may see what not to do. This includes a segment on the importance of non-verbal communication in negotiation, with that aspect, as displayed in the poor negotiation, being replayed and analysed. The instructional video also includes short vignettes that illustrate the principles being taught in practice. For example, the principle of negotiation that, in preparation, a party should identify underlying interests is illustrated by a short vignette featuring two Air Gondwana

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21 Tyler and Cukier, above n 8, 83-84.
executives brainstorming about the interests of both the airline and the party with whom they are to negotiate. Such observational learning has been recognised as one of the most effective ways of teaching negotiation skills. 24 This has been attributed to the fact that ‘observers are able to absorb beneath a conscious level and then apply by analogy to new situations’. 25

Modules 2-5 take a constructivist approach to learning, the major aim being to engage the learner in carrying out tasks which lead to better comprehension. 26 These modules provide the opportunity for students to learn, by practising, to apply the principles of negotiation to which they are introduced in Module 1. In the case of Modules 2-4, the technology is utilised to provide formative feedback to enhance that learning. This feedback is detailed and consistent for all students. The role-play in Module 5 then enables summative feedback to be provided for individual students.

There is also a linkage with Diana Laurillard’s model for the successful learning of law. This model suggests five phases:

1. become familiar with the key ideas and information in each area of law and know how these ideas and information are organised or structured;
2. accurately relate the language of the law to its underlying meaning;
3. act on simulated but realistic situations on the basis of what they know about the law, theories of law and the practice of law;
4. use feedback to modify their understanding and adjust their actions; and
5. reflect on actions and feedback in relation to the structured ideas in a given area of law. 27

There would appear to be no reason why this model should not, with appropriate adaptation, be capable of applying to the learning of skills. Air Gondwana represents an application of these five phases: it provides instruction so that students may become familiar with the key ideas of negotiation theory, examines the meaning of the language of this theory and illustrates that meaning by the short vignettes. It allows students to act on simulated but realistic situations, provides feedback to modify their understanding and adjust their approach, and gives them the opportunity to reflect and synthesise this understanding and feedback before being required to undertake the face-to-face role-play. They are further provided with individual feedback on the negotiated agreements that they produce, as well as general feedback by way of the debriefing machinima. Finally, the class in which the skill is linked with legal and ethical issues provides an additional opportunity for students to reflect on the ideas they have learnt in a broader context.

Air Gondwana motivates and engages students by using a realistic story-line of the fictitious airline to provide a meaningful context to the learning tasks they are undertaking. It has been recognised that ‘narrative-centered (sic) learning environments [can] provide engaging worlds in which students are actively involved in ‘story-centric’ problem-solving activities.’ 28 An important means of portraying this realistic story-line is the use of the Flight Simulator X images throughout the program and stills and machinima produced using the Second Life virtual environment to depict authentic scenarios. As Agostinho remarked:

The use of characters to present tasks and critical information in a simulated environment has proven to be a useful strategy in the creation of more authentic learning environments online. Such characters can not only perform the role of setting and structuring tasks within the fictitious scenarios, but also that of providing useful and realistic guidance. ...
the subject can be dealt with in a more authentic manner than if presented in a more decontextualised way.29

An authentic learning experience is facilitated by realistic depictions achieving what the poet Samuel Taylor Coleridge first called a ‘willing suspension of disbelief’. In so doing, it has a high probability for enhancing learning and promoting knowledge construction.30

The characters that appear in both the instructional video in Module 1 and the refresher quiz in Module 4 do more than serve as a sense of continuity and connection. In the instructional video, the character of Karl the junior executive is depicted as a neophyte negotiator. It is a Karl who is shown conducting a poor negotiation but who is then mentored in the short vignettes by the more experienced executive, Ally. Karl then uses the knowledge he has gained to conduct a good negotiation. In this way, the students, who are also neophyte negotiators, learn in parallel with Karl. They too benefit from the instruction provided and by observing the mistakes that Karl makes. They learn by observing Karl’s more positive model of behaviour in the preparation and bargaining stages of the good negotiation.

In Module 4, the playboy son of the airline’s owner, who has been entrusted with the running of the airline, makes his first appearance on screen. His character was carefully designed so that he would represent a person with power but who attained that level without any business training, in particular training in negotiation. It is this character, as the new negotiation neophyte, that is used as an avenue for posing questions about negotiation theory and practice. These questions are directed at Karl, or Karl and Ally jointly, but which are to be answered by the student, effectively on behalf of Karl or Karl and Ally. This is a variation, therefore, of the student becoming teacher, with the active learning benefits associated with adopting that role.31

The design of the program has also been influenced by not only these pedagogical considerations but also matters of a more practical nature. It is true that an authentic learning environment may be created by providing detailed background information. However, as in the design of all such computer programs of this type there is a fine balance to be struck between providing sufficient detail to convey realism and overloading students with so much detail that they find difficulty coping with the workload and keeping the necessary facts in good order in their minds. Excessive workload along with difficulty of use or navigation, as much as gaps in the information provided, can easily distract students from focusing on the main task at hand.32

Another major consideration in the design of such a program concerns its cost. It has already been noted that grant monies were required to produce the 20-minute instructional video and for a learning designer to assist in the creation of the Authorware components of Modules 2-4. However, a number of strategies were used to minimise the financial cost. The author was the writer, director and producer of the instructional video, thereby relieving the project of the cost of professionals in those roles. Suitably extrovert staff were utilised as actors, constituting a further saving. Whenever possible, freely available software was used by the author. Further, by embedding the program in QUT’s Blackboard learning management system, it gained the benefit of that program’s features such as hyperlinking, statistics tracking and reporting. Such features would otherwise have required the expense of specialist programming. However, these strategies themselves carry their own cost in terms of time. Assuming so many tasks associated with the project meant a commitment by the author in terms of time over 18 months that far exceeded a normal academic workload. Such a project can only be completed, therefore, if it

32 See, eg, Tisha Bender, Discussion-Based Online Teaching To Enhance Student Learning: Theory, Practice and Assessment (2003) 31
progresses beyond work to become a hobby and then a labour of love. However, the product of the labour has been a resource which creates an authentic learning environment for not only the originally intended audience (first-year law students) but also neophyte negotiators in other disciplines. It has also led to the author acquiring a range of self-taught skills which may be used to create other engaging and authentic learning experiences. These skills can also be transferred to others for the overall benefit of the author’s organisation and that of others.

IV. EVALUATION OF THE PROGRAM

Different forms of monitoring and evaluation were employed in the course of the project. Focus groups comprising staff in the Contracts units and groups of students, were conducted at two stages: after the writing stage and after the production stage. Where necessary, adjustments were made to the project in light of this feedback. Ongoing contact was kept with a project reference group, the members of whom were expert in negotiation training.

After the program had been used by students, a formal survey was conducted with an 87.6% response rate. The formal survey, which was paper-based and undertaken in tutorial classes, consisted of both quantitative and qualitative aspects. In addition, unsolicited emails were received which evidence student response to the program.

Two questions in the formal survey were specifically directed at measuring whether the project had successfully achieved its primary objectives of developing a solid foundation for development of students’ negotiation skills (i.e. helping them to gain an understanding of basic negotiation theory and practice) and providing a better learning experience than the traditional format of instruction in a lecture and role-play previously utilised. The first question was:

\textit{Air Gondwana} enabled me to gain an understanding of basic negotiation theory and practice.

A total of 94.8% of respondents indicated ‘agree’ or ‘strongly agree’ to this proposition. Indeed, only three students disagreed. Full results were as follows:

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<tr>
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<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Neutral</th>
<th>Agree</th>
<th>Strongly agree</th>
</tr>
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<tbody>
<tr>
<td>Total (367)</td>
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<td>16</td>
<td>204</td>
<td>144</td>
</tr>
<tr>
<td></td>
<td>0.0%</td>
<td>0.8%</td>
<td>4%</td>
<td>55.6%</td>
<td>39.2%</td>
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As one student commented, ‘It makes you realise there is a real skill to negotiation and that it’s a learnable skill’. Another commented that it ‘[m]ade the fundamental principles of negotiation extremely easy to understand.’

As noted, a challenge for the program was that it needed to cater for a large number of students variously studying full-time, part-time or externally. An aim of the program, therefore, was to deliver the same learning experience irrespective of the study mode of the student. It is worth noting, in relation to the above table, that 95% of full-time students agreed or strongly agreed, 90.5% of part-time students agreed or strongly agreed and 95.8% of external students agreed or strongly agreed with the question. This similarity in response across the different cohorts of students was also reflected in the other questions in the survey, discussed below. An external student stated in an unsolicited email, ‘I have found \textit{Air Gondwana} to be fun and instructive … Thanks for putting in such a lot of work to make learning interesting (and for finding ways of achieving equity in learning experiences for external students).’

The objective of providing a better learning environment is difficult to measure since to be properly valid, it would require the same cohort to experience both the traditional form of instruction and the new approach produced by the project. Practically speaking, only
students who had completed Contracts A previously and were undertaking Contracts B this year, or who had failed one or both of the units and were repeating, would fall within this cohort. Although the questionnaire did not specifically seek to separate the responses of students who met this description, it was evident from qualitative comments that there were a small number of students who qualified. However, the vast majority would not have fallen within this cohort. Nevertheless, all students are familiar with the concept of both lecture and role-play and for that reason the following question was designed as the next best measure in the circumstances:

I think I gained a better understanding of basic negotiation theory and practice from Air Gondwana than I would have from a single 1 hour lecture and two unrelated role plays [which was the previous approach to teaching basic negotiation in Contracts A and Contracts B].

A total of 92.7% of students agreed or strongly agreed with the proposition, 57.8% strongly agreeing. A bare eight students indicated a preference for a traditional form of instruction, perhaps reflecting their perceived best learning style. Full results are as follows:

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<th></th>
<th>Strongly Disagree</th>
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<th>Agree</th>
<th>Strongly Agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total (367)</td>
<td>5</td>
<td>3</td>
<td>17</td>
<td>128</td>
<td>212</td>
</tr>
<tr>
<td>1.4%</td>
<td>0.8%</td>
<td>4.6%</td>
<td>34.9%</td>
<td>57.8%</td>
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</table>

One student who had experience with the previous approach commented: ‘Was very practical — far more practical than the previous approach which I did in Contracts A over a year ago. Felt more involved in the negotiation because of all of the background information and build up to it.’

Other students also made specific comparisons between the virtues of traditional lectures and learning utilising multimedia. Comments included: ‘I love how it’s interactive. So much better than listening to a lecture and it’s more practical and fun. I learn more when it’s interesting and Air Gondwana made it interesting to study negotiation and Contracts as a whole! Thanks’; and ‘I like the idea and concept. I felt as if I was “learning” but it wasn’t obvious that I was learning. I felt completely involved in the process. Great — user-friendly and hands-on.’

As Jerome Bruner observed, being interested in material and having fun are powerful stimuli for learning. 33 Two other specific questions were also posed to measure the effectiveness of the program in these respects. The first addressed the program’s narrative-centred learning environment:

Air Gondwana provided a realistic setting for me to understand the principles of negotiation.

A total of 85.3% of respondents agreed or strongly agreed with this proposition. Only eight students did not find the program realistic whilst 12.5% did not indicate a leaning either way. The full results are as follows:

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<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Neutral</th>
<th>Agree</th>
<th>Strongly Agree</th>
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<tr>
<td>Total (367)</td>
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<td>6</td>
<td>46</td>
<td>197</td>
<td>116</td>
</tr>
<tr>
<td>0.5%</td>
<td>1.6%</td>
<td>12.5%</td>
<td>53.7%</td>
<td>31.6%</td>
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Among the aspects most commonly identified in qualitative comments as being liked by students was the narrative running through the program, which they thought made the

33 Bruner, above n 31, 14
program engaging and interesting. For example, ‘Having a story to remember (along with characters) made learning more enjoyable and easy to remember. Another student remarked, ‘I enjoyed the build up of a narrative and background story in the Air Gondwana videos and subsequent role-play. As a result of this, the role-play felt more realistic and involving.’

The second question addressed the ‘fun factor’:

I enjoyed using Air Gondwana.

Over three-quarters of the students indicated that they agreed or strongly agreed that they enjoyed the program. Full results are as follows:

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<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Neutral</th>
<th>Agree</th>
<th>Strongly agree</th>
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<tbody>
<tr>
<td>Total (367)</td>
<td>2</td>
<td>10</td>
<td>68</td>
<td>165</td>
<td>122</td>
</tr>
<tr>
<td></td>
<td>0.5%</td>
<td>2.7%</td>
<td>18.5%</td>
<td>45.0%</td>
<td>33.2%</td>
</tr>
</tbody>
</table>

That the program provided a fun way to learn, and the humour used in the program, also figured in the qualitative comments concerning aspects most liked by students. One student commented, ‘Thanks Des for all the effort, far more enjoyable than another lecture … brought a smile to my face every time’, and another, ‘It approaches the topic with a sense of humour. It’s extremely impressive and not at all boring. I think the university should be very proud of the program.’

Of those that responded that they did not enjoy the program or were neutral in their response, the majority seem to have been affected by the fact that the program was designed primarily for the QUT standard Windows PC environment, which posed difficulties in some cases for students having Apple Mac computers. Other students had difficulties with the drivers or firewalls in their own computers. These students were therefore put to the inconvenience of needing to access a different computer in order to access the program, and this detracted from their learning experiences. Mac compatibility was an issue flagged from the outset but, on technical advice, could not be addressed within the budget at this time. Development of the project in the future will address this issue.

A measure of the impact of the project on student learning is how well it has helped students to understand the application of theory to real-world practice situations. The following question was posed:

Air Gondwana helped me to understand the application of the principles of negotiation in practice.

A total of 90.5% of students agreed or strongly agreed with this proposition, with only four students disagreeing or strongly disagreeing.

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<th>Disagree</th>
<th>Neutral</th>
<th>Agree</th>
<th>Strongly agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total (367)</td>
<td>2</td>
<td>2</td>
<td>31</td>
<td>219</td>
<td>113</td>
</tr>
<tr>
<td></td>
<td>0.5%</td>
<td>0.5%</td>
<td>8.4%</td>
<td>59.7%</td>
<td>30.8%</td>
</tr>
</tbody>
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The real-world learning experience was another of the aspects most commonly highlighted in qualitative comments. Student comments included: ‘It gave a real-life situation/scenario which made it very easy to follow and learn’, and ‘It was realistic and practical and enabled me to think outside the problem and apply basic common sense to reach an effective solution.’

When combined with the very positive responses concerning attainment of a basic level of understanding of negotiation theory and practice, there is evidence of the program having a positive impact on student learning which should provide the foundation for
further development in later units studied, in accordance with the law school graduate capabilities program. Students have been strongly encouraged to make appropriate entries concerning their understandings and their reflection in their Student e-Portfolios (an online resource allowing students to self-track their development and record their achievements) to reinforce this outcome. One student commented: ‘One of the finest units I have done where I feel the material has been concreted into my understanding/memory.’

V. CONCLUSION

The business of law schools has changed. No longer is it sufficient to teach simply the content of the law. Well-rounded law graduates also need to be trained in the skills necessary to practise their profession. One of those skills is the skill of negotiation.

Skills training poses its own challenges when considered in the context of units teaching large numbers of students who are studying in a variety of modes. Today, many or most of those students are so-called ‘millennial students’ who, in addition to juggling work, study and social commitments, have grown up in a digital age of merged technologies. Technology offers the means of addressing these challenges, providing flexibility, interactivity and engagement for students. It also can afford the same learning experience irrespective of the mode of study.

Air Gondwana utilises different forms of technology to meet the challenges of teaching the theory and practice of negotiation skills to a large cohort of students studying full-time, part-time and externally. It provides an authentic learning experience through the use of a realistic story-line and practical fact scenarios which actively engage students and which make their learning fun.
COMMENCING LAW STUDENTS’ INTERESTS AND EXPECTATIONS: COMPARING UNDERGRADUATE AND GRADUATE COHORTS

WENDY LARCOMBE, * PIP NICHOLSON**
AND IAN MALKIN***

This paper presents findings from a survey of interests and expectations conducted in 2007 with commencing LLB students, and repeated in 2008 with commencing JD students at the University of Melbourne. The ‘Studying Law’ survey was designed to elicit information regarding:

- Students’ interests in studying law, including their intended use of the degree;
- Students’ expectations of academic study, success and support; and
- Students’ learning strategies and academic readiness for study in law.

Differences in the interests and expectations of the undergraduate and graduate cohorts are discussed. The findings have implications for selection processes, for language and academic skills support programs, and for first-year teaching in law.

I. INTRODUCTION

Recent research in higher education generally, and legal education in particular, has emphasised the importance of the ‘first year experience’ for student retention, engagement, and academic success. The research literature identifies a number of variables that affect students’ first-year experience and academic performance, including: poor course selection; interest and aptitude; realistic expectations of the day-to-day demands of the course; and previous academic performance and academic skill levels. The Studying Law Project, undertaken by the authors at the Melbourne Law School, attempts to contribute to an understanding of the relation between law students’ interests and expectations and their academic achievement. Findings from the project reported elsewhere have confirmed that the interests, expectations and academic ‘readiness’ of undergraduate students commencing the Bachelor of Laws (LLB) had a bearing on academic performance in the
first semester. Specifically, LLB students who achieved very high results in their first semester law subjects expressed at commencement higher levels of interest in activities involved in study in law, higher levels of confidence in their academic readiness, and more realistic expectations about the amount of study that would be required than students who received a ‘bare pass’ for one or both of their first semester law subjects.

With the transition to graduate-only entry to the Melbourne Law School in 2008, the authors were keen to explore how the interests and expectations of graduate-entry students in the Juris Doctor (JD) compared with those of undergraduate LLB students. It was also desirable to collect further information about graduate students’ transition and academic skills needs, and their expectations and preferences regarding instruction, assessment and support. It was in this context that the authors repeated the survey of interests and expectations administered to LLB students in 2007 with the commencing JD cohort in February 2008. This paper presents a comparison of selected LLB and JD students’ responses in relation to three issues: interest in law; expectations of workload and support; and self-rated academic readiness. The paper then discusses the implications of these findings for law school selection processes and also for transition and first-year support programs.

II. THE STUDYING LAW PROJECT

The Studying Law Project aims to investigate:

• commencing law students’ interests, expectations and readiness with respect to their chosen course;
• the relation between reported interests and expectations at commencement and first semester results in law; and
• the differences, if any, in the interests and expectations of an undergraduate and a graduate cohort.

A. Method

The authors designed a 73-item questionnaire which was administered to the commencing LLB cohort in week one of semester one, 2007, and to the commencing JD cohort at the end of their orientation program in February 2008. The questionnaire elicited information regarding:

• students’ interests in studying law, including their intended use of the degree;
• students’ expectations of academic success, study and support; and
• students’ academic readiness for study in law, including use of effective learning strategies.

4 A ‘bare pass’ was deemed to be a mark of 50-55 per cent.
5 First-year student surveys have been used at the Melbourne Law School for a number of years to gain accurate information about our students’ expectations and experiences. The Law School has also sought to conduct exit interviews with all first-year students who discontinued their course, and with final-year graduating LLB students.
6 The authors would like to acknowledge the invaluable assistance of Ms Jill Dixon, the Studying Law Project Manager, who handled all aspects of survey administration and data preparation; also Ms Marnie Collins, Statistical Consultant, Statistical Consulting Centre, University of Melbourne, who prepared all preliminary data analyses and advised on interpretation of results.
7 In both instances, the survey was administered by the Project Manager, Ms Jill Dixon. The nature and purpose of the survey were fully explained, and students were given a plain English statement describing the project and the voluntary and confidential nature of the information they were asked to provide. An incentive prize was offered to encourage participation. Students who chose to participate in the study then completed and returned an informed consent form together with their questionnaire responses. Students supplied their student number on the consent form to enable first semester results and limited demographic data to be extracted from faculty files and matched with survey data. Students were advised that none of the first-year lecturers (including the principal researchers) would have access to unprocessed data or be able to identify individual students. The project was approved by the relevant ethics committee at the University of Melbourne.
A number of questionnaire items were based on questions previously included in the national First Year Experience surveys,8 the Law School’s First Year Experience Questionnaire,9 and the ‘English Language Learning: Students’ Expectations and Perceptions’ survey administered to international ESL (English as a second language) students commencing studies at the University of Melbourne in 2005 and 2006.10 The questionnaire was trialled with a small number of current law students to ensure that it could be completed within 15 minutes and that no item caused confusion or misunderstanding. No changes were needed as a result of the trial.

B. Profile of the Respondent Samples

Of the 431 students enrolled in the LLB in 2007, 415 (96 per cent) returned useable questionnaires and signed consent forms. Of the 74 students who commenced study in the JD in 2008, 72 (97 per cent) returned useable questionnaires and signed consent forms. The high response rate meant that the respondent samples were representative of the commencing cohorts in each program.

Overall, respondents in the LLB were very young (only 10 per cent were aged 20 years or more) and consisted predominantly of school leavers (74 per cent had no prior university experience). Female students (62 per cent) outnumbered male students (38%). The vast majority (91 per cent of respondents) were studying combined degrees, with Commerce/Law and Arts/Law accounting for three quarters of the combined degrees. Respondents in the JD had an average age of 24 years, and female students (65 per cent) again outnumbered male students (33 per cent). The proportion of students holding Commonwealth Supported Places was comparable in each program: 64% of the LLB students and 59% of the JD students were classified as ‘Australian Supported’. Of the full-fee paying students, 13% of the LLB and 10% of the JD students held international student visas.

Selection of school-leavers into the LLB was principally by Equivalent National Tertiary Entrance Rank (ENTER). In addition, 20% of Commonwealth Supported Places were awarded to students who met ‘Access Melbourne’ criteria — a special entry scheme designed to redress social, educational and financial disadvantage.11 Selection of graduate applicants into the JD in 2008 was based on three elements: results on a Law School Admission Test (LSAT), results in all previous tertiary studies, and a personal statement of 850 words.12 Final-year school results were not considered.13 Again, 20% of Commonwealth Supported Places were awarded to applicants through the Graduate Access Melbourne scheme.14 While all JD entrants were required to have completed the equivalent

8 Designed by Krause et al, above n 1.
9 Professor Malcolm Smith coordinated an extensive survey of first-year law students’ experiences in 2001. This survey was adapted and repeated in 2004 to enable the faculty to reflect on the effectiveness of initiatives introduced as a consequence of the 2001 findings.
12 Note that applicants can use the personal statement to explain any apparent variability or inconsistency in their tertiary results. Further information on the application process and selection criteria for the Melbourne JD is available on the University of Melbourne website. See How to Apply, University of Melbourne <http://jd.law.unimelb.edu.au/go/future-students/how-to-apply/> at 3 December 2008.
13 This is designed to provide a ‘second chance’ at entry to law at Melbourne. Very high-achieving school-leavers are currently guaranteed entry to the Melbourne Graduate program of their choice if they achieve a 75% weighted average in their undergraduate degree at the University of Melbourne. See Guaranteed Entry for School-leavers to Graduate Professional Entry Programs, University of Melbourne <http://jd.law.unimelb.edu.au/go/future-students/how-to-apply/> at 3 December 2008.
of a 3-year Bachelor degree as a condition of entry, 44 per cent had completed 2 or more previous qualifications indicating that this cohort overall had extensive prior academic experience.

III. COMPARING UNDERGRADUATE AND GRADUATE STUDENTS’ INTERESTS AND EXPECTATIONS

Responses of the commencing JD students’ interests and expectations (n = 72) were compared with those of the LLB cohort as a whole (n = 415) and also, where appropriate, with those of two performance subgroups within the LLB: students who received a result of 80 per cent or above in one or both of their compulsory first semester law subjects (‘high-achieving’ students, n = 48) and students who received a pass mark of 50-55 per cent in one or both of their compulsory first semester subjects (‘low-achieving’ students, n = 41). Selected comparisons are reported in relation to the three factors that were associated with academic success in the LLB cohort: students’ interests in law; their expectations of workload and support; and their ‘academic readiness’.

A. Students’ Interests in Law

Students’ interests in law were investigated through a range of questions which sought information about respondents’ reasons for commencing study in law, including their career plans, and their levels of interest in common activities involved in studying law. It was anticipated that JD students would have made a more informed choice of course than LLB students on average, and that they would be more likely to plan to work in the legal profession after graduating. Both these expectations were confirmed by the findings.

Students were asked to indicate their reasons for choosing to study law by selecting from eight listed options. They could select as many options as applied. ‘Other’ was also an option and space was provided for students to explain their reasons — see Table 1.

As Table 1 shows, among the LLB cohort, certain reasons for studying law — ‘Interest and aptitude’ and ‘Social justice’ — were associated with high achievement, while others — ‘Parental advice’ — were associated with low achievement. JD students were slightly more likely than LLB students overall to select ‘Interest and aptitude’ and ‘Social justice’ as reasons for choosing to study law. Not surprisingly, the JD students were notably less likely than LLBs to nominate ‘Achieved required marks’ or ‘Parental advice’. Interestingly, JD students were also less likely than LLB students to select ‘Financial’ reasons for studying law. This suggested that the JD students were not as career oriented as we might have expected, although they had more definite career plans than the commencing LLB students. More than one third (38 per cent) of the JD students nominated ‘Don’t Know’ in response to the question ‘How long do you expect to practice law after completion?’, while 56 per cent of the LLB students selected this answer. Further, 50 per cent of the JD students expected to practise law for ‘More than 5 years’ after completion, compared with only 23 per cent of the LLB students.

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15 Results data were retrieved for the two compulsory first-year subjects in which all commencing LLB students were enrolled in 2007: Principles of Public Law (PPL) and Legal Method and Reasoning (LMR). In addition to passing grades, students may have received a fail (N) result, a withdrawn (WD) result, or a withheld (WH) result. Because a range of non-academic reasons can explain N, WD or WH results, for the present purposes, the authors isolated responses of students whose results fell into one of two categories: those who completed first semester assessment but received a bare pass (50-55 per cent); and those who received a first class Honours result (80 per cent or above). At the Melbourne Law School, a result of 80 per cent or above is generally awarded in first year to around 10 per cent of the cohort. The average mark in PPL in 2007 was 68 per cent and the average mark in LMR was 67 per cent. It should be noted that our definitions of ‘high-achieving’ and ‘low-achieving’ are not the same as those used by Krause et al, above n 1.

16 See Larcombe, Nicholson and Malkin, above n 3.

17 The low overall numbers in the LLB performance subgroups mean that differences of five per cent or less between the subgroups’ response levels were not considered meaningful.
Table 1: Reasons for studying law

<table>
<thead>
<tr>
<th>Reasons for studying law</th>
<th>Subgroups of LLB 2007</th>
<th>Year enrolled</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Low achiever (50–55%) n=41</td>
<td>High achiever (80%+) n=48</td>
</tr>
<tr>
<td>Financial</td>
<td>34%</td>
<td>46%</td>
</tr>
<tr>
<td>Professional status</td>
<td>39%</td>
<td>52%</td>
</tr>
<tr>
<td>Social justice</td>
<td>17%</td>
<td>54%</td>
</tr>
<tr>
<td>Parental advice</td>
<td>42%</td>
<td>21%</td>
</tr>
<tr>
<td>Interest and aptitude</td>
<td>44%</td>
<td>88%</td>
</tr>
<tr>
<td>Best option available</td>
<td>20%</td>
<td>23%</td>
</tr>
<tr>
<td>Achieved required marks</td>
<td>42%</td>
<td>33%</td>
</tr>
<tr>
<td>Other</td>
<td>10%</td>
<td>6%</td>
</tr>
</tbody>
</table>

The JD students’ higher levels of interest in the course and in work in the legal profession was confirmed by responses to another set of questions which asked students to rate their level of interest in a range of activities involved in studying law — see Table 2. On a five point scale where one equals ‘Very Low’ and five equals ‘Very High’, so that three represents an ‘Intermediate’ or neutral level of interest, the means of JD students’ responses matched or exceeded those of LLB students on all but one measure. Indeed, the JD means matched or exceeded those of the LLB high achievers on 10 of the 12 measures. Given that the LLB high achievers’ levels of interest were noticeably higher than those of the LLB low achievers, the JD responses are a favourable indicator of first semester academic engagement and achievement.

B. Students’ Expectations of Academic Success, Study and Support

Students entering both the LLB and JD programs at the Melbourne Law School have usually achieved high academic results in their previous studies. Many undergraduate students assume that they will receive similarly high marks in law despite the selective nature of the cohort, the independent learning required in tertiary study, and the demands of studying in a new discipline. We anticipated that graduate-entry (JD) students, who had extensive prior experience of university study, would have more realistic expectations than school leavers of the results they may receive in law and of the demands of the workload. We also anticipated that JD students would better understand that they would be responsible for their learning in a university context, and that they would need to be proactive in seeking support if they needed it. Findings from the survey confirmed these expectations in broad terms, although not to the degree expected.

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18 Differences between LLB/JD means of 0.2 or greater were considered as meaningful. Owing to the lower numbers in the LLB performance subgroups, only differences between subgroups’ means of 0.3 or greater were considered as meaningful.
<table>
<thead>
<tr>
<th>Activity</th>
<th>Low achiever (50-55%) n=41</th>
<th>High achiever (80%+) n=48</th>
<th>LLB 2007 n=415</th>
<th>JD 2008 n=72</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advising clients on their legal rights and responsibilities</td>
<td>3.2</td>
<td>3.8</td>
<td>3.5</td>
<td>3.8</td>
</tr>
<tr>
<td>Thinking critically about the Australian legal system</td>
<td>3.2</td>
<td>3.8</td>
<td>3.5</td>
<td>4.1</td>
</tr>
<tr>
<td>Understanding business regulation and practice</td>
<td>3.6</td>
<td>3.1</td>
<td>3.4</td>
<td>3.3</td>
</tr>
<tr>
<td>Investigating democracy and systems of government</td>
<td>3.6</td>
<td>4.0</td>
<td>3.7</td>
<td>4.1</td>
</tr>
<tr>
<td>Developing proposals to reform laws and improve legal systems</td>
<td>3.2</td>
<td>3.9</td>
<td>3.6</td>
<td>4.1</td>
</tr>
<tr>
<td>Understanding environmental regulation and practice</td>
<td>2.8</td>
<td>3.7</td>
<td>3.3</td>
<td>3.6</td>
</tr>
<tr>
<td>Investigating international law</td>
<td>3.6</td>
<td>4.3</td>
<td>4.1</td>
<td>4.3</td>
</tr>
<tr>
<td>Devising legal arguments and strategies to protect a client’s interests</td>
<td>3.7</td>
<td>4.2</td>
<td>4.0</td>
<td>4.0</td>
</tr>
<tr>
<td>Advancing social justice</td>
<td>3.4</td>
<td>4.0</td>
<td>3.9</td>
<td>4.3</td>
</tr>
<tr>
<td>Investigating other countries’ legal systems</td>
<td>3.8</td>
<td>3.8</td>
<td>3.8</td>
<td>3.8</td>
</tr>
<tr>
<td>Investigating the position of disadvantaged and minority groups</td>
<td>3.4</td>
<td>3.8</td>
<td>3.7</td>
<td>4.0</td>
</tr>
<tr>
<td>Understanding legal processes for resolving disputes</td>
<td>3.6</td>
<td>3.9</td>
<td>3.8</td>
<td>4.0</td>
</tr>
</tbody>
</table>

Table 2: Levels of interest in common activities involved in studying law
As Table 3 shows, JD students were less likely than LLBs to indicate that they would only be happy with marks in the (unlikely) 80 per cent and (extremely unlikely) 90 per cent range. However, proportionally fewer JDs than LLBs would be happy with a mark in the 50 per cent or 60 per cent range — indicating that there will still be a need to explicitly discuss marking scales and average results in law with commencing graduate-entry students so as to ‘soften the ground’ before results are returned.

<table>
<thead>
<tr>
<th>Lowest % mark I’d be happy with for a law assignment</th>
<th>Year enrolled</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>LLB 2007 n=415</td>
<td>JD 2008 n=72</td>
</tr>
<tr>
<td></td>
<td>Count</td>
<td>Percent</td>
</tr>
<tr>
<td>50-59%</td>
<td>25</td>
<td>6%</td>
</tr>
<tr>
<td>60-69%</td>
<td>96</td>
<td>23%</td>
</tr>
<tr>
<td>70-79%</td>
<td>188</td>
<td>45%</td>
</tr>
<tr>
<td>80-89%</td>
<td>93</td>
<td>23%</td>
</tr>
<tr>
<td>90-100%</td>
<td>12</td>
<td>3%</td>
</tr>
<tr>
<td>Total</td>
<td>414</td>
<td>100%</td>
</tr>
<tr>
<td>Missing</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>415</td>
<td>414</td>
</tr>
</tbody>
</table>

Table 3: Expectations of marks in law

LLB students’ expectations of academic results were even more unrealistic when viewed in light of the amount of study they expected to undertake outside of class time. Students were asked how many hours of study per week (total for all 4 subjects) that they expected to undertake during semester. Faculty staff would hope that students were studying on average six hours per subject per week outside of class time (including preparation of assessment tasks) — around 24 hours per week. However, as Table 4 shows, 69 per cent of the LLBs and 50 per cent of the JDs indicated that they expected to study for fewer than 16 hours per week in total.

Whether the JD students will be able to complete the amount of study they expect the course to require may be the more important issue for that cohort. As Table 4 shows, JD students on average had substantially higher commitments to paid work and family care than their younger counterparts in the LLB. More than one third (39 per cent) of the JD students expected to work in paid employment for 11 or more hours per week during semester, even though they could expect that the course would demand on average 40 hours per week of their time. In addition, one in ten (10 per cent) of JD students would be caring for family members for more than 16 hours per week during semester (compared with only 1 per cent of LLB students).
Table 4: Time commitments to study, paid work and family care

In contrast to the JD expectations of workload and results, findings related to independent learning and responsibility for achievement indicated that prior experience of university study made little difference to the students’ perceptions. While almost all students in both cohorts agreed that they were responsible for their own learning and academic performance (97 per cent LLB and 97 per cent JD), most also agreed that, having offered them a place, the university should ensure that they received all necessary support to pass their subjects (78 per cent LLB and 82 per cent JD). Most students in both cohorts expected their subject teachers to help them if they had difficulty with any aspect of their course (90 per cent LLB and 91 per cent JD). Surprisingly, JD students were even more likely than LLB students to agree that they expected their subject teachers to contact them if it appeared that they may be having academic difficulties (76 per cent LLB and 89 per cent JD). The latter finding may be related to the high level of staff-student contact during the 2008 JD orientation and the small class sizes in that program.19

C. Students’ Self-rated ‘Readiness’ for Study in Law

We expected that graduate-entry students would rate their ‘readiness’ to undertake a range of academic tasks in law at higher levels than the LLB students. This proved to be the case, with JD students reporting equal or higher levels of confidence on all eight of the listed tasks — see Table 5. Graduate students on average were noticeably more confident (difference in means of 0.3 or greater) in their abilities to critically evaluate information and opinions, to write academic legal essays of up to 5,000 words, and to actively participate in class discussions and group work. The JD students’ higher levels of confidence in their ‘academic readiness’ are no doubt a result of their more extensive

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19 JD students were in classes of 18 for their pre-semester intensive subject, whereas LLB first semester subjects are taught in classes of 45. Also, it is less likely that LLB students would have met their subject teachers during orientation in 2007; teacher-student social interaction was a feature of the JD orientation in 2008.
academic experience. For example, 72 per cent of JD students had previously written essays of 3,000 words or more, compared with only 28 per cent of the LLB students.

<table>
<thead>
<tr>
<th>Rate your readiness to undertake the following academic tasks to a high standard</th>
<th>Subgroups of LLB</th>
<th>Year enrolled</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Low achiever (50-55%) n=41</td>
<td>High achiever (80%+) n=48</td>
</tr>
<tr>
<td>Critically evaluate information and opinions</td>
<td>3.5</td>
<td>4.0</td>
</tr>
<tr>
<td>Read and make notes from a range of primary and secondary legal sources</td>
<td>3.4</td>
<td>4.0</td>
</tr>
<tr>
<td>Establish effective study routines and learning strategies</td>
<td>3.3</td>
<td>3.9</td>
</tr>
<tr>
<td>Listen attentively and engage with information delivered orally in lectures or seminars</td>
<td>3.7</td>
<td>4.2</td>
</tr>
<tr>
<td>Research legal issues using a range of specialised primary and secondary legal sources</td>
<td>3.5</td>
<td>3.6</td>
</tr>
<tr>
<td>Write academic legal essays of up to 5000 words</td>
<td>3.2</td>
<td>3.5</td>
</tr>
<tr>
<td>Manage demanding and competing workloads and deadlines</td>
<td>3.5</td>
<td>3.7</td>
</tr>
<tr>
<td>Actively participate in class discussions and group work</td>
<td>3.4</td>
<td>3.9</td>
</tr>
</tbody>
</table>

Table 5: Self-rated academic readiness

While higher levels of confidence in ‘academic readiness’ were associated with high academic achievement in the first semester of the LLB, as shown in Table 5, it does not necessarily follow that the JD students’ higher levels of academic readiness (compared with the LLB students’ levels) will correlate with higher academic achievement. However, the greater academic confidence and experience of the graduate-entry students do have implications for both first-year teaching and academic support programs, as discussed in the next section.

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This may be so for a number of reasons: for example, academic teaching staff may expect graduate-entry students to demonstrate higher levels of academic readiness and skill and marking practices may be adjusted in accordance with those expectations, especially in first semester; JD students’ high levels of confidence at commencement may mean that they find the process of adjusting to becoming a ‘novice law student’ more challenging than expected; confidence in academic readiness may not translate into high standards of work in students who are juggling multiple commitments and time pressures.
IV. IMPLICATIONS AND DISCUSSION

The present study confirmed that graduate-entry (JD) students’ interests and expectations regarding study in law differed on average from those of undergraduate (LLB) commencing students. These differences were ‘favourable’ in that they indicated a closer match between the interests and expectations of the JD students and the ‘realities’ of the degree. Indeed, on a number of measures, the JD students’ expectations and interests closely matched those of the LLB students who went on to achieve high results in their first semester studies in law.

Most notably, the JD students expressed higher levels of interest than LLB students in undertaking a law degree and in the kinds of general topics covered in day-to-day study in law. They also expressed more realistic expectations of academic results and workload, however the JD students’ comparatively high levels of commitment to paid work and family care is an issue of potential concern. While the JD students appeared to have a better understanding of the amount of independent study involved in a law degree, they may be unrealistic about their ability to manage the demands of the degree while juggling their other commitments. This issue can be taken up in transition and academic skills programs. For example, transition programs can explicitly discuss with students how to best manage the workload that the course requires, and opportunities for part-time work within the faculty can be targeted to the new cohort. Some flexibility may also be needed in relation to the forms of assessment tasks used and their submission dates — for example, take-home exams scheduled over a weekend may unduly disadvantage those in the graduate cohort with family responsibilities. Academic skills support programs in the LLB have traditionally focused on English language development and ‘Writing Essentials for Law’ but JD students in their first semester are more likely to benefit from workshops and resources on time management and efficient study strategies.

The JD students’ relatively high levels of confidence in their academic skills may explain, and to an extent even justify, their ambitious workloads and multiple commitments. JD students expressed particularly high levels of confidence (means of 4.0 and above) in their ability to critically evaluate information, to listen attentively and engage with information delivered orally, and to participate in class discussions and group work. Given that first-year subjects in the Melbourne Law School are taught in seminar-style, many JD students may well find that they are better prepared for, and able to adjust more quickly to, the academic demands and the teaching-learning style of the law degree than significant numbers of LLB students. However, there will still be a need for explicit discussion with students of teachers’ expectations and perceptions of responsibility for learning and achievement, given that most JD students still believed that the university and their subject teachers should ensure they received all support needed to pass their subjects. Continued need for discussion of marking scales and interpretation of law results is also indicated.

The survey findings confirm that first-year teachers in the JD will need to take account of graduate-entry students’ higher levels of academic experience and ensure that the curriculum and learning activities are designed to provide sufficient challenge while supporting students’ transition into the new discipline and learning environment. While we found that graduate-entry students were more likely to express high levels of interest in

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22 A well-attended workshop on this topic was organised for the 2008 JD cohort in the third week of semester one.
23 The more extensive skills and experience of the JD cohort had been anticipated and a range of changes were made to the first semester program as a result, including: introduction of a two-week intensive foundational subject — Legal Method and Reasoning — undertaken prior to the start of first semester; greater use of ‘authentic’ assessment tasks in the first semester (such as preparation of a memorandum of advice, presentation of oral argument, and conducting a negotiation); and assignment of students to small syndicate groups who were given responsibility to facilitate class discussions, host guest lectures, prepare reading notes and so on.
common aspects of study in law, it is likely that their levels of frustration will be proportionally higher if first-year teaching and learning is not well matched to their interests and their skill levels. Academic support programs will also need to be tailored to the needs and experiences of this cohort. For example, the writing development needs of the JDs are more likely to be related to the new disciplinary environment and its discourse conventions rather than basic writing expression issues. The findings also indicate that highly individualised support for academic skill development, provided on an as-needs basis, will be more appropriate than programs delivered across the cohort.24

The higher levels of interest and academic skill of the commencing JD students, coupled with their more realistic expectations of success and workload, indicate that the selection process for the JD is better able than the LLB selection process to recruit a cohort of students who are well matched to the demands of the degree at the Melbourne Law School. As outlined above, selection into the JD is based on three elements: academic performance in tertiary studies; results on a law aptitude test; and a personal statement of interest. University of Melbourne ‘Graduate Access’ criteria are also considered. Selection into the LLB is based solely on previous academic performance (usually Year 12 results) and ‘Access’ criteria. As the findings reported above indicate, high academic achievement at school level does not guarantee strong performance in a law course. LLB students’ first semester results were associated with their commencing levels of interest in law, realistic expectations of workload and support, and self-ratings of academic ‘readiness’. The academic performance of the JD students will no doubt vary,25 however, their survey responses indicate that their achievement is less likely to be affected by lack of interest, unrealistic expectations of workload or inadequate academic preparation. In this respect, a personal statement of interest and a law-specific academic aptitude test appear to be valuable elements of a law selection process.

V. CONCLUSION

The Studying Law Project has identified a number of differences between undergraduate and graduate commencing students’ interests, expectations and ‘readiness’. While the details of the findings may be specific to the Melbourne Law School context, and in particular the selection processes for the different programs, some general conclusions can be drawn. The fact that JD students’ responses on the Studying Law survey tracked most closely to the responses of high-achieving LLB students indicates that law school selection processes may be improved by attending to students’ interests and aptitude for study in law, not only previous high academic performance. Personal statements or interviews, combined with a law aptitude test, appear to have a role in this regard. The findings reported here also indicate that students commencing law with prior successful experience of university study are likely to need or benefit from different forms of academic support and first-year teaching than those suited to undergraduate commencing students. Student surveys are a useful aid in identifying the different interests and support needs of the cohorts. Academic support services and first-year curricula can then be targeted to the particular needs and skills of graduate-entry students.

Previous research has established that academic achievement and student satisfaction are fostered by an accurate understanding of the nature and demands of the selected course of study.26 Periodic surveys of student expectations, and of different cohorts of commencing students, enable the discussion of university learning and teaching practices, commonly undertaken as part of orientation, to be targeted to particular areas of misunderstanding. In the local environment of the Melbourne Law School and the move to

24 In 2008, skills development was arranged by the Language and Academic Skills Adviser in Law to assist individual JD students with English language pronunciation, research strategies and methods, reading strategies and written expression.
25 First semester results for the JD students have now been collected and statistical analysis is being undertaken at the time of writing.
26 Krause et al, above n 1.
graduate-entry, accurate and timely information about the different interests and expectations of the JD students, compared with LLB students, has been a valuable aid to teachers needing to adjust and respond to the new cohort. In any law school, however, current information about students’ interests, expectations and academic readiness is likely to be a valuable aid to improving the first-year experience.
E-LEARNING — ARE ‘OLD’ COMMUNICATION AND LISTENING SKILLS BEING DEVALUED IN PURSUIT OF E-LEARNING?

Elfriede Sangkuhl

Abstract

E-learning is being introduced in many courses in order to provide students with learning flexibility. Comprehension skills are being tested electronically and discussions take place in the virtual environment.

E-learning can address some of the hurdles of student attendance in a traditional classroom. These include the challenge of the ‘real time’ class requiring physical attendance in order to participate, the challenge of listening to a teacher for an extended time, the challenge of patience as class members ask questions, and the challenge of asking your own questions. All university teachers and students need to become good listeners and confident speakers. Most students will require the discipline to attend a workplace and function in a team. These important disciplines are not addressed by e-learning.

The classroom has advantages that cannot be duplicated in the e-learning environment. The classroom provides the physical social interaction necessary for students to practise and develop their communication skills. It teaches a student to listen in a disciplined way, allows a student to ask questions, hear and evaluate responses and to think and reason and speak ‘on their feet’. ‘Although computers can be used to assist in the teaching of basic cognitive skills, it appears that they cannot engage students in the evaluation or synthesis of material, nor in activities in the affective domain.’ Classroom teaching provides a learning environment that cannot be wholly replaced by e-learning. The social interaction and disciplines essential to an effective classroom provide students with the communication and teamwork skills required by employers. The classroom also provides the social environment essential to developing neural plasticity; that is, modification of neural connections in the brain’s chemistry and, hence, the ability to learn.

I. INTRODUCTION

This paper will consider which ‘old’ communication and listening skills are being devalued in pursuit of e-learning. The paper will then address the issue of why it matters if these communication and listening skills are devalued in university education.

There are many reasons why Australian universities are adopting e-learning. ‘Some universities are wishing to meet student expectations for more flexible delivery and to generate efficiencies’ in delivery and ‘in assessment that can ease academic staff workloads.’

Biggs recognises that e-learning involves the use of technology in learning from simply ‘putting lecture notes on the web’ to using educational technology to manage learning.

* Dr Elfriede Sangkuhl is a lecturer in Revenue Law at the University of Western Sydney. Dr Sangkuhl would like to thank her colleague Dr Graham Hendry for his constructive comments on this paper.
1 Marlene Le Brun and Richard Johnstone, The Quiet Revolution: Improving Student Learning in Law, (1994) 103. The authors write about law teachers and students. However, all university teachers and students, whatever their discipline, need to become good listeners and speakers.
2 Ibid 245.
4 Ibid.
5 John Biggs, Teaching for Quality Learning at University (2nd ed, 2003), 214.
engage learners in appropriate learning activities and assess learning, through to distance and total off-campus teaching.\textsuperscript{6}

There is no single definition of e-learning. E-learning appears to encompass any use of any information and communication technology in learning and teaching ‘to either fundamentally change the way education is delivered to students, or using it to augment the traditional way that higher education has been conducted by replicating the classroom in an electronic environment.’\textsuperscript{7} E-learning can also involve the use of technology to research, retrieve lecture notes, conduct lectures and tutorials in the virtual environment, assess students in the virtual environment, conduct electronic discussions, or any combination of the above, with or without any real-time classroom interaction. For the sake of this paper, e-learning is all of the above.

This paper examines the work of Richard Ladyshewsky which demonstrated that e-learning, if well resourced and structured with sound pedagogy, can achieve grades equal to or even better than face-to-face classroom environments employing similar pedagogical principles. E-learning is essential in providing access to tertiary education for students who, because of geographic isolation, pressures of work, family or a mobility disability, may need good e-learning to be able to gain a tertiary qualification.

The classroom poses many challenges that e-learning can address. Some of these include the challenge of the ‘real-time’ class requiring physical attendance in order to participate, the challenge of listening to a teacher for an extended time, the challenge of patience as class members ask questions, and the challenge of asking your own questions. However, ‘[b]oth teachers of law and graduates in law need to become good listeners as well as accomplished speakers.’\textsuperscript{8}

The research comparing the effectiveness of e-learning with traditional classroom learning, conducted by Ladyshewsky and considered in this paper, was performed in a business school. The study was limited to comparing the grades received by students undertaking the course using the two modes of delivery. The study did not consider the listening and speaking skills of the students, considered important to law students.

The classroom has advantages that cannot be duplicated in the e-learning environment. It teaches students to listen in a disciplined way, it allows students to ask questions, hear and evaluate responses and to think, reason and speak ‘on their feet’. Howard Barrows,\textsuperscript{9} the inventor of problem-based learning, is sceptical about the ability of e-learning to effectively replicate the effective face-to-face problem-based learning process. David Kember and Carmel McNaught\textsuperscript{10} highlight the use of discussion as one of the key principles of good teaching in higher education. As e-learning is incorporated into our university courses, are university educators sacrificing or devaluing the valuable skills of listening, questioning and verbal communication?

‘Although computers can be used to assist in the teaching of the basic cognitive skills, it appears that they cannot engage students in the evaluation or synthesis of material, nor in activities in the affective domain.’\textsuperscript{11} This paper examines the work of Louis Cozolino and Susan Sprokay\textsuperscript{12} on the importance of improving student neural plasticity and how this is best achieved in ‘the context of social interaction’.\textsuperscript{13} ‘The ability to learn is dependent on modification of the brain’s chemistry and architecture, in a process called “neural

\textsuperscript{6} Ibid 214 and 215.

\textsuperscript{7} David Amand, ‘Re-organizing Universities for the Information Age’ (2007) 8(3) International Review of Research in Open and Distance Learning 1, 8.

\textsuperscript{8} Le Brun and Johnstone, above n 1, 103.

\textsuperscript{9} Howard Barrows, ‘Is It Truly Possible To Have Such a Thing as dPBL?’ (2002) 23(1) Distance Education. Here, dPBL stands for distributed problem-based learning.

\textsuperscript{10} David Kember and Carmel McNaught, Enhancing University Teaching: Lessons from Research Into Award-Winning Teachers (2007).

\textsuperscript{11} Le Brun and Johnstone, above n 1, 245.

\textsuperscript{12} Louis Cozolino and Susan Sprokay, ‘Neuroscience and Adult Learning’ (2006) Summer 110 New Directions for Adult and Continuing Education.

\textsuperscript{13} Ibid 11.
plasticity’. 14 Cozolino and Sprokay demonstrate that improving neural plasticity improves the ability to learn in both young and adult learners. David Annand stated that, in university education, there was a ‘silent struggle underway within the academy to determine the appropriate means to employ technology’. 15 This paper resists the seemingly ‘irresistible technological, economic and social imperatives (that) seem about to impose significant change on the conduct of higher education worldwide’ 16 and refocuses the debate on desirable student outcomes.

II. COMPARING E-LEARNING WITH FACE-TO-FACE LEARNING

The results of a quantitative study performed at the Curtin University of Technology Graduate School of Business, which compared students’ final grades as between units offered in e-learning and the face-to-face environment, are examined. The study was conducted over two years, over nine units, and examined the performance of 1,401 students.

This study recognised that the ‘paucity of controlled research which examines the differences in electronic learning and face to face learning’ 17 is due to the difficulty in controlling the ‘different variables influencing the educational outcome.’ 18 The variables include the ‘course design, the technological applications, pedagogical approaches, student and instructor characteristics, and methods of assessment’. 19

The literature review conducted by Ladyshewsky found that ‘much of the criticism of EL [e-learning] stems from the inappropriate use of this technology to support learning. Educational programs that have merely posted material on the web and called it EL have been the centre of this criticism.’ 20 Ladyshewsky concluded that ‘a high quality EL experience requires a pedagogical approach that creates a responsive and creative learning environment.’ 21 The results of the study demonstrated that the same high quality pedagogical approach required for good face-to-face learning is required for e-learning. Ladyshewsky summarised the results of a study of 436 randomly chosen websites conducted in 2000 which ‘found that most sites promoted individual rather than collaborative learning; direct instruction rather than inquiry; clicking rather than communicating; automatic feedback rather than guidance; and memorization rather than knowledge construction’; 22 that is, most sites demonstrated poor pedagogical practices. Poor pedagogy is not limited to e-learning and would be practised in many university lecture halls and tutorial rooms around Australia.

Ladyshewsky’s study attempted to compare the same pedagogy in the e-learning environment with the classroom environment. This was done by selecting nine units and offering them as a ‘fully online unit involving no face to face interaction’ 23 as well as in classroom mode. The same unit coordinators responsible for the face-to-face-classes were also responsible for moderating the virtual classroom. The coordinators were supported by ‘two full time EL staff and a part time educational specialist’. 24 The study attempted to create the same pedagogical environment whether the delivery was via the virtual classroom or the real classroom.

14 Ibid.
15 Annand, above n 7, 8.
16 Ibid.
18 Ibid.
19 Ibid.
20 Ibid 2.
21 Ibid.
22 Ibid.
23 Ibid 6.
24 Ibid 7.
The study focused on the ‘pedagogy behind unit design and delivery’ and this included:

- Avoiding the tendency to merely post information on the web;
- Designing a responsive and creative learning environment which included:
  - Ensuring high quality regular contact between students and instructor through emails and discussion rooms;
  - Active learning strategies such as self-assessments, practical activities and project-based assignments;
  - Transparent student expectations with detailed instructions and timelines;
  - Alignment between online activities, responsibilities and assessment;
  - Keeping discussion rooms to a manageable size, at levels of 10 to 15 students; and
  - Providing a help desk to help students with technical aspects.

The above good pedagogical practices were, presumably (the report on the study was silent on this point), also present for the face-to-face students. Ladyshewsky stated that ‘the close team work of the staff also ensured that there was a similar structure and level of quality across the units … and having who developed the F2F (face-to-face) version of the unit, also creating the EL unit.’

The results of this study showed that ‘if a high degree of pedagogical thought goes into the design and delivery of EL, and is supported by adequate resources, positive educational outcomes can be achieved by students.’ The study recognises that even though the quantitative grades achieved by students demonstrated that student performance was slightly better using e-learning, grades are not the only measure of student performance. Employer expectations of university graduates, examined later in the paper, encompass more than academic grades. Employers and universities are giving prominence to ‘the development of generic skills such as communication skills, teamwork skills and critical thinking, in the desired outcomes of higher education.’

The research by Ladyshewsky, however, provides assurance that good pedagogy in the classroom can be replicated on the web and can deliver academic grades comparable to those achieved in the classroom. This outcome is positive for distance learners and educators.

### III. ‘Old’ Communication Skills

The biggest constraint of the ‘virtual’ learning environment is the fact that it is a ‘virtual’ environment, not a physical environment. The e-learning environment can emulate a classroom. It can allow for real-time activities, group activities and ‘discussions’. The e-learning environment can simulate many aspects of a physical classroom except the most important one, the experience of actually being in a classroom. Biggs states that ‘[t]he great benefit of online teaching is two-way communication.’ The great benefit of classroom teaching is two-way communication and, further, multi-way communication. For example, the teacher communicates with the class and the class gives the teacher instant feedback on any comprehension problems. The teacher’s response is then heard by all the members of the class, not only those who asked the question.

Going to classes requires a number of ‘old’ communication skills such as:

- The discipline required to dress, and physically get to the class on time;
- The discipline required to listen to material that is not always engaging, that may go on for too long;

26 Ibid 10 and 11.
27 Ibid 12.
28 Many students would dispute this assertion, being firmly focused on their final grades as outcomes.
29 Richard James, Craig McInnis and Marcia Devlin (eds), above n 3, 3.
30 Biggs, above n 5, 216.
The social skill to politely listen to the questions of other students that may not be relevant for you;

The patience to work in a group, not of your own choosing, to answer a problem that you may not find inspiring; and

The perseverance to attend on a regular basis.

This list of skills appears to be a dreary list of worthy attributes. However, it ignores the joy of learning that can be found in a classroom. The joys of the group dynamic can be a real aid to understanding not only the academic material necessary to pass a subject, but the life experiences of the class. Very few students will get employment in an industry where they can work totally in the ‘virtual’ environment.

This defence of the virtues of attending class and being polite, showing respect and acquiring social skills could sound like the last roar of a dinosaur refusing to acknowledge its own extinction. Gilly Salmon calls those holding these views ‘Web-phobes’ who ‘are very worried that the benefits of learning together may be lost and that it will be a bad day for knowledge, for feelings, for the joys of gatherings and groups.’

She continues that, while some are bemoaning the loss of the classroom, some of us are getting on with it! Small factions of teachers, researchers and trainers have led the way. Like all pioneers, they have a tough time. For them, and for the thousands of online teachers that will follow, I hope this book will be of interest and of use. It’s time to start the wagon train again but this time with a rough and ready trail to follow.

This paper proffers two arguments in mitigation of its position:

1. **Employer expectations:**
   - Listening and speaking, thinking on your feet and physical and mental attendance (be it in a classroom, office, chambers, client meetings, etc) are generic skills. These generic skills, however, are the skills required by employers and require some ‘real time’ and ‘real class’ practice by students.

2. **Educators as neuroscientists.**

### IV. EMPLOYER EXPECTATIONS OF UNIVERSITY GRADUATES

Many universities conduct surveys of graduate employers with the aim (among others) of identifying ‘employer perceptions of the key capabilities needed by graduates in the wide range of professions catered for’ by the university conducting the survey. In 2007, the survey conducted by UWS went out to all the employers of UWS graduates between 2005 and 2006 and 146 employers responded. As part of the survey, employers were invited to identify ‘the most important attributes, abilities, skills, and knowledge needed by graduates for effective performance in their particular profession in coming years.’ The employers were asked to rate the relative importance of 44 aspects of professional capability as identified in national and international studies of early career graduates. The top 10 aspects as selected by employers were:

1. Being able to communicate effectively;
2. Being flexible and adaptable;
3. A commitment to ethical practice;
4. Being willing to face and learn from errors and listen openly to feedback;
5. Being able to organise work and manage time effectively;
6. Wanting to produce as good a job as possible;

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32 Ibid.
33 Cozolino and Sprokay, above n 12, 11: “[T]he most effective adult educators may be unwitting neuroscientists.”
35 Ibid.
36 Ibid 3.
37 Ibid.
7. The ability to empathise, and work productively, with people from a wide range of backgrounds;
8. A willingness to listen to various points of view before coming to a decision;
9. Being able to develop and contribute positively to team-based projects; and
10. Being able to set and justify priorities.

The University of Tasmania conducted a similar survey in 2003 called ‘Employer Expectations and Satisfaction with University of Tasmania Graduates 2003’. The Tasmanian survey sampled 365 employers from a range of business types, sizes and locations. This survey requested employers to rate ‘26 attributes, skills and competencies which they expected graduates employed by their company to demonstrate on entering their employment.’ The top five attributes as selected by employers were:

1. Communication skills;
2. Capacity to act ethically;
3. Capacity to learn new skills and procedures;
4. Capacity for cooperation and teamwork; and
5. Ability to apply knowledge in practice.

The top 10 selection criteria used by 271 graduate employers in the 2007 Graduate Outlook report by Graduate Careers Australia (GCA) included:

1. Interpersonal and communication skills (written/oral);
2. Critical reasoning and analytical skills/problem-solving/lateral-thinking/technical skills;
3. Passion/knowledge of industry, drive/commitment/attitude;
4. Cultural alignment/values fit;
5. Academic qualifications;
6. Teamwork skills;
7. Emotional intelligence (including self awareness, strength and character, confidence, motivation);
8. Work experience;
9. Activities — includes both intra and extracurricular; and
10. Leadership skills.

The two university surveys and the selection criteria demonstrate that communication skills are the number one attribute that employers seek from university graduates.

Rated most highly by employers are ‘communication skills’, ‘capacity to act ethically’, ‘capacity to learn new skills and procedures’, ‘capacity for cooperation and teamwork’ and ‘ability to apply knowledge in practice’. This group of attributes emerges as important for the majority of employers.

Some of the broad and overarching attributes which deal with world views and social and cultural sensitivities — such as ‘international experience’, ‘international awareness’ and ‘capacity to function in a multicultural/global context’ — were not regarded as very important in a new graduate employee. In addition, ‘management and supervisory skills’ and ‘IT/computing skills’ were also regarded as less important than communication skills. These latter responses were clarified by the qualitative analysis of employers’ open-ended comments in which a number of employers explained that they expect both of these sets of skills to be learned most appropriately ‘on the job’.

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38 Joan Abbott-Chapman, ‘Employer Expectations and Satisfaction with University of Tasmania Graduates 2003’ (Final Report Presented to Professor Sue Johnston, Pro-Vice-Chancellor (Teaching and Learning), November 2003).
39 Ibid 2.
40 Ibid 35.
41 University of Western Sydney (UWS), above n 34, 5-6.
42 Abbott-Chapman, above n 38, 74.
43 Ibid 73.
V. IMPROVING STUDENT NEURAL PLASTICITY

Literature explored by Cozolino and Sprokay supports the statement that the ability to learn is dependent on the brain’s ‘neural plasticity’.44 ‘Neural plasticity reflects the ability of neurons to change their structure and relationships to one another in an experience-dependent manner according to environmental demands.’45

Cozolino and Sprokay challenge the accepted view of ‘thinker as solitary’46 and considered research by neuroscientists that found that the brain ‘flourishes best within the context of social interaction. However one may hold the notion of individuality and the isolated self, humans have evolved as social creatures and are constantly regulating on another’s internal biological states.’47 Even though e-learning can provide a ‘virtual’ social environment, with discussion rooms and other two way communication possible, e-learning cannot provide the physical social environment that promotes neural plasticity, leading to better learning.48

It is becoming more evident that through emotional facial expressions, physical contact, and eye gaze — even through pupil dilation and blushing — people are in constant, if often unconscious, two-way communication with those around them. It is in the matrix of this contact that brains are sculpted, balanced, and made healthy. Among the many possible implications of this finding for the adult educational environment is the fact that the attention of a caring, aware mentor may support the plasticity that leads to better, more meaningful learning.49

Cozolino and Sprokay recognise that classroom teachers ‘[i]ntuitively using a combination of language, empathy, emotion, and behavioral experiments … promote neural plasticity and network integration.’50

Cozolino and Sprokay are emulating the traditions of the humanistic educational philosophers, such as ‘Rousseau, who instructs “Begin thus by making a more careful study of your pupils, for it is clear that you know nothing about them”’.51 In the modern context, Barbara Fines equates the humanistic approach to education as the ‘student centered approach’.52 In the context of teaching law, Fines states:

Student-centered teaching is as fundamental to our humanistic educational philosophy as is client-centered counseling to humanistic psychology or legal practice. We teach our students as individuals, with all their diverse personalities, intelligences, backgrounds and circumstances.53

Teaching students as individuals is not possible in the virtual environment where teachers never see their students. Teachers may respond to individual written queries of their students and get to know them in a virtual sense but that is only one dimension of a student. If the e-learning course allows for the occasional physical class in order to facilitate presentations, these occasions are sufficiently rare or time-pressured that the teachers can’t get to know the students individually. Also, the students will be under pressure to perform, as opposed to the routine of ‘performing’ in weekly classes where a rapport can be established between the teachers and students, and between students.

44 Cozolino and Sprokay, above n 12, 11.
45 Ibid.
47 Ibid.
48 Ibid.
49 Ibid.
50 Ibid.
52 Ibid.
53 Ibid.
VI. CONCLUSION

Even though e-learning can provide useful learning alternatives and learning support, it will always be providing a second class-learning environment because it cannot replicate all the experiential features, such as facial expressions, physical contact, eye gaze, empathy and emotion, essential to the growth of neural plasticity.

Again, from Cozolino and Sprokay:

Studies with birds have demonstrated that the ability to learn their ‘songs’ can be enhanced when exposed to live singing birds as opposed to tape recordings of the same songs. … Other birds are actually unable to learn from tape recordings and require positive social interaction and nurturance in order to learn.⁵⁴

Like birds, some students can perform well using only the virtual environment to learn, while other students’ learning outcomes will be disadvantaged in the virtual environment. However, all students using the virtual environment for their learning will miss out on the optimum learning experience using the virtual environment. They all miss out on the experience of developing ‘a safe and trusting relationship’ with their teacher and their class. Students in e-learning environments miss out on the ‘activation of both thinking and feeling’ ⁵⁵ which is essential to effective learning and communication.

In the words of Cozolino and Sprokay, ‘like birds learning their song, people probably engage more effectively in brain altering learning when they are face-to-face, mind-to-mind and heart-to-heart.’ ⁵⁶

⁵⁴ Cozolino and Sprokay, above n 12, 13.
⁵⁵ Ibid 12.
⁵⁶ Ibid.
INTENSIVE TEACHING OF GRADUATE LAW SUBJECTS: M<sup>E</sup>EDUCATION<sup>1</sup> OR GOOD PREPARATION FOR THE DEMANDS OF LEGAL PRACTICE?

MAREE SAINSBURY<sup>*</sup>

I. INTRODUCTION

This article examines the use of intensive teaching in law units, particularly as part of a graduate entry law program in the form of a Juris Doctor (JD). As a graduate-entry program, the JD attracts mature age students who are generally already in the workforce. Their circumstances are such that they generally need to continue to work, often full-time, at the same time as undertaking their studies. Many experience the competing claims of family, mortgage and careers. They may be undertaking law studies to go further in their current career, as opposed to looking for a career change, and thus want to keep developing that existing career.<sup>2</sup>

These factors impact greatly on the demand for delivery of subjects. After-hours scheduling is an attraction, as is the ability to minimise the number of times the student has to attend university during the week. The ability to complete a course in minimum time is also a priority for some students.<sup>3</sup>

The University of Canberra (UC) replaced its graduate-entry LLB with a JD degree in 2005. In order to cater better for the graduate student market, the classes were scheduled after hours, using Wednesday and Friday nights and Saturdays. The classes were scheduled intensively so that the students following the typical course structure were only undertaking one subject at a time.<sup>4</sup> The Faculty of Law recently sought feedback from its JD students on certain aspects of its course, including what motivated the student to choose that particular course (the Review).

While the sample size was too small to reach any firm conclusions,<sup>5</sup> this article will draw on feedback received in the Review to examine the demand and priorities of graduate law students in choosing a course and completing it. It will examine various ways of meeting those demands and whether or not it is possible to reconcile them with the need to maintain the integrity of the academic process. The focus of this article will be on the decision to teach intensively to meet the demands of the graduate student. However, other aspects of the teaching process will also be considered. The view is reached that market demands and educational values are not opposing forces, but can be reconciled to provide a quality educational program that takes into account the requirements of the student population.

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<sup>3</sup> Online learning is also another way of meeting these needs; however, it is beyond the scope of this article to address the effectiveness of that mode of teaching.

<sup>4</sup> The course can be completed with three years of full-time study. It is one year less in duration than the LLB, as there is no requirement that the student complete one year of open electives. The subjects required are the same as the law subject in the LLB but are all taught at graduate or postgraduate level, and students need to complete a minimum of eight postgraduate subjects. The intensive schedule offers three subjects per semester, including a summer semester. See Juris Doctor, University of Canberra, Faculty of Law <http://www.canberra.edu.au/faculties/law/courses/masters-doctoral/jd> at 3 December 2008.

<sup>5</sup> We received approximately 20 completed questionnaires.
II. TEACHING OF GRADUATE LAW:
The Growth of the Juris Doctor in Australian Universities
And the Changing Nature of the Student Population

A. What is a Juris Doctor?
The Juris Doctor is a Masters-level graduate-entry law program recognised for the purposes of admission to legal practice.6 The name was originally used in the United States in the 1960s as a label for a higher and professional degree in law.7 In Australian universities, the Juris Doctor is not a doctorate but either a Masters-level or graduate-entry program. The Juris Doctor degree is growing in popularity among Australian law schools as the way to teach graduate-entry law.8 In 2003 it was reported that four law schools had introduced a JD program, with another two introducing the program in all but name.9 As of April 2008, 12 Australian law schools offered a Juris Doctor degree.10

B. The Impact of Changes in the Tertiary Education Environment
The growth in the Juris Doctor degree comes at a time when the tertiary education sector itself is undergoing many changes. It is well documented that the financial constraints on universities have increased dramatically.11 Government funding has declined over the last 20 years12 forcing universities to look at cost cutting and becoming more entrepreneurial.13 Ironically, at the same time as cutting funding, government regulation has become more demanding, with more reporting requirements for universities.14

There are also changes in Australian society which impact on the tertiary sector. Australian society is ageing.15 The potential undergraduate student population is shrinking. At the same time, unemployment is low and many job opportunities exist.16 Even undergraduate students are choosing, or are forced, to study part-time.17 A change in the nature of student demands has seen students more focused on achieving an end result, and wanting to accelerate the progression of their degrees.18

The above factors combine to make the graduate law student an attractive and growing market.19 The next section considers the demands and needs of that student demographic and how a law school might cater for them.

6 Court Procedures Rules 2006 (ACT) reg 3605
10 Namely University of Melbourne, Monash University, the University of New England, Bond University, RMIT, the University of Notre Dame, University of Technology, Sydney, University of Southern Queensland, University of Canberra, Australian National University, Charles Darwin University, the University of Queensland and Murdoch University. The University of Queensland, however, had no intake for 2008. The University of Notre Dame is also no longer offering the course, pending a review.
13 Davies, above n 11.
14 Ibid.
17 The AUTC Report noted many significant changes in student demands and expectations — in particular, the fact that students increasingly spent significant periods of time in paid work and that universities had taken steps to accommodate this by scheduling after-hours classes and recording lectures in some form. See Johnstone and Vignaendra, above n9, 315.
18 Ibid 317-319.
19 For example, at the University of Canberra in 2007, graduate law entry rates grew at a higher percentage than undergraduate entry.
C. THE GRADUATE LAW STUDENT

One of the selling points of the Juris Doctor degree is its ability to provide a Masters-level qualification while at the same time providing part of the academic qualifications necessary for admission to legal practice. However, it is also more attractive to the mature age student if it allows for the fact that this student has many demands on his or her time and is generally also holding down paid employment.

While the reasons a holder of a degree may want to return to study law will be many and varied, there are a few common categories. First, the student may be seeking a career change. Secondly, they may see a law degree as a means to further advancement in their current career. Thirdly, there is the category of ‘lifelong learners’ — individuals who are continually looking to improve themselves and keep stimulated through further study.

A graduate law student will have certain characteristics and requirements in terms of legal education. These may include:

- financial commitments, hence the need to hold down paid employment;
- family commitments;
- the above two factors combined to create time constraints;
- possession of an undergraduate degree or graduate equivalence. It can therefore be assumed that they possess graduate-level skills, although will need to adapt these to a new discipline.

The Review found that after-hours classes and an intensive mode of teaching were important in a student’s choice of course. These factors were more important to the student than the offering of small-group teaching, the status of the Juris Doctor as a Masters course and the reputation of the university.

Therefore, the market demand seems to support after-hours and intensive teaching. This raises the question of whether intensive mode teaching is the most effective way to teach law to graduate students. Of course, idealistic educational values alone cannot sustain a tertiary education course and cannot realistically dictate how law schools deliver their programs.20 There are a number of competing claims in designing a JD program. First, the student demographic, as outlined above, must be taken into account and a program designed which is attractive to that demographic. Secondly, there are professional requirements — in order to be admitted to legal practice, the student needs to obtain qualifications that are recognised by the relevant admitting authority. This generally means the possession of a degree recognised by that authority and the completion of the Priestley Eleven subjects.21 Thirdly, the program and its delivery need to be educationally sound. Teaching needs to be effective. It needs to impart the graduate skills required for a law graduate, such as knowledge of the discipline, an ethical attitude, communication skills, problem-solving and reasoning, information literacy and an interpersonal focus.22

The answer to effective course design therefore lies in finding a way of catering to the students’ requirements and attracting a viable market without compromising on educational values. The next section considers in more detail the issues involved in designing a JD degree which meets the educational and other needs of a graduate law student.

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21 For example, the Court Procedures Rules 2006 (ACT) reg 3605.
III. The Characteristics of Effective Teaching

The Australian Universities Teaching Committee report on Learning Outcomes and Curriculum Development in Law\(^{23}\) (the AUTC Report) identified some elements of good teaching, as follows:

- Effective teaching is teaching which facilitates student learning;\(^{24}\)
- It occurs where the lecturer is enthusiastic about the subject matter and able to motivate students to feel the need to learn the material;\(^{25}\)
- The material should be made genuinely interesting so that students find it a pleasure to learn;\(^{26}\)
- The teacher should be concerned for and respect students and recognise diversity in the student body;\(^{27}\)
- The teacher should be available to the students and make clear what is expected of them;
- Any teaching method should incorporate clear explanations which use a variety of techniques, such as anecdotes and role plays, to illustrate key points to students. It should focus on key concepts and common misunderstandings rather than trying to cover a lot of ground;\(^{28}\)
- Assessment methods should be varied and focus on key areas, encouraging students to think deeply about the task rather than forcing rote learning or the reproduction of detail. It should also avoid unnecessary anxiety;\(^{29}\)
- It should involve collaborative work and a ‘dialogue between teacher and learner’ in which the teacher seeks evidence of student understanding and misunderstanding;\(^{30}\)
- There should be timely and high quality feedback on student work so that students know how they are doing while they are still able to do something about it;\(^{31}\)
- Students should be engaged at their level of understanding, ensuring an appropriate workload while encouraging student independence; and
- Effective teaching requires a constant process of monitoring what students are experiencing.\(^{32}\) The AUTC Report noted a shift to more student-focused teaching in law schools over the last 15 years.\(^{33}\)

A. Intensive Teaching as Effective Teaching

Can intensive teaching be effective teaching? Studies conducted on intensive teaching do not reach any definitive view as to how it compares to traditional teaching methods. On balance, most studies find that intensive teaching is at least as effective as its non-intensive counterpart. Some studies show an improvement in learning outcomes.\(^{34}\)

However, problems with assessing the effectiveness of intensive teaching should be noted. For example, the intensive teaching method may attract students that are suited to it — often it is an option for the student and one which will predominantly be taken up by students who suit that learning style. Secondly, the surveys are generally based on data received immediately after the period of intensive teaching ends and may not reflect the long-term outcomes which are more important but also a lot harder to evaluate. Thirdly,

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\(^{23}\) Ibid.
\(^{24}\) Ibid 277-8.
\(^{25}\) Ibid 278.
\(^{26}\) Ibid.
\(^{27}\) Paula Lustbader (1999) cited in Johnstone and Vignaendra, above n 9, 279.
\(^{29}\) Johnstone and Vignaendra, above n 9, 279-80.
\(^{31}\) Dieudonné Leclercq (1999a) cited in Johnstone and Vignaendra, above n 9, 281.
\(^{32}\) Michael Prosser and Keith Trigwell (1999), cited in Johnstone and Vignaendra, above n 9, 281.
\(^{33}\) Johnstone and Vignaendra, above n 9, 291-306.
most of the research is done at undergraduate level or below and may not be applicable where the student already possesses generic graduate attributes.35

Negative views of intensive teaching see it as a response to convenience rather than an approach that promotes substance and rigour.36 James Traub calls it the ‘McEducation’ of university learning.37 These concerns reflect the reality, as reflected in the Review, that the scheduling of classes that are convenient for students to attend is an overwhelming factor in student choice. However, the counter-argument is that a response to convenience can still promote substance and rigour.

Other critics of intensive teaching have noted that intensive delivery may be more suited to skills acquisition rather than discursive, conceptual learning.38 If this were true, it would be a problem in legal education, which has come to view the universities’ initial role in legal education as providing academic training with subsequent practical training offered as part of a graduate course in legal studies.39 The AUTC Report notes that ‘[a]rguably the most significant of all the developments in Australian legal education in the last decade is the focus on teaching legal skills within the undergraduate curriculum’. Skills education is increasingly included in a law degree. However, legal education must do more than impart skills to law graduates. Students need to attain knowledge of the substantive law and an ability to think critically about it. Critics would argue that intensive teaching is not the most appropriate way of achieving this end, due to the fact that it does not allow time for student reflection or an in-depth analysis of subject content.41 Related negative comments on intensive teaching are that it promotes poor student learning practices such as cramming instead of long-term developmental learning.42

Once again, there are counter-arguments. Intensive teaching does not have to entail a reduction in teaching hours and, thus, need not have any impact on the depth of analysis. There is also no evidence that student reflection requires an extended time frame. It may be more important to engage the student effectively with the subject matter. Further, others argue that the time spent teaching a course is not a reliable indicator of positive outcomes — more useful is the course content, competency of the lecturer and teaching style.43 It may be that longer duration is only perceived as superior as it has, in the past, been seen as the norm.44

From a practical point of view, intensive teaching is arguably harder on the student and the lecturer. This is particularly so when it is offered outside of work hours and the student is working full-time as well as studying at night and on the weekends. It is more problematic if a student falls behind, as it is difficult, if not impossible, to catch up.45 However, depending on the method of intensive teaching adopted, there may also be considerable advantages, both educational and practical, to the format. At UC, each unit is taught in 10 four-hour blocks over two and a half weeks.46 Teaching in standard mode would use one two-hour lecture, possibly another one-hour lecture, and a one-hour tutorial. The use of larger blocks of time allows flexibility for a diversity of instructional activities.47 For example, the one session can incorporate lecturing time, discussion questions and other group activities such as mooting or class presentations. The Review found that lecturers in the JD program saw this as an advantage. This flexibility needs to be

35 Ibid.
36 Traub, above n 1, 114-123.
37 Ibid.
38 Davies, above n 11.
39 Johnstone and Vignaendra, above n 9, 2.
40 Johnstone and Vignaendra, above n 9, 133.
41 See, for example, Traub, above n 1.
42 Traub, above n 1. See also Alan Wolfe (1998) cited in Davies, above n 11.
44 Ibid.
45 Johnstone and Vignaendra, above n 9, 318.
46 From 2009, this is likely to be extended to four weeks, in response to staff and student feedback in the Review.
utilised appropriately by the lecturer — this was recognised by both students and lecturers in the Review. The use of time needs to be coherently planned and flexible enough to respond to student needs and encourage concentration and engagement with the material.

Intensive teaching promotes greater group cohesion which is conducive to group activities. This was emphasised in the Review, where one of the strengths of the JD was noted by both students and staff to be the relationship that developed between fellow students and with the lecturer. This provided an enhanced working environment and promoted greater discussion.

Similarly, intensive teaching methods can provide for greater student and lecturer motivation and stimulation. In order to succeed, the student needs to be motivated, committed and enthusiastic. Similarly, the lecturer needs to be motivated, prepared and enthusiastic to successfully deliver teaching material and conduct teaching activities in this form. Intensive teaching has some advantages over its traditional counterpart in that the student is able to focus and absorb the one subject matter — they are able to focus on one thing at a time and do not need to ‘read themselves in’ or get themselves up to speed after a week’s break between classes. For students that are already multitasking outside of the university environment, this is an added advantage.

Intensive teaching and the skills required to master it may actually contribute to imparting skills for legal practice, in particular the ability to manage work flow and meet deadlines. This should lead students to develop the skill to digest and assemble legal issues in a short time frame. It also contributes to teamwork, not only in specific group activities but due to the need for the class to work cooperatively to get through the teaching material and activities in the allocated time frame.

The practical and customer service aspects of intensive teaching should also not be discounted. The timetabling (after-hours, intensive delivery) provides customer service in response to a change in student population from direct school entry to a more diverse population including mature age and lifelong learners. It is responding to a growth in the postgraduate student population, a population which has existing demands from the workplace and family. It takes into account the significant expansion of the casual and part-time employment sector by offering classes outside of business hours. In recognising these factors, it makes tertiary education more accessible to this sector of the market.

The aim, therefore, in course design, should be to develop a program which recognises the drawbacks of intensive teaching and attempts, as far as possible, to minimise them. The advantages of intensive teaching should also be recognised and enhanced. The next section considers some practical steps to assist in that process.

B. Minimising the Challenges and Working With the Advantages in the Context of a Juris Doctor

1. Teaching Process

Small group teaching and the use of extended teaching blocks provide an ideal environment for interactive teaching. Lecturers should be encouraged to consider how best to use the teaching blocks in a flexible way that engages and stimulates both the student and the lecturer. For example, this could be achieved by breaking up lecture time with group work and interactive exercises, and running interactive discussion-based lectures.

The outcome of generic skills/graduate attributes should be a focus. Davies talks of ‘outcomes-based’ education where the things the learner can do with what they know are more important than the input or content. Where there is not the opportunity to provide as

49 In the author’s own experience, the management of time can be a factor even where the number of teaching hours is the same as for traditional delivery. The small-group, interactive nature of the teaching promotes a lot more class discussion, which needs to be managed by both the lecturer and the student.
50 Davies, above n 11.
much content as in other forms of learning, this can be compensated by encouraging more engagement and a ‘deeper learning’ of what is taught.

Over-assessment should be avoided. However, it is important that students receive some feedback on how they are going, particularly where the whole course is taught intensively. This could be done by having a short assessment item that can be quickly marked, such as an in-class test, halfway through the subject, or providing continuous feedback on class participation tasks. The student’s result on completion of one intensive unit should also be released before they commence the next, if that is possible.

2. Administration and General

Any student-focused view of learning should see administration of the course from a student’s point of view. Where time frames are short, it is important that students have ready access to reading lists and timetable information well in advance. Effective administration is often one of the first things to suffer, being hard to maintain in an under-resourced tertiary environment.

Managing the expectations of graduate law students studying in this mode is also an important consideration. While students that possess an undergraduate degree can be assumed to possess many generic graduate attributes, a lot will have been applying and further developing these skills in a different context. The adjustment to using their existing skills in a law context, and developing relevant new skills, can be a difficult one. In the author’s experience, this can be difficult to manage. Skills such as legal writing and problem-solving can be taught early in the course, but need to be refined through application. It is important to manage the students’ expectations in this respect.51

Finally, it is important to seek regular feedback from the students on their course experience. One source of evaluation on the effectiveness of intensive teaching is feedback from the students to indicate whether they have found it effective or not.

IV. CONCLUSIONS

Flexible delivery of law units is an attractive option for the growing demographic of students that are juggling many competing demands. One form of flexible delivery is intensive teaching. Intensive teaching is even more attractive to the market when scheduled after hours and on weekends.

While current literature evaluating the effectiveness of intensive teaching is limited, it can be concluded that there is nothing to suggest it is less effective than teaching over a longer period of time. Further, an overview of some of the characteristics of effective teaching shows that a lot of them will be as easy, if not easier, to achieve in an intensive format. However, working with the benefits of intensive teaching will require planning on the part of the lecturer and preparation on the part of the student.

Perhaps the one drawback of intensive teaching that is difficult to counter is the demanding nature of the schedule, both for the staff and students, particularly where combined with other family and work commitments. However, where properly utilised, intensive teaching offers the opportunity to work with different learning activities and promotes a sense of motivation and commitment on the part of staff and students.

51 For example, by emphasising to students, in assessment criteria and in class, that they are likely to require new skills, and advising about their progress in feedback given on assessment items.
The study which is the subject of this paper examines ‘intertester reliability’, with one of the stated aims to identify a marking method of optimum reliability so as to improve consistency between multiple markers. A brief survey of the literature suggests that criterion-referenced assessment implemented by means of a marking rubric is a superior form of managing formal assessment. The matters under investigation are confined to a comparison of the (intertester) reliability of marking results obtained using three different marking methods, a finding as to which method produces the greatest range of results, and a comparison of the time taken by markers using those methods. The results could, however, have secondary utility in considering the reliability of the use of marking rubrics as a means of implementing criterion-referenced assessment, particularly in large groups with multiple markers. The findings of this paper will show that there is no statistically significant (p<0.05) difference in reliability of results, range of results or time taken when utilising any of the 3 methods employed.

I. INTRODUCTION — WHY BE CONCERNED ABOUT RELIABILITY OF MARKING ASSESSMENTS?

Formal assessment is an integral part of higher education.1 There is an abundance of literature on the purpose and design of assessment tasks and the integration and compatibility of those tasks with broader aims (such as graduate attributes and learning outcomes of the tertiary institution as a whole, the relevant faculty or school, and the individual student).2 The reliability of the marking process and resulting scores or grades, however, receives comparatively sparse coverage from researchers.3

It is of increasing importance to tertiary institutions to optimise the accuracy and integrity of assessment. Reputation is a factor in a prospective student’s choice between competing institutions.4 Once a student has selected an institution, they incur financial liability for study, with failed subjects incurring repeated liability. There has been a consequent shift in the institution/student relationship whereby the student body is now more ‘customer-oriented’, viewing themselves as consumers of the tertiary product,5 investing time and money and expecting a return on that investment.

Determining the most reliable, defensible marking method is therefore both an advantage over market competitors and a risk management tool. This knowledge can benefit a tertiary institution in managing the student appeals process, justifying the outcome of that process to upper stratum of review in the institution and, in a most extreme

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1 Few would argue with the assertion that assessment lies at the centre of the student experience and is a dominant influence on student learning’: Barry O’Donovan, Margaret Price and Chris Rast, ‘Know What I Mean? Enhancing Student Understanding of Assessment Standards and Criteria’ (2004) 9(3) Teaching in Higher Education 325.
case, defending litigation by aggrieved students. Sue Bloxham states bluntly that her ‘hunch is that students will become increasingly litigious about marking in the future and our procedures will struggle to stand up to this kind of onslaught if we persist in claiming that marks given are completely accurate’. Hilary Astor confirms that students are ‘increasingly taking their universities to court’, with the number of student litigation cases in Australia having ‘escalated since the mid-1990s’. Whilst there is authority to the effect that courts will intervene in ‘disciplinary issues’ but will not intervene in ‘questions of academic assessment and judgment’, this line is not always clear and resulting litigation can, in any event, ‘cost universities millions of dollars in legal fees’.10

Continuing the analogy of the university as a quasi-corporate supplier of product to students as consumers, more effective evaluation of the product is facilitated by using a more reliable marking method. Assessment provides ‘evidence regarding the success or otherwise of the programme’.11

Broader ethical and integrity issues of equality and fairness are also supported by a marking method with superior reliability — students are more likely to be graded only on their own performance in the piece of work being assessed, without additional reference to their prior academic performance or to other students’ performance in the item being marked.12

Managing large groups of students with multiple academic staff responsible for marking presents specific challenges. Individual markers need to ensure consistency in marking on different days and across large numbers of assessments, whilst consistency between markers must also be achieved. Mark Saunders and Susan Davis cite ‘pressures caused by high student numbers and tight marking deadlines’ as a particular challenge to reliability of marking standards. A corollary of assessing large student groups and carrying substantial marking workloads is that a marking method which saves time without compromising reliability has a practical advantage. The increased use of casual or sessional academic staff to carry out marking — the ‘outsourcing’ of marking work — presents further challenges to achieving consistent quality across a spectrum of markers. Saunders and Davis note that staff changes over time are especially ‘likely to alter’ the ‘understanding of criteria and consistency’ between markers.

8 Professor Hilary Astor of the University of Sydney Faculty of Law is quoted in Harriet Alexander, ‘Student Fees Spark Rush of Grade Disputes’, The Sydney Morning Herald (Sydney), 15-16 March 2008.
10 Alexander, above n 8.
11 Yorke, above n 5, 105.
13 Richard James, Craig McInnis and Marcia Devlin, Assessing Learning in Australian Universities (2002) 31; Mark Saunders and Susan Davis ‘The Use of Assessment Criteria to Ensure Consistency of Marking: Some Implications for Good Practice’ (1998) 162 Quality Assurance in Education 162, 162.
14 Sadler, above n 12, 191.
16 Saunders and Davis, above n 13, 166.
Integrity of assessment in the humanities, including law, is complicated by assessment tasks more likely to consist of ‘open questions’ which are more difficult to assess in a fair, valid and reliable manner. The contemporary trend towards ‘modular schemes’, whereby students are able to construct programs and select electives across disciplines, provides added impetus to ensure equity by maximising the integrity of assessment methods.

The range of results obtained by different marking methods is relevant to the integrity of those methods. Where a method produces marks which are concentrated or clumped in one band, there is a failure to adequately discriminate between students, and ‘the good students are not credited for their achievements’ whilst ‘the poorer students are not made aware strongly enough that improvement is needed’. Discriminating between students’ work which lies within a concentrated middle band is more difficult for markers than allocating marks to papers which lie at extreme ends of the spectrum of marks. It is desirable, then, that a marking method produce both a relatively greater range of results and a valid means of discriminating between items of student work which are close in quality.

Which method of marking assessment tasks, then, achieves optimum integrity and reliability? Effie Maclellan conducted a qualitative study involving ‘in-depth interviews with twelve academics’ seeking their views on ‘what might constitute desirable assessment tasks and scoring methods’. The former concern is beyond the scope of this paper. However, the responses to the latter issue are of interest. All respondents were in favour of ‘explicit assessment criteria’ being accessible by both markers and students when the assessment task was issued. Respondents nominated ‘the provision of clear marking rubrics’ as a means to achieve consistency between markers. Maclellan observes that the judgments involved in assessing student performance are complex, and that ‘opinion was divided on the extent to which criteria enables the judgment’.

The references to criteria by the academics surveyed in Maclellan’s study reflect a trend towards, and support in literature for, criteria-based or criterion-referenced assessment.

II. RESEARCH PROJECTS IN THIS AREA

Raija Kuisma conducted an ‘action research project’ to compare the results of lecturers’ marking with and without the use of a criterion-referenced marking form, with ‘formally espoused criteria’. The methodology involved four lecturers marking separate bundles of assignments by using first their ‘own criteria through the exercise of their normal judgment which was their normal practice’ and then marking the same assignment bundles using the criterion-referenced marking form. The methodology selected meant that marking between the lecturers — ‘intertester reliability’ — could not be compared. What could be analysed was ‘intrater reliability’. The results demonstrated a greater range of marks.
using the marking form, and a ‘distribution of marks closer to the normal distribution’ when using the marking form. 32 George Brown, Joanna Bull and Malcolm Pendlebury 33 note that ‘the two main measures of reliability in assessment are measures of agreement between assessors and within assessors’ or intertester and intratester reliability.

The study which is the subject of this paper examines ‘intertester reliability’, with one of the stated aims to identify a marking method of optimum reliability so as to improve consistency between multiple markers.

Christopher Dracup 34 conducted a study of intertester reliability between two academics double-marking the same set of papers without reference to an espoused marking criteria in order to determine whether double-marking in the subject and course studied could be justified by a significant compensation for marker unreliability. This study compares results using three different marking methods.

Saunders and Davis 35 collected data from two workshops run to address concerns that marking criteria and procedures (for undergraduate dissertations at their institution) required revision, and that the consistency of application of marking criteria by multiple markers required examination. The results of their research indicated that the revision of existing criteria, and the beneficial effects of collegial discussion and marker training, improved reliability. These are issues outside the scope of this paper. However, they would be appropriate subjects for future studies.

III. TERMINOLOGY IN ASSESSMENT LITERATURE

Based on an analysis of the literature, distinctions need to be drawn between the different terminology used in this area.

First, the concepts of ‘assessment criteria’, ‘criterion-referenced assessment’ and ‘criteria-based assessment’ must be distinguished from the terms ‘marking guide’, ‘marking form’ and ‘marking rubric’. The former terms refer to the design and purpose of the assessment task itself, whereas the latter terms refer to a marking tool used to actually score or grade the student on their performance in the task. In formulating a marking guide, form or rubric reference is logically made to the assessment criteria. The marking guide designed for use in this study was explicitly based on assessment criteria (based on desired outcomes) made available to students in the form of assignment instructions. As a side observation, marking forms are of utility as a form of feedback to students — ‘the matrix itself has considerable diagnostic value for the learner’. 36

The second distinction between concepts which arises is that between ‘criterion’ and ‘standards’. 37 Clair Hughes and Clare Cappa report on the process of developing ‘a set of generic assessment criteria and standards, or rubric, which could be customised to the requirements of individual law subjects’. 38 They define criteria as pertaining to ‘qualities of interest and utility’, whereas standards are about ‘a definite level of achievement … definite levels of quality’. 39

D Royce Sadler reviews four grading models utilised by four different universities, each of which described their models as ‘criteria-based’: achievement of course objectives; overall achievement as measured by score totals; grades reflecting patterns of achievement; and specified qualitative criteria or attributes. 40 An advocate of the last approach, Sadler nonetheless argues that in order to judge student work ‘on an absolute rather than a relative scale’, and to ‘realise on the aspirations for criteria-based grading’, a shift is required from

32 Ibid 27.
33 Brown, Bull and Pendlebury, above n 2, 234.
34 Dracup, above n 3, 691-708.
35 Saunders and Davis, above n 13.
36 Sadler, above n 12, 185.
37 Hughes and Cappa, above n 5, 417; Sadler, above n 12, 175, 193.
38 Hughes and Cappa, above n 5, 417.
39 Ibid 418.
40 Sadler, above n 12, 179, 181, 183, 184.
criteria-based assessment to standards-based assessment. The practical implementation of this shift as it relates to marking methodology should include ‘fixed reference levels of attainment’ (standards) of ‘attributes or properties’ (criteria) measured by ‘statements setting down the properties that characterise something of the designated levels of quality’ together with ‘exemplars’ representative of various standards or grades.\(^{41}\)

### IV. Marking Guides/Criteria/Rubrics

The practical guide issued by the University of Melbourne’s Centre for the Study of Higher Education recommends specific strategies for the management of volumes of marking generated by large groups of students. These recommendations include the provision of consistent criteria to markers (marking guides), the use of exemplars, and the use of a standardised feedback sheet.\(^{42}\) Brown, Bull and Pendlebury state that ‘specific, but manageable, criteria or marking schemes increase reliability’, referring to intertester reliability, but noting that criteria or marking schemes are also important in improving the consistency of an individual marker (intratester reliability).\(^{43}\) The Institute of Educational Assessors recommends ‘the use of straightforward, unambiguous mark schemes which can be interpreted consistently by all examiners’ as a means of ensuring ‘inter-marker reliability’ (intertester reliability).\(^{44}\) Saunders and Davis affirm that ‘what is clear from other research … and emphasised by our experience, is that criteria which are designed carefully and used with clear procedures can reduce inconsistency in assessment.’\(^{45}\) Dracup, referring to the utility of his 1997 study, cautions that whilst marking criteria can reduce ‘marker unreliability … reliable marking does not guarantee valid assessment.’\(^{46}\) Dracup illustrates this point with a hypothetical scenario wherein multiple markers base the scores awarded on an estimate of the word count of the assessments submitted — reliability (correlation between the scores awarded to the same paper by different markers) would be high whilst validity would be nonexistent.\(^{47}\) Wiggins, discussing the concept of ‘authentic’ assessment, addresses this topic, stating that marking criteria must be ‘appropriate’ as well as standardised in order to ensure both validity and reliability.\(^{48}\) This paper does not seek to address the issue of the validity of the assessment task used as the subject of the research.\(^{49}\)

In addition to the use of marking guides (variously referred to as rubrics, criteria, or schemes), the use of exemplars was a recurring theme in various authors’ recommendations for improving the reliability of marking.\(^{50}\) This study did not employ exemplars as a tool to compare the relative reliability of different marking methods. This is an area which could be investigated by a follow-up study.

Sadler\(^{51}\) (as noted above) identifies four ‘models’ which various tertiary institutions claim ‘denote criteria-based assessment or grading’. The model he appears to advocate is based on ‘specified qualitative criteria or attributes’, implemented by marking guides, with criteria ‘elaborated into a marking grid’ in a number of forms.\(^{52}\) These marking grid/guide formats can include: ‘a simple numerical rating scale for each criterion’ (with marks tallied overall); ‘a simple verbal scale for each criterion’; or a verbal scale ‘expanded into verbal

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41 Sadler, above n 12, 190, 192.
42 James, McInnis and Devlin, above n 13, 35.
44 Chartered Institute of Educational Assessors, above n 22.
45 Saunders and Davis, above n 13, 4.
46 Dracup, above n 3, 707.
47 Ibid.
51 Sadler, above n 12, 176.
52 Sadler, above n 12, 184.
statements that indicate different degrees on each criterion’, in which case the marker may simply ‘eyeball the matrix to assign an overall grade’. These criteria and results can be distributed to students on ‘grading criteria sheets’ or as ‘scoring rubrics’ at the time an assessment task is handed out to students. A less explicit format noted by Sadler is a list of ‘verbal grade descriptions’ for each grade level. The generalised use of the terms ‘marking guide, rubric, criteria or scheme’, is therefore not indicative of a consistent or homogenous entity. The marking guide employed in this study is annexed as an example.

V. MATTERS UNDER INVESTIGATION IN THIS STUDY
— CURRENT AND FUTURE UTILITY

This survey of the literature suggests that criterion-referenced assessment implemented by means of a marking rubric is a superior form of managing formal assessment. Arguably, the trend of opinion is that criterion-referenced assessment implemented by means of a marking rubric, based on standards as opposed to criteria, is the ideal, or as close to an ideal as is possible given the inherent subjectivity of human judgment. This study does not attempt to address this distinction between criteria and standards, nor to investigate the concept of criterion-referenced assessment. The matters under investigation are confined to a comparison of the (intratester) reliability of marking results obtained using three different marking methods, a finding as to which method produces the greatest range of results, and a comparison of the time taken by markers using those methods.

The results could, however, have secondary utility in considering the reliability of the use of marking rubrics as a means of implementing criterion-referenced assessment, particularly in large groups with multiple markers.

Follow-up studies would be required to examine other aspects of this area. Intratester reliability using the three marking methods could be explored by having 10 different markers mark a random selection of 10 of the 30 assignments, with each person marking the same 10 assignments using the three marking methods employed in this study. A statistically significant difference between results obtained by the same marker using different methods to repeatedly mark the same assignments would indicate levels of intratester reliability for each method. A hypothesis can be extrapolated from the distinction drawn between criteria and standards that a marking form constructed by reference to standards, rather than merely by reference to criteria, would yield a greater range of marks and a finer tool to discriminate between work of less differentiated quality in the central or average band of marks.

VI. INTRODUCTION TO BUSINESS LAW (IBL)

Introduction to Business Law (IBL) is a first-year introductory law subject for students not enrolled in a law degree (non-lawyers), which has been offered at the University of Western Sydney (UWS) since 2001. The primary focus of IBL has been on providing non-lawyers with the necessary skills/information for them to recognise legal problems when they may arise in their chosen future careers. Historically, the students in IBL have been...

53 Ibid 184-185.
54 Ibid 185.
55 Ibid.
57 Kuisma, above n 17, 28.
58 The current stated aims for the unit as listed in the unit outline are: ‘This is an introductory law unit designed to introduce the fundamentals of law in a commercial context. The unit introduces students to the basic principles of law and the legal system as well as examining some of the major areas of law that impact on commercial dealings. This unit examines the structure of the legal system, the way law is made, legal reasoning and problem solving. The main areas of law covered include contracts, torts, consumer protection and agency.’
59 Further significant details about the history and structure of Introduction to Business Law can be found in Susan Fitzpatrick, ‘Making IBL Relevant to Gen Y’ (Paper presented at the 62nd Australian Law Teachers Association (ALTA) Conference, University of Western Australia, Perth, Western Australia, 23–26 September 2007).
from a Commerce or Accountancy program, but there are also a significant number of
students from a diverse range of degrees/majors including tourism, hospitality,
management and engineering.

IBL is usually offered during both of the main semesters (Autumn and Spring) of the
university year and regularly attracts in excess of 1200 students. For formal assessment
purposes, students in IBL have traditionally undertaken three items of assessment: two
‘take-home’ assignments and a formal final examination. This research project will
examine the operation of the first of those take-home assignments.

The first assignment (see attachment 1) that students undertook in the Spring 2007
session of IBL was a brief research essay which focused on the area of Alternative Dispute
Resolution (ADR). It was 1200 words in length and was due in the fifth week of the
semester.

VII. PROJECT METHODOLOGY

The research team collected 30 assignments randomly from the approximately 1200
assignments which were submitted by the students. Each of those assignments was
electronically scanned and stored. The electronically scanned versions of the assignment
contained no identification of an individual student. The original assignments were then
returned to the person who was tasked to mark them for the purposes of the IBL unit.
Students had no knowledge of whether their paper was selected for analysis and in no way
did this research project affect or attempt to alter the marks which students were ultimately
awarded for their respective assignments.

With a view to examining the integrity of the marks which the student is ultimately
awarded, each of these 30 assignments would be assessed in three different ways by
different markers. A high school located within the catchment region of UWS was
identified and agreed to participate in this project. A high school was chosen as it provided
ready access to a large number of people who could, in a relatively short period of time,
perform the tasks which will be outlined below. The researchers were not of the belief that
it would be reasonably possible to organise to have the assessment of the assignments
undertaken by legal academics in tertiary institutions in a reasonable period of time, in
sufficient numbers to be statistically valid, particularly without piloting the project first.
Therefore the researchers also envisaged that by undertaking this research task in a high-
school environment, the possibility to pilot the methodology for consideration for use in a
much larger study involving tertiary institutions throughout New South Wales would be
extremely valuable.

High-school teachers in New South Wales also have experience in using standards-
referenced assessment techniques which are used widely in the marking of assessment
items for the school-based assessment component of the Higher School Certificate grade,
and when participating in the marking of High School Certificate examinations. This
experience, as professional markers, positions this group as ‘experts’ in this type of
assessment methodology and means that they are highly consistent and reliable markers.

The authors would assert that it could be argued that, as professional teachers, these
participants do have a similar skill level to academics who may have taught a similar type
of course. The content of the assignment chosen certainly was not so technical or specific

60 For spring session 2008, the current prediction is for more than 2000 students. The unit is normally also offered
during the summer session at the university and often attracts more than 120 students at that time.
61 During the semester in which this research project operated, the first take-home assignment constituted 15% of the
final mark, the second assignment 25%, and the final exam constituted 60%. Note that in 2008, a new direction for
assessment purposes began. Instead of two assignments and a formal exam, students were provided with an online
multiple choice test (20%), an assignment (20%) and a formal examination (60%).
62 For further discussion of standards-referenced frameworks and assessment, see Board of Studies, New South Wales,
HSC Assessment in a Standards-Referenced Framework — Guide to Best Practice
63 The authors acknowledge that any attempt to resort to literature for a concrete definition of ‘professional’ or
‘profession’ is met with severe limitations, but offer further justification and discussion on this point via an
that a non-lawyer would have difficulty with it. No attempt to provide an analysis of the demographics/skill levels of those 30 teachers is provided within the scope of this project.

Thirty teachers from the identified high school volunteered to be part of the project. Those 30 teachers were divided into three equal groups of 10. Each of these three groups received the same 30 assignments, but each group was provided with a different method of marking. All groups were provided with a copy of the assignment question (see attachment 1) and hard copies of the assignments. The groups were labelled as 1, 2 and 3.

Each of the 10 teachers in group 1 was asked to mark their 30 assignments based on the assignment marking criteria issued by the creator of the assignment task. Each of these markers were asked to record their marks on the papers themselves and also to list the total time spent marking each paper.

Similarly, each of the 10 teachers in group 2 were asked to mark the same 30 assignments and again record the time taken for each paper. However, participants in this second group were not provided with the marking criteria issued by the creator of the assignment task. Instead this group was provided with marking criteria designed by this research team (see attachment 2). This criteria was designed to be much more specific than that which was issued by the assignment’s creator. They provided a marking guide with very specific reference to items we were looking for and assigned a particular numerical value to those items, which in some instances was so specific that it went into fractions. In addition, markers in this group were also provided with a one-page summary sheet upon which they could see a summary of the marking criteria and associated marks (again see attachment 2). The following is a typical example of how this would occur. It specifically relates to the notion of identifying the four most common types of ADR and ascribes a very clear numerical value to each part of the answer:

States/explains four processes of ADR –

- Negotiation. Simple equitable discussions between the parties to the dispute
- Mediation. Neutral third party used to assist in resolving the dispute
- Conciliation. Third party plays an active role in assisting the parties to resolve their disputes
- Arbitration. A third party hears evidence and arguments from both parties, then imposes a decision on the parties. The arbiterator is usually an expert in the relevant field

\[\text{States/explains four processes} \quad \frac{1}{2} \text{ mark per process} \]
\[(\text{possible 2 marks})\]

(From attachment 1)

Group 3 were also issued with the same 30 assignments and again requested to record the mark and time taken for each of the papers. As was the case for group 2 participants, members of this group were not provided with the marking criteria issued by the creator of the assignment. Instead this group was issued with no criteria at all. It was left entirely to their professional judgment and skill to determine how they would assess the assignment and what mark they might ascribe to each of the 30 assignments they were presented with.

So, whilst each of the three groups of 10 markers were issued with the same 30 assignments, each of the three groups were asked to mark using distinctively different methods.

### VIII. Results

The following table shows, by group, the mean and the standard deviation (SD) for the results of all 30 assignments marked in the three different formats as described above. The average time taken to mark that item is also displayed.

<table>
<thead>
<tr>
<th>Assignment</th>
<th>MEAN</th>
<th>SD</th>
<th>TIME TAKEN</th>
<th>MEAN</th>
<th>SD</th>
<th>TIME TAKEN</th>
<th>MEAN</th>
<th>SD</th>
<th>TIME TAKEN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assignment 1</td>
<td>8.7</td>
<td>0.86</td>
<td>9.2</td>
<td>8.7</td>
<td>0.63</td>
<td>10.1</td>
<td>9.55</td>
<td>1.62</td>
<td>7</td>
</tr>
<tr>
<td>Assignment 2</td>
<td>10.05</td>
<td>0.60</td>
<td>10.1</td>
<td>10.3</td>
<td>0.89</td>
<td>10.2</td>
<td>9.95</td>
<td>1.12</td>
<td>9.5</td>
</tr>
<tr>
<td>Assignment 3</td>
<td>7.65</td>
<td>0.47</td>
<td>11.1</td>
<td>7.75</td>
<td>0.42</td>
<td>10</td>
<td>9.7</td>
<td>1.64</td>
<td>11</td>
</tr>
<tr>
<td>Assignment 4</td>
<td>6.4</td>
<td>0.57</td>
<td>9.7</td>
<td>6.65</td>
<td>0.53</td>
<td>8.5</td>
<td>7</td>
<td>0.82</td>
<td>12.2</td>
</tr>
<tr>
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<td>0.32</td>
<td>8.5</td>
<td>8.8</td>
<td>0.26</td>
<td>8</td>
<td>8.3</td>
<td>0.92</td>
<td>8.7</td>
</tr>
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<td>Assignment 6</td>
<td>8.5</td>
<td>0.41</td>
<td>9</td>
<td>8.35</td>
<td>0.47</td>
<td>8.6</td>
<td>8.9</td>
<td>1.20</td>
<td>9.9</td>
</tr>
<tr>
<td>Assignment 7</td>
<td>8.5</td>
<td>0.47</td>
<td>12</td>
<td>8.35</td>
<td>0.47</td>
<td>12.9</td>
<td>8.95</td>
<td>1.17</td>
<td>15</td>
</tr>
<tr>
<td>Assignment 8</td>
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<td>16</td>
<td>7.3</td>
<td>0.75</td>
<td>11.1</td>
<td>7.6</td>
<td>1.39</td>
<td>12.9</td>
</tr>
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<td>9.1</td>
<td>9.15</td>
<td>0.85</td>
<td>7.6</td>
<td>9.25</td>
<td>0.75</td>
<td>8.2</td>
</tr>
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**Table 1. Distribution of data**

The mean and standard deviation of the marks for each of the 30 assignments for the three different groups reveals some interesting data. The most significant difference in mean between the three groups occurs with Assignment 3 for groups 1 and 3, where the mean for group 3 is 9.7 and the mean for group 1 is 7.65. This is a difference of 2.05.
The most significant difference in standard deviation, perhaps unsurprisingly, also occurs with Assignment 3, but this time for groups 2 and 3, where the standard deviation for these groups are 0.42 and 1.64 respectively. This is a difference of 1.22.

The following graphs show the distribution of the assignment means and standard deviation by group.

**Chart 1. Mean of assignments by group**

![Chart 1. Mean of assignments by group](chart1.png)

**Chart 2. Standard deviation of assignments by group**

![Chart 2. Standard deviation of assignments by group](chart2.png)
Statistically, as independent samples, the t-test assesses whether the means of two groups are statistically different from each other. This analysis is appropriate whenever you want to compare the means of two groups. In this instance, the means of all three groups will be compared with each other in pairs. That is, group 1 will be compared to group 2, group 2 to group 3 and group 1 to group 3.

The mean assignment mark of group 1 as compared to group 2 reveals a one-tailed P value equal to 0.4485 and a two-tailed P value equal to 0.8979, neither of which are considered to be statistically significant (p>0.05). The mean of group 2 as compared to group 3 reveals a one-tailed P value of 0.1295 and a two-tailed P value of 0.2582. By convention, these values are not considered to be statistically significant (p>0.05). The mean of group 1 as compared to group 3 reveals a one-tailed P value of 0.2011 and two-tailed P value of 0.2028. Again, by conventional criteria, these values are not considered to be statistically significant (p>0.05).

The time taken to mark each of the assignments was a recorded variable also considered in this research project. The longest average time taken to mark any of the assignments was by group 1 in connection with Assignment 22 (19.3 minutes), whilst the shortest average time taken to mark an assignment was by group number 3 with Assignment 1 (7 minutes).

The most significant difference in mean time, between the three groups, occurred with Assignment 22 for group number 1 and 2, where the mean time for group 1 was 19.3 minutes and the mean time for group 2 was 12.5 minutes. This was a difference of 6.8 minutes.

The following graph shows the average time taken to mark an assignment by each of the 3 groups.

![Chart 3. Average time taken to mark an assignment](image-url)

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Again using a standard t-test statistical analysis, the mean time taken by group 1 as compared to group 2 reveals a one-tailed value of 0.249605 and a two-tailed value of 0.499210. The mean time taken by group 2 compared to group 3 shows a one-tailed value of 0.413322 and a two-tailed value of 0.826644. Finally, the average time difference between groups 1 and 3 shows a one-tailed value of 0.323618 and a two-tailed 0.647236. None of these t-test figures is considered to be statistically significant on a conventional basis. The statistical analysis via the t-test is reinforced when the average time taken by all group members is considered. For group 1, the average time taken to mark an assignment was 11.91 minutes. For group 2 it was 11.49 minutes, and for group 3 it was 11.61 minutes. Clearly there is very little difference in the overall average time taken to mark a paper.

IX. CONCLUSIONS

This research paper has reported on the critical need for ensuring the integrity of the marking process. What has become evident is that there appears to be no statistically significant difference between the three different marking methods used for marking a traditional humanities-based essay assignment for students in an interdisciplinary introductory law unit.

That is, three different methods have been used to mark the same assignments by utilising different markers to employ these different methods. One group was asked to use the criteria issued by the designer for the assessment task, another group was asked to use criteria designed by the research team responsible for this assignment, whilst the third group was provided with no specific criteria upon which to base their marking.

No statistically significant variations between the marks awarded for any of these three methods employed appears evident. In addition, there also appears to be no statistically significant variation of time taken to employ each of these methods. In particular, this has significant implications as it clearly takes significantly more time to develop an intricately based assessment criteria/marking guide, such as that provided for use by group 2, compared to doing nothing more than writing the actual question, which was the method utilised for marking by group 3.

Given all of the literature described in this paper, which highlights the need to ensure a rigorous marking regime, the results obtained seem surprising and certainly need further validation. It is the intention of the authors to undertake a similar project within a tertiary environment in the near future.

It seems remarkable that, with relative ease, each of these three groups was able to obtain such similar results. It seems that intertester reliability may be more easily achieved than has been suggested by the literature. The authors are unable to directly account for the results as they have been achieved. It may be that the marking guide as presented to group 2 was so precise that it allowed for little potential deviation or that the teachers assigned to mark the assignments in group 3 (i.e. those with no guidance at all) all had a similar view of the points that they were looking for in a ‘model’ answer. It may also be important that this assignment was marked out of 15, allowing potentially little deviation in scores compared to, say, an assignment marked out of 40 or 50, which could very conceivably offer much greater scope for deviation of marks, potentially giving rise to statistically significant different results. We would point out that if this were the case then the parameters of this project would have been significantly altered. The experience of high school teachers, as professionals, in using standards-referenced assessment as described above could also be a consideration in accounting for the results achieved.

We do acknowledge that the marking scheme used for groups 1 and 2 has not been validated and there has been no attempt to analyse its reliability. This is clearly one of the limitations of this study and it may therefore be recognised as a contributing factor to the statistically insignificant results revealed between the means of the final marks awarded and the time taken for each of the assignments. These types of limitations could be
overcome by using both intertester and intratester reliability mechanisms on a larger scale. That is, for example, all of the 10 members of group 1 could have been asked to utilise the three different methods for marking each of the 30 assignments. Such a scheme would be extremely time consuming and well beyond the scope of this project, but would provide for more robust data to emerge.

Clearly, this was a small-scale research project and the results therefore need to be appreciated in that context. We are particularly conscious of the close contact that markers may have had as employees of the same school. We can see the clear need for this study to be repeated using additional assignments with similar size groups and with larger sized control groups. Nonetheless we are unaware of any collusion or manipulation of the final marks by any of the participants in the study and, therefore, present our conclusions accordingly.
APPENDIX 1 – FULL ASSIGNMENT ISSUED TO STUDENTS AND MARKERS

Introduction to Business Law 20084
Spring 2007
Assignment 1 Information Sheet

The assignment question is set out at the end of this information sheet. Please read the information carefully. FAILURE TO FOLLOW THE REQUIREMENTS STATED BELOW WILL RESULT IN SEVERE LOSS OF MARKS.

1. The Assignment

Marks: 15 Value: 15% of the final marks for the unit.

Discuss the processes available in alternative dispute resolution and explain its advantages and disadvantages.

In your answer you should make use of at least three secondary sources of information outside of the textbook.

2. Marking Criteria

Content & analysis
• identify relevant information
• accurately state & explain concepts
• critically analyse issues

Argument
• Structured
• Logical & coherent
• Supported by authority
• Contain supportable conclusions

Research
• Look beyond the textbook.
• Identify relevant sources accurately.
• Utilise the sources meaningfully in your discussion.
• Select sources of information which are authoritative. (An anonymous blog is not as authoritative as a report published by the Australian Law Reform Commission.)

Presentation
• Grammar, syntax, punctuation & spelling
• Layout & paragraphing
• Appropriate & adequate referencing
• Bibliography

3. Form of the assignment

The assignment should be presented as follows:
• A4 paper, stapled in the top left corner and typed
• Each page must be numbered and in black ink only (no other colouring)
• Only one side of the paper should be used
• Leave a margin of about 3cm on both sides of the page, so the marker can write comments
• Avoid eyestrain for the markers, by using:
  o 12 point font
  o one and a half line spacing
• Attach and complete the assignment cover sheet. Make sure you include the time and day of tutorial AND the tutor. A copy of the cover sheet to be used is attached
• DO NOT SUBMIT ASSIGNMENTS IN FOLDERS OR SIMILAR COVERS.

• **Word length: 1200 words**

The word limit includes reference details and any footnotes, but not the bibliography at the end. It is an indication of what the teaching staff believe to be necessary in order to provide an adequate answer on all issues. If you find you are below the word limit then you should carefully revise your work to check if you covered all relevant issues. If you are above the word limit then check to see that you are not discussing irrelevant material.

We are not interested in counting every word but you are expected to express yourself succinctly, so if you exceed the word limit by more than 10% of the total word limit, the tutor marking may not read beyond the extra 10%.

4. **Referencing**

Use the Harvard system, but carefully follow the modified Harvard style used by Terry and Guigni (the prescribed text) to refer to other materials.

References to texts must include page numbers in most cases (eg, p 8 of Terry and Guigni referring to Devlin). When referring to any cases or legislation *italicise* or *underline* case names and the titles of legislation, and include the standard legal citation for cases and legislation. (eg, p 33 of Terry and Guigni referring to *Walker v NSW* (1994) 69 ALJR 111 and to the *Bills of Exchange Act 1882* (UK))

A **bibliography** of all references must be attached at the end of your assignment. This is not to be counted in the word length. It should include material used by you in preparing the assignment (whether you refer to these directly in your assignment or not). Organise the references into separate sections depending upon whether the material is primary or secondary sources and written or electronic. The secondary material should be listed alphabetically by the author’s surname.

5. **Collusion and Plagiarism Warning**

• Students will have an opportunity to discuss the assignment topic in tutorials in Tutorial 3. However, your preparation for the topic and your written answer is to be undertaken individually. No collusion is permitted.
• Copying from articles, books or other students’ work without acknowledgement at each point of use, is plagiarism, as is rewording what you have read from another source without appropriate acknowledgement.
• Collusion and plagiarism are forms of academic misconduct for which severe disciplinary penalties can be imposed. For more details see the UWS policy.
APPENDIX 2 – MARKING GUIDELINES CREATED BY RESEARCH TEAM

Marking Guide

Content and analysis: /6

Accurately state and explain concepts:

Define “alternative dispute resolution”
  • “any way of resolving a dispute without resorting to litigation”
  • “additional” to court system, rather than “alternative”
  • Negotiated agreement rather than solution imposed on parties

Does not offer a definition – 0 marks

Defines “alternative dispute resolution” from a low quality source e.g. internet research / Wikipedia or does not offer a source for definition – ½ mark

Defines “alternative dispute resolution” from an authoritative source e.g. textbook - 1 mark

States/explains four processes of ADR –
  • Negotiation
    Simple equitable discussions between the parties to the dispute
  • Mediation
    Neutral third party used to assist in resolving the dispute
  • Conciliation
    Third party plays an active role in assisting the parties to resolve their disputes
  • Arbitration
    A third party hears evidence and arguments from both parties, then imposes a decision on the parties. The arbitrator is usually an expert in the relevant field

States/explains four processes – ½ mark per process
(possible 2 marks)

Critically analyse issues: ½ mark per process

Advantages/disadvantages of four processes of ADR
  • Usually faster and less costly
  • More flexible and responsive to individual needs of parties
  • May provide a “second class” type of justice
  • May re-enforce existing power relationships between the parties
  • Works best when parties co-operative approach to problem-solving rather than insisting on maintaining a particular adversarial position with no room for flexibility
  • Other advantages/disadvantages researched by student
  • Comparison between processes

Provides “list-style” recitation of advantages and disadvantages of processes and ADR generally: 1 – 1½ marks

Makes some comment/critique of processes and ADR generally: 2 – 2½ marks

Critical analysis of processes, comparison of processes: 3 marks
(possible 3 marks)
INTERTESTER RELIABILITY: REPORTING ON ASSESSMENT METHODS

Argument /2

Quality of argument:
Structured; logical and coherent, supported by authority, contains supportable conclusions

Low quality of argument – illogical structure, incoherent reasoning, little or no support offered for conclusions – 0 - ½ marks
Acceptable quality of argument – some attempt at structure and some authority offered in support – 1 – 1½ marks
Excellent quality of argument – logically structured and flowing, well supported by authority – 2 marks

Research /3

Look beyond the textbook
Identify relevant sources accurately

½ mark per secondary source identified and used by student (possible 1 ½ marks)

Utilise the sources meaningfully in discussion
Select sources of information which are authoritative

Low quality of sources used, no meaningful discussion or analysis (e.g. block quote from unreliable internet source with no critique or analysis): 0 marks
Acceptable quality of most sources used, some attempt to discuss and critically analyse sources: ½ - 1 marks
Excellent quality of sources used, authoritative sources, sources well integrated into discussion and argument – 1 ½ marks

Presentation /2

Grammar, syntax, punctuation and spelling:

Unacceptable – many errors, poor standard – 0 marks
Acceptable – fair standard - ½ mark
Excellent – high quality, very few errors – 1 mark

Format:
Complies with the following requirements:
• A4 paper, stapled in the top left corner and typed
• Each page numbered
• Black ink only
• Only one side of paper used
• Margin of about 3cm on page
• 12 point font
• One and a half line spacing
• Attaches completed assignment cover sheet
• Complies with word limit 1200 words, including reference details and footnotes, but not bibliography (10% leeway either way, e.g. 1080/1320)

Unacceptable – complies with very few requirements – 0 marks
Acceptable – complies with majority of requirements – ½ mark
Excellent – complies with all requirements – 1 mark
Referencing and Bibliography

• Referencing: Harvard system, using modified Harvard style used by Terry and Guigni (the prescribed text) to refer to other materials.

  References to texts must include page numbers in most cases (eg, p.8 of Terry and Guigni referring to Devlin). When referring to any cases or legislation italicise or underline case names and the titles of legislation, and include the standard legal citation for cases and legislation. (eg, p.33 of Terry and Guigni referring to Walker v NSW (1994) 69 ALJR 111 and to the Bills of Exchange Act 1882 (UK))

• Bibliography: of all references attached at end of assignment, organised into separate sections: primary or secondary sources and written or electronic - secondary material should be listed alphabetically by the author’s surname.

Referencing poor or non-existent – 0 marks
Referencing acceptable, correct system used, some errors – ½ mark
Referencing excellent, correct system used, minimal errors – 1 mark

Bibliography poor or non-existent – 0 marks
Bibliography acceptable, most sources listed, not separated into sections – ½ mark
Bibliography excellent – all references listed in separate sections – 1 mark

TOTAL OUT OF 15
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**TOTAL**: /15
The intense focus by government and universities on research has been pressed most often at the expense of quality learning and teaching in universities. There is some irony here. The core purpose of universities is the provision of both research and education, such purpose being identified in all the universities’ statutes. For example s 6 of the University of New South Wales Act 1989 (NSW), the objects section, provides that both education and research are principal functions. Nowhere in this objects provision (or in any of the other university statutes) is there any suggestion of subservience of one function to another. Further, one only has to ask graduates what they remember and value from their years at law school to realise that it is the teaching which informs their view — both the excellent and the abysmal. Research, on the other hand, is often equated with a closed door and sign indicating that the occupant is on leave.

The suggestion, therefore, of the appointment of certain staff to teaching-intensive, or teaching-only, positions is somewhat curious. If the objective of the exercise is to recognise and value excellence in teaching, then the models proposed do not satisfy that objective.

This paper examines the ways in which universities value education and, then, whether excellence in legal education can be advanced by the appointment of teaching-intensive academic staff.

I. INTRODUCTION

This paper examines the ways in which universities value education. Such examination is timely given that the intense focus by government and universities on research has been pressed most often at the expense of quality learning and teaching in universities, despite very clear direction provided by all university statutes that both research and teaching are primary functions. The question is then asked whether excellence in legal education can be advanced by the appointment of teaching-intensive or teaching-only academic staff. If the objective of the exercise is to recognise and value excellence in teaching, do the models proposed satisfy that objective?

II. TEACHING AND RESEARCH IN UNIVERSITIES

The core purpose of universities is the provision of both research and education, such purpose being identified in all the universities’ statutes. For example, s 6 of the University of New South Wales Act 1989 (NSW), the objects section, provides that both teaching and research are principal functions, as follows:

1. The object of the University is the promotion, within the limits of the University’s resources, of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence.

2. The University has the following principal functions for the promotion of its object:

   a. the provision of facilities for education and research of university standard,

   b. the encouragement of the dissemination, advancement, development and application of knowledge informed by free inquiry,

* Academic Fellow (Learning and Teaching) for Law, UNSW. The author would like to thank Rosanne Quinnell, Academic Fellow (Learning and Teaching) Faculty of Science, UNSW for all her assistance.

1 This paper expands upon an earlier version submitted as work-in-progress to UNSW Faculty of Law Research Series following the Australasian Law Teachers’ Association Conference in Cairns, July 2008. The writer would like to thank the two anonymous reviewers to this journal for their valuable suggestions.
(c) the provision of courses of study or instruction across a range of fields, and the carrying out of research, to meet the needs of the community,

(d) the participation in public discourse,

(e) the conferring of degrees, including those of Bachelor, Master and Doctor, and the awarding of diplomas, certificates and other awards,

(f) the provision of teaching and learning that engage with advanced knowledge and inquiry,

(g) the development of governance, procedural rules, admission policies, financial arrangements and quality assurance processes that are underpinned by the values and goals referred to in the functions set out in this subsection, and that are sufficient to ensure the integrity of the University’s academic programs.2

Nowhere in this objects provision (or in any of the other university statutes) is there any suggestion of subservience of one function to another. Indeed it has always been thus: teaching and research go hand-in-hand. ‘[B]oth involve various aspects of the acquisition of knowledge: acquisition of established knowledge by the student, and the acquisition of new knowledge by the teacher.’3

In his informative article, John Scott describes such a statement of purpose, as it applies to a university, as its mission.4

A modern term applied to universities, “mission” is the broadest word to describe a university’s basic purpose … Ultimately, the life force of any enterprise is its mission, either stated or assumed.4

For most modern universities, their mission is based on the triangle of research, teaching and community or public service. These are more than mere aspirations. They are, as in the words of the University of New South Wales Act 1989 (NSW), ‘principal functions’: they are core business. Scott traces the development of these three functions as they relate to universities from their establishment in medieval times to the postmodern era.

From medieval to postmodern times, service is the keynote. All universities were and are social organizations designed to provide higher educational services such as teaching, research and a host of other academic services to the church, governments, individuals, and in the future, perhaps, the world.5

Service in teaching and research were fundamental to the medieval universities of Europe. They used the scholastic method of instruction, which applied ‘Aristotelian logic (philosophy) and dialectic (debate) to Christian doctrine.’6 Thus, the emphasis was on teaching. ‘The universitas was a corporation or guild of masters (professors) and scholars (students)’7 which pursued and disseminated learning, serving both the church and monarchs of the day. Scott dates the emergence of the early modern university to the period 1500–1800, coinciding with the emergence of the nation-states of Europe and the decline of the power of the church.

According to Scott, following the Second World War there was a huge change in the way that universities were funded, with a consequential shift in mission. Funding now came primarily from government and from the corporate sector. The very real involvement of big business is new.

[C]ritics now warn that while this is a legitimate part of the public service mission, commercial pressures threaten traditional missions and institutional autonomy.

2 University of New South Wales Act 1989 (NSW), s6.
5 Ibid 8-9.
6 Ibid 7.
7 Ibid 6.
Indeed, some analysts fear that the Western university is no longer a social institution but an industry, subservient to blind market forces like any other business.\(^8\)

Although writing of universities in the US, the analysis holds true for Australian universities who are also potentially subservient to ‘blind market forces’. Samuel Weber puts it in a similar way when he says:

The mission of the university is thus increasingly understood as that being accountable to those who pay for it, whether these are understood to be large corporations, individual taxpayers or even students.

Examination of such history is both rewarding and revealing. It helps to make sense of the 21st century university, but detail is beyond the scope of this paper. Suffice to say that it is clear that scholarly teaching, informed by research, has always been the core business of universities. It still is. The recent involvement of the corporate sector, however, changes the balance struck between the interaction of research and teaching to produce what might be coined an industrial model, largely to the detriment of autonomy for universities and particularly for their teaching function.

III. RESEARCH PRIVILEGED AT THE EXPENSE OF TEACHING

One only has to ask graduates what they remember and value from their years at law school and university to realise that it is the teaching which informs their view — both the excellent and the abysmal. Research, on the other hand, is often equated with a closed door and sign indicating that the occupant is on leave.\(^9\) And, yet, Australian universities have undergone massive change over the past decade. They have needed to realign their research and teaching at the behest of government and other interested parties. As government funding is reduced, research is rewarded and their missions have altered. Many universities, therefore, identify as research-intensive.

Such emphasis on research comes most often at the expense of teaching and has produced, in the words of Mary Wright, ‘[a]mbiguity and a [c]ulture of [i]ncongruence’.\(^10\)

The ambiguity refers to an individual academic’s attitude to his or her own teaching (and the value ascribed to it) as compared to that individual’s perception of what the university expects. Her article begins with a quote from Parker Palmer.

‘When my opening talk is over, someone will come up to me and confide, “I agree with everything you say about teaching — but I am the only person on campus who feels this way.” At the end of the second session, three or four more people will approach me, one by one to share the same secret. By the time I leave, I have met ten or fifteen people who share a common vision for education — each of whom is certain that he or she is alone on this campus.’ (1998, pp. 173-174)

Paralleling Palmer’s observations, survey data of research university faculty indicate that there are curious discrepancies in the value that faculty [academics] assign to teaching and the worth they believe their colleagues and organizations attribute to instructional activities. A study of faculty in 11 research and doctoral institutions in 1991 and 1996 found that faculty felt they attributed more importance to teaching than their departmental colleagues, chairs, deans, and central administrators did.\(^11\)

According to the study, this disagreement is peculiar to research-intensive institutions.

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\(^8\) Ibid 28.

\(^9\) This need not always be so, however. See two initiatives which aim to make the linkage explicit.


\(^10\) Mary Wright, ‘Always at Odds? Congruence in Faculty Beliefs about Teaching at a Research University’ (2005) 76(3) Journal of Higher Education 331, 333.

\(^11\) Ibid 331.
[P]erson-organization misfit in regard to instructional beliefs, or the pattern of rating one’s own value of teaching above that of one’s peers, is not found among faculty in other institutional types. Therefore, what may be most singular to the research university is not the perceived worth of teaching but the varying beliefs held about the activity. Uniquely, faculty in research universities tend to hold views about teaching that they feel are incongruent with those of their peers, supervisors, and institution.12

She asks, ‘What is it about a research university that would produce lack of agreement between the individual’s values and perceptions of organizational leaders’ views?’13 There are many answers. She claims, for instance, that incongruence occurs in research-intensive universities which have inconsistent and unclear objectives about what they believe to be teaching excellence, and who set ambiguous goals and responsibilities. Further, she maintains that in such institutions, teaching is a lonely activity which is poorly rewarded. Staff in such universities fall far short of creating communities of learning and teaching, even failing to create effective teaching networks.

For the author, the most worrying aspect is the finding that individual teachers feel unable to profess a real commitment to teaching because it is feared that such identification may be career suicide. Even more worrying is that this same sentiment is repeated by Nancy Van Note Chism when she writes about teaching awards, which are ‘[c]oveted at many liberal arts institutions yet sometimes termed “the kiss of death” at research institutions …’14 It goes straight to the value that the research-intensive university is perceived to ascribe to teaching.

IV. AUSTRALIAN UNIVERSITIES: CURRENT STATISTICS AND OTHER RESEARCH — WHAT DO THEY REVEAL?

Given that the research above paints such a bleak picture of the status of teaching in universities, particularly research-intensive universities in the US, it is worth asking whether this is what is happening in the Australian tertiary sector too. Certainly, the Australian sector manifests imbalance between teaching and research. However, whether there is real incongruence of the type that Wright describes is not clear. There are, however, two indicators of imbalance in the system which favour research and which point to teaching as having a low value or status.

A. Indicator 1 – the Bifurcation of Academic Work Into Research-only and Teaching-only Roles

One indicator that research is more highly prized than teaching can be gleaned from the data available through the Australian Government Department of Education, Science and Training (now the Department of Education, Employment and Workplace Relations or DEEWR).15

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12 Ibid 332.
13 Ibid 332.
This above figure, available on the former DEST website, shows the trend of staff toward ‘teaching only’ and ‘research only’ functions, and away from a combined ‘teaching and research’ function.

Of particular interest within the ‘teaching only’ function are the trends in work contract. [A previous table] shows the increase of staff employed on a casual basis (of more than 10 percentage points) from 1996 to 2005, and the corresponding decrease of those employed with a full-time contract. This can be aligned with the trends highlighted in changing work contracts for staff as a whole.

Staff engaged in a ‘research only’ function accounted for 12.1% of total full-time equivalence in 2005. This was an increase of more than two percentage points since 1996, which equated to around 2,000 extra staff employed undertaking ‘research only’ functions. Unlike ‘teaching only’ staff, the majority of staff in this function (76.5%) were employed on a full-time basis. This level has remained steady since 2000.¹⁶

Three important points arise here. The first is that there has been a movement away from the appointment of staff whose function is both teaching and research. Second, as to the teaching-only staff, there has been an increase in the number employed on a casual basis in the period from 1996 to 2005. Third, the numbers of research-only staff, on the other hand, have increased and the majority of those are employed full-time.

It should also be noted that the largest number of staff in the above pie chart (Figure 4), are
described (picturesquely) as ‘Other’ staff.

[N]early all general staff are formally described as ‘Other’, [although interestingly] Vice-
Chancellors are also categorised as having ‘Other’ function (if they have been classified by
their universities according to the definitions in the DETYA staff statistics manual). 17

Further data for 2006 is available in table form in another part of the website. 18 It is not
possible, however, to use this same data to make further assumptions along the lines of
gender and current duties. Anecdotal evidence suggests that the teaching-only staff (both
full-time and casual) are young and female, whereas the research-only staff tend to be
male, appointed to Level C and upwards. The above data, however, does not allow for this
conclusion to be drawn. 19

It is worth noting that Australia is not alone here. Marina Angel writes compellingly of
the status of women and their appointment by way of less secure, non-tenured (contract)
positions in US law schools. Thus, ‘nearly 30 per cent of all women full-time faculty are
contract teachers, compared to only 14 per cent of males.’ 20 Further,

[i]f the current trends continue short-term contract teachers will become the norm. There
may no longer be teacher/scholars who serve their schools, universities, and communities
with their professional expertise. With the unbundling of these traditional functions of a
tenured professor, a university faculty will consist of three separate groups: those who only
teach students in traditional or “virtual” classrooms; those who only teach students through
clinical or ‘skills’ experiences; and those who work with small groups of advanced
students on applied research fully funded by grants. 21

17 Ian Dobson, “‘Them and Us’ — General and Non-general Staff in Higher Education’ (2000) 22(2) Journal of Higher
Education and Management 203, 204. The author, believing that she is in good company, also owns up to a
classification of ‘Other’. (DETYA became DEST and is now DEEWR).

18 DEST (Now DEEWR) <http://www.dest.gov.au/NR/rdonlyres/668941E0-2437-4155-BEC7-
04B9a9DB84DA/216713Staff2006combined.xlsx#Table 1.3> at 10 December 2008.

19 But see Hilary Winchester, Colleen Chesterman, Shardi Lorenzo, & Lynette Browning, National Colloquium of
Senior Women Executives in Higher Education. The Great Barrier Myth: An Investigation of Promotions Policy and
December 2008.

50(1) Journal of Legal Education 1, 13.

21 Ibid 14.
The trend of such division of function does not favour teaching in research-intensive universities. The separation of scholarly enquiry (research) and learning and teaching in universities is regressive. Further, the growth is in research, and the division between the two provides a perception of a privileging of research.

**B. Indicator 2 – Promotion**

The promotion policies available on some of the websites of Australian universities still indicate favourable weighting against teaching and for research. Under such regimes, while most academics seek promotion on the basis of both teaching and research prowess, it is possible to be promoted, to Level E, relying on research excellence alone. An excellent researcher need not demonstrate more than a satisfactory (sustained) teaching record. Excellence in teaching, however, does not enable promotion unless it is accompanied by excellence (superior standard) in research as well. It is fighting against a culture with one hand tied behind your back.

Sean Brawley’s article explains the procedure (and disappointment) of an application for promotion to Associate Professor on the basis of an outstanding contribution to teaching. His initial hurdle was exposed when, ‘[d]espite allowing me to nominate my teaching as my outstanding field, the form was constructed for a response on outstanding research.’ Further, he was compelled to nominate international referees for research, whereas another promotion candidate relying only on research only needed written support from a colleague about his or her teaching. He was not promoted and concluded, ‘My standard of evidence was not high enough but what was expected of me if I was to be successful was a standard higher than that of research.’ As Christine Asmar wrote (quoting Paul Ramsden in support):

> In universities with academic cultures that have traditionally lauded and rewarded disciplinary research, attempts to enhance the status and effectiveness of teaching and learning practices must take account of the ongoing power of the research culture. Ramsden (1992, p235) has noted for example, that in terms of what is likely to be rewarded in universities, ‘the reality will always be that teaching performance as a means of gaining promotion will take a secondary role’.

Such policies send a very powerful message about how an institution values learning and teaching.

**V. RESTORING THE BALANCE**

So is it possible to ‘enhance the status and effectiveness of teaching and learning practices’ and to restore the balance between research and teaching under such circumstances? The answer is, of course, yes. However, we, as teachers, ‘need to take into account the power of the research culture.’

There has already been significant recognition and valuing of excellence in teaching throughout the Australian university sector. Teaching and Learning units have been established within universities to support learning and teaching and inculcate communities of practice centred on the scholarship of teaching. Teaching is rewarded by teaching awards, which are much sought after. Funding to schools and faculties is most often

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23 Ibid.
25 Ibid.
27 Ibid 18
28 Ibid.
29 I note the argument advanced by Nancy Van Note Chism, above n 14.
linked to improvement in teaching performance, such teaching performance being measured largely by survey instruments administered to students.30 Professional teaching development is encouraged by the offering of teaching programs which lead to qualifications in tertiary education. In this way, ‘staff engage with current research into student learning and develop practical pedagogical skills.’ 31

However, as stated earlier, the Australian sector manifests imbalance between teaching and research, although fatal incongruence of the type that Wright describes is not really evident. This paper argues that there is imbalance, rather than incongruence, and that there is a real need for correction. There needs to be an appropriate balance struck between research and teaching in universities, given that it is their core business to conduct both. There is a legitimate and meaningful relationship between the two. The numbers of research-only and teaching-only staff are on the rise — but, evidently, teaching-only staff are casually employed, filling much needed gaps in the system. Their job is to teach, not research. Correspondingly, research-only staff are high status and the majority of them are employed on a full-time basis. It is also harder to achieve promotion on the basis of teaching excellence, as opposed to research. Both of these indicators go straight to the value that universities, particularly the research-intensive universities, are perceived to ascribe to teaching.

VI. TEACHING-INTENSIVE STAFF

So, where do teaching-intensive staff appointments fit within this paradigm?32 Initially it needs to be established that teaching-intensive (or teaching-focused, the terms are interchangeable) staff do not have the same function as teaching-only staff, who are invariably casual employees with no security of employment and who teach but do not research. Rather, it is proposed that teaching-intensive staff would be full-time (or fractional full-time) staff members whose very teaching focus suggests teaching excellence. It is, however, anticipated that their teaching would be informed by their research into the scholarship of teaching. This is, therefore, not a teaching-only role, but such a role is still contentious. Proposals by the various universities differ but for most, such staff would be distinguished by titles such as Teaching Fellows (not Associate Professor) and promotion opportunity would end at Level D. Further, the hierarchy is inflexible. Once assigned to such a track it would not be possible to revert to the more traditional teaching and researching role.

For many in the tertiary sector, the idea of such a function is too close to the notion of dividing universities into research and teaching institutions. For the National Tertiary Education Union (NTEU), appointment of such staff effectively ensures that they cannot become researchers and potentially creates an underclass of academics. Following is an extract from a bulletin sent by the NTEU to its members at one of the large research-intensive universities:

Research and Teaching Intensive Roles – assumptions about you and your work

The principal change proposed would introduce new categories of Academic staff, comprising ‘research intensive’ and ‘teaching intensive’ roles. These could be determined on appointment to the job for new staff, or for current staff be assigned to them, with the balance between these intensities varying over an individual’s career, depending upon ‘the needs of the unit… as determined by the manager, and the career development goals of the individual’. For new staff this ‘intensity’ would be determined on appointment, in fact by the proposal for the advertisement of an Academic job to be either research or teaching ‘intensive’.

30 Whether such ‘student satisfaction’ surveys truly measure teaching performance is another matter which needs to be pursued at another time.
31 Asmar, above n 26, 23.
32 There have been many financial arguments put forward in favour of such teaching-intensive appointments. This paper does not address the financial arguments.
The objective of these proposals is alleged to be the goal of ensuring that the University has the best teachers and researchers, and the least amount of ‘underperforming’ staff. There seems to be an inference that the organisation and allocation of work needs to radically change to meet this goal, while in fact there are numerous opportunities currently for University Management representatives to indeed both manage and support all staff to achieve teaching and research excellence, while maintaining the integrity of Academic work, and the rights of Academic employees to have a say in the allocation of their work.

The logic of the justification for these new designations is somewhat confused. The argument in support of ‘teaching-intensive’ positions is based on the notion that ‘teaching-intensive’ staff “would normally be expected to contribute to research in either their discipline or the pedagogy in their discipline”. This is in fact no different to what educational researchers presently do. Likewise, the new category of ‘research-intensive’ staff “would participate in teaching through supervision and instruction of postgraduate students, interaction with Honours students or limited instruction to undergraduate students”, which is what many research-only staff presently do.33

According to the latest available information, the University of Queensland (UQ) have appointed 48 such staff (at A to E level). At UQ, they are called teaching-focused;34 focused apparently on teaching and on the scholarship of teaching. Further it is claimed that

[t]hey will be apprised of the latest advances in their disciplines, and will be committed to excellence in teaching and curriculum design and engaged in scholarship activities related to their teaching. Teaching-focused academics whose teaching is informed by professional practice (for example, health clinicians) will be recognised as full academic appointments.35

VII. TEACHING-INTENSIVE STAFF IN A LAW SCHOOL

The above definition of teaching-focused (teaching-intensive) staff in UQ raises some interesting points specifically for law schools, because it envisages that there will be two types of teaching-focused academics. The first type is the individual whose teaching is informed by the scholarship of teaching and learning (SOTL). This position relies on an appropriate balance being struck between the hours of teaching and researching into SOTL and that such SOTL research will be counted as real research so that these academics could be classed as young researchers and/or promoted on the basis of this research. There is already some indication that this is not so in UQ.36

The second type is the academic ‘whose teaching is informed by professional practice (for example, health clinicians)’.37 On first blush, this suggests another drawing together of the profession and the academic. Law has not always been taught in universities. It is claimed that in Australia, there has always been a particularly close link between legal education and the legal profession. The legal profession in colonial Australia was initially comprised of persons who had been admitted in Great Britain or Ireland or who had passed examinations conducted by professional authorities and (in the case of solicitors) undertaken articles in Australia.38

The traditional English model was that barristers were educated at the Inns of Court and the more lowly solicitors were apprenticed or articled as clerks. The Inns of Court in

35 Ibid.
36 Discussion with a teaching-focused appointee at a recent conference suggests that she is ineligible for a research grant because of her teaching-focused position and that her teaching load is well in excess of her teaching/research peers.
37 UQ, above n 32.
London had been providers of higher education for barristers for many centuries. Attendance at these Inns, and the quality of education offered, waxed and waned over the centuries. The articled clerk was dependent upon the prowess and personality of his master. Thus few practitioners were university educated.

Law in universities had a faltering start. In England, the two universities of Oxford and Cambridge did not create courses for the study of law until the mid-19th century. Oxford first offered a ‘BA in law and history in 1850 and a BCL in 1852. Cambridge created a Board of Legal Studies in 1854, initiating the LLB the following year …’ There were few takers. The University College London also opened a law faculty but they found it hard to retain teachers. Towards the end of the 19th century, some provincial universities began to teach law, ‘although most of their faculty were practitioners teaching part time to prepare articled clerks for the solicitors’ examination.’ In Australia, the first university to be established was the University of Sydney in 1850. However, the first head of that university proclaimed that ‘The soundest lawyers come forth from schools in which law is never taught, the most accomplished physicians are nurtured where medicine is but a name.’ Such clear opposition coupled with further political disquiet, meant that the faculty of law in Sydney University was not established until 1890, by which stage both Melbourne and Adelaide had established faculties. It is further claimed by Michael Chesterman and David Weisbrot that even though the number of law faculties (and attending students) grew during the 20th century in Australia, it was not until 1968 that there were more university graduates than articled clerks that were admitted to practice — at least in New South Wales. Moreover, a system of admission without university qualifications still flourishes.

The picture one gains of legal education during the 19th and much of the 20th century in Australia is that it was primarily vocational; content of the programs was largely dictated by the professional admitting bodies and taught by practitioners in a part-time capacity. Such faculties were described in 1952 as being more rigidly theoretical and more narrowly practical than in the United States, largely because “the profession’s assumption that the business of Law Faculties is to train practitioners results in legal education being dominated by practical rather than intellectual interests.”

In 2008, less than 50 per cent of university law school graduates are admitted to practice and the weight of reliance on practitioners to teach, while varied across the country, is not the norm. Law is now largely taught in universities by legal academics with postgraduate qualifications, whose teaching is informed by wide-ranging and in-depth research. This is not to begrudge the valuable contributions which have been made, and continue to be made, by practitioner-teachers. The reality is, however, that in the 21st century, an LLB is not a narrow vocational degree program. It anticipates more than a direct line to practice and there is no shortage of students who anticipate the same thing.

The web quotation from UQ uses the example of a health clinician as the academic whose teaching is informed by professional practice. In a medical faculty this may well be valid. It appears, to the author at least, that there may be a greater culture of research amongst medical practitioners than with legal practitioners. The model, however, does not fit comfortably in law schools.

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41 Ibid 264.
42 M Chesterman, and D Weisbrot, above n 38, 711.
43 For instance, through the Law Extension Committee, which is an adjunct of the University of Sydney.
45 However, it is really beyond the scope of the author, and this paper, to test this.
VIII. CONCLUSIONS

For many commentators in higher education, any strategy which purports to recognise and reward excellence in teaching is a good thing because it raises the profile of teaching. The focus on the scholarship of teaching may also be good, particularly if the position does become a focal point for engagement with the scholarship of teaching. But there are too many ‘ifs’ and, in a very pragmatic way, it would be possible to achieve all of the above without appointing teaching-intensive staff at all.

Most importantly, the appointment of teaching-intensive staff threatens to entrench the divide between research and teaching and, given the real strength of the research culture, it is more likely to create an underclass than not. This would in turn reduce, not increase, the status of teaching. As the above bulletin from the NTEU indicates, the ‘logic of the justification for these new designations is somewhat confused.’ Rather than create a new class of academic, it would be more effective to amend promotion criteria to ensure that research into the scholarship of teaching is considered to be a legitimate form of research for promotion purposes. Promotion should also be a level playing field. Recruitment practices, too, could and should be revised to encourage the employment of fractional staff whose teaching is fully supported and who can work towards future full-time employment. In this regard, Sally Kift talks about fractional staff and enabling a ‘paradigm shift towards institutional assimilation and a sense of belonging’ along the way. Nor is such an initiative to create a new class of teaching-intensive academic welcomed by the legal academy, many of whom see such appointments as winding back the clock.

Excellence in learning and teaching is more likely to be advanced by strengthening the ties between research and teaching. The appointment of teaching-intensive staff does not answer that imperative.

46 NTEU, above n 33.
48 At a recent legal conference, the author sought the views of the audience by way of a short qualitative survey instrument. None of the academics who returned the survey were supportive.
THE STUDENT AS APPRENTICE: BRIDGING THE GAP BETWEEN EDUCATION, SKILLS AND PRACTICE

JOEL BUTLER* AND RACHEL MANSTED**

An endeavour to bridge the acknowledged gap between traditional legal education and legal practice, Mooting, Appellate Advocacy and Legal Practice (MAALP) was an exercise in ‘experiential education’.1 Designed to develop students’ practical legal skills through a synthesis of academic inquiry and experience, the authors introduced and taught MAALP as a new course in the Faculty of Law at Bond University in 2007. The course aimed to replicate, as far as possible in a controlled learning environment, the conditions and demands of legal practice, focusing on the development of specific legal skills within a wider professional context. Students were expected to engage in processes that simulated what they would be expected to do in practice, and this experiential component was supplemented with theoretical and instruction-based lectures and seminars, individual practice sessions, and reflective learning. Effectively, students were ‘apprenticed’ to legal practice.

The authors argue that a mode of teaching involving exposure to emulated legal practice, combined with repetition, reflection and dedicated instruction, has a valid place in modern legal education. Through the experience of MAALP, the authors seek to demonstrate one way in which legal educators can meet the ‘increasingly urgent need to bridge the gap between analytical and practical knowledge’.2 This paper outlines the background to this need, and analyses the course’s teaching aims and methodologies and the degree to which valid pedagogical outcomes were achieved, both from the perspective of the authors and students.

I. PURPOSE AND OBJECTIVES OF MAALP

A. MAALP in the Context of Traditional Teaching and the Skills Revolution

Most student learning in Australian law schools is facilitated through lectures and tutorials, and is assessed through examinations and essay-style assignments. This ‘doctrinal’ approach to education concentrates on imparting information about substantive law through the examination and analysis of legal principles in both common law and statute,3 usually via lectures and sometimes tutorials. The vast majority of content is purely substantive and concerns the examination of cases, principles and statutes and the legal theory and methods used to interpret cases, principles and statutes. Notably, the benchmark standard of Australian legal curricula, the ‘Priestley 11’, refers only to areas of substantive law.4

A resultant theme in the analysis of legal education has, for some time, been the criticism that doctrinal legal instruction fails to prepare students for legal practice and the consequent need to incorporate legal skills into the law school curriculum.5 Nearly a

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decade ago, the Australian Law Reform Commission argued that legal education must be reoriented ‘around what lawyers need to be able to do’ rather than remaining ‘anchored around outmoded notions of what lawyers need to know’. The doctrinal approach remains the dominant teaching mode in most law faculties in most law courses. Although many law schools have now integrated skills components into their traditional substantive law subjects and offer some skills-based electives, change is slow in developing. There remains ‘a powerful disconnection’ between legal curricula and ‘professional skills and approaches’ required by lawyers in practice.

B. Learning Outcomes

In order to demonstrate a possible way in which to bridge this gap between analytical knowledge and practical know-how, MAALP was designed to achieve several tangible learning outcomes.

First, MAALP was designed to introduce students to the way in which lawyers encounter and use legal knowledge. As Paul Ramsden has noted, the teaching of any discipline ‘always involves attempts to alter students’ understanding so that they begin to conceptualise phenomena and ideas in the way scientists, mathematicians, historians, physicians [or lawyers] or other experts conceptualise them’. The authors are of the view that the delivery to students of decontextualised legal doctrine in traditional lecture format leads to a less developed understanding by students of how that doctrine relates to the actual practices and purposes of the profession. This is not to say that decontextualised instruction is not useful or has no place. However, where it is possible to contextualise such instruction with experience of the skills required to use legal doctrine, students’ understanding of that doctrine itself will be better developed.

Second, the course was designed to allow students to experience firsthand how the practice of law can give rise to physical, emotional and ethical issues. Paul Mahrag’s conception of learning is that it should properly be considered as a ‘transaction’, moving beyond the point where ‘mentality’ and ‘reality’ are separated. Thus, learning should be ‘the acquisition, coordination and practice of habits, impulses and dispositions towards action in the world’ in the case of MAALP, the world of lawyering. MAALP aimed to move beyond the ‘mentality’ of legal doctrine by placing students in a physical, emotional and ethical ‘reality’ beyond that of the traditional classroom.

Third, MAALP aimed to develop student competence in a number of practical legal skills. By providing students with the opportunity to experiment with and rehearse legal skills and deal with information in the context of legal practice, MAALP aimed to facilitate the transmission of how to go about situating, processing and synthesising legal information. In legal practice, the ‘intricate relationship between theory and practice’ means that a legal expert with the capacity to contextualise theory ‘is more likely to perceive the features of the environment that are relevant to the profession’s core practices and purposes’. This mirrors the goals of the integrated skills components in substantive law courses, including those at Bond University. However MAALP represented a more comprehensive experience of mock legal practice, which aimed to provide greater levels of

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6 Australian Law Reform Commission, above n 4, [2.21].
7 See Le Brun and Johnstone, above n 5; Pearce, Campbell and Harding, above n 5, 155; Celia Hammond, ‘Teaching Practical Legal Problem Solving Skills: Preparing Law Students for the Realities of Legal Life’ (1999) 10 Legal Education Review 191, 192; Sullivan et al, above n 2, 6-7, 11-12, 14, 23.
9 Paul Ramsden, Learning to Teach in Higher Education (2nd ed, 2005), 7 (emphasis added).
11 Ibid.
12 Sullivan et al, above n 2, 10.
competence than achievable in the limited time devoted to skills in substantive law subjects. Concurrently, the course aimed to furnish students with knowledge and understanding of a number of areas of ‘substantive’ law, through the medium of self-directed, contextual learning. MAALP sought to inculcate students with the habits, impulses and dispositions necessary to work with the substance of law in practice, and to begin to develop in them the impulses and patterns of action and thought that will be necessary for them to become, eventually, experts in the law.

II. COURSE CONSTRUCTION

Enrolment in MAALP was restricted to 24 undergraduate (LLB) and postgraduate (JD) students. There were no specific course prerequisites and no experience of particular skills or legal practice was assumed. However, it was considered that a basic knowledge of core legal concepts would be of significant benefit to students’ capacity to participate in the course and, as such, the course was limited — subject to waiver on application — to students who had completed at least two semesters of their law degree (up to eight subjects). Final marks evidenced that the few students who undertook the course early in their degrees were not empirically at a disadvantage. While some suggested that they may have gained more had they had a ‘knowledge-bank’ of more substantive law prior to taking the course, these students also predicted that MAALP would allow them to better contextualise the law in their future studies.13

A. Teaching Modes

The Carnegie Report, Educating Lawyers: Preparation for the Profession of Law, notes that ‘teaching to develop practical skill, particularly when it involves working with clients, frequently requires settings and pedagogies different from those used in the teaching of legal analysis.’14 To facilitate the learning outcomes outlined in this article (see I:B), MAALP employed two parallel teaching modes. First, students were placed in, and expected to react in a ‘real life’ manner to, situations that mimicked practice in a private law firm. Instructors took on the roles of solicitor-partner, tribunal member, arbitrator, court officer, judge or instructing client as appropriate, and students were required to remain in character as employed solicitors (we refer to this type of instruction as ‘in-character’). Second, in-character instruction was supplemented with comprehensive instruction on approaches to practice and skills methodologies and extensive and often individual feedback (we refer to this type of instruction as ‘out-of-character’).

B. Course Structure

Students were required to attend three hours per week of compulsory classes (a one-hour lecture and two-hour tutorial) as well as participate in additional skills exercises on a number of occasions throughout the semester. Lectures involved one of three categories of instruction: first, explanation of methodologies for approaching, and at times demonstration of, various practical skills; second, instruction on theoretical aspects of legal practice; and third, the provision of comprehensive feedback on students’ work, skills performance, general behaviour and interaction. Lecture topics included, for example, the legal and practical process of approaching an appeal, filing documents, appropriate communication with clients and colleagues, methodologies for drafting written argument, practical legal ethics, and receiving, recording and following clients’ instructions in the context of legal practice. Due to the small class size, lectures could also be interactive in nature, especially where

13 All student comments in this article are taken from interviews with students, notes of which are on file with the authors.
14 Sullivan et al, above n 2, 14.
particular legal skills were being described, demonstrated or analysed. For example, one lecture involved an in-class deconstruction of an advocacy simulation video and pre-prepared written brief. Students reported that interactivity in lectures not only allowed them to actively explore their own ideas, preconceptions and experiences, but that this mode of learning often kept their attention more than traditional one-way lecturing.

Tutorials, each of six or fewer students, were flexible in their content and mode of delivery as required by the learning focus. At the start of the semester, students applied (with a written letter accompanied by a properly prepared CV), interviewed for, and accepted positions in their ‘law firm’ tutorial group. When students were required to attend tutorials in character, they played the role of solicitors employed by their particular tutorial firm (complete with firm history, intranet, client lists, stationery and precedents). In-character tutorials included tasks such as conferences with firm partners and analysis of client files. Out-of-character tutorials involved instruction on similar topics to those covered in lectures, with greater opportunity for interactivity, including participation in practical exercises calculated to improve performance in specific skills, and discussion and feedback on progress and development. Practical exercises were heavily weighted towards improving confidence and competence in oral communication.

After applying and interviewing for a solicitor’s position, students signed a mock contract of employment with their tutorial firm, with an allocated ‘starting salary’ linked to the quality of their application and interview performance. Mid-semester ‘performance reviews’ gave instructors a formal medium through which to discuss students’ progress and make suggestions for improvement across all areas of the course (including teamwork and interaction within their tutorial). Students’ ‘salary’ was also reviewed on the basis of their performance in the course to date. Further, students were given some insight into, and appreciation of, the environment that they might expect in a graduate position, as lectures canvassed topics such as delegation, the politics of firm practice, and the management of ethical and firm obligations.

Out-of-hours time was devoted to in-character activities, including:

- an employment interview;
- client interviews and interaction for the purpose of receiving or clarifying instructions (via telephone);
- a conciliation before the Anti-Discrimination Tribunal;
- a directions hearing (Australian Industrial Relations Commission);
- hearings (Administrative Appeals Tribunal, Federal Court, Full Federal Court, High Court); and
- a guest lecture and mediation workshop with a visiting expert.

Students were responsible for timetabling their appearances for activities scheduled out-of-hours and often were required to liaise with a ‘court registry’ in order to do so.

The instructors made themselves available, both in person and via email, for students to contact and seek clarification and feedback (both in character where, in practice, junior solicitors might consult a partner, and out of character for other matters).

Students were assessed across all skills in the course, including oral and written components, with tasks towards the end of the semester weighted more heavily than those at the beginning. The core legal skills assessed comprised oral and written advocacy, oral and written communication (in the context of both legal advice and client communication and administration), general administrative skills (including file-keeping), teamwork, and professional skills and ethics. All marks were awarded to students by the instructors, based on students’ performance assessed against a defined assessment criteria, which were delineated to students. Both peer- and self-assessment were used frequently and informally, but never counted towards marks or took the form of marks or grades. Most students felt that critiquing themselves and each other, and receiving verbal feedback from the instructors, was more useful to their overall development than being awarded a final mark for each item of assessment.
C. Material
In addition to the usual teaching material — lectures, handouts, class notes, etc — MAALP also featured the use of matter files distributed to students. These files either consisted of real material collected by the instructors or colleagues during time in legal practice or were created to appear as realistic as possible. Copies of original documentation (redacted where necessary) including correspondence, court documents and transcripts of interviews were provided. Students were required to 'sift' through this information to determine the issues of law and fact relevant to each particular matter and, afterwards, to clarify any gaps in their case understanding with clients.

Extensive instruction was not given on substantive legal doctrine. However, a high level of technical legal accuracy was expected and formed part of the assessment criteria for both written and oral work. Students were expected to engage in self-directed learning (with guidance provided by the instructors in weekly scheduled class time, supplemented by ad-hoc meetings with students as required) in order to acquaint themselves with the specific areas of law required for each matter. These areas included aspects of taxation, anti-discrimination, tort, criminal and industrial relations law.

D. Administrative Aspects
Each ‘firm’ had an intranet site which made available instructional materials, as well as providing additional communication tools for students and instructors. Most of the correspondence required (for example, letters to clients), was sent to the instructors via email, and other written material (for example, files and court documents) was required to be provided in hard copy. Formal court correspondence was lodged at the university law library enquiries desk, which acted as the relevant court ‘registry,’ receiving and stamping documents and receiving the appropriate filing fees. Service of documents was effected by a document exchange system also hosted at the law library desk.

III. ANALYSIS OF METHODOLOGY AND OUTCOMES
Employing the approaches outlined above, the course sought to provide practical experience in four key areas of the practice of lawyering: practice and professional skills, advocacy and court procedure, writing skills, and ethics and professional conduct.

Although practical skills were undoubtedly the focus of the course, MAALP was not simply an intensive skills subject. Individual skills components were integrated with each other as a continuous process of simulated practice, where considerations relating to the firm, court, colleagues, matter, client, procedure and substantive law had to be actively engaged with and managed, simultaneously and over time. The MAALP experience also differed from ‘clinic’ subjects which typically integrate work in a public-interest law clinic with self-reflective learning.15 In MAALP, clients and problems were fictitious, offering more pedagogical malleability: learning tasks could cover a broad range of issues and jurisdictions, and were not dependent on the regularity or compatibility of a particular clinic’s client base. Moreover, students had more flexibility to experiment with different skills techniques without the danger of adverse impact on a real client.

The combination of in-character experiential education through simulation, and instruction on approaches to practice, skills methodologies and personal feedback had visible (and sometimes surprising) educational outcomes and resonance with students. While the workload in MAALP was heavy in comparison to other law subjects (students estimated around 1½ to 2 times that of a normal course), (anonymous) student course evaluations bear out that the coursework was highly engaging for students. Throughout the

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course, students were demonstrably keen to participate actively in the practical activities and maintain their in-character roles. Often students went the ‘extra mile’ in their role-plays, even where the additional activities offered no prospect of extra course credit. Several students commented that they considered the experience ‘fun’ and something they looked forward to engaging in on a day-to-day basis.

A. Practice and Professional Skills

One of the major purposes of MAALP was to foster in students the cultivation of the ‘practical wisdom’ of what it is to engage in legal practice, and to allow them to contextualise the substantive law that they received, both in this course and in others in the curriculum, in relation to ‘real-life’ clients’ problems.

MAALP provided a managed learning environment in which students were presented with ‘decontextualised’ information that they were required to contextualise as a process of learning to acquire a sort of practical wisdom. Usually, in conventional legal instruction, material is provided to students with pre-identified issues and one-dimensional solutions that are matters of legal theory only. By decontextualising material, and forcing students to determine what law should be applied, how it should be applied, and the different practice tools that would have to be deployed to solve a problem, students were encouraged to engage on a ‘deep’ (as opposed to ‘surface’) level with the learning material and assigned tasks. Deep learning requires moving beyond a rote-learned understanding of concepts or skills, to a critical examination of a concept or skill’s components, an ability to relate those components to other contexts, and an understanding of their place in the wider context of that discipline.

Initially, little emphasis was placed by students on client instructions as a guide for their actions. Instead of seeking carefully defined and clearly articulated instructions from clients, students decided themselves what was in their clients’ interests and acted accordingly, with often only a cursory reference to their (often assumed) clients’ instructions or objectives.

This is not surprising given most student learning consists of theoretical problem-solving in relation to legal theory extracted from the judgments of appellate courts. The student approach to problem-solving in the traditional law school environment consists of the requirement to find the ‘right’ answer to a legal question, abstracted from the interests of a client who has presented with a particular problem. This approach has led to problems in legal practice, as a recent article noted:

Unsurprisingly, some graduates and new lawyers approach matters in a much more academic, rather than a practical, manner … This academic approach can create difficulties for new lawyers in terms of other essential legal skills such as time management and responsiveness, managing client expectations, commerciality and advising on the most appropriate strategy or tactics.

The article quotes a senior practitioner who has ‘seen graduates who have been unwilling to budge or compromise during the course of a negotiation, simply because they feel the law is on their side’. The authors noted very similar attitudes from students in the early weeks of the course. However, the files submitted by the students at the end of the course, and the attitudes and approaches of students, revealed that their awareness of the lawyer-client relationship, and their willingness to engage (albeit in a simulated manner) with that relationship, had greatly increased.


18 Ibid.
It has been noted that, ‘[u]ntil one practices the taking of instructions from a difficult client one has only a dry and sterile understanding of a lawyer’s potentially conflicting ethical obligations to that client, to their employers and to the court’.19

Throughout the course, the importance of lawyer-client duty was emphasised — both in lectures as a matter of theory and through the actions that were required to be undertaken by students in their practice. Matter instructions were always styled as having originated from a client, and students made direct contact with clients in person, via email, letter and telephone in order to ascertain their objectives and instructions and keep them informed of a given matter’s progress.

Students attended a conciliation on behalf of their client, and were instructed that prior to accepting any settlement proposal the client would need to be consulted via telephone. After some skilful negotiating, the students as ‘reasonable’ solicitors had arrived at a ‘reasonable’ solution, according to the legal strengths and weaknesses of each side. Upon contacting their clients, the students experienced the oft-felt tension between rational application of the law and clients’ conception of their ‘rights’ and their desired outcomes. This led to a discussion of how the client could have been better prepared for possible outcomes for conciliation, and how to put a case to a client that a certain outcome may be in their best interests without ‘railroading’ the client or telling them what to do.

The instructors observed that students’ ability to properly situate relevant legal information in its proper practice context developed over the semester. For instance, students’ ability to recognise how a relevant fact could be utilised (according to the rules of procedure and evidence as well as in support of their case) in oral argument improved markedly in most students by the final oral hearings.

Students’ ability to synthesise relevant factual information from irrelevant information was observed to significantly develop throughout the course. The time taken to filter information or to ascertain what information needed to be extracted from instructing clients, partners or the files themselves as necessary decreased over the semester. As expected, with continued exposure, students became more comfortable interacting in a practice-type environment.

A survey conducted by the University of Sydney ascertained that for employers, the most desirable skills for graduate employees were not specifically legal, but generic — for example, work ethic, proficiency in oral and written communication, interpersonal, document management and time management skills and computer skills.20 As part of the simulated practice environment, students were required to submit timesheets to a secretary on a weekly basis, and keep orderly and comprehensive files, which were assessed for content and form. Time limitations, group work and time accountability were strictly emphasised.21 Further, MAALP sought to foster general competencies in both independent and team work, and specific interpersonal skills associated with interacting with colleagues in the context of the legal practice. It was necessary for students to spend a substantial amount of time outside of class preparing for practical exercises, often in teams of two. The instructors deliberately paired students with different skills, personalities or backgrounds for different appearances. Emphasis was placed on the need for professional courtesy when dealing with professional colleagues. In one instance, students’ professionalism was tested when opposing counsel became over-enthusiastic in the filing and service of certain procedural motions that went beyond the prescribed scope (but not the spirit) of the course.

Several of the students had had prior experience with legal practice, through clerking in law firms. Those students who had undertaken clerkships with legal firms confirmed that the experience of MAALP was similar to their clerkship experiences. However, several

21 Celia Hammond, above n 7, 193.
others took the course expressly to find out whether or not they wanted to pursue a career in legal practice. One student reported that she never thought she would apply for a clerkship until she did the course. Another reported that the knowledge of how the law was practiced made her more confident in seeking work in a law firm.

B. Advocacy and Court Process

The development of effective court and tribunal advocacy was one of the key focus areas of the course, and the most heavily weighted in terms of assessment. Often, mooting classes and competitions are criticised for placing ‘too much emphasis on the “moot” part of moot court and not nearly enough on the “court’’.22 With this in mind, advocacy practice in the course was, as far as possible, contextualised within the twin processes of matter management and court procedure. Students were required to manage all aspects of taking a matter to court: the court process (for example, filing documents in the prescribed manner within time limits, managing court timetables) managing clients expectations (for example, writing to their client to inform them of the outcome of a decision and to seek their instructions on what further steps to take); drafting written arguments and submitting them to court; and interpreting and using rules of court. Students were provided with a ‘MAALP Court Act,’ with accompanying ‘Rules’ and ‘Practice Directions’ (issued at regular intervals). The Act and Rules were adaptations of existing Court and Tribunal Acts and Rules; their main purpose being to educate students to anticipate this aspect of case management, and of the importance of court procedures as a process that shapes the form of a matter as it progresses. Specific exercises were also directed at familiarising students with the importance of document exchange with opponents, time limits and procedural court hearings. In a number of cases, students were given the opportunity not to be instructed on, but to discuss and brainstorm, legal issues and tactics prior to taking part in a practical exercise. Several students, particularly those earlier on in their degrees, found this process valuable, as in most skills classes, students are not given any guidance on the material they are presenting.

Advocacy techniques were taught through a process of performance, critique, directed elemental skills training and repetition. Appearances in some form were made nearly every week, as it was anticipated that students would become more comfortable, confident and competent the more frequently they appeared. In order to manage workload, appearances were often made in the same matter, either through repeated practice of one matter prior to formal hearing, or by taking the same matter through various levels of appeal. In these instances, appeals were made on the basis of judgments handed down in response to students’ court hearings. A variety of targeted exercises were used to improve students’ oral technique, question-answering ability, demeanour, and organisation and delivery of legal argument. For example, a common flaw of budding advocates is an over-reliance on poorly organised notes. After attempting various ways of organising their own submissions in several hearings, students were provided with an example of how a well-organised set of written advocate’s notes might look. They also watched a video of an advocate mooting with that set of notes, observing the advocate’s technique in combination with how the notes were used effectively. Students were encouraged to trial new techniques and analyse their own performances with a view to adjusting their technique.

It has been argued that in many university skills classes, students will only conduct one skills simulation before moving on, and in this way ‘they do not develop proficiency.’23 Without exception, as a result of repeated practice, each MAALP student’s advocacy style and technique improved over the course of the semester. For some, the improvements were only slight (these tended to be students with substantial prior mooting experience). However, for most the difference between their first and their final hearing was substantial. As expected, certain students responded better to different exercises, depending upon what

23 Roy Stuckey, above n 1, 826.
resonated with them personally and what areas of their advocacy needed improvement. The most useful aspect in a number of cases was encouragement to trial new techniques, especially in relation to voice projection and the utilisation of notes. Equally importantly, students engaged actively with the court process aspects of the advocacy training, and although students acknowledged that preparing court documentation according to the rules, meeting deadlines and actually dealing with their opponents’ correspondence was time consuming and, at times, difficult, most felt that the experience had given them an appreciation of the ‘real life’ process beyond usual university advocacy training.

C. Writing

The effective communication of legal knowledge is an essential skill for practice. That communication varies greatly depending upon a particular communication’s audience. In MAALP, students were required to draft written correspondence to clients and to submit written legal argument to court.

It is said that an effective law teacher will ‘make the material of the subject matter genuinely interesting’. 24 While mooting as a performance-based skill is found by many students to be ‘fun’, 25 writing is generally thought less so. However, by integrating the writing as a part of each court matter that students were required to participate in, the interest of students was held, with students often drafting extra correspondence to clients or motions to court that were not mandatory for assessment.

Lectures and tutorial workshops were given on technical rules and methodologies for approaching legal argument in a written context. In one lecture, students had the opportunity to deconstruct two written briefs — one ‘good’ and the other ‘better’ — side by side, discovering for themselves what made the ‘better’ brief superior, and establishing their own frameworks and rules by which to improve their drafting.

In most written work forming part of the law school curriculum, assignments (including skills-style assignments such as letters of advice) are rarely submitted more than once. Notwithstanding the fact that markers often spend considerable time commenting upon students’ work, the comments are somewhat of a dead-end process. Regardless of how diligent students are in reading such comments, there is not usually the impetus or to redraft and submit an improved item of work. The traditional system has valid administrative and assessment-based justifications. However, in MAALP, certain key written work was put through several cycles of marking and redrafting. Letters were draft marked in character as by a firm partner; written submissions were draft-marked out of character. This served the dual purposes of emulating the process of preparation of written work in legal practice and providing stepping-stone feedback that genuinely formed part of the learning process.

Students universally reported that the feedback they received was valuable to the development of legal skills and legal writing, and many of them commented that more extensive feedback could be given (even though the feedback given in this course was an almost constant process). When asked how, if at all, they felt their professional skills had developed, most students responded that they felt far more confident in their abilities as a result of repetition in practice.

D. Ethics and Professional Conduct

The Australian Law Reform Commission has recognised that professional skills training should be ‘calculated to inculcate a sense of ethical propriety, and professional and social responsibility’. 26 The New South Wales Law Reform Commission has also recognised that developing a ‘professional sensibility’ must be undertaken using a problem-solving

24 Nicholas James, above n 16, 150.
approach, and must be removed from the ‘large lecture’ in order to be effective.\textsuperscript{27} Although by no means a comprehensive demonstration of all aspects of practical legal ethics, the course provided considerable instruction on ethical issues in legal practice and presented students with in-character situations requiring them to make ethical judgments. In MAALP, the various manifestations of lawyers’ duties to client, court and fellow practitioners were frequently interspersed throughout discussion of other topics in lectures and tutorials. Along with a consistent expectation of professionalism, emphasis on client instructions and observance of court procedure, several practical (and unannounced) ‘ethical dilemmas’ were set up within matters to allow students to experience firsthand the manifestation of ethics in practice.

The ethics problems that were set for the students were ‘unstructured’ — that is, they were not given in a context of an identified set of issues and problems. An important aspect of education in general is the development of students’ ability to think and act in uncertain situations.\textsuperscript{28} In one instance, students were instructed to appear at a directions hearing, against a pre-existing client of the firm (as detailed on the firm intranet). Two students identified the conflict of interest and the remainder were duly remonstrated after they appeared in court. In another instance, the registry ‘accidentally’ provided confidential and privileged documentation to the wrong side. In this situation, the ethical course of action was unclear, which stimulated class discussion about the resolution of ethical dilemmas in practice. It was intended that students gain a valid appreciation for the disparity between the relative ease with which ethical dilemmas can be spotted in a purely academic context, and the relative ease with which they can be overlooked in practice. However, it is difficult to quantify whether the course achieved its objectives in relation to ethical and professional conduct, beyond exposing students to, and providing them with the opportunity to consider, ethical and professional issues in context.

\textbf{IV. CONCLUSION}

Several of the students who took MAALP had previously done legal work experience or clerkships with law firms. For others, MAALP was their first ‘practical’ experience of what it was like to work in a law firm. Of these, several have now participated in work experience or clerkships and reported that their MAALP experience made them more confident in working through their clerkships, as they had an understanding of the processes involved in the work they were doing and a similar understanding of what was expected of them to competently undertake their work. If for no other reason, this is an indication to the authors that MAALP fulfilled its purpose of ‘preparing students for legal practice.’

Students reported that MAALP prepared them well for the practical components of other law courses, but that MAALP was of more limited utility in translating to other (more traditionally taught) law subjects. A number of students commented that they were now aware of the disjunct between what they were taught in law school and how legal issues would be dealt with in the ‘real world.’ There seemed to be a general perception from students that the problems and issues posed to them in MAALP were more nuanced than the material presented to students in traditional substantive law courses, and that this additional complexity derived from the ‘real’ context in which the law was encountered in mock practice.

The MAALP experience demonstrates the value of orienting students as apprentices of legal practice. The environment created by situating learning in a largely practical context enhanced students’ capacity and willingness to learn theoretical precepts and processes essential to thinking and acting like a lawyer. While most professional learning occurs ‘on

\textsuperscript{27} New South Wales Law Reform Commission, \textit{Complaints Against Lawyers,} (Discussion Paper No 26 1992) [5.26 - 5.31], recommendation 63. See also Sullivan et al, above n 2, 154-160.

\textsuperscript{28} Roy Stuckey, above n 1, 809.
the job', the legal classroom can be a valid venue for providing the foundation for thinking like a lawyer — and developing processes, methodologies and tools that must be at students’ disposal to begin their careers as lawyers.

It has been recognised that effective practical legal training is far more resource intensive than other modes of law school education. MAALP was no exception, and this may prevent similar courses from being implemented as anything but limited-numbers electives. The MAALP classroom, involving the careful management and guidance of learning from both in-character and out-of-character aspects, practical and theoretical discourse, provided a unique pedagogical setting in which to teach practical skills, – even though it may be difficult to implement as a stand-alone course. To provide skills training in speaking, negotiating and argument is useful. However, in order to make those skills relevant to a dynamic legal profession, they must be contextualised so that students appreciate why they are doing what they are doing, and how what they are doing would relate to the wider context of their practice of the law.

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30 Paul O’Shea, above n 19, 275.
REFLEXIVE PROFESSIONALS OR DISEMPOWERED TECHNICIANS? A CASE STUDY OF THE RISKS OF ‘MCLEARNING’ IN A REGIONAL LAW SCHOOL.

LYNDA CROWLEY-CYR

A guiding thought for me, as a legal ethics teacher in a tertiary institution in the 21st century, is that ethics is like a slow release fertiliser; it must be introduced slowly. Too much too fast can be harmful. If introduced slowly and consistently, however, its nourishing benefits can be lasting and visible.

In 2006, at the James Cook University Vice Chancellor’s Teaching and Learning Symposium on Assessment and Feedback, keynote speaker Richard James from the Centre for Studies in Higher Education at the University of Melbourne and principal author of the influential book *Assessing Learning in Universities* spoke of the disempowerment of students in assessment in university courses. The message was clear. While assessment is a highly influential force on students’ choice in terms of which subjects to undertake as part of their university learning experience, student input in terms of setting and developing assessment is generally excluded. This paper offers a case study of a trial, in a professional legal ethics subject, to use assessment as a vehicle for student empowerment in order to enhance and promote reflexive professionalism. The response by students was surprising. The experience stimulated some observations about changes in higher education within present-day modernity.

I. INTRODUCTION

This paper is as much about exploring why an attempt at empowering a group of university final-year law students was unsuccessful as it is about describing the change in their assessment. There are two main parts to this paper. In the first part, modernity is used as a theoretical framework for examining and explaining wider changes in universities in Australia. Such changes are associated with the evolution of what I call ‘McLearning’. I use the term McLearning to explain a manifestation of change in higher education that is part of more comprehensive and widespread societal changes described by some observers as ‘the McDonaldization of society’.

The distinguishing features of McLearning are that the delivery of knowledge must be fast, easy and palatable for students, the ‘new knowledge consumers’. Increasingly, students have become knowledge consumers in a cutthroat market environment in which they no longer have the time (if ever they did) to study without the pressures of debt, work and family.

The underfunding of legal education and the correlated underdevelopment of students’ reflexive capacities is the present order of the day, at least in regional law schools. Being reflexive, in the sense that it is used here, means being first aware of your behaviour and how your behaviour can affect others so that you can then engage in a constant process of change in response to this new knowledge — ultimately, to achieve a higher degree of ethical literacy. Normally, everyone ‘is aware’ of the basis of what they do as an integral part of doing it and can explain this. This is simply being able to reflect. Being reflexive, however, is to be aware of what you do, why you do it, what the implications of what you do are on others and the environment, and constantly monitoring, examining and readjusting all of this in light of incoming information about those very practices. Only then can persons engage in a process of readjustment, altering the character of their actions and practices.

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Casualised black-letter law teaching and examination-based assessment are the chief processes that interfere with students learning to become reflexive professionals. In many respects, we have reverted back to the 1950s trade school where article clerks came in from a day’s work to attend night-time lectures and to be coached for their exams. With the conversion of legal education to academic rather than trade school form came opportunities for reflection and the development of assessment such as essays and research projects which assisted students to place the law in its social, political and economic context.

Far from producing ‘clever’ people to manage the challenges of life in present-day modernity, it is suggested that the neoliberal university may be dulling and narrowing student self-constructs and risks, becoming an assembly line for ‘unreflexive’ technicians. The absence of reflexivity means that students, like university managers, have succumbed to the neoliberal paradigm. They are deprived of the ability to reinvent themselves as empowered agents in their own destiny. Instead, they become technicians — the unquestioning victims of neoliberalism.

Part IV of this paper presents the case study of a trial, in a legal ethics subject, of the use of assessment as a vehicle for student empowerment in order to enhance and promote reflexive professionalism. What the teaching/learning experience disclosed, was the hegemonic place of the passive consumer amongst a group of final-year law students, and their disempowerment.

II. Theorising About Change in Higher Education

Modernity, as I use it here, refers to the entire Enlightenment quest for perfection manifest in its contemporary form. As Zygmunt Bauman states, the ‘project of modernity, if there was one, was the search for the state of perfection’. For Bauman, modernity is characterised as economic progress and the quest for order. It is a ‘liquid’ process; neither fixed in form nor in time. For others, like Anthony Giddens, modernity is Analogised as the erratic juggernaut — a force that cannot be harnessed by man. Such constructs of modernity, as a ‘liquid’, incessant and erratic process, are useful frameworks that can be used to understand other changes like corporatisation, globalisation and consumerism — three modern forces that impact on the ‘enterprising’ process of universities in Australia.

Corporatisation refers to a modern trend whereby public institutions mimic private corporations and assume the trappings of the market and competition policy. This trend represents the transformation of higher education into a commodity and the necessary shift to economic considerations in order to sustain competitiveness in a process of globalisation. Globalisation, through its increased irresistibility and wide use in the latter decades of the 20th century and beyond, has come to represent an overarching modernising process. The term is sufficiently elastic to encompass all interpretations of fundamental trends, transitions and transformations that are considered a revolutionary departure from the past. As the production of knowledge replaces primary industry and manufacturing,

5 These terms have come to mean much more than the continued global expansion of ‘capitalism of the West’ or the development of a ‘world system’. See, eg, Anthony Giddens, Beyond Left and Right: The Future of Radical Politics (1994) 80.
7 Ibid.
8 For an interesting account of the meaning of globalisation and associated trends and changes, see Will Hutton and Anthony Giddens, ‘In Conversation’ in Will Hutton and Anthony Giddens (eds), On the Edge: Living with Global Capitalism (2000).
higher education, for instance, is becoming the ‘product’ made available to ‘consumers’ both locally and globally. This change is associated with the corporatist trend and the application of business practices in Australian universities.\(^{10}\)

As Margaret Thornton puts it, instead of being regarded as a ‘public good provided by the state’, higher education can now be bought and sold through a ‘quasi-private user pays system’.\(^{11}\) This shift towards a user pay ‘consumer culture’\(^ {12}\) is part of wider fundamental change in the form and function of the state, described by Mark Considine as the ‘enterprising of the state’.\(^ {13}\) Responsibility for quality of education and research has been divested by government to the institutions themselves and, as Simon Marginson says, ‘it is no longer in the interest of the institutions to acknowledge problems or fault, regardless of the real state of affairs’.\(^ {14}\) Indeed, the pace of accelerated change since the 1980s is such that some commentators question whether ‘any existing set of public institutions in any one nation [or even the] collective behaviour’ of human beings have the capacity to come to terms with it.\(^ {15}\) To use Will Hutton’s imagery, such change is so overwhelming because of ‘the sense of there being no escape’ from this juggernaut as it comes ‘down the tracks straight at you’\(^ {16}\).

For smaller regional universities, like James Cook University, the commodification of education and the associated need to compete in the national and overseas marketplace in order to close the gap in Commonwealth funding shortfalls, has involved the overextension of its existing resources. Law teachers, for example, are expected to develop undergraduate and postgraduate short courses for full-fee paying students while moving towards ‘flexible learning’ — yet to be defined methods of teaching for mostly HECS (Higher Education Contribution Scheme) students.

We are, some might say, ‘in the midst of a transition era’,\(^ {17}\) — a period Giddens describes as ‘exemplifying the movement from simple modernization to reflexive modernization’.\(^ {18}\) An interesting dimension of Giddens’ concept of ‘reflexive modernization’ is the unfortunate growth of ‘ontological insecurity’.\(^ {19}\) Ontological insecurity involves a process of continuous struggle by individuals to come to terms with who society wants them to be and who they are.\(^ {20}\) It sits alongside other insecurities like personal insecurity and material insecurity experienced by everyone in present-day modernity.\(^ {21}\)

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11 Ibid.
12 Ibid.
16 Hutton and Giddens, above n 8, 4.
18 Paul Havemann provides a comprehensive list of diverse ‘emancipatory goods’ and ‘apocalyptic bads’, which he has drawn in part from the literature, that characterise the contradictory and complimentary dimensions of reflexive modernisation. See Paul Havemann, ‘Social Citizenship, Re-commodification and the Contract State’ in Emelios Christodoulidis (ed), Communitarianism and Citizenship (1998) 135.
19 Giddens defines ‘ontological security’ as ‘a sense of continuity and order in events, including those not directly within the perceptual environment of the individual’. See Anthony Giddens, Modernity and Self Identity: Self and Society in the Late Modern Age (1991) 243.
20 Ibid.
The self in ‘high’ modernity, Giddens says, can experience radical doubt about the reliability of certain forms of social and technical framework.\(^{22}\) In a secular ‘risk’ culture such as Australia, such doubts can filter into most aspects of day-to-day life, causing feelings of restlessness, foreboding and desperation.\(^{23}\) As people become more ‘segmented and differentiated’, they become ‘more wary and appraising of each other’, constantly seeking out ‘someone or some group as blameworthy’ for their anxieties.\(^{24}\)

Therefore, if we accept there is such a thing as ‘a reflexive project of the self’ as part of modernisation,\(^{25}\) then ‘clever’, healthy and wealthy student consumers are in a better position to successfully reinvent themselves. They have adopted rational, economic man’s approach to their education and the way they organise their lives. Their rationality is a direct response to the neoliberal market model of society in which everyone wants to get the most for the least, regardless of the impact on others. Indeed, such people are potentially those that have been categorised by some observers as members of ‘Generation Y’. Col McCowan, for example, has made the following observations about some of the characteristics of ‘Generation Y’.\(^{26}\) In his opinion, these students tend to:\(^{27}\)

- Lack awareness of, and respect for, the needs of others
- Make unreasonable demands and expectations
- Refuse to take personal responsibility — blame others
- Eagerly wait for a lecturer to slip up
- Make derogatory comments based on superficial features
- Have arrogant, inflated egos — posturing, not genuine
- Be image obsessed — either ‘in’ or ‘out’
- Have limited attention span, lack of focus
- Have poor organisational ability.

As is discussed below, such characterisation may help to explain why changes in assessment aimed at empowering a group of final-year law students by becoming more reflexive are not necessarily welcomed. Of course, not all students fit this stereotype. Those students that struggle to manage mounting anxieties associated with a range of social, health and financial problems, for instance, may not have the means or ability to reinvent themselves as successful, self-confident professionals. They may nonetheless all share the same tendencies and desires that contribute to, or result from, the McDonaldisation of society.

Consumerism represents another important force in the history of the modernisation of society. Consumption is the lifeblood of a modern economy. Like demand for other consumable products, the demand for knowledge is partially responsible for the employment of administrative and academic staff in universities. Processes of ‘reflexive modernization, detraditionalization and individualization’ characterise the transformation of state-based institutions, like learning institutions, into organisations where students have become consumers in a ‘weightless society’\(^{28}\) where everything is computerised. New economists have replaced the old system of inputs and outputs with cost-effective calculations. Such change, however, is not without consequences. Indeed, the emergence

\(^{22}\) Giddens, above n 19, 181.
\(^{23}\) Ibid. 24
\(^{24}\) Young, above n 21.
\(^{25}\) Giddens defines this as a project ‘whereby self-identity is constituted by the reflexive ordering of self-narratives’:
Giddens, above n 19, 244.26 Col McCowan is a registered psychologist, teacher, and counsellor who has been Manager of the Careers & Employment service at the Queensland University of Technology (QUT) for the past 13 years. Prior to that, he worked in private practice and over 15 years in government at service-delivery, training, management, and senior policy levels. He created a presentation that was referred to at James Cook University as a useful reference point.
of a widening penumbra of unavoidable risks and insecurities has led to the blaming of the modernisation process itself for inducing such ‘risks’.29

III. MANAGING TIME, RISK AND OPPORTUNITY IN HIGHER EDUCATION

In The Consequences of Modernity, Giddens introduces the compression of time and space (mobility and speed) as significant features of modernity.30 Giddens points out that ‘emptying’ of space can be understood in terms of the separation of space from place; two separate concepts. Place refers to the setting or locality of social activity, which was historically dominated by physical ‘presence’. Modernity increasingly separates place from space by fostering relations between ‘absent’ others, with locality having little relevance on face-to-face interaction.31 This compression, or ‘emptying’ of time and space, is driven by technology, markets and powerful corporations. Corporations assist in the modernisation of higher education by producing and then selling modernising products such as videoconferencing and online teaching technologies as advancement. Indeed, it is challenging to imagine our lives without global communications, the latest and most profoundly significant being the internet and associated tools like portable computers and mobile phones; fast travel for local and global work experiences; fast food and fast medicine to help manage our accelerated consumption; and so on. These are all significant ingredients for achieving ‘success’ in consumer societies (howsoever that is defined).

Indeed, modernity offers an ever-expanding and improving array of such goodies to keep student consumers hungry for more — more choice, more speed, more fantastic. The notion of the digital classroom fits well with ideas (central to modernity) that man as master and processor of the universe can achieve anything. Indeed, scientific and technological reach appears boundless, save for our imagination. Teachers of today must invest their energy in aiding students to consume knowledge through methods of assessment that promote ‘deep learning’ as opposed to ‘surface learning’.32 The contradiction is that on the one hand we have an institutional rhetoric that calls for the promotion of deep learning, while on the other hand the institutional reality structures McLearning as the only option for many.

Our value as teachers is also being measured by the institutions in which we work and beyond, at least in some part, by how well we use technology to give consumers what they want and increasingly expect. In other words, to meet the expectations of today’s so-called ‘Generation Y’,33 students, teachers must also master the art of technology assisted ‘edutainment’.34 Edutainment refers to the relationship between learning and play or entertainment in a presentation such as a television program (Play School and Humphrey B Bear) or a website (The Visible Human Project with 3D anatomy).35 This is partly because today’s consumer students have grown up with a culture of edutainment and technotainment.36 As Kim Veltman explains, while the notion of linking teaching, delight

30 Giddens, above n 4, 17.
31 Ibid 18.
32 The theory has been developed by Paul Ramsden, Learning to Teach in Higher Education (1992); John Biggs, Teaching for Quality Learning at University (1999); and Noel Entwistle, Styles of Learning and Teaching: An Integrated Outline of Educational Psychology for Students, Teachers and Lecturers (1981) amongst others.
34 For the definition of edutainment, see Whatis’com <http://whatis.techtarget.com/definition/0, sid9, gc538402,00.html> at 2 December 2008.
and effect on persons is not new (the concept arose in the 1950s), radical technologically driven changes in this direction in higher education are relatively new, occurring since the late 1980s.\textsuperscript{37}

Traditionally, law teachers were assumed to have expertise in complex areas of law. Today, expectations are higher, with student consumers and university employers demanding more from teachers of higher education. Law teachers, like others, must be technicians versatile in the use of videoconferencing, PowerPoint and ‘clicker’ technology in the classroom, as well as an array of online teaching tools. The layers of complexity increase when teachers are compelled to manage their own travel and work-related expenses through the introduction of online systems like Spendvision.\textsuperscript{38} This increase in administrative work impinges on any timesaving innovation made available through the mastering of new technologies in teaching.\textsuperscript{39} Innovation is, in effect, stifled and hopes of becoming effective edutainers through the use of the latest, ‘fantastic’ and desirable technologies to assist student learning can be thwarted.

For those teachers who grew up without the benefits of Wikipedia, Facebook, YouTube and Google in their early childhood, the use and adoption of new technologies like Blog Tools, Digital Libraries, My Grades, Podcasts, Wiki Tools (to name but a few) which can be delivered individually or as a pre-packaged solution like Blackboard.\textsuperscript{40} Such solutions incorporated into their teaching can often take more time to ‘master’ than is offered by a few hours of intensive training. Failure to do more (like integrating new technologies into teaching, administration and research) due to lack of time, at least at the outset, can be a source of mounting anxiety and stress. Ontological insecurities in the teacher ‘self’ are enhanced by stories in the popular media that claim ‘switched-on teachers’ are those who are technology savvy.\textsuperscript{41}

Further, in universities in the neoliberal age, the process of learning stresses eases of assimilation of the ‘product’. The role of academics must be as customer-focused service providers. Consumerism, however, also has economic, environmental, and social costs. The act or practice of consumption also inevitably involves the possible destruction or expenditure of whatever is consumed.\textsuperscript{42} This expanded and accelerated approach of consumption may be hindering digestion and absorption, which helps explain the absence of reflexivity. Of course, what we see as potentially worth consuming (that which attracts desire) and how we consume may differ depending on the time and place. When students consume new knowledge as part of their professional degree, for instance, they don’t tend to consider the ‘product’s impact on their physical and intellectual wellbeing. Students tend to be ends focused (the LLB) rather than means focused. The desire for McLearning (fast: intensives/block mode; easy: online, less material covered and smaller books) is reflected in the regularity of questions posed by mainly Generation Y students like: ‘Can I pass this subject if I don’t attend classes?’ or ‘How much work do I have to do to pass?’ and ‘Can I complete this degree in three years or less?’ So apart from palatability (familiar and entertaining/fun), students are focusing on ease and speed of obtaining their degree

\textsuperscript{37} Ibid. Also see Dee Dickinson’s website, New Horizons for Learning, which promotes edutainment as useful in terms of explanatory learning, learner driven studies, team learning and technology-based learning enhancements. See New Horizons for Learning <http://www.newhorizons.org/nnll/about/dickinsonbx.htm> at 2 December 2008.

\textsuperscript{38} According to the James Cook University (JCU) user guide, Spendvision is an ‘internet based Expense Management System for processing corporate credit card transactions, reimbursements for “out of pocket” University expenses, managing University travel administration and general purchase expense’.

\textsuperscript{39} My comments are part of a context that resonated with a resounding majority of delegates who attended my presentation of a version of this paper at the Australasian Law Teachers Associations Conference, James Cook University, Cairns, July 2008.

\textsuperscript{40} These options are currently available at James Cook University’s online teaching website, Learn JCU. See also ‘Blackboard Academic Suite’ <http://www.blackboard.com/clientcollateral/Academic_Suite_Brochure_New.pdf> at 2 December 2008.


\textsuperscript{42} Bauman, above n 9, 23.
product. They, too, want to collapse time and space, consistent with the modernisation of modernity.

As with the myriad of other products we consume, the ecological footprint of the product, the product’s origin or the environmental consequences of its manufacture or disposal are secondary considerations; afterthoughts, if considered at all. Take fast food for instance. The embrace of fast-food outlets like McDonalds is ‘glocal’ (including and combining local, regional, and global stretch). In Australia, it is accompanied by other popular outlets like KFC, Red Rooster, Hungry Jacks, Domino’s, Eagle Boys and Pizza Hut. Our growing addiction to fast foods has led to findings that Australians eat 3.4 times a month on average at one of these fast-food outlets, often because people are in a hurry and feel they have no time to cook. We have yet to evaluate the impact of McLearning socially, culturally, ethically, environmentally or professionally. That said, there appears to be a pattern emerging indicating that there are negative impacts associated with the rapid embrace and over-consumption of new products and technologies in the university classroom. The learning environment is similarly susceptible to becoming ‘polluted’ by the tools and practices of McDonaldised teaching which favour fast yet ‘fun’ (at least at first until they are replaced by ‘improved’ products/versions) learning of facts that can be memorised and then communicated on the test. Students soon learn that if further supported with a ‘bit of factual information’, they can achieve a good mark. This type of system is described by Biggs as a ‘poor, non-aligned system’ that puts at risks the conditions for quality learning.

In terms of risks associated with information and communication technologies like mobile phones and computers, scientists are now arguing about the serious harms associated with their high use — physical, environmental and social. The physical risks associated with mobile phones, for example, are said to increase with heavy and prolonged usage. With an estimated 3 billion mobile phone users worldwide, disposal of mobile phones is also an environmental challenge due to the high toxicity of some of their components. The concept of privacy is also evolving as mobile phones are carried everywhere, including the classroom, impinging on ideas of confidentiality and eroding telephone etiquette.

The use of computers and the internet has been associated with heightened stress and anxiety in users who feel unable to manage the increasing volume of emails, spam and junk mail generated daily. Speed risks eroding effective professional communication. Even ‘spellcheck’ has become too bothersome and slow, spurring some consumer students to create innovative abbreviations and acronyms in a ‘liquid’ language which teachers struggle to decipher. Electronic correspondence from students often begins with a ‘hey’ which is more likely to have originated from American television programs than from the

43 The term ‘glocal’ was proposed by Ronald Robertson in 1995 to explain interrelations between the global and the local. See Ronald Robertson, ‘Glocalisation: Time-Space and Homogeneity-Heterogeneity’ in Mike Featherstone, Scott Lash and Ronald Robertson (eds), Global Modernities (1995).


old English words ‘hal’ meaning safe, or sound49 or ‘hail’, meaning literally ‘good health to you’!50 The communication style used by the group of legal ethics students discussed below reflects the difficulty that these students have with two key concepts: voice and audience. As a legal ethics teacher, I try to help these students understand that in their professional lives they will likely be communicating with members of the judiciary and the legal profession as well as with a wide range of clients who are not necessarily of their age and stage. In fact, the legal ethics subject is also about training people to be professionals in all of their behaviour, including their communications. The same can be said of all the law subjects of the law degree. The development of these types of ‘good’, or professional, and ethical communication skills ought not to become a focus only in the final year of the law degree when the profession’s rules of conduct are examined.51

Globalisation of crime must also be included on the ‘risks list’ of McDonaldised learning. Internet anonymity has created opportunity for cyber-bullying and harassment; problems perhaps better recognised as associated with school-aged children. However, higher education students and even their teachers can be victimised in this way by email or on internet sites like ‘Facebook’.

In some universities in Australia, student feedback systems (SFS) provide an internet system that, despite its intended benefits, is open to misuse. Guaranteed anonymity of participant students and the absence of any opportunity of reply for teachers mean that inappropriate, personal and rude communications from disgruntled students can overshadow the good work of teachers in especially non-elective subjects.

The next part of this paper focuses on responses to assessment designed to empower final-year law students, yet seemingly disempowering them through the raising of a typical affective and cognitive expectation for a McLearning environment.

IV. EMPOWERING STUDENTS: A CASE STUDY

A counter-hegemonic ideology to the neoliberal construct of the university as a marketplace for consumer students reflects the presumption that students are reflexive citizens. Such learners are engaged in the reflexive project of the self. They seek self-determination and empowerment to actualise their own potential, and university lecturers guide, facilitate and evaluate this process through aligned teaching. Aligned teaching is problem-based learning that aims to get students to solve professional problems by building on the skills and knowledge base that students possess. According to Biggs, teachers ‘set up a learning environment that supports the learning activities appropriate to achieve the learning outcomes’.52 Ideally, the learner then constructs meaning out of the learning activities.53

The counter-hegemonic ideology exists simultaneously with the neoliberal ideology in Australian universities, creating contradictory and conflicting expectations on the part of both learners and teachers. The ontological insecurity that characterises modernity is one that Giddens suggests can be successfully combated by reflexivity.54 Structured processes and learning contexts that deny students the ability to develop reflexivity are a source of ontological insecurity because they interfere with the students’ ability to reinvent themselves as modernity demands.

The legal ethics subject is a requirement for the purposes of admission as a legal practitioner in Australia. At James Cook University, the subject is concepts based,55 aiming

50 Arthur Leslie Banks and James Alexander Hislop, Health and Hygiene (2nd ed.1962) 70.
51 Of the 83 consumer disputes finalised by the Queensland Legal Services Commission in 2006-07, three quarters of them were about costs and quality of service, including communication. See Legal Services Commission Annual Report 2006-07, 23 <http://www.lsc.qld.gov.au/22.htm> at 2 December 2008.
52 Biggs, above n 46, 2.
53 Ibid.
54 Giddens, above n 19.
55 The core concepts include power and vulnerability; trust and duty; denial and acknowledgement; responsibility and accountability; and dignity and apology.
to create reflexive professionals and including the teaching of professional conduct. The subject is designed to assist law students to develop ethical awareness and literacy by learning how to evaluate the outcomes of their face-to-face encounters with other people based on analysis of the process and the way processes can sometimes produce or generate undesired outcomes. The subject examines the consequences of behaviour and responsibility for outcomes based on the harm or good of processes that legal practitioners are empowered to initiate as professionals. Some of the outcomes generated by the behaviour of lawyers in the practice of law are explored in the various sessions of the subject. The classroom is effectively converted into a laboratory in which students are given opportunities through discussions, role-playing (student-to-teacher and student-to-student interactions) and observation. The teaching occurs in small groups of no more than 25 students.

Today’s legal practitioners must be highly skilled, reflexive and flexible professionals, able to critically analyse and solve complex legal and ethical problems and communicate effectively with a diverse range of people from different cultural, social, political and economic backgrounds. Power imbalances (inherent in the lawyer-client relationship) are a key concept woven into the various sessions to help explain the risk of unintentional harms associated with how legal practitioners behave. The legal ethics subject, therefore, was considered an appropriate opportunity to incrementally introduce assessment that may help to address the disempowerment of law students. The assessment was aligned to the objectives of the subject in such a way as to present students with the opportunity to have an active role in evaluating and grading the subject’s sessions and their learning experience — a form of empowerment through constructive alignment. Typically, law students have been denied participatory roles in the assessment and grading processes. Since the analysis of unequal power relationships is a core concept in the subject, it is well-suited to assessment initiatives that aim to broaden understanding of power imbalances in lawyer-client relationships and having to meet new and unfamiliar challenges.

The first piece of assessment in this subject involves the writing of an Ethic CV to help students gain a better understanding of their values and ethical self. It was inspired by a document published in 2006 by the Queensland Law Society’s ethics consultant, Max Del Mar, as part of the Professional Ethics Project. The aim of the Ethic CV is to encourage ethical awareness and ‘a way to provide incentives for ethical aspirations’ through the recognition of ethical achievements.

A. The Ethic CV

Essentially, the Ethic CV was used in the legal ethics subject as self-concept assessment; that is, to assist students to develop an ethical sensibility and awareness of their own ethical development to date. This piece of assessment required students to create a section that could be inserted into their curriculum vitae that described in a few lines, their:

- Community involvement (for example, membership of non-profit organisations, law-related volunteer work, non-law related volunteer work)
- Ethical courses attended or presented
- Professional pro-bono work
- Community awards
- Community fundraising
- Cultural awareness (recent/favourite books/articles/law cases/reform papers/movies)


57 Biggs, above n 46.


59 Ibid 8.
• Submissions to ethics committees or other committees; and/or
• Any other examples of ethical development.

These subheadings are suggestions raised in the Law Society’s ethical CV documentation. It is not an exhaustive list. The idea was to help students build on their awareness of their ethical ‘self’ in a positive and practical way by showcasing their values and ethical and moral development to future employers. The assessment was worth only 5% of the total marks in the subject. It was to be handed in after commencement of the semester but prior to first teaching session.

This process also allowed for an informal assessment of the student’s existing skills in finding the electronically available document from the Law Society website and independently following the instructions in the detailed outline. Students were informed that feedback on the results would be provided at the first session and students would be given the opportunity to amend their CV entries and resubmit at the end of semester as part of a larger ethics portfolio.

Since the lecturer had not met with the students in the classroom environment, emails were the only mode of communication used by students to contact the lecturer. Some of the emails were polite but others were not. For example, one email received from a student simply stated: ‘Hey, I can’t find it.’ This was not considered an inappropriate communication by a final-year law student with a lecturer that the student had not previously met; in essence, a stranger. Another said, ‘How are we to know the meaning of ethics if we haven’t yet been taught the first lecture?’ This is a disturbing response not only because of what it is suggesting about the student but what it is telling us about what the student has extracted from the law degree. It ought to be reasonable to expect that anyone who has completed four years of a law degree has some understanding of the meaning of ethics, something that can be assimilated from almost any subject in a law degree in the 21st century. Finally, another student wrote ‘Do you want all of my CV? It’s personal’. This statement indicates confusion about the role of the CV as a fundamental document used by those seeking employment or to evidence scholarship. In this sense, the CV is a public domain document intended to inform everyone who receives it that the person described in the document has value and worth.

Another incremental step towards empowering students through their assessment was to allow students to design their own assessment rubric. The rubric could then be used to assess the actual workshop sessions, in a sense ‘turning the tables’, with students acting as assessors of the subject content based on their own instrument created for this purpose. The expectation that students would draw up an evaluative rubric generated the most email exchange and yet there was a stark change in the style of the emails; they were far less demanding and far more courteous and respectful. Such emails were received after the first workshop, which focused on the development of ‘good’/professional communication skills.

B. The Rubric and Ethics Portfolio

The ethics portfolio is a progressive work that is made up of three A4 pages relating to each of the three workshop days. The portfolio represents the end product of the students’ learning journey in this subject through the evaluation and grading processes that they developed by constructing their rubric at the beginning of the subject. This assessment task was intended to assist students to develop and articulate a clear understanding of the purpose of a marking rubric as a tool to assess how well the preset objectives have been met by the individual students. More importantly, the idea was for students to gain a better understanding of the relevance of legal ethics as expressed in the subject’s objectives in terms of their day-to-day lives and as future reflective professionals.

Students were required to develop a simple rubric. An example of the rubric appears below. The intention of this part of the assessment was discussed in detail both in the
subject outline, which included the following example of a rubric, and at the first face-to-face session at the start of the subject.

**Assessment Rubric**

<table>
<thead>
<tr>
<th>Session</th>
<th>Outstanding (insert your own words)</th>
<th>Reasonable (assessment descriptions to be inserted by student)</th>
<th>Unsatisfactory (assessment descriptions to be inserted by student)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value</td>
<td>(assessment descriptions to be inserted by student must refer to objectives of this subject)</td>
<td>(assessment descriptions to be inserted by student)</td>
<td>(assessment descriptions to be inserted by student)</td>
</tr>
<tr>
<td>Impact</td>
<td>(assessment descriptions to be inserted by student)</td>
<td>(assessment descriptions to be inserted by student)</td>
<td>(assessment descriptions to be inserted by student)</td>
</tr>
</tbody>
</table>

This piece of assessment involved students constructing a tool with which they could critically assess their chosen sessions. The assessment was in terms of the value and impact of the session. The value of a session was to be objectively determined by comparing the content of the session with the subject aims and objectives listed in the subject outline. Students were to critically analyse the value of the session in terms of assisting students to develop the knowledge and skills described in the objectives listed in the outline. Students were encouraged to support their critique with appropriate authorities, whether from the legal, educational or social science literatures or case law. For example, if critically assessing the value of the session on ‘interactive listening’ in terms of preparing students for legal practice as ethical professionals, the students had to support their assessment. On the other hand, in terms of the session’s impact, students were asked to subjectively grade whether, if at all, it had an impact on their own knowledge, understanding or skills development — again, in line with the outcomes defined in the subject outline.

The rubric was worth 5% of the total marks for the subject. It was in the portfolio pages that students could describe how and why they evaluated and graded the sessions of their choice, good or bad. The main focus was to give students the impetus to consider the connection between the curriculum and the assessment, all aimed at assisting students in becoming better equipped to deal with the ethical dilemmas that may present themselves in busy legal practices. The ethics portfolio was to consist of four pages in which students described their assessment of the sessions in accordance with their rubric. The portfolio was worth 10%.

**C. Findings**

A significant minority of students openly described their overwhelming fear and panic at having to complete the assessment in this subject during a classroom feedback session. What became evident was that very few students had a clear understanding of the role of the assessment criteria (generally within a rubric) which appeared in their subject outlines over the course of their studies in previous (and current) university study periods. Many admitted to not having really looked at the criteria after their first year of study because it ‘all looked the same’ and appeared ‘straightforward’. This lack of understanding of the meaning of the different assessment criteria in subject outlines was not expected as it was assumed (perhaps naively) that these final-year students would be well versed in the meaning and use of such criteria.
Surprisingly, while some of the students found the assessment in this subject interesting and of some value, most said that they did not want to be empowered in this way and did not enjoy the deviation from the usual assignment and examination forms of assessment that they felt comfortable with. This was the case regardless of any stated or perceived benefits of the assessment in this subject. It seems that some of the students did not see the exercise as empowering.

Some students could not complete the tasks independently because they lacked the skills (for example, some emailed the lecturer stating that they could not find the Max Del Mar document on the internet despite attempting to do so). Alternatively, they may have lacked the confidence or the will to engage in the process or there may have been other factors at play.

The university’s electronic student feedback system (SFS) confirmed that students preferred the familiar forms of assessment like assignments, tests and examinations. A sample of some of the comments is as follows:

- ‘I didn’t like the form of assessment. Teachers have more knowledge and it is our place to learn from them’
- ‘Overall subject matter and teaching were good but did not understand the written assessment and why it was used’
- ‘Challenged by the assessment but do not agree as to its validity’
- ‘I did not like the assessment at all … I found it to have no real relevance and would much rather have just written an assignment.’
- ‘It’s [sic] quality and interest was good, however the assessment was ridiculous and unstructured’
- ‘I found the assessment to be different but I don’t like it … I would prefer assignments’
- ‘The rubric was a nightmare and irrelevant’

IV. SHARING IDEAS ABOUT MY JOURNEY: SOME CONCLUDING REMARKS

An important lesson learnt was that the lecturer cannot assume that students necessarily possess all of the knowledge, skills and graduate attributes attached to lower-level subjects in the degree simply because they have completed and passed those subjects. The tertiary education system is not well equipped at measuring how well students have mastered new skills and attributes other than the basic critical analysis and problem-solving skills acquired through written assignments and examinations. The empowering, reflexive professional approach is more likely to lead to consumer dissatisfaction while high SFS and university teaching awards seem more likely to flow to producers adopting the consumer-driven approach.

Also, I acknowledge that I have some way to go in learning how to make assessment more empowering for this group of students. My intention is to help students become the graduates that employers and professional groups expect them to be in terms of effectively coping with the world of work. However, this must be achieved by also engaging students in assessment activities that they perceive as being meaningful to them. The student feedback is clear that the novel assessment introduced in this legal ethics subject requires further development. I draw some comfort however, from the words of Max Del Mar when he says:

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60 In response to the emails, I checked the site to ensure the document was still available. Further, I asked a final-year student that was not enrolled in the subject to search for the document. It was located by the student based on the same information as was given to the legal ethics students within five minutes.

61 Queensland Law Society, above n 58, 8.
All of us experience the frustration and disappointment of not being able to interest someone else in something we feel passionate about. It is a frustration that lies at the heart of problems associated with the teaching of ethics.

In conclusion, I find that McLearning and the push by universities to build the higher education market remind me of the current yearning for fast food. Fast food is quick, easy, palatable and glocal. However, it lacks nutrition and can be bad for you, society and the environment.
FOR SALE: BEAUTIFUL FAMILY HOME, 3 BEDROOMS, FRIENDLY POLTERGEIST AND UNIQUE REPUTATION AS LOCAL MURDER SITE — THE OBLIGATIONS OF DISCLOSURE ON REAL ESTATE AGENTS UNDER THE FAIR TRADING ACT (NZ)/TRADE PRACTICES ACT (CTH).

DEBRA WILSON*

I. INTRODUCTION

The doctrine of caveat emptor requires a prospective purchaser to satisfy himself as to the quality of the property he is considering purchasing. There is therefore no obligation on the vendor to reveal any information about the property, and liability will only arise if the vendor makes a positive misrepresentation concerning the property. Although caveat emptor was initially the standard rule applied to the sale of residential properties, a series of exceptions developed in response to a change in social conditions following the First World War have severely limited its application.

This paper begins with a brief discussion of the development and decline of caveat emptor. It then considers a specific category of potential claims arising as a result of the sale and purchase of residential property, being damages for the failure to reveal that the property has a latent, stigmatising characteristic which is likely to have an effect on the value of the property.

Two differing approaches to these stigmatised property cases in other jurisdictions are then considered; first, the United States, which has relied on a combination of caveat emptor and specific disclosure legislation to determine liability and, second, the United Kingdom, which has considered the non-disclosure of stigmatising factors as a matter of interpretation of the contract between vendor and purchaser.

A recent New South Wales case, *Hinton v Commissioner for Fair Trading* (‘Hinton’), which involved the failure of real estate agents to disclose that three members of a family had recently been murdered in the house, raised the possibility that the *Fair Trading Act 1987* (NSW) could be applicable in stigmatised property cases in Australia. This paper considers the application of the *Trade Practices Act 1974* (Cth), the state Fair Trading Acts and also the New Zealand *Fair Trading Act 1986* to these type of cases, and suggests that while a claim under these Acts may be established due to the failure to disclose stigmatising characteristics, the additional requirements in the remedies provisions will likely reduce, if not prevent, the applicability of the Acts to stigmatised property cases.

II. THE RISE AND DECLINE OF CAVEAT EMPTOR

Caveat emptor was first applied to real estate transactions in England in the 16th century. It was considered an appropriate rule on the basis that English society at the time was agrarian in nature. It was the land itself that was therefore of the greatest value to the purchaser. Structures built on the land were generally sufficiently basic in design that any defects in their quality were patent, or identifiable by a potential purchaser on close inspection. Provided that there was no active misrepresentation or fraud by the vendor, the

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1 The full Latin phrase is ‘caveat emptor, qui ignorare non debit quod jus alienum emit’ [‘let a purchaser, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution’].
purchaser was considered to be in as good a position as the vendor to identify any defects in the property.

The decline of caveat emptor began in the 1930s in England as a result of an increase in the mass production of houses due to property damage following the First World War. Due to increased demand, houses were built more quickly and were of a poorer quality than previously. Houses were also more complex in design, resulting in more defects being classified as latent, or not readily identifiable even on the purchaser’s close inspection. Further, the nature of purchasers had changed. Houses were now being purchased by the middle class, who had a tendency to buy and sell houses more frequently and were therefore not as careful in inspecting properties as the pre-World War purchasers, who were generally looking for a long-term home. As a result of these two factors, the vendor and purchaser were no longer in similar positions in terms of being able to identify defects in property. The purchaser could not rely on a close inspection to identify defects even if that inspection was carried out by a professional. The vendor, on the other hand, might have knowledge of the defect due to his personal experience with the property and, therefore, was at an advantage in the transaction.

The courts addressed this disparity in knowledge by eroding the doctrine of caveat emptor on the basis that it no longer served the needs of society, imposing a duty on the vendor to disclose any information he held about potential defects to the purchaser. Failure to comply with this duty allowed the purchaser to seek damages for loss of value or rescission of the contract. The difficulty was in determining which non-physical defects were considered to sufficiently affect the value of the property to justify the granting of a remedy.

By the 1960s, the latent defect exception to caveat emptor had extended to require disclosure of any ‘material facts affecting property value where the seller, but not the buyer, knew of the facts.’ This exception covered any latent defects affecting the value of the property, regardless of whether the defect was physical or non-physical.

III. NON-PHYSICAL DEFECTS IN PROPERTY

The common term used to describe property which has a non-physical defect is ‘stigmatised property’. In the USA, the National Association of Realtors has defined this as any property which ‘has been psychologically impacted by an event, which occurred or was suspected to have occurred on the property, such event being one that has no physical impact of any kind.’ Beginning in the 1980s in the USA, a series of cases considered the liability of vendors for failing to reveal that their property was stigmatised. The following are examples of non-physical defects which have been argued to meet this definition.

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5 See, eg, Miller v Cannon Hill Estates [1931] 2 KB 113, where the court found that there was an implied warranty as to fitness in houses under construction. The decline of caveat emptor in other countries, notably the USA, began in the 1940s.


7 Ibid 387.

8 Ibid, above n 3, 98.

9 Robert Shisler, ‘Caveat Emptor is Alive and Well and Living in New Jersey: A New Disclosure Statute Inadequately Protects Residential Buyers’ (1996) 8 Fordham Environmental Law Journal 181, 184. See also Wilhite v Mays 232 S E2d 141, 143 (Ga Ct App, 1976) where the judge commented that caveat emptor ‘apparently worked well in agricultural societies, as evidenced by its centuries of acceptance, but the sale of farm acreage … is very different from the sale of a modern home, with complex plumbing, heating, air conditioning and electrical systems. [Caveat emptor is] no longer a reflection of American values.’

10 Although rescission was considered a ‘most extraordinary power … one which should be exercised with great caution’: Reed v King 193 Cal Rptr 130, 132 (1983).

11 Lingsch v Savage 29 Cal Rptr 201, 204 (Dist Ct App, 1963).

A. History Stigma

Some of the most common claims of stigma refer to the failure of the vendor to reveal the specific history of the house. In Reed v King,13 a purchaser was granted rescission of the purchase contract on the basis that the vendor had not revealed that the property had been the site of a multiple axe murder of a woman and her four children 10 years previously. In Stambovsky v Ackley,14 a purchaser argued that he ought to have been informed that the property was haunted by three ghosts: a civil war naval lieutenant; a man in his 60s; and a young child with a round, apple-cheeked face who wandered around the house and once ate a ham sandwich belonging to the owner.15 The judge in this case awarded damages, stating that as the vendor had actively publicised the existence of the ghosts on previous occasions,16 she was ‘estopped to deny [the ghost’s] existence, and [therefore that] as a matter of law the house is haunted.’17

The fact that sexual offences have occurred in a property is also considered stigmatising. In Sanchez v Guerrero,18 it was held that it ought to have been disclosed to a prospective purchaser that the current owner had allegedly molested several children in the house, and in Van Camp v Bradford,19 the fact that the daughter of the previous tenant had been raped at knife point in the property ought to have been revealed.20 The judge in Van Camp concluded that ‘the stigma associated with the residence is analogous to the latent property defects that have become an exception to the strict application of caveat emptor.’21

B. Health Stigma

It has been argued that any aspects of the property’s history that might result in perceived health issues for new purchasers ought to be revealed. This is particularly relevant where a property was previously used, or rumoured to have been used, as a methamphetamine lab,22 as the chemical residue remains in household surfaces for several years.23 It is also a matter for debate whether the prior medical history of an occupant ought to be revealed, for example, where the health issue was HIV or the AIDS virus,24 or other disease which is ‘highly unlikely to be transmitted through the occupying of a dwelling’25 but might still be of concern to new purchasers.

C. Off-Site Stigma

It is not only non-physical characteristics of the property itself which arguably ought to be disclosed, but also any non-physical characteristics of the neighbourhood that might impact on the value of the property. In Van Camp, the judge held that, in addition to the rape of a tenant, it should also have been revealed that several rapes had occurred in the

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15 Ibid 672.
16 The vendor had sent several articles on the hauntings to the Readers Digest, and the house featured on a local walking tour of the area as a ‘riverfront Victorian with a ghost’: 572 NY S2d 672 (1991), 675.
17 Ibid 674.
18 885 SW 2d 487, 492 (Tex App, 1994).
19 63 Ohio Misc 2d 245 (1993).
20 In both cases, the purchaser had specifically asked about the property’s history. In Sanchez, the purchaser had asked about the previous owner. In Van Camp, the purchaser had asked about the reason for bars on the basement window and had been told only of several robberies in the street years ago.
21 63 Ohio Misc 2d 245 (1993), 252.
22 Note that if chemical residue was actually found in the property, this would be considered a physical defect while the fear of residue or the house’s reputation as the site of a methamphetamine lab would be a non-physical defect.
25 Over 30 US states have legislation in place specifically exempting liability for failing to reveal diseases meeting this criteria to new purchasers: Massachusetts Association of Realtors, Stigmatized Property <http://www.marealtor.com/content/stigmatizedproperty.htm> at 11 December 2008.
neighbourhood. In contrast, however, the mere presence of a sex offender in the neighbourhood did not need to be revealed.

In *Strawn v Canuso*, a new subdivision was advertised as having a ‘peaceful bucolic setting with an abundance of fresh air, clean lakes and rivers’. It was held that the fact that a nearby landfill had contaminated the lake and groundwater with possibly hazardous waste ought to have been revealed.

One interesting case, *Alexander v McKnight*, suggested that the presence of undesirable neighbours ought also to be disclosed. This was a pre-emptive case, with the owners of the property claiming that their property value would decline due to the antisocial behaviour of their neighbours. The court held that while this information ought to be disclosed to potential purchasers, it was not appropriate in this case to award damages. The judge concluded by stating that ‘if anything, the concept of let the buyer beware is an anachronism in California having little or no application in real estate law.’

### IV. THE USA RESPONSE TO STIGMATISED PROPERTY CASES

The increase in stigmatised property cases in the USA resulted in the enactment of state legislation to clarify the extent of the duty owed to prospective purchasers. According to Johnson, 34 states have enacted some form of legislation. These Acts take one of three forms: those specifically requiring disclosure of particular conditions; those specifically exempting certain information from disclosure; and those requiring that ‘material or adverse conditions’ be disclosed. This third form has resulted in uncertainty concerning whether ‘material or adverse’ is limited solely to physical defects or whether it could also include non-physical defects. Real estate agents have responded to this uncertainty by inserting disclaimers, or ‘as is’ clauses into the sales contract, in effect, re-introducing caveat emptor. The enforceability of these clauses is uncertain.

### V. STIGMATISED PROPERTY CASES IN ENGLAND

Although cases concerning stigmatised property in England are not as common, there have been two relevant cases in recent years. In *Sykes v Taylor-Rose*, the Taylor-Roses purchased property without being told of its history. In the 1980s, a young girl kept as a slave had been murdered and buried in the back garden, then later exhumed and...
dismembered. Various body parts were hidden in the walls of the house.39 When the Taylor-Roses discovered this, they sold the house. The purchasers, the Sykeses, were told only that a murder had taken place in the house, but discovered the specific details through watching a documentary on television. They claimed that the Taylor-Roses ought to have revealed all of the details of the murder, specifically that there were still unaccounted-for body parts thought to be in the house.

The claim was based on Question 13 of the Seller’s Property Information Form: ‘Is there any other information which you think the buyer might have a right to know?’40 The court held that there was no obligation to disclose based on the wording of this question. The test was not objective but whether, in the honest opinion of the seller, the information should be given.41

In another example, rescission of a purchase contract was sought following a claim that a property in Derbyshire was haunted by ‘a little boy with piggy eyes’.42 It was also reported that walls weeped, objects were moved, and the female purchaser felt on one occasion as if she had been raped by a ghost.43 A remedy was denied in this case, with the judge finding no proof of the haunting and dismissing the claims as ‘hysterical reactions’.

VI. STIGMATISED PROPERTY CASES IN AUSTRALIA AND NEW ZEALAND

The early stigmatised property cases in the USA and England suffered from the disadvantage that there was no applicable legislation concerning the level of disclosure required. The early USA cases based their arguments on caveat emptor jurisprudence, and the English cases were argued as a breach of a standard form contract provision. While there is no specific legislation relevant to stigmatised property in Australia or New Zealand (with the exception of the New South Wales state legislation discussed below), there is some general legislation imposing a standard of conduct in trade which is potentially of application.

The Trade Practices Act 1974 (Cth) contains two relevant provisions. Section 52 states that ‘a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive’. Section 53A states ‘a corporation shall not, in trade or commerce, in connexion with the sale or grant … of an interest in land … (b) make a false or misleading representation concerning … characteristics of the land.’ New Zealand and the Australian states and territories have enacted Fair Trading Acts with almost identical wording.44

The legislation restricts liability for misleading or deceptive conduct by requiring that the conduct occur ‘in trade’. The private vendor of a residential property is not in trade and will, therefore, not be liable for failing to reveal stigmatising characteristics.45 The legislation will, however, apply to the sale of residential property by a commercial entity and, more particularly, to real estate agents.46

Non-disclosure of information can be considered misleading or deceptive depending on the circumstances of the case. In Demagogue Pty Ltd v Ramensky47 Black CJ stated ‘[s]ilence is to be assessed as a circumstance like any other. To say this is certainly not to impose a general duty of disclosure; the question is simply whether, having regard to all

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40 Question 13 is no longer part of the Sellers Property Information Form.
43 Ibid 1167.
44 Fair Trading Act 1986 (NZ) ss 9, 13; Fair Trading Act 1987 (NSW) ss 42, 45; Fair Trading Act 1989 (Qld) ss 38, 40; Fair Trading Act 1987 (SA) ss 56, 59; Fair Trading Act 1990 (Tas) ss 14, 17; Fair Trading Act 1999 (Vic) ss 9, 12; Fair Trading Act 1987 (WA) ss 10, 12; Fair Trading Act 1992 (ACT) ss 12, 15; Consumer Affairs and Fair Trading Act 1992 (NT) ss 42, 45.
46 Cervolo v Peter Economou Real Estate Pty Ltd (1985) ATPR 40-635.
the relevant circumstances, there has been conduct that is misleading or deceptive.' The test is whether, on the facts of the case, there was a reasonable expectation that particular information would be disclosed. The application of this legislation to stigmatised property was tested in *Hinton*. This case concerned the purchase of the house in which Sef Gonzalez had murdered his parents and sister three years previously. The property was purchased by Mr Kwok and Ms Lin. After paying the deposit, they discovered the history of the house and sought rescission of the contract on the basis that due to their Buddhist faith, they could not live in a property where a murder had occurred. Although the vendor finally agreed to refund the deposit and release the purchasers from the contract, the New South Wales Fair Trading Commission brought an action against the real estate agents for engaging in misleading or deceptive conduct under s 42 of the *Fair Trading Act 1987* (NSW) (the equivalent to s 52 of the *Trade Practices Act 1974*), and s 52 of the *Property Stock and Business Agents Act 2002* (NSW), for failing to reveal the history of the property. The New South Wales Administrative Decisions Tribunal held that the real estate agents had breached the *Property Stock and Business Agents Act* and had engaged in misleading or deceptive conduct under the *Fair Trading Act*. It considered that the purchasers had a reasonable expectation of being told about the history of the property, as this might affect its value.

The issue of stigmatised property has only been considered in New Zealand in a striking out application, *Deverick v Hedley*. In this case, the purchaser of property brought an action under s 9 of the *Fair Trading Act (NZ)* claiming, inter alia, loss of value to the property on discovering that a previous owner had contracted AIDS and died in the house, where his body remained for a period of time during a wake. Williams J refused to strike out the claim, on the basis that ‘it could not be said that Mr Hedley’s claim under the *Fair Trading Act* is incapable of success’.

VII. CAN THE TRADE PRACTICES ACT/FAIR TRADING ACTS PROVIDE A REMEDY IN STIGMATISED PROPERTY CASES?

In *Hinton*, although finding that the real estate agents had breached both Acts, the penalty imposed was under s 192 of the *Property Stock and Business Agents Act 2002* (NSW). It was not necessary to consider damages under the *Fair Trading Act 1987* (NSW) as the contract had already been rescinded and an amount equivalent to the deposit given to the purchaser by the vendor. It is not clear whether, had the vendor not agreed to release the purchasers from the contract, a remedy would have been available under this Act.

While it was determined that the Hintons had engaged in misleading or deceptive conduct under s 42, this is not sufficient to result in a remedy. Section 68 states that:

(1) A person who suffers loss or damage by conduct of another person that is in contravention of a provision of [Parts of the Act including s 42] may recover the

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48 Ibid.
50 Section 52(1) of the *Property Stock and Business Agents Act 2002* (NSW) states that ‘A person who, while exercising or performing any function as a licensee or registered person, by any statement, representation or promise that is false, misleading or deceptive (whether to the knowledge of the person or not) or by any concealment of a material fact (whether intended or not), induces any other person to enter into any contract or arrangement is guilty of an offence against this Act.’ Following the media reporting of the Lin’s claim, the New South Wales Government introduced amendments to the Act to allow action to be taken against a licensee who repeatedly engages in conduct ‘that is dishonest or unfair’ as from 1 July 2007: *Estates Gazette Property Stock and Business Agents Act 2002* (NSW) s 53A, amended by *Property Stock and Business Agents Amendment Act 2006* (NSW) s 15.
51 [2006] NSWADT 257 [150].
53 Equivalent to *Trade Practices Act 1974* (Cth) s 52.
54 (2000) 9 TCLR 326 [38].
amount of the loss or damage by action against the other person or against any person involved in the contravention.

This same wording occurs in s 82 of the Trade Practices Act 1974 (Cth) and the various Fair Trading Acts.\(^{56}\) The requirements of the remedies section create two issues for the recovery of damages in stigmatised property cases. First, it must be shown that the person suffered ‘loss or damage by conduct of another person’. This wording introduces a causation requirement into the section. In order to gain a remedy, it must therefore be proven that the loss or damage was suffered as a result of the failure to disclose the stigmatising characteristic of the property.

In stigma cases, the loss or damage is generally the loss of property value. This loss stems not from the failure of the real estate agent to disclose the stigmatising characteristic, but from the general public reaction to it, something which the real estate agent has no control over. The public reaction ought, therefore, to be considered a novus actus interveniens, preventing causation being established.\(^{57}\) This point was made in the case of Adkins v Thomas Solvent Co\(^{58}\) in which the majority decision commented that if the stigma had a physical consequence, in this case the fear of living near to contaminated land, which did, in fact, result in the property being contaminated, then causation could be established. If there was no physical consequence, it would be a novus actus interveniens.

The second issue is that the damage suffered must be quantified. The person may recover ‘the amount of the loss or damage’. This amount can generally be determined by the difference between a reasonable market value and the amount the property sold for once people were aware of the stigmatising characteristic.\(^{59}\)

The problem with a calculation of damages in this manner is that a stigmatising characteristic does not permanently affect property values. While property values might initially decrease, over time the property will generally regain its value.\(^{60}\) A Wright State University study showed that a well-publicised murder can lower the value of the property by 15-35 per cent, but that in five to seven years, this fades.\(^{61}\) The Stambovsky house was subsequently sold for market value.\(^{62}\) For this reason, judges in South Carolina have only awarded damages when the stigma results in permanent physical injury.\(^{63}\)

This might suggest that the decision of the purchaser to immediately attempt to sell the property on discovering the stigmatising characteristic is a factor that ought to be taken into account. A real estate agent could potentially argue that the purchaser’s decision to immediately resell the property and not wait until the stigma fades can have two

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56 Fair Trading Act 1986 (NZ) s 43; Fair Trading Act 1987 (NSW) s 68; Fair Trading Act 1989 (Qld) s 99; Fair Trading Act 1987 (SA) s 84; Fair Trading Act 1990 (Tas) s 37; Fair Trading Act 1999 (Vic) s 159; Fair Trading Act 1997 (WA) s 79; Fair Trading Act 1992 (ACT) s 46; Consumer Affairs and Fair Trading Act 1992 (NT) s 91.

57 Evelyn Williams, above n 12, 39, states that the fear resulting in a decrease in property value ‘caused by the irrational fears of third parties destroys the necessary proximate causation’.


62 Evelyn Williams, above n 12, 34.

consequences for the recovery of damages. First, the immediate resale could itself be seen as a novus actus interveniens. If the purchasers had used the property in the manner reasonably to be expected of homeowners (which could be argued as purchasing a property to live in for at least several years) then the stigma might have vanished and they would have been able to sell the property for market value, therefore suffering no loss.

Alternatively, the purchasers could be argued to have failed to mitigate their loss, by selling the property immediately. It might be considered reasonable to retain the property until the stigma faded, although this argument will depend on several factors including the nature of the stigma and the particular characteristics of the purchaser. The purchasers of the Gonzales house, due to their religious beliefs preventing them from living in property where a murder had taken place, could likely not be reasonably required to remain in the house.

The particular facts of the Gonzales house raise yet another issue. If the religious beliefs of the purchasers were significant enough that they could not live in a house where a murder had taken place, ought they not to have specifically raised this question with the real estate agents? The real estate agents had informed the purchasers that the property was a ‘deceased estate’. Did the purchasers then contribute to their own loss by not asking a question that clearly had important implications to them, but that the real estate agents felt did not need to be revealed to satisfy the reasonable expectations test?

VIII. CONCLUSION

The Hinton case suggests that the failure to reveal stigmatising characteristics has the potential to result in a remedy under the Trade Practices Act 1974 (Cth) or Fair Trading Acts. It is not clear that this is the case. While the non-disclosure can, depending on the facts, satisfy the misleading or deceptive requirement of the legislation, this does not in itself result in a remedy. It has been suggested that an application of the remedies section, not required in the Hinton decision, raises several issues. First, a remedy may be denied altogether due to a lack of causation between the failure to disclose and the loss of value. Second, if a remedy is awarded, there are arguments of failure to mitigate the loss and contributory negligence, which might result in the amount of the damages being reduced.

It is not unreasonable to expect that stigmatised property cases will increase in New Zealand and Australia over the next few years. Experience in the USA and England has demonstrated that deciding these cases by reference to exceptions to caveat emptor, or the terms of the purchase contract, does not always give a satisfactory result. In the USA, it was seen that legislation was needed to clarify the extent of disclosure obligations. With the exception of New South Wales, there is no specific legislation in Australia or New Zealand that can apply to the disclosure of non-physical defects, leaving the matter to be addressed by reference to the Trade Practices Act 1974 (Cth) or Fair Trading Act 1986 (NZ). If there are issues as to whether the Acts can be applied in these cases, then this ought to be considered ahead of time to avoid the negative public reaction to that seen following the sale of the Gonzales house.


65 Contributory negligence is not available in Australia under the Trade Practices Act 1974 (Cth): I&L Securities v HTW Valuers (Brisbane) Pty Ltd (2000) 210 CLR 109. However, it is available under the New Zealand Fair Trading Act 1986, which contains identical wording: Specialised Livestock Imports Ltd v Borrie (Unreported, Court of Appeal CA 72/01 McGrath, Robertson, Randerson JJ, 20 September 2002).
INTESTACY REFORM IN NEW SOUTH WALES AND QUEENSLAND: A CRITICAL EVALUATION OF ASPECTS OF THE UNIFORM SUCCESSION LAWS: INTESTACY REPORT

**Fiona Burns**

I. INTRODUCTION

When a person dies without leaving any will at all, or without leaving an effective and valid will, it is still necessary from a practical and legal perspective to deal with the assets and liabilities which that person has left behind. In this situation, the deceased is known as an intestate and his or her estate is referred to as an intestate estate. Jurisdictions such as New South Wales and Queensland each have formulated and implemented legislative intestacy schemes of distribution which will determine who will receive the intestate’s property and on what basis. Such schemes have been developed over a long period of time and have been influenced by assumptions about the importance of spousal and family relationships.

The law of intestacy was extensively examined by the New South Wales Law Reform Commission (‘the Commission’), resulting in the publication of the *Uniform Succession Laws: Intestacy Report* (‘the Report’) in 2007. The Report has recommended a uniform approach to intestacy across Australia, thereby requiring some significant changes to some intestacy regimes.

In the recent past, intestacy law has been dominated by three broad features:

a) Primacy of distribution to the immediate family — the spouse and children;

b) In the absence of a surviving spouse or children, distribution to a pre-set class of next of kin set out in hierarchical order; and

c) In the event that there is no next of kin, a vesting of the estate *bona vacantia* in the state.

This scheme of distribution has been justified on the basis that it is the likely or presumed intention of the vast majority of intestates.

The purpose of this paper is to:

1) Set out and evaluate some of the major proposals of the Report, with some reference to the present law in New South Wales and Queensland; and

2) Identify some major trends in the Report.

It will be argued that although the Commission has retained an approach that accords with the abovementioned three broad bases for intestate distribution, some of its recommendations evidence a community ‘climate change’, fostering a revision of the law of intestacy. Moreover, the Commission has demonstrated a willingness to adapt the law to take into account the special needs of Indigenous Australians in intestacy matters.

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1 *Probate and Administration Act 1898* (NSW) pt 2 div 2A.
2 *Succession Act 1981* (Qld) pt 3.
4 A draft Intestacy Bill 2007(SA) has also been prepared by the South Australian Parliamentary Counsel in 2006. A copy of the Bill is annexed to the New South Wales Law Reform Commission Report, above n 3, 256-274.
II. SPOUSE AND ISSUE: DEFINITIONS

A. Spouses

Until relatively recently, the concept of spouse for intestacy matters was limited to the traditional marriage recognised in Western society. Currently, under the general law, the definition of spouse has expanded to include de facto and same sex relationships. Intestacy legislation recognises the interests of de facto and same sex relationships. In Queensland, the de facto relationship must have existed on a genuine domestic basis within the meaning of s 32DA of the Acts Interpretation Act 1954 (Qld) or the parties must have lived together as a couple on a genuine domestic basis continuously for two years before the death of the intestate. In New South Wales, a two-year period is stipulated except that there is no required time period when there is no other relationship and no issue.

A situation where the deceased is survived by both a spouse by marriage and a de facto spouse may raise difficult issues. In New South Wales, a de facto partner will only be entitled to the spouse’s share of the intestacy if the de facto is the sole partner in a de facto relationship with the intestate and was not a partner in any other relationship at the time of the intestate’s death. Moreover, the legislation in New South Wales only allows for either a spouse or a de facto spouse to inherit, while in Queensland the legislation provides for a shared inheritance. The Queensland legislation includes three possible ways to divide the estate: an agreement between the spouse and the de facto, a right for a partner or a personal representative to apply to court for a distribution order, and the statutory power of the personal representative to divide and distribute the estate into equal shares amongst the partners, subject to some special conditions.

The Commission’s recommendations reiterated the broad definitions of who would be recognised as a spouse for intestacy purposes. These include a registered relationship under the relevant legislation, a relationship into which a child has been born, or a relationship which has been in existence for at least two years. However, the Commission stopped short of recommending that the model intestacy legislation ought to contain a uniform definition of (de facto) spouse.

The Commission also endorsed the Queensland approach to multiple partners because it could more flexibly deal with a variety of situations.

B. Issue

For the purposes of traditional intestacy law, the issue of the intestate were the nearest lineal descendants of the whole blood. However, those who, for the purposes of distribution in the case of intestacy, constitute the issue of the intestate have now dramatically changed. In both New South Wales and Queensland, parentage may be presumed on a number of bases including marriage, cohabitation, artificial fertilisation procedures, adopted children and children en ventre sa mere.
At common law, children related only by marriage were not an entitled party in intestacy and this remains the law in Australia. The attitude towards stepchildren was no doubt informed by the desire to retain assets in the hands of blood-related members of a family. Where stepchildren are adopted by the step-parent, the general position (including Queensland) is that prior family relationships no longer exist. However, in New South Wales, where a biological parent dies and the surviving parent commences a relationship with a person who adopts the child, the property of the deceased parent can still devolve to the child as if the adoption did not take place.

The Commission recommended the retention of the present broader concepts of parentage and issue. Moreover, it considered that it was preferable for the model law to rely on Commonwealth and State law, rather than introducing separate definitional provisions for intestacy purposes.

The Commission retained the concept of children *en ventre sa mere* and determined that the simplest and clearest approach was that only children in the uterus of their mother at the date of the intestate’s death ought to be entitled to make a claim as a child. Children from embryos would not constitute issue if they were to be implanted and born after the intestate’s death, notwithstanding incontrovertible evidence of paternity.

The Commission refused to change the common law position for stepchildren, arguing that although the number of stepchildren had risen in the community, stepchildren had two natural parents upon which to rely. An entitlement to intestacy of the step-parent would amount to double-dipping and added unnecessary complexity to the law.

The Commission recommended that where a person has been adopted, for intestacy purposes previous family relationships ought not to be recognised.

**C. Comment**

The Report’s treatment of the definition of spouses and issue raises two major issues.

First, throughout the Report, the Commission recognised that one of its aims is to simplify the law by implementing a streamlined and uniform scheme. However, it is questionable whether this will be achieved because the Commission has contended that the definition of spouse and issue is ultimately a decision for the Commonwealth and State legislatures. It could theoretically be possible for two States to adopt identical distribution provisions. However, because of the definition of the parties, the outcome of the distribution process could differ. Second, from a definitional perspective, the Commission accommodates the rights of spouses more than issue. For example, in those cases where the evidence of spousal entitlement is entirely based on cohabitation, the Commission has recommended a relatively short period of two years rather than the period of five years prescribed in one State. However, the Commission has stated that its recommendations would be in addition to the criteria contained in the relevant legislation of each State. For example, s 32DA(2) of the *Acts Interpretation Act 1954* (Qld) specifies certain factors which may be taken into account in order to determine whether persons are living in a de...

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22 Status of Children Act 1996 (NSW) s 10; Status of Children Act 1978 (Qld) s 18E.
23 Status of Children Act 1996 (NSW) s 14; Status of Children Act 1978 (Qld) ss 14-17.
24 Adoption Act 2000 (NSW) s 33; Adoption of Children Act 1964 (Qld). A wide variety of presumptions are contained in the *Family Law Act 1975* (Cth) ss 69P-69T.
25 *Probate and Administration Act 1898* (NSW) s 61A(3); *Succession Act 1981* (Qld) s 5A.
26 *Re Leach* (deceased) [1985] 2 All ER 754, 759; Sherrin and Bonehill, above n 6, 180; Ken Mackie, ‘Stepchildren and Succession’ (1997) 16 *University of Tasmania Law Review* 22, 23.
27 *Adoption of Children Act 1964* (Qld) s 28.
28 *Adoption Act 2000* (NSW) s 97.
29 New South Wales Law Reform Commission, above n 3, [7.9].
30 Ibid [7.32] and Recommendation 32; xvii, 158. This is in accord with important decisions on the issue in the sense that embryos which are part of an in-vitro fertilisation program will not constitute issue of an intestate: *Estate of K* (1996) 5 Tas R 365. See also Rosalind Atherton, ‘En Ventre Sa Frigidaire: Posthumous Children in the Succession Context!’ (1999) 19 *Legal Studies* 139, 153-160.
31 New South Wales Law Reform Commission, above n 3, [7.54]; Recommendation 27; xvii, 137.
32 Ibid [1.32], [1.48].
33 Ibid [2.11]; [2.12].
facto relationship. These include, for example: the nature and extent of the common residence;\(^{34}\) whether or not a sexual relationship exists;\(^{35}\) the degree of financial independence or interdependence;\(^{36}\) and the ownership, use and acquisition of property.\(^{37}\) Such factors, as well as the required two-year period, would determine whether or not a spousal relationship existed for intestacy purposes.

In comparison, the Commission has restricted the definition of issue because it has stopped short of extending the concept of children *en ventre sa mere* or changing the approach to stepchildren.

Indeed, the Commission recommends that adopted children ought not to be able to inherit from biological parents, so as to prevent double-dipping. However, other examples of practical double-dipping could occur under the Report’s recommendations. For example, the next of kin of several unmarried and childless aunts who die intestate could acquire assets from different aunts at different times under the intestacy rules.\(^{38}\) For the Commission, double-dipping only becomes a problem when a double entitlement leads to the potential diminution of the assets which could be acquired by a spouse (or possibly the legally entitled issue of the intestate).

### III. Spousal Distribution

The centrality of the spouse under the intestacy rules is entrenched by the proposed rules to govern the distribution of the intestate’s assets to the spouse.

#### A. Surviving Spouse and No Issue

In New South Wales\(^ {39}\) and Queensland\(^ {40}\), the surviving spouse will take the whole of the intestate’s estate where there is no surviving issue. The Report recommends that this should remain the case.

#### B. Surviving Spouse and Issue

New South Wales and Queensland deal with the distribution of the estate between the surviving spouse and issue in a similar fashion, although there remain some differences.

In New South Wales,\(^ {41}\) where an intestate leaves a surviving spouse and issue, the method of distribution will depend upon the value of the estate, excluding household chattels. If the value of the estate, excluding household chattels, does not exceed the prescribed amount of $200,000,\(^ {42}\) the spouse will be entitled to the whole of the estate.\(^ {43}\) If the value of the estate, excluding household chattels, does exceed the prescribed amount, the surviving spouse is entitled to: the household chattels; the prescribed amount plus interest;\(^ {44}\) and one half of the balance of the estate.\(^ {45}\)

Where the estate includes a matrimonial home, the spouse is entitled to appropriate the deceased’s interest in the matrimonial home in satisfaction or partial satisfaction of the spouse’s share.\(^ {46}\) If the matrimonial home exceeds the value of the share to which the spouse would be entitled, the appropriation of the matrimonial home would still be permitted and the value of the issue’s share in the estate would correspondingly decrease.\(^ {47}\)

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34 *Acts Interpretation Act 1954* (Qld) s 32DA(2)(a).
35 *Acts Interpretation Act 1954* (Qld) s 32DA(2)(c).
36 *Acts Interpretation Act 1954* (Qld) s 32DA(2)(d).
37 *Acts Interpretation Act 1954* (Qld) s 32DA(2)(e).
38 New South Wales Reform Commission, above n 3, Recommendation 36; xviii, 166.
39 *Probate and Administration Act 1898* (NSW) s 61B(2); Certoma, above n 5, 34.
40 *Succession Act 1981* (Qld) sch 2 pt 1.
41 For a helpful account, see Certoma, above n 5, 34-39.
42 *Probate and Administration Regulation 2003* (NSW).
43 *Probate and Administration Act 1898* (NSW) s 61B(3).
44 Interest is calculated with reference to s 84A of the *Probate and Administration Act 1898* (NSW).
45 *Probate and Administration Act 1898* (NSW) s 61B(3).
46 *Probate and Administration Act 1898* (NSW) a 61D.
47 *Probate and Administration Act 1898* (NSW) s 61B(13)(a).
Complex provisions deal with the exercise of the right of appropriation and the valuation and definition of the matrimonial home.\textsuperscript{48} The term ‘household chattels’ has been defined both inclusively and exclusively.\textsuperscript{49} The intent of the legislature appears to have been to include items of minimal value which would form part of the personality of most intestates. The problem is that the meaning of some terms is not clear.\textsuperscript{50} Some items which form part of the ‘inclusive’ definition could be valuable and form the bulk of the estate,\textsuperscript{51} giving the spouse a windfall.

The Queensland\textsuperscript{52} scheme significantly differs from the New South Wales scheme in three ways.

a) Queensland does not differentiate rules for estates below or in excess of a certain value.

b) The statutory legacy is $150,000;\textsuperscript{53} and

c) If there is only one surviving spouse and child (or his issue), that spouse is entitled to one half of the intestate’s estate. However, when there is more than one surviving child, the spouse will only be entitled to one-third of the intestate’s estate.\textsuperscript{54}

There are seven central characteristics of the Commission’s recommendations.

First, the Commission recommended that where an intestate is survived by a spouse and issue, the spouse ought to be entitled automatically to the whole of the intestate estate, except in cases where the issue, surviving the intestate, are issue from another relationship.\textsuperscript{55} Issue from the same relationship would not be entitled to any assets from the intestate’s estate.

Second, in those cases when the intestate is survived by issue from another relationship (which the Commission considered were limited), then special rules of entitlement would apply.\textsuperscript{56} However, the Commission did not intend that such issue would automatically receive a distribution from the estate.\textsuperscript{57}

Third, the Commission avoided the problem of household chattels. It considered the question was one of determining entitlement to the personal property or personal effects of the intestate.\textsuperscript{58} Instead, the Commission was influenced by the proposals of the Queensland Law Reform Commission\textsuperscript{59} which recommended that an intestate’s personality ought to include all the intestate’s assets, except specified items. Following this proposal, the Commission resolved that the intestate’s spouse should be entitled to all of the intestate’s tangible personal property, excluding: property used for business purposes; banknotes or coins, unless they are part of a collection made in pursuit of a hobby or non-commercial purpose; property held as pledge or some other form of security; property in which the intestate invested in as a hedge against inflation such as gold or diamonds; and interests in land.\textsuperscript{60}

Fourth, the Commission considered that the statutory legacy could be justified quite easily because it was intended to remove any financial hardship to which the spouse would otherwise be subject.\textsuperscript{61} The Commission determined that the current levels were too low.\textsuperscript{62}

\textsuperscript{48} \textit{Probate and Administration Act 1898} (NSW) s 61E, sch 4. For a helpful outline, see Certoma, above n 5, 35-36, 38.

\textsuperscript{49} \textit{Probate and Administration Act 1898} (NSW) s 61A(2).

\textsuperscript{50} Ibid 36-37.

\textsuperscript{51} Ibid 37.


\textsuperscript{53} \textit{Succession Act 1981} (Qld) sch 2 pt 1 para2(1)(a).

\textsuperscript{54} \textit{Succession Act 1981} (Qld) sch 2 pt 1 para 2(2)(a), 2(2)(b).

\textsuperscript{55} New South Wales Law Reform Commission, above n 3, Recommendation 4; xiii, 62.

\textsuperscript{56} Ibid ch 4. It is interesting to observe that the Commission referred to the situation as being of limited significance.

\textsuperscript{57} Ibid [3.53]-[3.76], [4.58].

\textsuperscript{58} Ibid [4.22].


\textsuperscript{60} New South Wales Law Reform Commission, above n 3, [4.26]-[4.30]; Recommendation 5; xiii, 62.

\textsuperscript{61} Ibid [4.33].

\textsuperscript{62} Ibid [4.36].
contending that an increase would ensure that in most cases the surviving spouse would get the whole of the estate.63 Although the cost of living in Australia differs across States, the Commission determined that a single sum of $350 000, plus 2 per cent interest, ought to apply throughout the country in order to avoid forum shopping.64

Fifth, the Commission recommended that ‘[i]n light of the preference for supporting the surviving spouse’,65 a one-half share of the residue ought to be distributed to the surviving partner regardless of the number of entitled issue from other relationships.66

Sixth, the Commission acknowledged the general support for the surviving spouse obtaining an interest in the shared home.67 However, there were two difficult aspects of the acquisition of the shared home. Automatic acquisition led to unequal treatment of spouses owning a shared home and those who did not, and could mean that issue from another relationship would acquire nothing from the estate.68 The method of identifying the shared home differed in a variety of jurisdictions and was generally subject to complex residency provisions.69 The Commission recommended that the surviving spouse should be able to elect to obtain any property in the intestate’s estate so long as she could provide satisfaction for its value70 by relying on her entitlement in the estate and, if the share was insufficient to cover the value, by paying the difference from other sources.71

Finally, the Commission addressed the problem of multiple partners. When the surviving issue are the children of the intestate and the surviving spouses, the Commission recommended that the surviving spouses and partners should be entitled to share the entire estate without the need to take into account their children. However, when there are surviving spouse(s), and then issue from different relationships, each spouse would be entitled to a statutory legacy (rateably, if there were insufficient funds) and a share of half the residue of the estate. Each issue would be entitled to an equal share of the remaining half of the estate.72

C. Comment

1. Spouse and No Issue

This recommendation of the Commission is not apparently contentious as it is consistent with schemes adopted throughout Australia.73 It is defensible when the surviving spouse is aged and has lived in a long relationship with the intestate. However, there could be some perceived inequalities in some cases, exacerbated by the definition of an entitled spouse or partner. For example, an intestate may have been assisted by his parents to acquire a home. Later, the intestate began to cohabit with a de facto spouse in the home two years before his death. The de facto spouse would be entitled primarily to the whole of the assets of the estate, notwithstanding the fact that she may not have substantially contributed to its acquisition. It appears unlikely that the parents would be able to rely on family provision legislation unless they could demonstrate dependency.74

2. Spouse and Issue

These recommendations significantly contrast with the law in operation in New South Wales and Queensland. The Commission jettisoned the concept of ‘household chattels’ and the specific right to take an interest in the shared home. Nevertheless, the

63 Ibid [4.58].
64 Ibid [4.59]-[4.60]. See generally, Recommendation 6; xiii-xiv, 71.
65 Ibid [4.78].
66 Ibid [4.78].
67 Ibid [5.12].
68 Ibid [5.13].
69 Ibid [5.24].
70 Ibid [5.21]; Recommendation 9; xiv, 86.
71 Ibid Recommendation 19; xv, 102.
72 Ibid Recommendation 23; xvi, 118.
73 Ibid [3.2].
74 Family Provision Act 1982 (NSW); Succession Act 1981 (Qld), Part IV (ss 40-44).
recommendations would further entrench the centrality of the spouse in the overall intestacy scheme, particularly as the entitlement of issue would be severely curtailed.

Surviving spouses would be entitled to the intestate’s tangible personal property. Although such personal property would include the intestate’s share of the household chattels, it is also likely that tangible personal property would encompass items which were never covered by the definition of household chattels. For example, motor vehicles, boats and aircraft are specifically excluded from the New South Wales and Queensland definitions.75 These are expensive items which may be used for pleasure and may not be considered business items under the definition of tangible personality.

The amount of the statutory legacy would increase so that the spouse would be entitled to a greater proportion of the estate. Where the estate was not large, this would mean that the amount for the entitled issue would be significantly reduced or non-existent. Moreover, the spouse would have the ability to purchase additional assets with the statutory legacy.

The residue would be apportioned equally between the spouse and the entitled issue without taking into account the number of issue involved. This does not differ from the current New South Wales approach (except that, in New South Wales, all issue of the intestate would be entitled to a portion of any residue) but it jettisons the differential approach in Queensland.

The spouse would be entitled to make an election to obtain any property belonging to the deceased that does not already form part of the tangible personality. This recommendation does have merit because disputes about the definition and nature of the deceased’s property would not prevent the spouse from exercising proper entitlement. However, it also has the effect of giving the spouse an opportunity to acquire a greater portion and range of the intestate’s property by relying on her share of the estate to provide satisfaction. Effectively, the spouse would have first choice over all property in the estate (which is not already tangible personality).

The Report does not take into account the fact that the spouse may be entitled to valuable assets belonging to the intestate outside the administration process. For example, the spouse and the intestate may have owned valuable assets as joint tenants76 and the spouse may have been nominated as the beneficiary under a superannuation fund.77 While these assets have existed in the past, they have been offset by a greater accommodation of issue generally. The Report’s omission could reduce the value of the estate without concomitantly reducing the spousal entitlement.

Why has the Commission decided to further favour the spouse? It is submitted that the Commission has responded to a social ‘climate change.’ In so doing, it has made important assumptions about: who are the spouse and issue; how the spouse will act in regard to the assets before and after death; the alternative legal avenues available to the issue; and community expectations.

Part of the answer lies in the paramount model of the spouse which appears in the Report. The surviving spouse is an older woman who has made financial and non-financial contributions to a longstanding relationship (despite the rules pertaining to de facts). The surviving spouse requires assets for care in older age.78 This model of a ‘typical’ spouse has empirical foundation. The population is ageing and the surviving spouse may be older, female, retired and living in a matrimonial home.79

In contrast, the surviving issue of the intestate are independent adults, able and expected to care for their interests without relying on the estate.80 Accordingly, previous

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75 Probate and Administration Act 1898 (NSW) s 61A(2); Succession Act 1981 (Qld) s 34A(1).
78 New South Wales Law Reform Commission, above n 3, [3.11]-[3.23];[3.25].
79 Ibid [3.11].
80 Ibid [3.25].
concerns that all children of the intestate ought to be provided for or be treated equally are not so relevant in this situation. Nevertheless, the surviving spouse will ensure that any assets from the intestacy still in existence after her death will be distributed to the issue (presumably under a will). If unusual family circumstances have led to the dependency of an adult child on the intestate, then the child can make an application under the family provision legislation. The Commission contended that community expectations that the spouse ought to be protected, or even inherit everything, could not be ignored. 

This model of the intestacy spouse stands in contrast to an earlier one which underpinned spousal distribution to women based on gender rather than age. While widowers were entitled to all of the assets of their spouse, the typical widow was a young woman, incapable of controlling the family assets, yet in need of income. The intestate’s children were young and vulnerable. A significant concern was that the widow would remarry and place the family assets beyond reach of the intestate’s issue. Accordingly, a compromise was made. The issue inherited two-thirds of the assets while the widow acquired one-third. This distribution applied even when the children were independent adults. However, all children were treated equally. It is arguable that these rules reflected ‘presumed intention’ and ‘community expectations’, even if they were discriminately based on gender.

Accordingly, the recommendations in the Report are another step towards implementation of the ‘widower’ model. However, while the recommendations may be defensibly skewed against adult children and in accord with ‘community expectations’, the interests of younger children are not adequately protected. It is assumed that the surviving parent will care for them using the intestate’s assets. The children will indirectly benefit from the distribution to the spouse.

The position is complicated for children from other relationships. Such children may not benefit directly or indirectly unless the estate is large and/or valuable assets are not quarantined from the administration due to other procedures for devolution. On the other hand, the effect of the recommendations is that if the estate is large enough, all (including adult) children from other relationships may be eligible to share one half of the residue, while children of the current relationship (including minors) will not.

While children of the intestate can make an application under family provision legislation, the procedure can be expensive and divisive. Moreover, the concept of spouse or partner is sufficiently flexible so that a de facto partner of little more than two years’ standing could acquire the whole of the estate, while minors from an earlier relationship would acquire nothing.

IV. NEXT OF KIN, BONA VACANTIA AND SURVIVORSHIP

A. Next of Kin

When there is no spouse and no issue, then both New South Wales and Queensland follow the general pattern that children, then parents, brothers and sisters, grandparents, aunts and uncles are entitled to the intestate’s estate. In New South Wales, the limit of intestate succession is set at the aunts and uncles of the intestate, whereas in Queensland it is the children of the aunts and uncles. Based on the degree of proximity to the intestate, it is considered that this would accord with the presumed intention of an intestate. Both

81 Cf hotchpot for advancements: Miller, above n 6, 25.
82 New South Wales Law Reform Commission, above n 3, [3.26]-[3.34].
83 Miller, above n 6, 18-19.
84 Ibid 19.
86 Note hotchpot for advancements: Miller, above n 6, 25. For a modern account, see Mackie, above n 76, 215-217.
87 Probate and Administration Act 1898 (NSW) s 61B(7).
88 Succession Act 1981 (Qld) s 37(1)(c).
89 Probate and Administration Act 1898 (NSW) s 61B(6)(e); Succession Act 1981 (Qld), s 37(1)(c).
90 New South Wales Law Reform Commission, above n 3, [9.3].
jurisdictions have also adopted *per stirpes* rather than *per capita* distribution\(^91\) and avoided the separate treatment of the maternal and paternal branches of the family.\(^92\)

The Report’s recommendations retain this basic framework of intestate distribution, preferring to make several relatively minor adjustments so that all siblings would be treated equally.\(^93\) Further, the issue of all siblings\(^94\) and aunts and uncles would share in a *per stirpes* distribution.\(^95\)

**B. Bona Vacantia and Survivorship**

When there are no surviving next of kin, both jurisdictions take the traditional approach, providing that the state takes by *bona vacantia*.\(^96\) However, both States have provided for a discretionary distribution scheme. In New South Wales, the Crown may provide out of the estate for persons who were dependants or for whom the intestate might reasonably have been expected to make provision.\(^97\) In Queensland, the matter is dealt with as a general power to waive rights in property.\(^98\) A group of persons (more expansive than that in New South Wales) is able to make an application to the relevant Minister for a waiver.

Despite evidence of public support for funds to be given to charities,\(^99\) the Commission rejected this suggestion as too costly and administratively difficult.\(^100\) Instead, it considered that *bona vacantia* estates ought to vest in the state, subject to the broad discretion of the responsible Minister (upon application) to make provision to certain classes: dependants; persons who have a just or moral claim; persons for whom the intestate might reasonably be expected to have made provision; trustees of the first three classes; and any other organisation or person.\(^102\)

However, the recommendations for *bona vacantia* situations would be affected by a 30-day survivorship rule. Presently, New South Wales does not have any survivorship requirement for intestacy purposes.\(^103\) In Queensland, however, if the entitled person does not survive the intestate for a period of 30 days, the estate will be dealt with as if the person had not survived the intestate.\(^104\) The problem is that it could lead to the estate vesting in the state as *bona vacantia*.

The Commission recommended a 30-day survivorship rule\(^105\) in order to avoid multiple administrations and the need to work out the order of death in cases of ‘simultaneous’ deaths.\(^106\) In order to obviate the perverse effect of the rule, the Commission also recommended that it ought not to apply when it would lead to the estate passing to the Crown as *bona vacantia*.\(^107\)

**C. Comment**

The recommendations discussed in this section are conservative because the Commission has retained the broad framework for distribution where there is no spouse. In so doing, the Commission has assumed this general kind of distribution is likely to reflect an intestate’s

\(^{91}\) Ibid [8.6].

\(^{92}\) Ibid [9.23]. This in significant contrast to New Zealand: [9.24].

\(^{93}\) Ibid Recommendation 30; xvii, 154.

\(^{94}\) Ibid Recommendation 34; xvii, 162. Cf the position in New South Wales regarding siblings ‘of the half blood’: *Probate and Administration Act 1898* (NSW) s 61B(6).

\(^{95}\) Ibid Recommendation 37; xvii, 173.

\(^{96}\) Ibid [10.1]. *Probate and Administration Act 1898* (NSW) s 61B(7); *Succession Act 1981* (Qld) sch 2 pt 2, para 4.

\(^{97}\) *Probate and Administration Act 1898* (NSW) s 61B(8).

\(^{98}\) *Property Law Act 1974* (Qld) s 20(5).

\(^{99}\) New South Wales Law Reform Commission, above n 3, [10.11].

\(^{100}\) Ibid [10.14].

\(^{101}\) Ibid Recommendation 38; xviii, 180.

\(^{102}\) Ibid Recommendation 39; xviii, 187.

\(^{103}\) Cf, eg, *Succession Act 2006* (NSW) s 35(1) for the situation in respect of wills.

\(^{104}\) *Succession Act 1981* (Qld) s 35(2).

\(^{105}\) New South Wales Law Reform Commission, above n 3, Recommendation 40; xviii, 196.

\(^{106}\) Ibid [11.9].

\(^{107}\) Ibid Recommendation 40; xviii, 196.
intentions and community attitudes. However, this is not necessarily the case in the light of
the decline of the collateral or extended family.

However, the recommendations in regard to *bona vacantia* and the 30-day rule make
some significant, yet arguably flawed, innovations. First, the estate vests in the state,
subject to the exercise of ministerial discretion. Although it is probably cheaper and less
time consuming to apply to the Minister, rather than under family provisions legislation,
any distribution will be subject to the discretion of the Minister. It cannot be totally certain
that governments will be easily persuaded to part with substantial financial windfalls.

Second, much of the language of the discretion is couched in terminology not
inconsistent with family provision legislation (rather than presumed intention). The
Minister considers whether: there are dependants; there is ‘a just or moral claim’; or there
are persons for whom the intestate ‘might reasonably be expected to have made provision.’
The focus is on eligible persons and the definition includes a broad reference to ‘any other
organisation or person’ so that the discretion is not circumscribed.

Despite reference to the intestate’s presumed intention elsewhere in the Report as an
important issue, the Minister is not required to consider the specific intestate’s presumed
intention. It is not incumbent on the Minister to investigate whether the intestate did
articulate any intention whatsoever, particularly when there was a will later found invalid.
Certainly, it would not be appropriate to consider uncritically the terms of a will made
invalid due to incapacity or undue influence. However, earlier and invalid wills which
could not be salvaged by judicial dispensing powers may nevertheless be helpful.
Examples of such exercises exist elsewhere. For example, in regard to court-authorised
wills, the court is able to consider the nature and content of previous wills as well as
evidence of the incapacitated person’s previous wishes. Additionally, the Minister may
make provision on the application by any person or organisation. It is arguable that the
Minister could exercise this power in favour of someone who has had no connection with
the intestate, without transparency of decision-making required under the legislation.

Third, the introduction of the 30-day rule is problematic, particularly when it is co-
joined with a 30-day rule for wills. If the sole beneficiary under the will did not survive to
take an inheritance under an otherwise valid will, the assets would be dealt with under the
intestacy rules. If the sole surviving next of kin did not survive, presumably the estate of
that party would still take the assets in order to prevent the state taking them under *bona
vacantia*. Arguably, the general survivorship for wills undermines the testamentary
intentions of the testator. However, it appears very illogical that the estate of the party who
did not survive under the intestacy rules would be protected from the automatic
consequences of the survivorship rule, whereas the estate of the clearly intended
beneficiary would not.

The attempt to circumvent *bona vacantia* when the person has not satisfied the
survivorship requirements serves to heighten the fact that the vesting of *bona vacantia*
estates in the state is not popular. It is arguable that the Commission too lightly dismissed,
on administrative grounds, suggestions that such funds could be dedicated to charitable
purposes. Surely the funds could be set aside from consolidated revenue and distributed
annually to a list of statutorily recognised and registered charities.

109 New South Wales Law Reform Commission, above n 3, [1.25]-[1.30].
110 Mackie, above n 75, 39-53.
112 Ibid 96-103. *Succession Act 2006* (NSW) s 8; *Succession Act 1981* (Qld) s 18.
113 See, eg, *Succession Act 2006* (NSW) s 19(2); *Succession Act 1981* (Qld) s 23(f), (g). Note also cy-pres schemes: eg,
*Charitable Trusts Act 1993* (NSW) ss 9, 10.
V. INDIGENOUS AUSTRALIANS

A. The Present Situation

The material and discussion above is subject to the special treatment of Indigenous Australians in the Report. The Commission considered the needs of Indigenous Australians separately because there would be occasions where the approach to intestacy distribution would necessitate divergence from the standards set for the rest of the community.\footnote{114 New South Wales Law Reform Commission, above n 3, ch 14. See also Atherton and Vines, above n 76, 156-157.}

Traditionally, marriage and kinship norms amongst Indigenous Australians have not followed English or Western society.\footnote{115 Ibid [14.3].} Therefore, it has been difficult and inappropriate to apply strict notions of marriage and lineal descent to the Indigenous population,\footnote{116 Ibid [14.3]-[14.4].} although in recent times this has been ameliorated by the recognition of de facto relationships and a broadened notion of issue for the purpose of intestate distribution amongst the Australian population generally.\footnote{117 Ibid [14.15].} In addition, customs may differ between Indigenous groups. Nevertheless, the Commission recognised that a significant number of Indigenous people died intestate.

At present, there are only a few jurisdictions in Australia which make special legislative provision for intestate distribution amongst Indigenous people.\footnote{118 Ibid [14.16]. These jurisdictions are: Queensland, Northern Territory and Western Australia.} Queensland is one of these jurisdictions in which customary marriage is recognised\footnote{119 Ibid [14.9]; See also Aboriginals Preservation and Protection Act 1939 (Qld) s 19(2).} and a separate intestacy regime operates.\footnote{120 Ibid [14.15].} Simply stated, the distribution regime withdraws control of intestacy matters from the control of the Indigenous people. When an Indigenous person dies intestate and it is difficult to determine who ought to be entitled to the assets, the chief executive of the Aboriginal and Islander Affairs Corporation may determine who is entitled, at his or her discretion, without necessarily complying with customary practices. If the chief executive is unable to make a decision, the proceeds of sale will be applied for the benefit of the Aboriginal and Islander people generally.\footnote{121 Ibid [14.17]-[14.22].}

B. The Recommendations

The Commission decided that it would be in the best interests of both Indigenous Australians and the uniformity of intestacy law to make provision for the distribution of Indigenous intestate estates.\footnote{122 New South Wales Law Reform Commission, above n 3, [14.42]-[14.61].} The Commission recommended a special provision for dealing with Indigenous kinship structures in which the distribution of the intestate estate would be in accordance with the particular customs and traditions.\footnote{123 Ibid [14.17].} Accordingly, where a person claims to be entitled, under customs and traditions, to an interest in an Indigenous person’s intestate estate, that person would be able to apply to the Court for an order of distribution of the estate.\footnote{124 Ibid [14.17]-[14.22].} The application would generally be made within 12 months of the grant of administration and would be accompanied by a plan of distribution prepared in accordance with the traditions of the community to which the Indigenous person belonged. The Court could make an order that the estate be distributed in a specific manner. However, the Court would have to make an order taking into account the traditions of the community or group to which the intestate belonged; and the Court would have to be satisfied that the order was a just one. The Court would be able to include property which had already been distributed by the personal representative within the period before he or she was made aware of the application. However, the Court would not be able to disturb a
distribution providing for the maintenance, education or advancement of a person who was totally or partly dependent on the intestate before his or her death. No application would be allowed after the intestate estate had been fully distributed according to law.  

C. Comment

According to the Commission, the special provision for Indigenous kinship structures would only apply in a small number of cases because most Indigenous intestate estates would be administered in accordance with the general law. Moreover, broader interpretations of what constitute spouses and children of the intestate may be consistent, or coincide, with customary law, so that a special distribution would be unnecessary. In any event, the Commission contemplated that the provision would be used to identify kinship structures rather than customary methods for dealing with the property of the deceased. However, it is unclear whether this would mean that definitional issues would be determined by customary law, while the distribution of assets would necessarily accord with the general law.

While the recognition of traditional and customary law in specific instances for intestacy purposes can be welcomed, there are two major issues. One is that the application of traditional Indigenous laws ought not to be to the detriment of minors or dependants of the intestate because of their potentially vulnerable condition. Unfortunately, the recommendations do not provide specifically for the protection of minors or dependants except to the extent to which a distribution has already been made to them. However, in light of the centrality of spousal entitlement in the reform recommendations for the general law, it may well be that specific Indigenous kinship patterns and the associated distribution plan may be more, rather than less, favourable to minors and dependants. The other issue is that the Report remains unclear about the extent to which kinship patterns and customary laws are indisputably established for all Indigenous groups so that they could be confidently applied.

VI. CONCLUSION

The Report can be seen as a conservative document.

First, the Commission recommends a broad framework similar to that adopted for intestacy in the past: primary entitlement to the spouse and (some) issue; secondary entitlement for the next of kin; then vesting the estate in the state as bona vacantia.

Second, the Commission has made an effort to develop a streamlined and clear system of distribution. It assumes that if the peculiarities of family circumstances require a variation of the common theme, the parties may take action under the family provision legislation.

Third, although the Commission assiduously reviews recommendations for reform throughout parts of the common law world, it often retains the old framework and ‘tinkers’ with the finer details.

Nevertheless, there are some significant shifts, evidencing that the social and community climate demands change.

One is the recognition of Indigenous kinship structures and customary law, indicating a willingness to take into account different, yet inclusive, ideas of relationship.

Another is the changed definition of the immediate family within the general law. In the past, it was assumed that both the spouse (narrowly defined) and the issue of the spouse and intestate constituted the immediately entitled family. In the Report, the spouse (broadly defined to include relationships outside traditional marriage) is the primarily entitled party, supported by generous and flexible approaches to entitlement. The issue of

125 Ibid.
126 Ibid [14.56].
127 Ibid [14.57].
the intestate are no longer eligible, unless they were born in a relationship with a person other than the current spouse. Indeed, children and issue are otherwise relegated to the second category — the next of kin.\textsuperscript{128}

There is also the changing basis of the law. Previously, modern intestacy reform was justified by what was likely to be the disposition of an intestate if he or she had put their mind to making a will. It was assumed that, just as wills were securely based on the intention of the deceased, intestate distribution ought to be validated by intention, albeit presumed. Methods based on discretionary entitlement and views of fairness, propriety or what was ‘just’ were not adopted.\textsuperscript{129} Some references in the Report to community expectations and the language of entitlement signal that future intestacy schemes may also be anchored in, and defended by, perceptions about how an intestate ought to have acted, rather than how she would have acted. The problem is that, like presumed intention, ‘community expectations’ may not always be a defensible ground for distribution.

\textsuperscript{128} See, eg. New South Wales Law Reform Commission, above n 3, [9.1]; cf Certoma, above n 5, 34-41. Mackie, above n 76, 211-213, takes an intermediate approach, separating issue for special treatment after spouses and before next of kin.

\textsuperscript{129} Sherrin and Bonehill, above n 6, 16.
I. INTRODUCTION

In a press release in March 2008, the Federal Government of Australia reaffirmed its intention to proceed with the long-awaited reform of personal property securities law in Australia. This was followed by the release of a draft Bill in May 2008, justified as follows:¹

1.1 The consultation draft Personal Property Securities Bill 2008 is a significant milestone towards achieving an efficient and effective national regulatory regime for Australian secured lending over personal property. The new law would replace 70–plus Commonwealth, State and Territory Acts administered by 30 government agencies with a single, national law supported by a single national online system for registering interests in personal property securities (PPS). A comprehensive national PPS scheme should promote more certain and consistent outcomes, reduce financing costs and encourage more diverse financing options. Complex and burdensome laws and administrative procedures would no longer stymie Australian businesses.

It is presently anticipated that the Bill will be introduced in the first half of 2009, with implementation of its provisions in May 2010.²

The intended regime echoes that of New Zealand by virtue of its Personal Property Securities Act 1999 (NZ) (the ‘PPSA’). The decision to follow New Zealand’s lead on this important law reform initiative has been justified partly by the benefits of harmonisation of law between these two trading partners (unless there are good reasons to do otherwise).³ The provisions of the Canadian statutes (on which the New Zealand legislation is based) and those of the United States of America have also been taken into account in the shape and scope of the proposed regime.

By way of introduction to the following discussion, the regime established through the PPSA model provides for a uniform system of creation (‘attachment’) of ‘security interests’ in a relatively comprehensive, albeit not totally complete, range of personal property (‘collateral’). These security interests may then be ‘perfected’ (the means whereby a creditor establishes priority of their claim to the collateral) either through registration (normally) or possession (in the case of documents of title and similar). Issues of priority amongst competing security interests are settled by reference to the relevant contract(s), context and default legislative provisions. The model also provides a process for enforcement⁴ and rules for dealing with such issues as accessions and commingled goods.

There is little doubt that the reform will be profound in its effects: it will effectively discard 100-plus years of law under which the provision and determination of rights, claims and protection have been linked to the form of the agreement pursuant to which the security was granted and/or the nature of the debtor and/or creditor. In addition, it will...
suspend the application of long-established legal principles, primarily that of *nemo dat quod non habet*. Instead, rights, claims and protection under the new regime will be driven by the security interest itself.

Given the fact that the *PPSA* model has been adopted as the basis of the Australian reform, it is both timely and relevant for Australia to look at that model and its function. As it is now more than five years since the model was fully implemented in New Zealand, it is also useful to review some of the aspects of the *PPSA* that raise potential issues for those using it or who are affected by its provisions.

This paper is not intended to be a full and comprehensive review of the entire *PPSA* or its application to business. Nor is it intended as a definitive statement of the law and its scope. Rather, it addresses two main areas. First, and by way of background and context, an overview of the New Zealand *PPSA* and its background is provided. Secondly, some particular provisions of the legislation (mainly those relating to perfection and enforcement) will be considered in terms of the questions that arise for businesses seeking to apply them. Although the focus remains on the New Zealand legislation, particular reference will, when deemed relevant and important, be made to where the Australian Bill differs from or reflects those provisions.

II. THE PERSONAL PROPERTY SECURITIES ACT 1999 (NZ)

A. Overview

Prior to the full implementation of the *PPSA* in 2002, the New Zealand ‘system’ of creating and determining priority of claims over personal property items was decidedly confusing, fragmented and messy. Consequently, in April 1989, the Law Commission proposed that New Zealand should follow the example of North American jurisdictions and utilise modern technology to better address the demands of present-day commerce. New Zealand lifted both terminology and application from the Canadian provinces’ legislation of the same name and general coverage, with the final *PPSA* being taken ‘almost verbatim’ from Saskatchewan’s.  

Although the *PPSA* was passed in 1999, the logistical difficulties involved in establishing a single register, educating users, advisors and affected alike, and re-registering of interests militated against hasty implementation. It was finally fully implemented in May 2002, with a further six months grace for all re-registrations to be completed. Geoff Brodie applauded the *PPSA* for its creation of a unified, simplified, streamlined and accessible system of registering all security interests in personal property … [doing] away with the myriad of formalistic distinctions that existed … and to treat in like manner all transactions that in economic substance utilised personal property as collateral.  

That is not to say there has been no controversy. As indicated above, the balance of this paper explores aspects of some of those potentially, and actually, controversial areas.

B. Issues

1. Pre-eminence of Security Interest

A longstanding principle of property law is that of *nemo dat quod non habet* — you cannot give a better title to a transferee than that you as the transferor enjoy. Of course, there are exceptions to this principle, most specifically negotiable instruments and real estate subject to the Torrens registration system that has long operated in States of Australia, New

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7 Brodie, above n 5, 23.
Zealand and other jurisdictions in the Commonwealth.\(^8\) However, the \textit{PPSA} now provides that where personal property other than negotiable instruments is subject to a security interest, \textit{nemo dat} may be overturned.

The outcomes of several cases illustrate this radical repositioning of title vis à vis personal property. Both those discussed here involve disputes between the holder of title and a third-party creditor as to who had the better claim over personal property in which a debtor/bailee had ‘rights’ sufficient to support a security interest. The first of these is \textit{Graham v Portacom New Zealand Ltd}.\(^9\) Portacom was the owner of five portable buildings leased for an indefinite period to NDG Pine Ltd (that ended up in receivership). NDG had granted a debenture to a bank that was duly perfected. Prior to the \textit{PPSA}, the fact that Portacom retained title would have meant the debenture holder (the bank) would have had no claim to the buildings. However, with the \textit{PPSA}, the position changed radically. Despite NDG having no more than possession of the buildings, the receiver (acting on the debenture holder’s behalf) had the ability to give a third-party purchaser of those buildings an indefeasible title. Because Portacom had failed to perfect a security interest, it lost out.

\textit{New Zealand Bloodstock Ltd and Anor v Waller and Ors}\(^10\) involved a stallion named Generous. However, the Court of Appeal proved less than generous to the owner of the horse (Bloodstock). Briefly, S H Lock was a secured creditor of Glenmorgan Farm Ltd under a floating debenture over all present and future assets, originally created in 1999 and duly registered in accordance with the statutory companies’ regime. A year later, Bloodstock entered an agreement with Glenmorgan whereby Glenmorgan would purchase the horse at residual value on the expiry of a lease period (July 2004, later extended to March 2005). Lock ‘perfected’ its security interest over the horse on the same day as the \textit{PPSA} came into force (1 May 2002), despite the fact that at the time Lock had originally become a secured creditor, Glenmorgan did not even possess the horse let alone own it.

As in the case of the buildings in \textit{Portacom}, Bloodstock’s ownership of the horse was not in dispute. It had agreed to sell the horse to Glenmorgan but only on the expiration of the lease and only on the payment of specified sums (that Glenmorgan had failed to fully meet). Nevertheless, the majority of the Court of Appeal referred to the \textit{PPSA}’s ‘statutory altering of the proprietary rights of a lessor, and the crucial importance of registration’,\(^11\) as justifying Lock’s superior right to the horse.

This ‘ousting’\(^12\) of the \textit{nemo dat} principle in these two cases quite clearly caught lessors and other (mainly) owners of commercial personal property by surprise and provided timely warning of the importance of treating their title in the collateral as a security interest subject to the rules under the \textit{PPSA}. As this is also the approach taken in the Australian draft legislation,\(^13\) there appears little reason to assume the outcome, implications or recommendations would be very different.

Many aspects of the \textit{PPSA} have not as yet been subject to as much interpretation as has the above. Because their application remains uncertain, they are worth examining in more depth as to their potential implications. By way of reminder, they include: the exceptions to perfection protection; effects on security interests of personal property being incorporated into real property; the rights of competing claimants where the collateral has been repossessed by the first-ranking claimant; and the extent of, and justification for, the

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\(^8\) First implemented in 1858 on the efforts of Robert Richard Torrens (a founding Member of South Australia’s Parliament). Relevant Australian and New Zealand legislation includes the \textit{Real Property Act 1925} (ACT); \textit{Real Property Act 1900} (NSW); \textit{Real Property Act 1886} (NT); \textit{Land Title Act 1994} (Qld); \textit{Real Property Act 1886} (SA); \textit{Land Titles Act 1980} (Tas); \textit{Transfer of Land Act 1938} (Vic); \textit{Transfer of Land Act 1893} (WA); \textit{Land Transfer Act 1892} (NZ).

\(^9\) [2004] 2 NZLR 528 (HC).

\(^10\) [2006] 3 NZLR 629.

\(^11\) [2006] 3 NZLR 629 (Court of Appeal), 649 (Baragwanath J).

\(^12\) Ibid 629, 649 (Baragwanath J). The importance of an owner registering a security interest was again highlighted in Segard Masurel (NZ) Ltd v Nicol and Ors [2008] NZHC 109 (Unreported, Cooper J, 12 February 2008) [38], a case involving wool provided to Feltex Carpets, subsequently placed in receivership, under a conditional sale agreement.

\(^13\) Personal Property Securities Bill 2008 (Cth) s 21: Meaning of Security Interest.
right of the parties to contract out of certain provisions, most particularly those providing for notice to the debtor.

2. An Exception to Perfection Protection

Part V of the PPSA provides that the buyer or lessee in certain circumstances will obtain title to goods free of a creditor’s security interest in the collateral. These include where a bona fide third party for value acquires those goods in the ordinary course of business, and where a security interest has not been perfected. However, the so-called ‘garage sale’ exception is most interesting as it provides that a person purchasing (or leasing) consumer goods for less than $2000 in a private arrangement, and without knowledge of pre-existing security interest over those goods, takes free of any such interest. It could be, and has been, argued that in most cases this will be a relatively minor concern. However, it is also worth remembering that the retail price of many consumer goods may fall below $2000. Therefore, despite the best efforts of retailers to protect their interests in such items, an unscrupulous purchaser could render their efforts pointless by purchasing and selling goods in a garage sale (or perhaps on a web-based trading site such as eBay or Trade Me) before disappearing.

Of course, potential purchasers faced with such largesse may well harbour suspicions as to the validity of the sale and the provenance of the items, but is that tantamount to knowledge? It should be noted that under the PPSA they must ‘know or have knowledge of a fact’. It also details at some length who may be considered to have such knowledge and when, yet fails to expressly contemplate constructive knowledge. Hence it is arguable that a failure to enquire may not satisfy that requirement.

In the Australian draft legislation, the wording of the equivalent provision is somewhat different. Although at first glance it appears more liberal (covering personal property used predominantly for personal, domestic or household purposes up to a value of $5000), reliance on it is subject to lack of ‘knowledge’. This clause embraces ‘recklessness’ as defined in the Criminal Code, and ‘significant probability’ of a particular state of affairs. This may serve to limit its scope.

3. Security Interests Incorporated into Real Property

The PPSA embraces security interests in personal property, including ‘chattel paper, documents of title, goods, intangibles, investment securities, money, and negotiable instruments’. Problems can arise where that personalty loses its character, most commonly on its becoming a fixture.

In Whenuapai Joinery (1988) Ltd v Trust Bank Central Ltd, a case decided well before the PPSA, the joiner had supplied large numbers of custom-made window frames and other fittings to a client in the process of constructing a large and expensive house. The supply was subject to a Romalpa-type reservation of title clause. The joinery was never paid for and, very early one morning (accompanied by media representatives), a team

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14 Personal Property Securities Act 1999 (NZ) s 53.
15 Personal Property Securities Act 1999 (NZ) s 52.
16 Personal Property Securities Act 1999 (NZ) s 54.
17 Personal Property Securities Act 1999 (NZ) s 19(1).
18 Personal Property Securities Bill 2008 (Cth) s 83.
19 Personal Property Securities Bill 2008 (Cth) s 41(2).
20 Personal Property Securities Bill 2008 (Cth) s 41(2)(b).
21 Personal Property Securities Bill 2008 (Cth) s 41(2)(c).
22 Personal Property Securities Act 1999 (NZ) s 16.
removed the items and bore them away. Trust Bank Central held a mortgage over the property. In the legal stoush that followed, the Court of Appeal held that the window frames and fittings had been ‘fixed’ to the house, thereby becoming incorporated into it from that point. Therefore, despite the fact they could be removed without damaging or threatening the integrity of the structure itself, the mortgagee had the better claim.

The PPSA preserves the distinction between personal and real property and, by analogy, the decision in Whenuapai. This legal situation raises some potential difficulties. Take, for example, the position of a tradesperson such as a plumber or electrician who is called by a householder to supply and install new appliances, fittings or wires/pipes. Almost inevitably, the supply of such items will be delivered on credit. Almost inevitably also, the goods will be subject to a reservation of title clause. If, as was the case in Whenuapai, the goods lose their character as personalty on affixation to real property, how effective is a reservation of title clause as against a mortgagee? If indeed it has no effect, what precautions (if any) can that tradesperson take to guard their security interest? Finally, assuming that at the time the householder called that tradesperson for assistance, he or she had already received a notice prescribed by s 119 of the Property Law Act 2007,25 would a mortgagee subsequently exercising rights of possession and sale have any obligations towards that tradesperson?

Taking those questions in turn, a reservation of title clause is unlikely to be effective as against a mortgagee’s claim once the property subject to that clause has been affixed to real estate. The position will not be improved by registration of the supplier’s security interest (perfection) as it is the nature of the property, rather than the priority of competing claims, that is important in determining the rights of creditors to the property.

Therefore, and by way of response to the second question, the dilemma for the tradesperson remains — he or she could demand cash before any work is done (realistic in relation to a small job but potentially jeopardising any chance of securing larger contracts and any enduring relationship with clients) or trust that nothing will go amiss.

The third question is more complicated: the tradesperson would have an action against the mortgagor — after all, a contract has clearly been breached. Any recovery would of course depend on the financial position of the mortgagor after the surplus or deficit (if any) on settlement of the mortgage debt. The price received on mortgagee sale may reflect the improvements and/or maintenance on the house but it may still not exceed the amount owed to the mortgagee, particularly where these events take place in the context of a declining property market.

The position of the mortgagee is less certain. The mortgagee is under no contractual or similar obligation to consider the wellbeing of a trade creditor when exercising any rights of possession or sale in relation to the encumbered property. There remains, however, the question as to whether the out-of-pocket tradesperson might argue unjust enrichment as against the mortgagee if it could be demonstrated that, as a result of the price-enhancing benefits provided by the work completed and goods provided, the mortgagee has either gained more or lost less on the mortgagor’s default than he or she would otherwise.

In light of the above, it is interesting to note that the Australian draft legislation has incorporated some protection for claimants against personal property collateral when those claims conflict with the interests of claimants to the real estate.26 Specifically, it spells out four exceptions to the ability of a holder of a security or other interest in real estate (eg, a purchaser) to claim the additional value of any personal property collateral that has become a fixture.27 In summary, it appears to mean that where the security interest in the collateral

25 A mandatory notice that spells out the default of the mortgagor under the mortgage, the time allowed to remedy the default and the consequences of not so doing (including possession by the mortgagee). Equivalent provisions under Australian law include Land Titles Act 1925 (ACT) s 93; Land Titles Act 1925 (NSW) s 93; Law of Property Act 2000 (NT) s 89; Property Law Act 1974 (QLD) s 84; Law of Property Act 1836 (SA) s 55; Land Titles Act 1980 (Tas) s 77; Transfer of Land Act 1958 (Vic) s 76; Transfer of Land Act 1893 (WA) s 106.
26 Personal Property Securities Bill 2008 (Cth) ss 130-131.
27 Personal Property Securities Bill 2008 (Cth) s 149.
is created prior to affixture, the secured party effectively retains priority.\textsuperscript{28} In addition, such priority is maintained: where the interest was attached (with, or possibly prior to, perfection) \textit{after} the collateral was affixed to the real estate; where a person subsequently acquiring the interest in the real estate has constructive or actual notice of that interest (from information contained on the land register); or when he or she has given consent.

An Australian tradesperson would thus appear potentially advantaged by comparison to his or her New Zealand counterpart. In particular, provided his or her security interest in the collateral was perfected prior to its affixture, he or she would also retain a right to claim against it.

\section*{4. Rights of Competing Claimants to Repossessed Collateral}

Part IX of the \textit{PPSA} provides a default process to be followed by ‘secured parties’ (who would normally have perfected their interests) seeking to exercise their rights against the security. Any such a party may take possession and sell the collateral where the debtor is in default or where the collateral is at risk.\textsuperscript{29} In such an eventuality, the secured party who has thus taken possession must pay out any higher-ranking secured parties before satisfying his or her own debt.\textsuperscript{30} Where the collateral is in the form of negotiable instruments or certain other choses in action, the highest-ranking secured party may apply it to satisfaction of the debt\textsuperscript{31} (note that in such cases the first secured party is highly likely to have possession of relevant documents to enable this to happen).

However, other provisions may be more controversial. First, a first-ranking secured party may propose to retain the collateral but before doing so must give notice to those ‘entitled’ to receive it,\textsuperscript{32} including:

\begin{enumerate}
\item the debtor;
\item any person who has registered a financing statement in respect of the collateral that is effective at the time the secured party took possession of the collateral; and
\item any other person that has given the secured party notice that that person claims an interest in the collateral.\textsuperscript{33}
\end{enumerate}

If any of those parties object to the proposal within 10 days, the collateral must be sold\textsuperscript{34} (with the seller duty-bound to obtain the best possible price).\textsuperscript{35} That makes sense. If, for example, those other claimants believe the return on sale of the collateral would exceed the valuation accorded by the first creditor, then it should be sold. Also, where retention of the collateral by the first-priority secured party would mean other interested parties were ‘adversely affected’, it is only fair if each or none were to have an equal chance to purchase it.

However, that is not the only possible outcome. Those listed in s 114 are also ‘entitled’ to redeem the collateral, with the only limitation being that the debtor’s right takes precedence over all others.\textsuperscript{35} The \textit{prima facie} implication of this provision is that the secured party with highest priority must surrender their right to retain where a lower-ranking secured party is willing to redeem — a position which could have rather odd consequences.

Suppose, for example, the collateral at issue is a licence to develop and exploit a potentially valuable invention. Leaving aside the debate over the extent to which, the

\begin{footnotesize}
\begin{enumerate}
\item Personal Property Securities Bill 2008 (Cth) s 130(1).
\item Personal Property Securities Act 1999 (NZ) s 109.
\item Personal Property Securities Act 1999 (NZ) s 116A.
\item Personal Property Securities Act 1999 (NZ) s 108.
\item Personal Property Securities Act 1999 (NZ) s 1120.
\item Personal Property Securities Act 1999 (NZ) s 114(1).
\item Personal Property Securities Act 1999 (NZ) s 121.
\item Personal Property Securities Act 1999 (NZ) s 132.
\end{enumerate}
\end{footnotesize}
mechanism whereby, and the consequences where, intellectual property rights may be subject to a security interest, this situation raises some potentially interesting issues.

Assume, for the sake of argument, that the inventor retains the patent rights but has entered into a cooperative joint venture (involving a licensing agreement) with a company (the debtor in this scenario) that specialises in developing new inventions for commercial launch. The debtor company agrees to bear all the costs and risks of development, a process predicted to take two years, in return for a high percentage of the commercial returns. Also, under the licence, the inventor has handed the patent documentation over to the company. To keep it interesting, there are several other competing parties holding security interests in some or all of the assets of the debtor company. These include: the holder of a security interest in all existing and after-acquired assets of the debtor (which, incidentally, replaces floating debentures under the PPSA); a yet-to-be-paid supplier of equipment and materials incorporated into a prototype of the invention, claiming under a purchase money security interest (PMSI); and another ‘junior’ creditor who has expressed interest in acquiring and/or developing the patent rights.

Several questions arise as to the rights and responsibilities of these various parties. First to be considered are those of the supplier of the equipment and materials. By virtue of the PMSI, this party has super priority over relevant collateral. In this instance, this creditor can either reclaim materials supplied (which have been changed by virtue of being incorporated into the prototype), or trace the claim through to the money obtained on disposal of that collateral. In this instance, however, the inventor would presumably either wish to destroy the prototype or protect it until such time as the work is completed on the invention. He or she would almost certainly not wish the prototype to be sold.

Could the holder of the PMSI then exercise his or her rights to repossess and sell the collateral (in this instance, the prototype) on the grounds that it is at risk (defined as where ‘the secured party has reasonable grounds to believe that the collateral has been or will be destroyed, damaged, endangered, disassembled, removed, concealed, sold, or otherwise disposed of contrary to the provisions of the security agreement’)?

Secondly, what is the position of the inventor? There may never have been any intention on the part of either debtor or inventor that the patent be claimed by any creditor. However, unless such an intention is clearly negated, the ousting of nemo dat means the inventor’s rights under the patent may not be safe against all others involved. The right of redemption presumably requires that the inventor gets in before any other entitled person — as the PPSA, with the exception of providing that the debtor has the highest priority, makes no specific provision for the treatment or ranking of any other competing attempts to redeem — and requires that he or she has adequate funds to do so. If these requirements are not met, the inventor in this position may have no means of preventing the patent documentation, or at least a licence to develop or exploit the invention, passing into the hands of a stranger.

The third set of rights and responsibilities are those of the other secured creditors, these being both the ‘senior’ first-ranking creditor with an interest in all present and after-acquired property (less that subject to the PMSI), and the ‘junior’. Several questions arise. First, could either of these creditors take possession of the documentation relating to the patent and sell it, or are their rights confined merely to those provided under the licence granted by the inventor to the debtor company? Secondly, what is the effect on the senior creditor’s position should the junior creditor (or another entitled person) exercise the right of redemption or demand that it be sold, thereby preventing the senior creditor retaining

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38 Personal Property Securities Act 1999 (NZ) s 109(2).
39 Personal Property Securities Act 1999 (NZ) s 132.
40 Personal Property Securities Act 1999 (NZ) s 121.
this potentially valuable collateral?\textsuperscript{41} Finally, if the commercial benefits of the patent have not yet been realised, how is it to be valued for the purposes of determining what a redeemer should pay and/or what the redeemer or retainer should pay to the other claimants, and/or the amount that should be expected on sale? \textsuperscript{42}

The Australian provisions are similar, although they grant the right of possession to any secured party, not just the highest ranking.\textsuperscript{43} This goes some way to ensuring that the interests of lower-ranking secured parties are not frustrated by a top-ranking creditor who is reluctant to act. However, the provisions regarding sale, possession and right of redemption are similar to those in the New Zealand PPSA, therefore potentially raising the same questions.

5. Contracting Out

The PPSA permits parties to contract out of certain rights on repossession that would otherwise be available under Part IX,\textsuperscript{44} and s 126(1) (debtor’s right to receive a verification statement on perfection), albeit with limits prescribed by s 12 (to protect the rights of third parties). These provisions have resulted in the widespread use, most noticeably on the internet, of so-called ‘boiler-plate’, standard-form terms and conditions in contracts covering the supply of a diverse range of goods, from kitchens to umbrellas, driveways to DVDs and CDs,\textsuperscript{45} and flowers to computer parts and accessories.\textsuperscript{46} What such statements of terms and conditions generally have in common is the exclusion of every right of the customer/debtor on repossession that is permitted (including the right to a statement of account,\textsuperscript{47} recovery of surplus on sale,\textsuperscript{48} objection to proposed retention,\textsuperscript{49} objection or notice in respect of proposed or actual removal of an accession by the secured party,\textsuperscript{50} and to redemption of the collateral).\textsuperscript{51}

Although the policy decision underpinning these provisions was that parties to a commercial agreement should have freedom of contract, it is arguable that these so-called ‘boiler-plate’ provisions can tip the negotiating balance and outcome heavily in favour of the creditor, even where the collateral is disposed of post-default at little or no loss. In addition, because such exclusions are so ubiquitous, it is useful to briefly consider whether they are in accordance with the words and/or spirit of the PPSA.

First, Part IX does not apply to security interests over ‘consumer goods’ — in such an instance, the debtor has those rights spelt out in the Credit (Repossession) Act 1997. However, and despite the fact that many suppliers are providing what might reasonably be described as ‘consumer goods’ (and it can be inferred from the fact they refer to the Consumer Guarantees Act 1991 in their terms and conditions that they contemplate the possibility transactions will be defined as involving such), there is frequently no specific allusion to the Credit (Repossession) Act. This failure potentially exposes the terms and

\textsuperscript{41} It is arguable that the rights of a creditor with a security interest are limited to realisation of the security and the repayment of their debt. However, if that is the case, why does the statute provide for the first-ranking creditor’s repossession and retention of the collateral and the right of those other than the debtor to redeem? Why does it not specify that the collateral should, in all cases, be sold other than those involving redemption by the debtor?

\textsuperscript{42} Personal Property Securities Bill 2008 (Cth) s 168-190. However, s 174 provides that a higher-ranking creditor can demand possession.

\textsuperscript{43} Personal Property Securities Act 1999 (NZ) s 107.

\textsuperscript{44} Silver & Ballard Online Store, Terms and Conditions <http://www.sandb.co.nz/terms.cfm> at 7 December 2008.


\textsuperscript{46} Personal Property Securities Act 1999 (NZ) s 116.

\textsuperscript{47} Personal Property Securities Act 1999 (NZ) s 119.

\textsuperscript{48} Personal Property Securities Act 1999 (NZ) s 120(2)

\textsuperscript{49} Personal Property Securities Act 1999 (NZ) s 121.

\textsuperscript{50} Personal Property Securities Act 1999 (NZ) ss 125-131.

\textsuperscript{51} Personal Property Securities Act 1999 (NZ). Note that there would appear to be an inherent logical inconsistency between the wording of s 107(2)(f) and the rest of the section when other relevant provisions are taken into account. Section 107(2) refers to the ability of the parties to exclude debtor’s rights (which in turn reflects the tenor of s 12, which specifies that any such contracting out cannot impinge on the rights of third parties). However, s 107(2)(f) purportedly allows parties to the security agreement (normally the debtor and creditor) to contract out of s 126 — a section that specifically provides that parties other than the debtor may seek reimbursement should their goods be damaged by removal of an accession.
conditions to legal challenge. In addition, it begs the question of whether including a summary of both sets of legal rights and limitations may lead to confusion and complication.

Secondly, it is to be noted that in addition to contracting out under Part IX, such terms and conditions commonly exclude a debtor’s statutory right to receive a verification statement on perfection. Under the PPSA, such exclusion is permitted but only where the debtor has waived his or her right to such receipt in writing. Presumably this requirement goes some way to ensuring that the debtor, when excluding their legal right to important information, manifestly demonstrates their understanding of the implications of so doing. Given this presumption, it is interesting to briefly consider the different practices of internet-based suppliers.

For example, Outerspace Dezine puts it thus: ‘11.3: unless otherwise agreed to in writing by the Seller, the Buyer waives its right to receive a verification statement in accordance with section 148 of the PPSA.’ 52 Concrete Creations merely excludes the right, with the client being requested to accept all the terms and conditions (including this one) through clicking the appropriate button or by way of a signed hard copy returned to the company. 53 BeerNZ deems acceptance by the customer of a shipment of goods as also being acceptance of its terms and conditions (including the relevant waiver). 54 While furniture-maker McKenzie and Willis merely requires an applicant for its Gold Card to indicate that they have read the terms and conditions (which again includes the waiver). 55

The question remains: are these various strategies for incorporating this waiver into boiler-plate, standard-form contracts demonstrably and adequately tantamount to a waiver in writing on the part of the customer/client/debtor? That is yet to be determined.

The Australian draft contains similar provisions. It specifically provides 56 that parties to a security agreement that does not involve goods that are predominantly used for personal, domestic or household purposes may contract out of rights associated with accession, 57 the giving of notice of possession, 58 disposal of collateral, 59 a creditor’s intention to retain collateral 60 and the right of redemption. 61 As is the case in the PPSA, contracting out of these rights may not affect third parties (including all other secured parties) unless they have agreed otherwise. 62 Finally, the right to contract out of the provision of a verification statement, while similar in terms of required process to that prescribed by the PPSA, is somewhat more limited in application, covering only collateral described as equipment or inventory (excluding consumer goods by default but potentially also excluding other non-consumer assets of a more permanent nature). However, and for similar reasons, a similar set of issues may nevertheless arise in relation to the boiler-plate type contractual terms and conditions discussed above.

III. CONCLUSION

There is little doubt that the Personal Property Securities Act 1999 has introduced a uniform, easily accessible and real-time registration system to New Zealand for security interests in personal property. It has clearly been a great leap forward from the antiquated,
complicated and confusing systems that existed prior to its full implementation in 2002. However, there are still some peculiarities inherent in the *PPSA* that raise some interesting, and at times contradictory, possibilities and problems that have not yet been fully explored. Some of these issues have been addressed specifically in the Australian draft and others have not. The final outcome of the submissions and discussion of the draft legislation remains to be seen.
INFORMATION GATHERING BY THE COMMISSIONER: DOES IT MATTER WHETHER YOUR ADVISOR IS A LAWYER OR ACCOUNTANT? THE IMPACT OF THE WHITE INDUSTRIES CASE

MICHAEL BLISSENDEN*

I. INTRODUCTION

There is no doubt that the Federal Commissioner of Taxation has extensive and powerful access and information gathering powers. Sections 263 and 264 of the Income Tax Assessment Act 1936 (‘ITAA 36’) provide for the Commissioner to seek access to buildings and documentation of taxpayers and their advisors for the purposes of the Act. The High Court decision in the Daniels v ACCC (‘Daniels’) corporation case1 established that legal professional privilege does apply in relation to investigations under the Trade Practices Act 1974. Although there is no direct High Court decision in relation to sections 263 and 264 of the ITAA 36, it would seem that these legislative provisions are also subject to the doctrine of legal professional privilege.2 This means that it would appear that sections 263 and 264 of the ITAA 36 do not abrogate the right to make a claim that legal professional privilege applies to documents that are being sought by the Australian Taxation Office (ATO). The ATO also accepts this position, as has been made clear in their Access and Information Gathering Manual.3 In the Manual, the ATO states that:

the Tax Office policy is that its access and information gathering powers do not override legal professional privilege. If a communication is subject to legal professional privilege, the Tax Office is not entitled to use its statutory powers to obtain it or informally request it.4

In essence, this common law privilege provides a defence to a claim for access by the ATO.

This of course is the position where a taxpayer has utilised a lawyer in obtaining advice concerning their tax affairs. It should be made clear that legal professional privilege is only applicable in relation to the lawyer-client relationship, and the privilege rests with the client.5 Legal professional privilege does not apply to the accountant-client relationship. However, many taxpayers utilise accountants and tax agents for tax advice and tax return preparation. The ATO recognises this and has acknowledged that taxpayers should be able to consult with their professional accounting advisors to enable full and frank discussion in respect of their rights and obligations under the tax laws.6 However, the ATO also makes it clear that they will access restricted and non-source documents, as defined in the Manual, in exceptional circumstances.7 As to what is meant by exceptional circumstances, Chapter 7 of the Manual outlines some examples, including where there is a scheme or arrangement for the purposes of Part IVA of the ITAA 36 or where there are reasonable grounds to believe that fraud or evasion has taken place.8 Approval by an appropriate ATO Senior Executive officer is required prior to accessing such documents. This would also be

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1 Daniels v ACCC [2002] HCA 49.


4 Ibid ch 6 [6.1.5].


6 ATO, above n 3, ch 7 [7.1.1].

7 Ibid ch 7 [7.2].

8 Ibid ch 7 [7.2.4].
the case where the ATO seeks to inspect or obtain documents listed in litigation procedures.

As to what falls within restricted and non-source documents, this is set out in the Guidelines to Accessing Professional Accounting Advisors’ Papers. In essence, the ATO is providing an administrative concession in an attempt to place the accountant-client relationship in a similar position as the lawyer-client relationship, yet retains the right to access documents in certain circumstances. An immediate problem that may arise is that, at the time that the accountant provides their tax advice, it will not be known whether a situation will arise that falls under exceptional circumstances. This immediately generates a significant difference between where taxpayers seek advice from accountants, as distinct from seeking advice from a lawyer.

So, on one hand, the well-entrenched principle of legal professional privilege covers the lawyer-client relationship and, on the other hand, an administrative ATO concession covers the accountant-client relationship. A closer examination of the concession granted to accountants is necessary to fully understand whether practical and legal differences exist.

II. ACCOUNTANTS’ CONCESSION

The Accountants’ Concession is in the form of an administrative guideline issued as part of the Access and Information Gathering Manual. The real practical issue occurs when the ATO does exercise its right to access restricted and non-source documents where there are, in the opinion of the ATO, exceptional circumstances. There is no legal mechanism as such to set in motion a review of this notion of exceptional circumstances.

Taxpayers and their accounting advisors may feel that the issuing of a manual providing this administrative concession is in itself a safe harbour mechanism. The real problem arises when there is an attempt by the ATO to seek access to documentation and advice provided by accountants and a dispute occurs as to the access power. The reason for this is that there is no specific legislative provision which the ATO has utilised in issuing the Access and Information Gathering Manual. Rather, the ATO is utilising the general administration power of s 8 of the ITAA 36, which merely provides that the Commissioner shall have the general administration of this Act.  

The Manual acknowledges that judicial decisions have indicated that the Guidelines give rise to a legitimate expectation that the ATO will not depart from them without giving the affected person an opportunity to argue that there are no exceptional circumstances. The Deloitte case concerned an action for judicial review of the decision to issue a s 264 ITAA 36 notice, while in the ONE.TEL case the Commissioner was seeking access pursuant to s 108 of the Sales Tax Assessment Act 1992 (Cth) (‘STAA’). Both cases relate to the decision to utilise those powers, in light of the Guidelines, concerning the accounting concession on such access. Although, in the end, the cases decided that there was scope for judicial review, the ATO had satisfied the expectations that arose from those Guidelines. An important aspect to note here is that the Commissioner had issued notices seeking relevant information from the taxpayer and their advisors. There clearly were decisions made under an enactment (being s 264 of the ITAA 36 and s 108 of the STAA) which, therefore, were capable of being subject to judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (‘AD(JR) Act’).

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10 Fraser and Deards, above n 5, 130, 135-136.
III. REVIEW PROCESSES UNDER THE AD(JR) ACT

Before proceeding to examine the impact of the recent judicial decision of the White Industries case, it may be useful to examine the manner in which an application can be sought under the AD(JR) Act. An application for review of an administrative decision is made pursuant to s 5 of the AD(JR) Act. The key aspect is set out in the opening words of s 5(1), where it is stated that ‘a person who is aggrieved by a decision to which this Act applies’ may apply for an order of review. It is important to remember this jurisdictional limitation when examining the decision making processes of the ATO.

The phrase ‘decision to which this Act applies’ is defined in s 3 of the AD(JR) Act and basically means a decision of an administrative character made, proposed to be made or required to be made under an enactment, other than a decision included in any of the classes set out in Schedule 1. Enactment is itself defined as an Act, an Ordinance of a Territory or an instrument made under such an Act or Ordinance.

The combined effect of these definitions is that decisions made by the ATO may, or may not, be subject to an application for review where the jurisdictional framework has been satisfied. For instance, schedule 1 of the AD(JR) Act excludes decisions which are made, or form part of the process of making assessments or calculations of tax, under the ITAA 36 or the Income Tax Assessment Act 1997 (Cth) (‘ITAA 97’). The type of decisions that would fall for consideration under the AD(JR) Act are those decisions made under the ITAA 36 or ITAA 97 for which the Commissioner is authorised or empowered to make. In this context, decisions to utilise the powers under s 263 and s 264 of the ITAA 36 would be decisions made under an enactment.

The grounds for such review are listed in s 5 and include:

(a) a breach of the rules of natural justice has occurred, is occurring, or is likely to occur, in connection with the conduct

[Paragraphs (b) – (j) not reproduced]

There is a clear connection between the need to identify a ‘decision to which this Act applies’ and then to identify the grounds upon which the application for review is being sought. As to the rules of ‘natural justice’, this concept is not further defined. However, the general understanding in administrative law terms is that the rules of natural justice, sometimes referred to as ‘procedural fairness’, are rules designed to ensure fair decision making by administrators in relation to the various interests of the parties concerned.15 Over time, administrative law has expanded the boundaries of the notion of procedural fairness to now include the notion of ‘legitimate expectation’. The term legitimate expectation refers to an expectation that is reasonable that a legal right will not be interfered with. However, it is ‘something short of a legal right.’16 In Kioa v West, Mason J included the concept of legitimate expectation in the list that attracts procedural fairness. His Honour stated that procedural fairness would apply where the administrative decision ‘affects rights, interests and legitimate expectations, only subject to the clear manifestation of a contrary statutory intention.’17 This has now developed to the point that if a legitimate expectation exists, it is expected that the decision maker will afford that person with procedural fairness.18

The above discussion needs to be taken into account when examining the scope of the judicial review of ATO decision making. In summary, there are two specific aspects that need to be identified before considering an application for review of a decision made by the ATO. The decision needs to be of an administrative character which has been made

15 Margaret Allars, Introduction to Australian Administrative Law (1990) 236.
16 Ibid 238.
17 (1985) 159 CLR 550.
19 Fraser and Deards, above n 5, 137-138.
under an enactment, and a specific ground under s 5 needs to be identified, such as a breach of the rules of natural justice. It should be noted that, from an administrative law perspective, it is not the breach of a ground of review such as procedural fairness which leads to a decision being made under an enactment.20

Applying this analysis to the Deloitte and ONE.TEL cases, Goldberg J and Burchett J both accepted that the decisions to seek access to documents under s 264 of the ITAA 36 and s 108 of the STAA fell within the provisions of the AD(JR) Act. On that basis, there had been decisions made under an enactment. Their Honours also determined that the Guidelines to Accessing Professional Accounting Advisors’ Papers created an expectation that the ATO would abide by such guidelines. On that basis, a legitimate expectation existed, and satisfied a reviewable ground for s 5 purposes.

IV. THE WHITE INDUSTRIES CASE

The above position now needs to be re-evaluated in light of the judgment by Lindgren J in White Industries Aust Ltd v FCT. In that case, the ATO and the taxpayer were involved in litigation proceedings in the Federal Court. The ATO sought discovery of certain accountants’ documents through normal discovery processes under 0 33 r 12 of the Federal Court of Australia Act 1976 (Cth). The applicant taxpayers claimed that the documents were privileged from production, pursuant to the Guidelines to Accessing Professional Accounting Advisors’ Papers. The applicants sought judicial review of the decision by an ATO SES officer to decide, pursuant to s 5 of the Guidelines, to lift the concession in respect of certain documents. The basis of this application was that the ATO officer had breached the rules of natural justice (procedural fairness) and that irrelevant considerations had been taken into account. The applicants asserted that decisions under the Guidelines, such as during the course of an audit or in relation to documents sought under discovery proceedings, were decisions of an administrative character made under an enactment for AD(JR) Act purposes. The applicants relied on the ONE.TEL and Deloitte decisions. Lindgren J dismissed the application on the basis that the application was incompetent, insofar as it relied on the AD(JR) Act.21

V. STATUS OF THE GUIDELINES

One of the most interesting aspects of this case is the discussion by Lindgren J of the status of the Guidelines. His Honour accepted that the Guidelines did create an expectation that they will be adhered to by the ATO. Even so, this did not mean that the decision made with respect to those Guidelines was an administrative decision under an enactment. The real issue was whether the Guidelines created any substantive rights which would render the decision (to lift the concession), a decision under the ITAA 36. His Honour concluded that the Guidelines were made by the Commissioner pursuant to the general power of administration under s 8 of the ITAA 36. On this basis, the granting of the concession and the discretion to exclude particular documents from it were only attributable to that general power of administration.

In the particular circumstances of the case, the ITAA 36 did not give legal force or effect to the Guidelines or to the decision by the ATO officer to lift the concession. In essence, the ITAA did not provide for the ATO officers’ decision and it could not be said to be a decision of an administrative character under an enactment. Rather, the decision by the ATO officer was a decision, prior to the actual claim by the ATO, for discovery pursuant to 0 33 r 12 of the Federal Court of Australia Act 1976, as a litigant in appeal proceedings. This aspect is critical. The actual decision by the ATO to seek access arose

21 As to whether an injunction could be issued against the ATO officer under s 39B of the Judiciary Act 1903 (Cth), Lindgren J listed the matter for hearing as it was considered that there were some reasonable prospects of success. However, this issue has now been settled between the parties.
during litigation and such access is dictated by the relevant rules of the Federal Court. It was not a decision by the ATO to seek access through the access and information gathering powers of s 263 and 264 of the *ITAA 36*.

In so holding, Lindgren J also distinguished the *Deloitte* and *ONE.TEL* judgments on the basis that the underlying decisions were made pursuant to the relevant enactments. Those enactments were s 264 of the *ITAA 36* and s 108 of the *STAA*. The end result of the decision in *White Industries* is that the *Guidelines* do not themselves immediately affect legal rights and obligations. The general administration power of s 8 of the *ITAA 36* does not provide a basis for those legal rights and obligations.

Even though the applicants had a legitimate expectation that the *Guidelines* would be followed, this did not, by itself, turn a non-reviewable decision into a reviewable decision under the *AD(JR)* Act. Therefore, even though the applicants could point to the potential application of procedural fairness, the jurisdictional threshold had not been met for *AD(JR)* Act purposes. There was not a decision made under an enactment. Instead, there was an ATO decision to lift the Accountants’ Concession and then seek access to documentation pursuant to the relevant litigation processes of the Federal Court.

His Honour stated that the decision by the ATO officer would have been reviewable as a decision of an administrative character made under an enactment if the *ITAA* had provided for the making of the *Guidelines* granting the concession. In addition, the *Guidelines* would then need to provide for the granting of the concession and for the making of the decision to lift it as a condition precedent to the taking of action to compel the giving of access. Finally, the *ITAA* or the *Guidelines* would themselves need to provide for the compelling of the giving of access.

**VI. PRACTICAL IMPLICATIONS AND THE WAY FORWARD**

On the surface, the concession provided to the accountant-client relationship is comparable to the position of the lawyer-client relationship. The Commissioner has acknowledged the need for taxpayers to be able to seek advice from both lawyers and accountants. However, the reality is that the concept of legal professional privilege is a common law right, recognised and, more importantly, enforced as a legal right belonging to the client. Such a right is able to be used as a defence to the access power of s 263 and the information gathering powers of s 264 of the *ITAA*.

In the context of the situation where there is litigation between the parties, legal professional privilege is a recognised common law right. In the case of the accountant-client relationship, the administrative concession provides protection only as far as it is relevant and workable, between the Commissioner and the taxpayer and their accountant advisor. Even though the *Guidelines* provide a legitimate expectation that the ATO will follow them, this is of relevance as to the process set out in the *Guidelines*. The *Guidelines* do not by themselves generate a legal right. They generate an expectation that the ATO will follow them. More importantly, decisions that are made in accordance with the *Guidelines* (appropriate notice to the taxpayers and an opportunity to respond) will be sufficient for the operation of the ATO access powers. The *White Industries* case shows that where decisions are made under the *Guidelines* which do not have direct impact on the legal rights of taxpayers and their accountant advisors, there will be a bar to possible judicial action in the courts.

From a practical perspective, there is a very significant gap of protection for taxpayers who use lawyers or accountants. Taxpayers need to be conscious of this distinction. There should be a concerted effort to move towards introducing a statutory level of protection for clients that use accountants for tax advice. The ATO *Guidelines* cannot provide enough safeguards for taxpayers. Providing a uniform statutory regime will eliminate any need for decision making by the ATO as to whether there are exceptional circumstances.
The Australian Law Reform Commission (ALRC) has now recommended that client privilege be extended to cover the accountant-client relationship. The ALRC recommends that:

Federal client legal privilege legislation should provide that a person who is required to disclose information under a coercive information-gathering power of the Commissioner of Taxation is not required to disclose a document that is a tax advice document prepared for that person.

A ‘tax advice document’ should be defined as a confidential document created by an independent professional accounting adviser for the dominant purpose of providing that person with advice about the operation and effect of tax laws.

A ‘tax advice document’ does not include ‘source documents’, such as documents which record transactions or arrangements entered into by a person (for example, formal books of account or ledgers). Source documents, even where given to a tax agent for the purpose of obtaining tax advice, will not be protected by the privilege.

An independent professional accounting adviser must be a registered ‘tax agent’ for the purpose of s 251A of the *Income Tax Assessment Act 1936* (Cth) or a nominee or employee of a registered tax agent, who is a qualified tax accountant.

No privilege should apply to ‘tax contextual information’ given for the purpose of providing tax advice. ‘Tax contextual information’ is information about:

(a) a fact or assumption that has occurred or is postulated by the person creating the tax advice document;
(b) a description of a step involved in the performance of a transaction that has occurred or is postulated by the person creating the tax advice document;
(c) advice that does not concern the operation and effect of tax laws.

No privilege should apply where a tax advice document is created in relation to the commission of a fraud or offence or the commission of an act that renders a person liable to a civil penalty; or where the person or the accounting adviser knew or ought reasonably to have known that the document was prepared in furtherance of a deliberate abuse of power.

In making this recommendation, the ALRC supports the New Zealand model, which has been in operation since 2005, of creating this tax advice privilege rather than simply extending legal professional privilege to accountants giving tax advice. On this basis, there can be more legislative control over the scope and operation of the privilege, as distinct from the common law doctrine of legal professional privilege. However, the New Zealand experience so far suggests that the protection being mooted for accountants will be far more confined than legal professional privilege. It should also be noted that the recommendation relates to an accounting advisor. There is no impact for the lawyer-client relationship, which will remain under the legal professional privilege umbrella.

Until this recommendation is acted upon, taxpayers and their advisors will need to be wary in relation to the provision of tax advice. It may be that there will be a need to consider the use of a lawyer when contemplating certain tax arrangements so that the common law right of legal professional privilege can be claimed. On the other hand, it may be appropriate to utilise an accountant for more specific practical and business-oriented advice relating to the tax affairs of the taxpayer which will not be requiring the protection of legal professional privilege. In the situation where there is documentation or advice that may be sought by the ATO, in accordance with the Guidelines, taxpayers and their advisors do need to be aware of the limitations of the Guidelines in terms of their intended protection.

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23 Ibid Recommendation 6-6.
24 Ibid ch 6, [6.278].
THE NON-DISCLOSURE RIGHT IN NEW ZEALAND — 
LESSONS FOR AUSTRALIA?

ANDREW MAPLES*

ABSTRACT

The Tax Administration Act 1994 (NZ) recognises legal professional privilege in the tax context. Following much debate, legislation was enacted in 2005 extending the concept of legal professional privilege to certain confidential communications between a tax advisor (who is not a lawyer) and a client. This statutory right is not dissimilar to that recommended in the recent Australian Law Reform Commission report Privilege in Perspective: Client Legal Privilege in Federal Investigations. This paper reviews this new form of privilege (called the non-disclosure right) in New Zealand, as well as the likely approach of the Inland Revenue Department (IRD) to this statutory right. The paper concludes that the introduction of the non-disclosure right is a positive step for taxpayers and tax advisors. However, the courts have made it clear that the protection afforded by this statutory right is more confined than legal professional privilege. In addition, the process for making such a claim will impose potentially significant compliance costs and the overall effectiveness of this new right will also depend on the approach to the rules by the IRD.

I. INTRODUCTION

In 2005, the New Zealand Government enacted the Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005 (NZ) (the ‘2005 Act’) which created a statutory right for accountants and other advisors who are not lawyers (referred to in this paper collectively as ‘tax advisors’) to claim protection from disclosure to the Inland Revenue Department (IRD) of certain tax advice documents. This followed a number of reports (and much debate) in New Zealand considering the role of legal professional privilege generally and the extension of privilege to tax advice provided by tax advisors. This statutory right is not dissimilar to that recommended in the recent Australian Law Reform Commission (ALRC) report Privilege in Perspective: Client Legal Privilege in Federal Investigations.1

The 2005 Act inserted the new ss 20B to 20G into the Tax Administration Act 1994 (NZ) (‘TAA 1994’). Unless indicated to the contrary, all references to legislation in this paper are to the TAA 1994. The right of non-disclosure applies where a notice to disclose is issued by the IRD after 21 June 2005, the date of the enactment of the 2005 Act, and applies to documents whether they were created before or after that date.

While the non-disclosure right is similar to legal professional privilege, the rules are not identical.2 In addition, in the tax context, the statutory right does not replace legal advice privilege for confidential communications between legal practitioners and their clients (as recognised in s 20 of the TAA 1994).3 Documents or other communications which are

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2 For example, a process must be followed for a book or document to be subject to the non-disclosure right. By contrast, legal professional privilege does not need to be claimed. Rather, ‘[p]rivilege attaches to a qualifying communication and remains unless waived by the client’: Blakeley v CIR (2008) 23 NZTC 21, 865, 21,869 (Rodney Hansen J) (High Court).
3 Section 20 of the TAA 1994 provides that any information or book or document is privileged from disclosure in the following circumstances: (a) if it is a confidential communication, whether written or oral, passing directly or indirectly between a legal practitioner in his or her professional capacity and a client, or between legal practitioners in their professional capacity; (b) if it is made for the purpose of obtaining or giving legal advice; and (c) if it is not made
protected under s 20 are not subject to the non-disclosure right requirements. The non-disclosure right also does not affect communications made between a lawyer and a third party for the purpose of preparing for existing or contemplated proceedings (litigation privilege).

Following the enactment of the non-disclosure right, the IRD released a Standard Practice Statement (SPS), ‘Non-Disclosure Right for Tax Advice Documents – SPS 05/07’, which outlines the IRD’s approach to applying the new provisions. It applies to a notice requiring either access to, or disclosure of, information under ss 16-19 issued on or after 22 June 2005. SPS 05/07 collectively refers to notices requiring information issued under these sections as an ‘Information Demand’.

The non-disclosure right, as enacted, does not apply to discovery in litigation proceedings. Following concerns raised with the Government by the New Zealand Institute of Chartered Accountants on this issue, the Taxation (International Taxation, Life Insurance, and Remedial Matters) Bill 2008, tabled in the New Zealand Parliament on 2 July 2008, proposes extending the right to prevent disclosure of these documents by the IRD during litigation.

It is not the purpose of this paper to consider the merits of extending a limited form of privilege to non-lawyers. It is also beyond the scope of this paper to compare the New Zealand approach of creating a new, separate, limited form of privilege for tax advisors with, for example, the approach adopted in the United States where the existing privilege has been extended to tax advisors.
The remainder of this paper is organised as follows. Part II reviews key concepts underlying the operation of the non-disclosure right. The process to be adopted by the IRD with respect to requests for information that may be subject to the right is outlined in Part III. Concluding observations are made in Part IV.

II. THE RIGHT TO CLAIM NON-DISCLOSURE

A. Introduction

The right of non-disclosure is contained in s 20B(1) of the TAA 1994 which provides:

A person (called in this section and sections 20C to 20G an information holder) who is required under 1 or more of sections 16 to 19 to disclose information in relation to the information holder or another person is not required to disclose a book or document that is a tax advice document for the person to whom the information relates.

There are several key concepts that are critical to understanding the operation of the non-disclosure rules. These concepts are discussed in this section.

B. A ‘Tax Advisor’

The non-disclosure right belongs to the taxpayer. However, the entitlement of a taxpayer to claim the right of non-disclosure depends on the person from whom advice was sought or given being a ‘tax advisor’. The term is defined in s 20B(4) of the TAA 1994 to mean a natural person who is subject to the code of conduct and disciplinary process of an ‘approved advisor group’ (see section C in this part of the paper). Partners, principals and employees in accounting practices who are members of an approved advisor group will therefore come within the term ‘tax advisor’. Books or documents created by an employee of a tax advisor’s firm, where the tax advisor is in public practice, are also subject to the non-disclosure right even though the employee themselves may not have this professional affiliation.

The definition of ‘tax advisor’ raises a significant issue where an advisor is working in public practice — for example, as a partner — but is not a member of an approved advisor group and is also not an employee of a tax advisor. At least with respect to the New Zealand Institute of Chartered Accountants (the Institute), one of the two ‘approved advisor groups’ (see section C in this part of the paper), it appears a non-member partner will still constitute a ‘tax advisor’. Under the Institute’s Rules of the Institute of Chartered Accountants of New Zealand (the ‘Institute’s Rules’), the Institute’s Council has discretion to allow members to practise and offer accounting services with non-members either in a partnership or corporate structure. Where the member is practising in partnership with a non-member, the non-member partner must agree in writing to abide by the Institute’s Act, the Institute’s Rules and Code of Ethics, and to subject themselves to the Institute’s disciplinary processes, as if they were a member. Accordingly, such a person will be ‘subject to the code of conduct and disciplinary process … of an approved advisor group’ as required by the definition of ‘tax advisor’.

The position is less clear with respect to non-members practising with members in a corporate structure. Alan Judge and Angela Williams observe:

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12 The Institute of Chartered Accountants of New Zealand Act 1996 (NZ).


14 New Zealand Institute of Chartered Accountants, above n 11, r 19.3(d)(v)-(vi).

15 This is permitted by r 19.8-19.14 and Appendix X of the Institute’s Rules.

In contrast to the rules relating to non-member partners in partnerships, there do not appear to be any specific Rules or requirements in Appendix X [Requirements for an Approved Company] for non-member shareholders or directors of corporate practices to subject themselves to the Institute’s code of conduct or disciplinary processes. However, the authors also observe that the Institute’s *Code of Ethics* states that non-members who are permitted to practise as directors in a corporate practice with members are required to comply with the *Code of Ethics*.\(^{17}\) In addition, references to ‘member’ in the Institute’s *Code of Ethics* are deemed to include non-member partners or directors, insofar as that is not inconsistent with the Institute’s Rules and *Code of Ethics*.\(^{18}\)

This issue is of particular importance for legally qualified partners in an accounting practice as, arguably, such practitioners are not protected by legal professional privilege. Section 20, which recognises client privilege in the tax context, protects confidential written and oral communication passing between ‘a legal practitioner in the practitioner’s professional capacity’ (emphasis added) and either: (a) another legal practitioner, also in their professional capacity; or (b) with the practitioner’s client. Under the *Lawyers and Conveyancers Act 2006* (NZ), and the now repealed *Law Practitioners Act 1982* (NZ), only lawyers operating through a law firm (including an incorporated law firm) or as sole practitioner can provide legal services to the public. A legally qualified partner of an accounting firm cannot provide ‘legal advice’ to their clients as this would be in breach of the *Lawyers and Conveyancers Act 2006* (NZ). On this basis, taxation advice provided by a legally qualified partner of an accounting firm to the firm’s clients is not provided pursuant to the partner’s capacity as a legal practitioner, but rather in their capacity as a partner of an accounting firm. Accordingly, such advice would not be protected by s 20 privilege.

The term ‘tax advisor’ will also include professionals holding in-house positions, who are involved in tax advisory work for their employer. When complying with an Information Demand, in-house tax advisors will need to ensure that they distinguish documents created for the main purpose of giving tax advice (such as a tax opinion) from those which are commercial or transactional in nature (such as a sale and purchase agreement).\(^{19}\) Tax advisors acting ‘in-house’ can, therefore, expect close scrutiny by the IRD and District Court (in the event of a challenge) of documents they create and for which the non-disclosure right is asserted.

The focus of the non-disclosure rules is clearly on the individuals who are communicating instructions, authorising documents and communicating advice. The reference to ‘natural person’ in the definition means incorporated professional practices or trusts are excluded from being tax advisors. Submissions were made to the Finance and Expenditure Committee considering the *Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2005* (NZ) concerning this issue. In response to these submissions, the *Officials’ Report* observed ‘that the ability to claim the right of non-disclosure should be limited to persons who are themselves subject to the disciplinary rules of the approved body … [requiring] a principal of the firm who is a member of an approved group or subject to the group’s rules … to claim the privilege’\(^{20}\) when a chartered accountancy firm operates through a limited liability company or trust.

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\(^{17}\) Ibid, referring to New Zealand Institute of Chartered Accountants, ‘Appendix 1: Applicability of the Code of Ethics’, above n 13, 49 [1].

\(^{18}\) New Zealand Institute of Chartered Accountants, above n 13, 49 [2].

\(^{19}\) This is clearly also an issue in the context of legal privilege; see, eg, *Case Y8* (2007) 23 NZTC 13,076.

\(^{20}\) Policy Advice Division, New Zealand Inland Revenue Department and the Treasury, *Taxation (Base Maintenance and Miscellaneous Provisions) Bill — Officials’ Report to the Finance and Expenditure Committee on Submissions on the Bill* (2005), 104 (the ‘*Officials’ Report*’).
C. The ‘Approved Advisor Group’

In order for a claim for the right of non-disclosure to be made, the tax advisor must be a member of an ‘approved advisor group’. An ‘approved advisor group’ is a group that includes natural persons who meet all of the following requirements:21

- they have a significant function of giving advice on the operation and effect of tax laws;
- are subject to a professional code of conduct in giving that advice; and
- are subject to a disciplinary process that enforces compliance with the code of conduct.

The Institute and the Tax Agents’ Institute of New Zealand (Inc) have approved advisor group status.

The secrecy provisions contained in s 81 of the TAA 199422 have been amended with the addition of the new s 81B. This section permits the Commissioner of Inland Revenue (CIR) to supply information to an approved advisor group about an action or omission by a person who is, or purports to be, a member of that group, which the CIR considers to be a breach of the tax advisor’s responsibilities under the non-disclosure right provisions. In response to concerns on how this power may be used,23 SPS 05/07 states such disclosure will only be considered in very specific circumstances; for example, where the tax advisor concerned has provided false or incomplete information in the statutory declaration required for the disclosure of tax contextual information.24

D. ‘Tax Advice Document’

1. Introduction

Three requirements have to be met for a document to be a tax advice document:

- the document is eligible to be a tax advice document (as outlined in the next part of this paper); and
- the person (i.e. either the taxpayer or their authorised tax advisor) makes a claim that the document is a tax advice document; and
- the person satisfies the legal requirements to disclose tax contextual information from the tax advice document as well as any attachments (see section E of this part).25

In respect of (b) above, if the claim that a book or document is eligible to be a tax advice document is made by a tax advisor,26 they must confirm that they have the authority from their client to make such a claim.27 Existing client engagement letters may need to be reviewed (and updated accordingly) to ensure they include such authority from the client. If the claim is not made by the required date, the right to claim non-disclosure will not apply to the document after the expiry of that period even if a further Information Demand is issued in respect of the same document or a claim for the right of non-disclosure is made at a later date.28

21 Tax Administration Act 1994 (NZ) s 20B(5).
22 Section 81 of the Tax Administration Act 1994 (NZ) imposes an obligation on every officer of the IRD to maintain secrecy of all matters relating to the various tax statutes.
23 These concerns were raised in submissions on the Taxation (Base Maintenance and Miscellaneous Provisions) Bill (NZ): Policy Advice Division, New Zealand Inland Revenue Department and the Treasury, above n 20, 123.
24 IRD, ‘Non-Disclosure Right for Tax Advice Documents — SPS 05/07’, above n 5, 36.
25 Tax Administration Act 1994 (NZ) s 20B(3).
26 Tax Administration Act 1994 (NZ) s 20D(1).
27 Tax Administration Act 1994 (NZ) s 20D(5).
2. A Review of the Concept

(a) Section 20B(2), TAA 1994

The TAA 1994 does not define the term ‘tax advice’. Rather, the Act sets out the requirements to be a ‘tax advice document’ in s 20B(2). A book or document is eligible to be a ‘tax advice document’ if:

(i) the book or document is confidential; and
(ii) it is created for the main purpose of either a taxpayer seeking advice from a tax advisor, or a tax advisor providing advice to a taxpayer, about the operation and effect of tax laws.

Tax advice documents include:

(i) tax advice from a tax advisor (including employees of the tax advisor’s firm where the advisor is in public practice) to taxpayers, in whatever form the advice is given (for example, letter, email, file note); and
(ii) research, analysis and other file notes made by a tax advisor (or their employee where the advisor is in public practice) for the main purpose of providing or recording tax advice given.

The term ‘book or document’ is broadly defined in s 3. For the remainder of this paper, the term ‘document’ will be used to refer to both ‘books’ and ‘documents’.

The use of the term ‘main purpose’ acknowledges more than one purpose may exist for the creation of a document. Determining the main purpose of a document is a question of fact and at times will require careful analysis. For example, where an opinion includes other areas of the law, such as commercial legislation, it may not be clear what the ‘main purpose’ of the advice was. In cases where there is dispute over the main purpose(s) for which a document was created, the District Court may be required to ‘rank’ the potentially multiple purposes for which a document has been created.

(b) An Illegal or Wrongful Act

A document created for: ‘a purpose of committing, or promoting or assisting the committing of, an illegal or wrongful act’ cannot qualify for non-disclosure. SPS 05/07 comments that an illegal or wrongful act not only includes tax evasion but extends to tax advice provided ‘in the course of committing some other illegal or quasi-illegal act, such as a wider act of fraud or some other crime’. Concern has been expressed that s 20B(2)(c) of the TAA 1994 could apply where there is the potential for the anti-avoidance provisions to be applied. Unlike tax evasion, tax avoidance is not illegal; rather it is often within the letter of the law but against the spirit of the law. For this reason, it may be viewed as ‘wrong’, which raises the issue of whether advice regarding tax avoidance arrangements may be seen as promoting or assisting the commission of a ‘wrongful act’. If this view were taken, any such documents could not be a tax advice document. Keith Kendall similarly observes that ‘it is not immediately clear where illegality begins and ends in this context, an issue shared with the common law privilege’. The IRD form IR

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29 Section 3 of the Tax Administration Act 1994 (NZ) provides that the term ‘book or document’ includes: ‘all books, accounts, rolls, records, registers, papers, and other documents and all photographic plates, microfilms, photostatic negatives, prints, tapes, discs, computer reels, perforated rolls, or any other type of record whatever’.
30 This is in line with recent cases in Australia which have adopted a dominant purpose test with respect to the application of legal professional privilege, eg, Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49 (High Court of Australia): Kendall, above n 9, 1.
31 The Taxation (International Taxation, Life Insurance, and Remedial Matters) Bill 2008, introduced into the New Zealand Parliament in July 2008, proposes an amendment to allow this determination to be made by the particular court hearing the proceedings which give rise to the claim.
32 Tax Administration Act 1994 (NZ) s 20B(2)(c). Section 20, providing for legal advice privilege, uses similar wording.
33 IRD, ‘Non-Disclosure Right for Tax Advice Documents — SPS 05/07’, above n 5, 28.
34 Judge and Williams, above n 16, 16.
36 Kendall, above n 10, 14.
519, Tax Advice Document Claim,\(^{37}\) cites tax evasion and ‘fraud of any type’ as examples of documents created for ‘illegal or wrongful acts’.

(c) The Meaning of ‘Firm’
A tax advice document includes a document created by an employee of the tax advisor’s firm where the tax advisor is in public practice. The term ‘firm’ is not defined in the TAA 1994 or the Income Tax Act 2007 (NZ). The IRD have adopted a broad interpretation of the term in SPS 05/07 referring to ‘a company, partnership or other business entity’.\(^{38}\) (emphasis added)

(d) The Book or Document Must Be ‘Confidential’
For a claim of non-disclosure for a document to be successful, it must be ‘confidential’ at the time of the Information Demand. This term is also not defined in the TAA 1994 and therefore should also bear its ordinary and natural meaning. The Officials’ Report comments: ‘The meaning of “confidential” should be determined in accordance with case law, particularly that relating to legal professional privilege.’\(^{39}\)

For a document to be confidential, it must:

(i) have been intended to be confidential. It is clear that the relationship of tax advisor and client must exist at the time the particular document is created.\(^{40}\) Judge and Williams\(^{41}\) observe that the relationship between accountants, as external advisors, and their clients normally imports an obligation of confidence in respect of the client’s information, a fact recognised in the Institute’s Code of Ethics. Documents and communications between accountants and their clients should, therefore, generally be covered by this obligation of confidence;
(ii) remain confidential between the tax advisor and the taxpayer; and
(iii) not be intended to be read by third parties or members of the public.\(^{42}\) SPS 05/07 states that the term ‘third parties’ excludes the taxpayers’ other advisors, such as their legal and financial advisors.\(^{43}\) In addition, a document will not be treated as provided to third parties where it is provided to employees of the taxpayer or its shareholders or owners or where the third party is subject to a confidentiality agreement.\(^{44}\)

In practice, tax advisors will need to ensure there is a clear differentiation between tax advice and other commercial (non-tax) advice. Tax advisors should mark eligible tax advice documents with the words ‘tax advice document’ or ‘confidential’ (or equivalent description) at the time they are created. Such labelling will not mean the document is confidential (or that the other s 20B criteria are satisfied) but will minimise the risk of inadvertent disclosure and facilitate the consideration of any future non-disclosure claim. Conversely, the failure to label a book or document accordingly (as will typically be the case with documents created before the non-disclosure right was introduced) will not prevent it being treated as confidential, although this may ‘make it more difficult to identify and sustain the claim.’\(^{45}\)

In addition, taxpayers and their advisors will need to ensure that the confidential character of documents is not lost, for example, by disclosing the documents to external parties. Where documents are disclosed to other parties such as financiers, there will need


\(^{38}\) IRD, ‘Non-Disclosure Right for Tax Advice Documents — SPS 05/07’, above n 5, 28.

\(^{39}\) Policy Advice Division, New Zealand Inland Revenue Department and the Treasury, above n 20, 119.

\(^{40}\) Tubb, above n 5, 15.

\(^{41}\) Judge and Williams, above n 16, 10.

\(^{42}\) IRD, ‘Non-Disclosure Right for Tax Advice Documents — SPS 05/07’, above n 5, 28.

\(^{43}\) Ibid. For example, newsletters and general circulars which do not give targeted advice to a particular client will not be classed as confidential.

\(^{44}\) Ibid.

\(^{45}\) Judge and Williams, above n 16, 12.
to be clear evidence that the document provider and recipient intend to maintain the confidential nature of the documents as well as any limitation on the use the recipient may put the document. Ideally, some written confidentiality agreement should be signed.

(e) Legal Advice Privilege vs Non-disclosure Right

The definition of ‘tax advice documents’ is narrower than the equivalent legal advice privilege which applies to ‘confidential communication[s], whether oral or written …’46 Information conveyed orally may therefore be subject to legal advice privilege, but not the non-disclosure right. This means that the right does not provide complete protection from disclosure for taxpayers and tax advisors under s 17, arguably the main information gathering section in the TAA 1994.47

Legal advice privilege is, however, narrower than the non-disclosure right insofar as, for the former, there must be the communication of information or documents between legal practitioners or between a legal practitioner and their client.

(f) Documents Ineligible as Tax Advice Documents

Documents which simply record decisions or transactions, set out calculations or summarise facts, whether or not they are part of the process of generating tax advice are not eligible to be tax advice documents. Similarly, documents or forms completed for the main purpose of meeting tax compliance obligations will also not be eligible to be tax advice documents.48 These types of documents will still need to be disclosed in full if subject to an Information Demand.

The early indication is that the courts will take a very literal (and restrictive) approach to interpreting and applying the non-disclosure rules. The District Court49 and the High Court on appeal, in Blakeley v Commissioner of Inland Revenue50 had to consider the term ‘tax advice document’. In this case, in the course of an investigation, the CIR was provided with four tax opinions written by the advisor (a director in a leading accountancy firm) for a taxpayer, which related to arrangements which, in the CIR's view, were void tax avoidance arrangements. The CIR issued an Information Demand requesting the advisor provide a list of names of those persons who had received advice from the advisor relating to similar arrangements. The advisor, Mr Blakeley, refused to comply on the grounds that to provide such information would involve the disclosure of a tax advice document which was protected by s 20B. In the High Court, Hansen J, agreeing with the District Court, held, inter alia, that the names and IRD numbers were not a tax advice document for the purpose of s 20B. They were not a book or document, as stipulated in s 20B(2) and as defined in s 3.51

E. ‘Tax Contextual Information’

Under the non-disclosure rules, the IRD may request that the taxpayer and their tax advisor provide the IRD with ‘tax contextual information’ from a tax advice document.52 This information may be requested either as part of the original Information Demand or, after a claim for the non-disclosure right has been made, a subsequent Information Demand may

47 Section 17 of the Tax Administration Act 1994 (NZ) enables the CIR to require a person to ‘furnish in writing any information’, as well as to produce for inspection any books and documents, the CIR considers necessary or relevant for the purposes specified in s 17(1).
48 The IRD states that the following documents are ineligible to be tax advice documents: business and management records; financial statements; numerical calculations compiled for the purpose of calculating a taxpayer's tax liability; transfer pricing reports; legal transaction documents including contracts and loan documentation; databases, spreadsheets and diagrams demonstrating transactions: IRD, ‘Non-Disclosure Right for Tax Advice Documents — SPS 05/07’; above n 5, 32.
49 CIR v Blakeley (2008) 23 NZTC 21,681 (District Court).
51 Ibid 21,869.
52 Tax contextual information is to be disclosed to the Commissioner in a statutory declaration in the prescribed form: IRD, Tax Contextual Information Disclosure, IR 520 (2005) <http://www.ird.govt.nz/resources/6/4/64dd3e004b8e5bb8at066b0bc87554a30/ir520.pdf> at 9 December 2008.
require disclosure of this information. This is a significant difference from legal professional privilege which also protects facts from disclosure. A failure to supply such information when requested will mean the book or document will not qualify as a tax advice document.

Tax contextual information means information coming within any of the following categories:

- Facts or assumptions relating to the transactions identified in the Information Demand that have occurred or are postulated;
- A description of the steps involved in the performance of the transaction (whether it has occurred or is postulated);55
- Advice on the operation and effect of laws other than tax laws on the taxpayer and any related facts or assumptions that the advice is based on;
- Advice on the operation and effect of tax laws relating to debt recovery issues and any related facts or assumptions;
- Facts or assumptions relating to the preparation of the taxpayer’s financial statements, supporting worksheets or other source documents containing information that the taxpayer is required to provide the IRD under an Inland Revenue Act.54

The word ‘postulated’ refers to a transaction that ‘will or is expected to occur or is assumed to have occurred’.55 Section 20F(3) of the TAA 1994 therefore applies to the situation where a tax advisor provided advice on a contemplated transaction, but was no longer acting for the taxpayer when the transaction took place and has no real knowledge of how the advice was implemented.56 Generally, the CIR will seek tax contextual information in order to establish the facts relating to a transaction or series of transactions.57

Tax contextual information includes not only facts, but also assumptions. Examples include that a taxpayer is a New Zealand tax resident or that a series of facts outlined in the opinion are true.58 Rob Wells comments:

As a matter of best practice taxpayers and tax advisors should ensure that background facts and assumptions on which the tax advice is based are dealt with separately in a tax advice document (maybe even in an appendix) so that they can easily be extracted if needed.59

F. The Meaning of ‘Tax Laws’

Section 20B(2) provides a book or document is eligible to be a tax advice document if, inter alia, it is created by a taxpayer for the main purpose of seeking or giving advice ‘about the operation and effect of tax laws’ (emphasis added).

The term ‘tax law’ includes any provision in the current Income Tax Act 2007 (NZ) and other tax statutes, as well as some past income tax Acts, an Order in Council, or a regulation made under another tax law.60 Unlike legal privilege, it does not apply to advice on other areas of the law such as company law.

It is clear from the definition of ‘tax law’ (and SPS 05/07) that the tax advice must only be about New Zealand tax rules as they affect the particular taxpayer.61 Tax advice about

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53 This may include diagrams (of transactions): Tubb, above n 5, 11.
54 Tax Administration Act 1994 (NZ) s 20F(3).
56 Policy Advice Division, New Zealand Inland Revenue Department and the Treasury, above n 20, 110.
57 This could include information on whether the transaction took place, who the parties were, the purpose of the transaction, relevant dates, amounts, conditions, formulae, etc: IRD, ‘Non-Disclosure Right for Tax Advice Documents — SPS 05/07’, above n 5, 29.
58 Tubb, above n 5, 11.
60 Tax Administration Act 1994 (NZ) s 2.
61 IRD, ‘Non-Disclosure Right for Tax Advice Documents — SPS 05/07’, above n 5, 29.
the effect and application of tax laws in another jurisdiction (for example, concerning tax rules in a country in which a controlled foreign company is resident) will not be subject to the non-disclosure right. A tax opinion dealing primarily with the operation of NZ tax laws, and which incorporates a (brief) comment on overseas tax law, will therefore be eligible to be a tax advice document (although the portion related to the overseas law may have to be disclosed on request as tax contextual information). In this example, the main purpose of the opinion was to give advice on NZ tax laws. Depending on the level of overseas content, advisors should consider clearly delineating the NZ and international advice (with only the former being subject to non-disclosure). Alternatively, advisors could prepare separate opinions dealing with the NZ and international tax consequences respectively.

In this respect, the non-disclosure right differs from legal professional privilege. Advice by a lawyer concerning foreign tax laws would be protected by s 20, ‘and it is probable that advice provided by a foreign lawyer would be protected by common law [legal professional privilege].’

Advice on non-tax issues, such as accounting treatment (including materiality, provisioning and related-party disclosures), insolvency law, and company and trust law, provided by tax advisors will constitute tax contextual information. If the main purpose of the document is to give such advice, it will not be subject to the right to claim non-disclosure.

III. PROCESS FOR CLAIMING THE RIGHT OF NON-DISCLOSURE

A. Step 1: The Issue of an Information Demand

Requiring a Document to be Disclosed

In order to claim non-disclosure status for a document, the CIR must have issued an official s 17 notice (or other statutory Information Demand). For taxpayers, and some accountants for whom tax is not a major part of their work, there will be potential for confusion as to whether such a communication from the IRD is a formal s 17 notice or simply a request for information that does not expressly rely on s 17 (and, hence, is not a statutory Information Demand). Wells (writing on behalf of the Institute) accordingly recommends ‘that any letter that requests information and refers to s 17 should be treated as a section 17 notice. Any doubts on whether the letter is a section 17 notice should be addressed promptly with Inland Revenue if matters of non-disclosure are an issue.’

In preparing the non-disclosure claim it is important that a careful assessment is made of each relevant document subject to an Information Demand. Any document or attachment that is not eligible to be a tax advice document must be produced under the Information Demand. The failure to supply such a document, or part of a document, by the required date may lead to a penalty imposed under the TAA 1994.

B. Step 2: Notification to the CIR That the Non-disclosure Right Is Being Claimed

The claim that a document is a tax advice document must be made by either the taxpayer or an authorised tax advisor. The CIR’s expectation (and preference) is that the tax advisor authorised to claim non-disclosure should be the tax advisor who created the tax advice document. If this is not possible, an appropriate alternative tax advisor may be the authorised tax advisor.

64 IRD, ‘Non-Disclosure Right for Tax Advice Documents — SPS 05/07’, above n 5, 30.
There is no legislative requirement for the claim to be made on a prescribed form. An IRD form, IR 519, *Tax Advice Document Claim Form*, has been designed for this purpose. The Institute recommends the use of the form to ensure the non-disclosure claim is valid.\(^{65}\)

The claim for non-disclosure of a tax advice document must contain certain information. Where the document was created by the taxpayer (i.e. a document seeking advice from a tax advisor on the operation and effect of tax laws), the claim must include all the following:

- A brief description of the form (such as a letter, email, report) and contents (such as a request for tax advice concerning fringe benefit tax) of the document;
- The name of the tax advisor for whom document was intended; and
- The date the document was created. This will be when it was finalised or sent to the taxpayer’s tax advisor.\(^{66}\)

Where the tax advisor (or their employee) has created the document, the claim must contain the following:

- A brief description of the form (such as a letter, research paper, summary of phone conference, email) and content (for example, the document may concern tax advice in respect of the goods and services tax) of the document;
- The name of the tax advisor who gave the tax advice in the document;
- The approved advisor group that the tax advisor belonged to when the book or document was created;
- The legislation and the revenue type (for example, income tax, fringe benefit tax, GST) to which the advice relates; and
- The date the document was created. This will be when the document was finalised or sent to the taxpayer.\(^{67}\)

The time period within which a claim that a document is a tax advice document must be made is determined by the particular section under which the Information Demand has been made.\(^{68}\) In the event that the CIR is not notified of the claim within the above stated time periods, the document will not be a tax advice document. Any late claim will also be invalid and the document can no longer be treated as a tax advice document.

If a claim is made (that a document is a tax advice document) within the relevant time frame, the document is protected, unless the IRD takes action to challenge the claim in the District Court\(^{69}\) or an approved advisor group informs the CIR that the tax advisor was not a member of their group at the relevant time.\(^{70}\)

Where a document required to be disclosed under an Information Demand does not meet the requirements of being a tax advice document, that document must be disclosed. This includes documents attached to tax advice documents such as appendices, schedules and notes where the attachment is not eligible to be a tax advice document.\(^{71}\) SPS 05/07 makes it clear that

> [a]ttaching or incorporating a document *capable of being treated as a separate document* to a tax advice document does not extend the right to claim non-disclosure to that attached

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65 Wells, above n 63.
67 *Tax Administration Act 1994* (NZ) s 20D(3).
68 SPS 05/07 provides a table summarising the various dates: IRD, *‘Non-Disclosure Right for Tax Advice Documents — SPS 05/07’*, above n 5, 31. The CIR may extend these time periods if requested to do so by the taxpayer.
69 A claim that a document is subject to privilege under s 20 of the *Tax Administration Act 1994* (NZ) can also be determined by the District Court on the application of either the CIR or taxpayer, lawyer, etc: s 20(5). As already noted, the Taxation (International Taxation, Life Insurance, and Remedial Matters) Bill 2008 proposes an amendment to allow this determination to be made by the particular court hearing the matter.
70 *Tax Administration Act 1994* (NZ) s 20C(3).
71 Section 20E of the *Tax Administration Act 1994* (NZ) provides: ‘An information holder who is required to disclose information in relation to a person is required to provide a copy of a book or document or part of a book or document that — (a) Is attached to a book or document that is eligible under section 20B(2) to be a tax advice document for the person; and (b) Is not eligible under section 20B(2) to be a tax advice document for the person.’
or incorporated document when that attached or incorporated document does not independently meet the tax advice document requirements. [emphasis added]72

From a practical perspective, it will normally be clear that a document is an attachment, etc., to tax advice documents; for example, through reference in the main document to the attachment. However, to avoid doubt, advisors should clearly indicate, through headings and other means, which information is an attachment, and ensure that tax advice information is clearly contained in the document they are claiming the right over and no such information is in the attachment which may not be subject to the right.

Tax advisors are required to keep copies of documents that are potentially eligible to be tax advice documents in a secure place from the date the Information Demand is issued by the IRD,73 and not the (later) date when the claim is made. This requirement ‘relates to the IRD’s concern that the taxpayer’s copy of the document may be destroyed or lost for some reason.’74

Information Demands can be issued against third parties such as share brokers and banks. Information held by third parties may be subject to a claim for non-disclosure. However, any such claim can only be made by the taxpayer or their tax advisor, not the affected third party (unless they are tax advisors and authorised to act accordingly). It is crucial that a taxpayer or their tax advisor is made aware of any such information request as soon as possible in order to determine whether a claim of non-disclosure should be made.

C. Step 3: Supplying the Tax Contextual Information

A person who is required to disclose information under an Information Demand may also be required by the CIR to disclose tax contextual information from a document that the taxpayer or their tax advisor claims to be a tax advice document. In SPS 05/07, the IRD states that the requirement to disclose such information may be made either as part of the original Information Demand or more usually through a subsequent Information Demand made at a later time. According to the IRD, ‘[t]he discretion to require disclosure of the tax contextual information will be exercised sparingly in order to minimise compliance costs…’75 Tax contextual information will usually only be requested after the information disclosed in the Information Demand has been considered and, for example, the CIR believes there are material gaps in the factual information available.76

The disclosure of the tax contextual information must be made in a statutory declaration by the authorised tax advisor in the prescribed form (IR 520). Verbatim recording of the factual information is not required — what is important is the tax advisor’s understanding of a transaction.77

Section 20F of the TAA 1994 outlines the time periods for which disclosure of tax contextual information must be provided. This will also depend on the section under which the CIR requested the information. These time periods may be extended in exceptional circumstances on a request by the taxpayer.78

The IRD can judicially challenge the tax contextual information if it is believed to be incomplete or incorrect.79 In addition, significant penalties can apply for making a false declaration and the IRD may refer the matter to the approved advisor group for disciplinary action against the tax advisor concerned.

72 IRD, ‘Non-Disclosure Right for Tax Advice Documents — SPS 05/07’, above n 5, 32.
73 Tax Administration Act 1994 (NZ) s 20C(4). The SPS 05/07 outlines what is meant by a ‘secure place’: IRD, ‘Non-Disclosure Right for Tax Advice Documents — SPS 05/07’, above n 5, 33.
75 IRD, ‘Non-Disclosure Right for Tax Advice Documents — SPS 05/07’, above n 5, 33.
76 Ibid.
77 Policy Advice Division, New Zealand Inland Revenue Department and the Treasury, above n 20, 110.
78 IRD, ‘Non-Disclosure Right for Tax Advice Documents — SPS 05/07’, above n 5, 34. These circumstances include the complexity of the situation and the compliance history of the taxpayer.
79 Tubb, above n 5, 19.
The CIR or the taxpayer/tax advisor may apply to the District Court for an order determining whether: (i) information provided by the taxpayer (or their tax advisor) is tax contextual information in relation to the tax advice document; or (ii) the taxpayer (or their tax advisor) is required to provide a more detailed or better description of tax contextual information in relation to the tax advice document.

IV. CONCLUSION

The non-disclosure right is a positive step for both tax advisors and their clients as it provides statutory protection from disclosure for tax advice documents. It means that these groups will no longer be dependent on the CIR’s discretionary and administrative guidelines. However, it remains to be seen whether the right is a positive step for tax administration and society at large. In evidence before the Commission of Inquiry into Certain Matters Relating to Taxation, Report of the Winebox Enquiry, the IRD cited legal professional privilege as one of the biggest obstacles to the Inland Revenue Department when it is conducting large corporate investigations. … The veil of privilege weakens the department’s ability to carry out its [revenue collection] duty because of the opportunity it provides for exploitation.

As another (limited) form of privilege, the non-disclosure right may further negatively impact on the IRD’s ability to gather information and, therefore, collect tax. The non-disclosure process is strictly prescribed in the TAA 1994, including time limits for making a claim that a document is a tax advice document and for disclosing tax contextual information. The failure to follow the process in a timely manner will potentially result in tax advice having to be disclosed to the IRD. Taxpayers and advisors therefore need to ensure that Information Demands are considered promptly and the relevant procedures are followed. While certain time limits can be extended at the CIR’s discretion, at this stage it is unclear whether the CIR’s discretion will be exercised generously or sparingly. Early indications are that, in the courts’ view, the protection afforded by the non-disclosure provisions is more confined than legal professional privilege and, as a creature of statute, it only ‘protects defined parts of a limited category of written communications.’

The process for claiming the non-disclosure right will impose additional compliance costs on the taxpayer and tax advisor, especially where a number of documents are subject to an Information Demand. When determining whether a document is a tax advice document, it will be crucial that the main purpose of creating the document is accurately determined. Tax advisors (including in-house tax advisors) will need to take care to distinguish the situations when they are providing advice, as distinct from carrying out other activities for their clients such as negotiating or implementing transactions. Clearly separating tax advice from other information in a document should facilitate disclosure. Taxpayers and tax advisors will also need to take care over the use and distribution of documents of a confidential nature to ensure their confidential character is maintained in the event that a future claim is made that such documents are tax advice documents.

The success of the non-disclosure right will, in part, depend on the approach and procedures put in place by the IRD (including prior an Information Demand being issued). For example, a claim for non-disclosure status can only be made once an Information Demand has been made. However, such a formal request for information will often be at

80 Tax Administration Act 1994 (NZ) s 20G(1).
81 Blakeley v CIR (2008) 23 NZTC 21,865, 21,870.
the later stages of the audit of a taxpayer. As a result, the IRD ‘needs to acknowledge and respect the confidential nature of potential tax advice documents at all times before formal information requests are made if the new provisions are to have any real meaning and substance for taxpayers.’\(^8\)

The IRD supports the non-disclosure rules.\(^3\) It ‘expects that there will be a benefit to the tax system in that taxpayers are more likely to seek competent advice when managing their tax affairs, if they can be assured that the advice will be candid and remain confidential.’\(^4\) This will, according to the IRD,\(^5\) promote voluntary compliance by taxpayers which will lead to a reduction in compliance and administrative costs. However, this needs to be weighed against the additional compliance costs imposed on taxpayers and tax advisors in complying with the rules.

It remains to be seen whether, in fact, the rules will mean more people will seek tax advice from tax advisors in respect of their affairs. In the author’s experience, with the exception of more sophisticated taxpayers, the protection (or non-protection) of client-tax advisor communication is normally not an issue in the mind of taxpayers when deciding if they will consult a tax advisor. In the author’s view, a significant increase in tax advice sought from tax advisors is unlikely. However, in the past, the more sophisticated taxpayer may have preferred to consult a tax lawyer because of the protection of privilege afforded such communications. These taxpayers may now be more willing to seek advice from their tax advisor as distinct from their lawyer, although the limits of the protection of the non-disclosure right compared with legal professional privilege may still mean such taxpayers will prefer seeking tax advice from lawyers.

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82 Judge and Williams, above n 16, 28.
83 Tubb, above n 5, 9.
84 Ibid.
THE PLAINTIFF-PROOF BARRIER — THE JUSTICIABILITY OF ACTIVITIES OF THE COMMISSIONER OF TAXATION IN TORTIOUS AND EQUITABLE ESTOPPEL TAXPAYER CLAIMS

JOHN BEVACQUA*

ABSTRACT

Justiciability is the concern with ensuring that only those cases involving matters which are appropriate for judicial scrutiny are determined in our courts. This article contends that both in tortious and equitable estoppel actions by taxpayers against the Commissioner of Taxation, justiciability considerations underlie the usual denial of relief to the plaintiff. In part II it is demonstrated that, although not expressly acknowledged, justiciability considerations underlie the especially restrictive judicial approach to determining such claims. In part III, the role which justiciability concerns have played in the determination of tortious and equitable estoppel claims by taxpayers against the Commissioner of Taxation is critically examined. An express, more coherent and uniform approach to justiciability considerations in tax cases is proposed.

I. INTRODUCTION: THE DOCTRINE OF JUSTICIABILITY AND TAX ADMINISTRATION ACTIVITIES

A justiciable matter is one which is considered capable of judicial determination. Conversely, non-justiciable matters are those which cannot be subjected to judicial determination for one or more of a number of interrelated reasons which can be broadly categorised as competency and separation of powers concerns. Competency concerns stem from the view that some cases cannot be judicially determined because they are cases which courts are ‘ill-equipped and ill-suited to assess.’ This argument is sometimes expressed in terms of lack of ‘judicial competency’ or ‘institutional competence.’ Competency-based justiciability concerns are raised in a range of matters, including those which give rise to political issues or bring into question high-level policy decisions. They are also raised in those matters which are considered as being unsuited to the adversarial nature of our system of judicial resolution, and its rules of evidence and procedure, because they raise multifaceted interests and diverse public policy concerns. Such matters are often described as ‘polycentric’. It is also typically political or high-level policy decisions which display polycentric characteristics.

The separation of powers underpinning of the justiciability doctrine is a desire to ensure an appropriate separation of powers between the legislature, the executive and the judiciary.

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3 Peter Cane has described a polycentric matter as one which requires ‘account to be taken of a large number of interlocking and interacting interests and considerations.’ See Peter Cane, An Introduction to Administrative Law (1986) 150. American commentator Lon Fuller has vividly described polycentricity by analogy with a spider’s web, noting that: ‘This is a “polycentric situation” because it is “many centred” — each crossing of the strands is a distinct centre for distributing tensions.’ See Lon Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 Harvard Law Review 353 at 395.
4 See, eg, the judgment of Bowen CJ in Minister for Arts Heritage and Environment v Peko-Walsend (1987) 15 FCR 274, 278-279, in which a disputed decision as to the Heritage listing of part of Kakadu National Park was described as follows: ‘[T]he whole subject matter of the decision involved complex policy questions relating to the environment, the rights of Aborigines, mining and the impact on Australia’s economic position of allowing or not allowing mining as well as matters affecting private interests ... It appears to me that the subject-matter of the decision in conjunction with its relationship to the terms of the Convention placed the decision beyond review by the Court ... The matter appears to my mind to lie in the political arena.’
is maintained and respected. This concern clearly forms a strong basis for classifying as non-justiciable those matters which are largely political or which involve high-level policy decisions. It also encompasses the grounds for rejection of cases involving certain subjects that are considered inherently unsuitable for judicial revisitation or intrusion, such as executive decisions concerning national security.  

Within these basic parameters, justiciability is a fluid and multifaceted concept which has been described as ‘a complex phenomenon that weaves together a number of strands to create a whole that is perhaps greater than the sum of its parts.’ Notwithstanding this fluidity, with a basic understanding of the competency and separation of powers ‘strands’ of justiciability in mind, it is possible to identify a range of circumstances in which tortious or equitable challenges to tax administration activities of the Commissioner of Taxation can readily be considered ‘non-justiciable.’

For example, judges may well be reluctant to allow a taxpayer to proceed with a damages action against the Commissioner in circumstances that directly or indirectly result in the successful taxpayer paying less tax than would otherwise have been payable on an ordinary reading of the relevant taxation law provisions. There are two main reasons for justiciability concerns in these circumstances. First, the rules of evidence which confine the judicial process may make it impossible for a judge to properly assess the competing public policy ramifications of such a result. Second, and perhaps most compelling, such a result could be viewed as an incursion by the judiciary into the legislature’s domain through creation of an exception to an otherwise legislatively sanctioned taxpayer liability.

Similarly, even in cases which do not involve payment of damages by the Commissioner to a taxpayer, it is easy to appreciate judicial justiciability concerns. For example, any result which would substitute the decision of the Commissioner with the decision of a judge could be viewed as an imposition on the Commissioner of a legal burden which might otherwise operate to restrict or modify the Commissioner’s legislatively sanctioned role. Again, it could be argued that such a determination would pose a judicial challenge to the legislative authority of Parliament.

It is contended in this paper that these types of justiciability concerns have been used as a judicial filter in many tax cases at common law and in equity. The result has been the imposition of significant restrictions on the availability of a number of private law remedies to taxpayers aggrieved by the acts or omissions of the Commissioner of Taxation. Part II of this paper addresses this contention. Specifically, discussion will centre upon the tortious remedy of negligence and the equitable remedy of promissory estoppel. It is contended that both of these avenues of relief serve as useful examples of the extremely restricted availability of private law relief to Australian taxpayer plaintiffs in claims against the Commissioner of Taxation, by virtue of either explicit or implicit concerns with ensuring one or more of the underlying strands of the doctrine of justiciability are not offended.

Part III critically examines the role of justiciability in private-law tortious and estoppel cases against the Commissioner of Taxation. It argues for a more explicit, coherent and uniform approach to justiciability in those cases. Such an approach would better ensure that disputes are dealt with in a manner which respects the sound principles underlying the concept of justiciability and fosters good tax administration practices, without unduly restricting the avenues of relief available to aggrieved taxpayers. The tortious policy/operational dichotomy is proposed as a useful starting framework for such an explicit, coherent and uniform approach to justiciability in taxpayer tortious and equitable claims against the Commissioner.

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5 Ibid 304: Wilcox J noted in his judgment that the relevance of a decision to questions of national security would render a matter ‘inappropriate’ for judicial review.
6 Finn, above n 2, 241.
II. THE CURRENT JUSTICIABILITY BARRIER IN NEGLIGENCE AND ESTOPPEL CLAIMS AGAINST THE COMMISSIONER OF TAXATION

The focus in this part of the paper will be on identifying the relevance of justiciability concerns in tortious claims of negligence and equitable estoppel claims. These two causes of action provide a useful representative picture of the role of justiciability in private-law tortious and equitable claims against the Commissioner of Taxation. They allow examination of its relevance both in claims where damages are sought and in claims of a declaratory or injunctive nature. They also capture the approach to justiciability in claims against the Commissioner of Taxation at common law as well as in equity.

A. The Justiciability of Negligence of the Commissioner of Taxation

Historically, the justiciability of negligence cases against statutory authorities such as the Commissioner of Taxation has been determined by an application of the ‘policy/operational’ dichotomy. The policy/operational dichotomy was described by Mason J in Sutherland Shire Council v Heyman in the following terms:

[A] public authority is under no duty of care in relation to decisions which involve or are dictated to by financial, economic, social or political factors or constraints … But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.8

In effect, therefore, applying the policy/operational dichotomy, an activity which is fundamentally operational in nature will be capable of being made subject to a duty of care in negligence. Conversely, a matter which is fundamentally a policy or discretionary nature will not be capable of sustaining a claim in negligence.

The reference by Mason J to the absence of any duty of care in cases concerning ‘decisions which involve or are dictated to by financial, economic, social or political factors or constraints’ is strongly indicative of the justiciability grounding of the policy/operational dichotomy.9 This grounding has been expressly highlighted. It has been noted that:

The phrase planning or policy decision is simply a recognition of the concept of justiciability in the area of negligence and public bodies. When a court feels that the allegation of negligence is unsuited to judicial resolution it will apply the label planning decision to express that conclusion.10

Accordingly, applying the policy/operational dichotomy, only planning or policy acts or omissions of the Commissioner of Taxation should be ruled non-justiciable. Conversely,

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10 In the UK, justiciability concerns are similarly not far from the surface in application of the policy/operational dichotomy. For example, Rowland v Takaro Properties Ltd [1988] AC 473, 501: Lord Keith of Kinkel noted that the policy/operational distinction was developed to address ‘the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution’.

purely administrative or operational malfunctions should be capable of forming the basis for a justiciable tortious claim.

The policy/operational dichotomy has recently lost favour in Australian courts. Instead, Australian courts today favour an ‘incremental approach’ founded on incremental developments of the law using the approach taken in categories of cases analogous with the factual matrix at issue. However, the policy/operational dichotomy, and the justiciability concerns which it represents, remain important for determining the sustainability of a claim in negligence in cases where a statutory authority such as the Commissioner of Taxation is concerned.

McHugh J gave clear guidance as to the continued relevance of the issue in delivering the leading incremental approach judgment in Crimmins v Stevedoring Industry Finance Committee. His Honour applied a six-stage test for imposition of liability, the fifth step of which closely resembles the policy/operational dichotomy and the justiciability concerns it encapsulates. His Honour described the fifth stage of his six-stage test in the following terms:

5. Would such a duty impose liability with respect to the defendant’s exercise of ‘core policy-making’ or ‘quasi-legislative’ functions? If yes, then there is no duty.

While the McHugh approach is far from settled law in Australia, it is strongly suggestive that justiciability measured in terms equivalent to the policy/operational distinction should remain a core component of a judicial assessment of any allegation of negligence raised against a public authority such as the Commissioner of Taxation. However, the case law to date reveals that the Commissioner of Taxation enjoys immunity from suit in negligence far beyond what would be suggested through an application of either the McHugh J incremental approach or the policy/operational dichotomy.

The position in Australia is that no Australian taxpayer has ever sustained allegations of negligence against the Commissioner of Taxation, concluding that negligence is largely an illusory remedy in the arsenal of remedies available to Australian taxpayers. John Bevacqua, ‘The Unicorn in the Stable: A Detailed Assessment of the Potential for a Successful Negligence Action Against the Commissioner of Taxation’ (Paper presented at the Australasian Tax Teachers Association Conference, Hobart, Tasmania, 23-25 January 2008).

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11 In large part, this is due to the difficulty in delineating between policy and operational acts. The dilemma was enunciated by Lord Slynn in the English case of Barrett v Enfield London Borough Council ([2001] 2 AC 550, 571: ‘It does not … mean that if an element of discretion is involved in an act being done … common law negligence is necessarily ruled out … as has often been said even knocking a nail into a piece of wood involves the exercise of some choice or discretion and yet there may be a duty of care in the way it is done.’ Lord Slynn’s reference to ‘knocking in a nail’ is derived from the US case of Ham v Los Angeles County (1920) 45 Cal App 148, 162, in which it was noted that ‘[i]t would be difficult to conceive of any official act, no matter how directly ministerial that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.’

12 In Australia, this rationale was first broached by Brennan J in Sutherland Shire Council v Heyman, above n 7, 481, in the following terms: ‘It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable considerations which ought to be negative, or to reduce or limit the scope of duty or the class of persons to whom it is owed.’ For similar views applied in the UK, see: Caparo Industries Plc v Dickman [1990] 2 AC 605, 618 (Lord Bridge); X (Minors) v Bedfordshire County Council [1995] 2 AC 635, 751 (Lord Browne-Wilkinson); and Barrett v Enfield London Borough Council [2001] 2 AC 550. The incremental approach was adopted in recent leading Australian cases involving allegations of negligence against public authorities including: Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1; Pyrenees Shire Council v Day (1998) 192 CLR 375; and Romeo v Conservation Commission of the Northern Territory (1998) 192 CLR 431.


14 Ibid 24-25.

15 It should be noted, however, that there is a current absence of uniformity in the High Court as to how the incremental approach should be applied, which precludes the possibility of more definite conclusions. For a good discussion of the various recent approaches to the question of duty of care by the High Court, see Prue Vines, ‘The Needle in the Haystack: Principle in the Duty of Care in Negligence’ (2000) 23(2) University of New South Wales Law Journal 35.

16 Elsewhere, I have set out the circumstances in which a successful negligence claim might be mounted by a taxpayer against the Commissioner of Taxation, concluding that negligence is largely an illusory remedy in the arsenal of remedies available to Australian taxpayers. John Bevacqua, ‘The Unicorn in the Stable: A Detailed Assessment of the Potential for a Successful Negligence Action Against the Commissioner of Taxation’ (Paper presented at the Australasian Tax Teachers Association Conference, Hobart, Tasmania, 23-25 January 2008).

There is no basis upon which to conclude that there is a tort liability in the Australian Taxation Office or its named officers towards a taxpayer arising out of the lawful exercise of functions under the Income Tax Assessment Act.\(^{18}\)

This sweeping rejection of the possibility of an action in tort against the Commissioner is effectively a declaration of non-justiciability of negligence allegations against the Commissioner of Taxation. Although Grove J does not elaborate on the basis for his stance, at face value His Honour’s approach is clearly far more restrictive than the policy/operational dichotomy or incremental approach to the question of justiciability.

The Grove J approach is not, however, without precedent in tax cases considering tort liability of the Commissioner. It is consistent with the approach taken in cases involving allegations of tortious breach of statutory duty\(^ {19}\) against the Commissioner of Taxation.\(^ {20}\) For example, in \(\text{Lucas v O’Reilly,}\)\(^ {21}\) a case in which the taxpayer alleged, among a number of causes of action, a breach of statutory duty on the part of the Commissioner in respect of a foreshadowed (and, the taxpayer argued, erroneous) Notice of Assessment of his tax liability,\(^ {22}\) Young CJ, in comprehensively rejecting the taxpayer’s submissions, stated:

If the cause of action relied upon by the plaintiff is based upon a breach of statutory duty, the plaintiff must show ... that the statute creating the duty confers upon him a right of action in respect of any breach ... However, it is, I think, clear that the defendant owes the plaintiff no such duty. The duty of the Commissioner is owed to the Crown.\(^ {23}\)

According to the Young CJ reasoning, the Commissioner owes no duty at all to taxpayers in his tax assessment function. The duty of the Commissioner is owed exclusively to the Crown. This view is open to some challenge, particularly given that there is no express statement to this effect in the \(\text{Income Tax Assessment Acts}.\)\(^ {24}\) Further, the Young CJ and Grove J stance is clearly contrary to views expressed by Isaacs J in \(\text{Moreau v FCT}.\)\(^ {25}\) in which His Honour asserted in relation to the duties of the Commissioner that ‘[h]is function is to administer the Act with solemnity, in the public interest and in a manner consistent with the public trust’\(^ {26}\) and which Grove J noted with approval.

These views have been positively received in a number of Australian cases. For example, in \(\text{Lucas v O’Reilly,}\)\(^ {27}\) a case in which the taxpayer alleged, among a number of causes of action, a breach of statutory duty on the part of the Commissioner in respect of a foreshadowed (and, the taxpayer argued, erroneous) Notice of Assessment of his tax liability,\(^ {28}\) Young CJ, in comprehensively rejecting the taxpayer’s submissions, stated:

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These views have been positively received in a number of Australian cases.

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18 Ibid 410.
19 Central to any case of alleged breach of statutory duty is a search for legislative intent to create a civil cause of action for a breach of the relevant statutory duty. See Sir Anthony Mason, ‘Negligence and the Liability of Public Authorities’ (1998) 2 Edinburgh Law Review 3, for discussion of the requirements of the tort of breach of statutory duty in Australia. See also Keith Stanton et al., Statutory Torts (2003); and Colin Phegan, ‘Breach of Statutory Duty as a Remedy Against Public Authorities’ (1974) 8 University of Queensland Law Journal 158. The concern is obviously to ensure that no judicial interpretation is applied to the relevant law provision such that it would operate to engage the Court in quasi-legislative activity by ascribing judicial intent to the legislature.

20 Further, the Young CJ and Grove J stance is clearly contrary to views expressed by Isaacs J in \(\text{Moreau v FCT}.\)\(^ {25}\) in which His Honour asserted in relation to the duties of the Commissioner that ‘[h]is function is to administer the Act with solemnity, in the public interest and in a manner consistent with the public trust’\(^ {26}\) and which Grove J noted with approval.

21 Ibid 410.
22 Breach of statutory duty was also pleaded in the alternative and also rejected by Grove J in \(\text{Harris v Deputy Commissioner of Taxation} (2001) 47 ATR 406.\)
23 \(\text{Lucas v O’Reilly} (1979) 79 ATC 4081, 4085.\)
24 Aside from a brief reference to a view that the \(\text{Taxpayers’ Charter} creates no tortious duties to taxpayers, His Honour makes no direct reference to any supporting legislative or administrative instrument authority. The \(\text{Taxpayers’ Charter} consists of a series of booklets released by the Australian Taxation Office in 1994. See \text{Taxpayers’ Charter: What you need to know} [NAT 2458]; \text{Taxpayers’ Charter: Expanded version} [NAT 2547]; \text{Treating you fairly and reasonably} [NAT 2549]; \text{Your honesty and complying with the tax laws} [NAT 2550]; \text{Who can help you with your tax affairs} [NAT2555]; \text{Your privacy and the confidentiality of your tax affairs} [NAT 2552]; \text{Accessing information under the Freedom of Information Act} [NAT 2554]; \text{Getting advice from the Tax Office} [NAT 2553]; \text{If you’re not satisfied} [NAT 2556]; \text{Fair use of our access and information gathering powers} [NAT 2559]; and \text{If you’re subject to enquiry or audit} [NAT 2558].\)
25 \(\text{(1926) 39 CLR 65.}\)
26 Ibid 67.
27 \(\text{(1982) AC 617.}\)
28 Ibid 651.
tax cases, although not expressly confirmed as correct. However, none of these cases were pleaded in tort.

Irrespective of the correctness or otherwise of the Young CJ and Grove J stance, the issue is one which clearly warrants some judicial consideration in the tortious context. There is little evidence of such consideration in the Grove J or Young CJ judgments. Instead, inherent in both the Young CJ and Grove J approaches to potential tortious liability of the Commissioner is a judicial deference to an unstated legislative intent to preclude the availability of tortious relief in tax cases. This deference renders non-justiciable almost all allegations of tortious liability by Australian taxpayers against the Commissioner of Taxation.

B. Justiciability in Equitable Estoppel Claims Against the Commissioner of Taxation

In equitable estoppel cases, the justiciability concern typically manifests itself as the ‘non-fetter’ principle. This is the principle that ‘government should not be shackled in exercising its power to make decisions in the public interest in the future.’ In the estoppel context, this translates into a principle known as the Southend-on-Sea principle, ‘that an estoppel may not be raised to prevent the performance of a statutory duty or to hinder the exercise of a statutory discretion.’

Unlike negligence which, as noted above, is largely judicially untested against the Commissioner of Taxation, estoppel has been tried with some limited success. However, in most cases alleging estoppel against the Commissioner of Taxation, the taxpayer has failed. In Australia, the general position regarding the prospect of estopping the Commissioner of Taxation has been bluntly and concisely stated by Kitto J in Federal Commissioner of Taxation v Wade: ‘No conduct on the part of the Commissioner could operate as an estoppel against the operation of the Act.’

Similar views, strongly suggestive of the extreme judicial sensitivity to encroaching on statutorily imposed duties of the Commissioner, have been reiterated more recently in AGC (Investments) Ltd v Federal Commissioner of Taxation by Hill J:

[T]here is no room for the doctrine of estoppel operating to preclude the Commissioner from pursuing his statutory duty to assess tax in accordance with law. The Income Tax Assessment Act imposes obligations on the Commissioner and creates public rights and duties, which the application of the doctrine of estoppel would thwart.

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32 Allars, above n 31, 86. The Southend-on-Sea principle derives its name from the case of Southend-on-Sea Corp v Hodgson (Wickford) Ltd [1962] 1 QB 416.

33 (1951) 84 CLR 105.

34 Ibid 117.

35 (1991) 91 ATC 4180.

36 Ibid 4195. In relation to this case, it was noted in Bellinz v Federal Commissioner of Taxation (1998) 39 ATR 198, that: ‘[i]t was not suggested that the appellants could rely on estoppel, although the administrative law arguments advanced in reality seek to activate a doctrine of estoppel in a different guise.’ The incursion of estoppel in administrative law cases often takes the form of the closely related administrative law doctrine of legitimate expectations. For a comprehensive exposition between the two causes of action see Dean Knight, Estoppel
Such comments indicate an implicit concern not to offend the central separation of powers ideals which underlie the principle of justiciability as reflected in the non-fetter principle. However in neither of these judgments is there any of the close and detailed discussion of the nature of the specific statutory duties or powers of the Commissioner, usually evident where the non-fetter principle is applied to determine whether a Crown instrumentality should be estopped. Nor is there evidence of any associated weighing up of public and private interests, which is usually central to determining whether a relevant statutory provision is capable of forming the basis for an estoppel action. While it seems highly likely that an examination of whether the relevant provisions of the Income Tax Assessment Acts would result in a determination that those provisions are ‘not for the benefit of any individuals or body of individuals, but for considerations of State’ and, therefore, incapable of sustaining a taxpayer estoppel claim against the Commissioner, no such analysis is entered into in the relevant tax cases to date.

The Commissioner has only been estopped in Australia in extraordinary cases in which the Commissioner has sought to resile from explicit and clear commitments made to an individual taxpayer tantamount to a contractual commitment. One such example is the case of Cox v Deputy Federal Commissioner of Land Tax (Tas). That case concerned a settlement of certain land tax liabilities of the taxpayer through an agreement between the Commissioner and the taxpayer. The Commissioner subsequently sought to reopen the land tax assessments. Griffith CJ, in denying the Commissioner’s request to reopen the assessments said:

That matter was in actual litigation between the parties in the manner prescribed by the Act. While that litigation was pending an agreement was come to by which the respondent submitted to the appellants’ claim, paid their costs and paid the amount claimed from him. Under those circumstances it seems to me impossible to re-open the matter. Although it is not, strictly speaking, res judicata, the compromise followed by payment operates as an executed agreement for valuable consideration.

These specific quasi-contractual exceptions to the general preclusion of estoppel claims against the Commissioner are special in that they are cases where the Commissioner has clearly and unambiguously sought to bind himself to a particular taxpayer and the application of estoppel presents no ‘substantial departure from statutory obligations.

The vast majority of estoppel claims could not be resolved without the risk of substantial departure from statutory obligations. Holding the Commissioner to a representation made to a taxpayer or class of taxpayers, singling them out for special treatment or concession, would arguably be tantamount to binding the legislature to the decision of the Commissioner of Taxation as an unelected public servant. Such a result


There are also echoes in the comments of Hill J of the Young CJ approach to tortious breach of statutory duty in Lucas v O'Reilly (1979) 79 ATC 4081, discussed above.

For example, in Commonwealth v Verswayen (1990) 170 CLR 394, arguably the leading Australian authority on the application of promissory estoppel principles against the Crown, a significant portion of each of the judgments of the High Court is dedicated to a close examination of the statutory intent, meaning and duties created by the relevant section of the Limitation of Actions Act 1958 (Vic), upon which the Commonwealth was seeking to rely to deny the possibility of the plaintiff bringing his action out of time, contrary to earlier representations not to do so. In contrast to the restrictive approach to estoppel in the tax cases, in that case, Mason CJ concluded, at 417, that: ‘It was not argued that any special rule of estoppel applies to assumptions induced by government, either so as to expand or so as to contract the field of operation of the doctrine.’

Admiralty Commissioners v Valverda (Owners) (1938) AC 173, 185. This test was cited by Mason CJ in Commonwealth v Verswayen (1990) 170 CLR 394 as central for determining whether the relevant statutory provision is capable of being waived (and, consequently, also capable of forming the basis for an estoppel action).

Other cases in which the taxpayer has been successful in having estoppel-like responsibilities imposed on the Commissioner of Taxation are: Precision Polls Pty Ltd v FCT (1992) 92 ATC 4549; and Queensland Trustees v Fowles (1991) 12 CLR 111. For a detailed exposition of these cases, see Cameron Rider, ‘Estoppel of the Revenue: A Review of Recent Developments’ (1994) 23 Australian Tax Review 135.

Rider, above n 40, 137.
would clearly offend the separation of powers ‘strand’ of the principle of justiciability. The fact therefore remains that, with few exceptions, the vast majority of estoppel claims against the Commissioner would not presently be considered justiciable.

III. TOWARD A NEW APPROACH TO JUSTICIABILITY IN NEGLIGENCE AND ESTOPPEL CASES AGAINST THE COMMISSIONER OF TAXATION

Part II of this paper has illustrated the pervasiveness of justiciability concerns in negligence and estoppel claims involving the Commissioner of Taxation. It was suggested that justiciability concerns would render both remedies inapplicable in almost all cases involving allegations by taxpayers against the Commissioner of Taxation. This situation raises a number of interesting interrelated questions concerning the robustness of this restrictive judicial approach and how justiciability might be more satisfactorily accommodated in such tax cases. The first specific question is whether, and to what extent, such an overwhelming concern with limiting justiciability of tax cases brought in tort or equity is justified.

At a generic level, the importance placed on justiciability has been criticised. It has been pointed out, for instance, that concerns with justiciability should be tempered by the reality of the absence of a clear separation of powers in Australia. Consequently, to the extent that justiciability concerns are aimed at ensuring an absolute separation of powers, it could be argued that this pursuit is in vain and unnecessary.

Further, the competency-based strands of the justiciability doctrine are similarly questionable if pursued over-zealously. For example, almost any case involving the Commissioner of Taxation could at some level be viewed as raising polycentric interests. Every taxpayer’s interests, as a user of tax-funded government services and infrastructure, are affected by the challenge to the revenue posed by a significant individual taxpayer claim. Further, any question involving a publicly funded office such as that held by the Commissioner of Taxation necessarily raises direct or indirect questions of the allocation of scarce public resources. These questions are inherently political. As one commentator has noted in the administrative law context:

[T]he potential scope of an exclusion of ‘political’ matters from the purview of the courts is enormous. If all such political ‘hot potatoes’ were to be deemed unsuitable for judicial scrutiny the administrative law casebooks would be slim volumes indeed.

Notwithstanding these easy criticisms and challenges to the over-zealous pursuit of the doctrine of justiciability, it is readily apparent why some limits on the justiciability of claims against the Commissioner of Taxation should be imposed. For example, to allow judicial scrutiny of every act of the Commissioner, as the officer primarily responsible for the collection of Commonwealth tax revenue, would impose unacceptable contingencies on the viability of vital government initiatives and services funded by that revenue. In extreme cases, these contingencies might bring about inefficiency and fiscal chaos. Inefficiency or fiscal chaos might result if a longstanding tax practice was successfully

45 Allars, above n 31, 36 notes that ‘in some respects there is no separation of powers in Australia. Legislative and executive power are not clearly separated. Federal Ministers who form the Federal Executive council and the Cabinet and administer federal government departments are Members of Parliament. ... Nor is there a true separation of legislative from judicial power. Judges have power to make rules of court, a legislative function’.
46 This has led one commentator to observe, in the context of discussion of the continued relevance of the concept in judicial review of administrative action, that justiciability ‘is a blunt instrument which fails to have regard in a nuanced way to those characteristics of a particular decision which make it unsuited to judicial review’: Peter Bayne, ‘The Court, the Parliament and the Government — Reflections on the Scope of Judicial Review’ [1991] 20 Federal Law Review 1, 3. Another noted that “non justiciability” is a confused amalgam of rationales, none of which bear great weight when closely examined”: see Finn, above n 2, 262.
47 For discussion of this fact, see, eg, Fuller, above n 3; John Allison, ‘The Procedural Reason for Judicial Restraint’ [1994] Public Law 452; and Bayne, above n 46.
48 Finn, above n 2, 249.
challenged in a taxpayer claim. Such an uncertain environment would also be ripe for abuse by vexatious or opportunist tax payer litigants and would create few incentives for voluntary compliance behaviour.

Clearly, therefore, the answer is not to entirely do away with justiciability as a filter for appropriate claims against the Commissioner of Taxation. The challenge is to deal with the justiciability issue in a manner which is conducive to the efficient administration of the taxation system, to ensure that the Constitutional and competency-based underpinnings of the concern with justiciability are not unduly compromised, and for all this to be achieved without unduly eroding taxpayer rights. Hill J extrajudicially commented on the importance of striking the right balance, noting that

the most important role of the judiciary is to stand between the State and the citizen. It must always be remembered that the Commissioner of Taxation is ultimately the State. The Income Tax legislation may impose trust in the Commissioner to perform his tasks properly and impartially as he generally does, but his actions must not be immune from review. The inescapable fact that taxation is the cornerstone of society must not be allowed to stand as a justification for arbitrary acts, bullying or the erosion of civil rights in the name of exaction of taxes.

Unfortunately, as we have seen in part II, justiciability is presently dealt with indirectly in negligence and estoppel actions through application of various principles and approaches such as the policy/operational dichotomy, the incremental approach and the non-fetter principle. Further, in the taxation context, negligence and estoppel actions have been ruled non-justiciable without explicit detailed reference to any of these usual established tests. One of the problems with dealing with justiciability in this diverse, restrictive and indirect way is the lack of transparency which such an approach engenders.

At its extreme, dealing with justiciability in this way creates the perception that determination of the issue is carried out by way of little more than an exercise in judicial discretion. This means that lawyers seeking to advise clients as to the prospects of a successful claim against the Commissioner might find it difficult to give clear guidance. There is always the prospect that even an otherwise strong claim may be defeated on justiciability grounds. In such an uncertain environment, taxpayer civil rights are devalued and weakened. At its extreme, this could lead to loss of taxpayer confidence and trust in the system of tax administration and possibly discourage voluntary compliance behaviour. It is clearly preferable, therefore, to strive for a systematic and transparent approach to applying any justiciability filter.

The question then becomes one of how that might be best achieved. The simplest answer would be for our judiciary to deal with justiciability as an undisguised question of justiciability, rather than in the context of the application of various other judicial tools and principles. It is conceded, though, that it would take an unlikely and substantial shift in judicial thinking to abandon the various well-entrenched tools, such as the policy/operational dichotomy or the non-fetter principle, used to address the issue in the past in favour of an unveiled and free-form approach.

49 The terms ‘inefficiency’ and ‘fiscal chaos’ have been most comprehensively examined in the literature and case law concerning restitutionary relief from the state. For good discussion, see Belinda Wells, ‘Restitution from the Crown: Private Rights and the Public Interest’ (1994) 16 Adelaide Law Review 191, 201; and the discussion by La Forest J in the Canadian case of Air Canada v British Columbia [1986] 2 SCR 539.


51 Similar comments have been made by Keith Stanton in the context of discussion of the judicial trend generally toward determining negligence actions against public authorities by reference to a ‘checklist’ of policy factors. See Stanton et al, above n 19, 98. See, also Jane Stapleton, ‘Duty of Care Factors: A Selection from the Judicial Menus’ in Jane Stapleton and Peter Cane (eds), The Law of Obligation: Essays in Celebration of John Fleming (1998); and Anthony Dugdale and Keith Stanton, Professional Negligence (3rd ed, 1998).


53 Although to some extent the shift in tort toward an incremental approach and away from rigid application of the policy/operational dichotomy is evidence that such a shift might be possible with time. In tort law there have also
A more realistic alternative would be an express judicial acknowledgement that principles such as the policy/operational dichotomy or the non-fetter principle are being applied specifically to determine the question of justiciability. This, at least, would recalibrate the focus of these tools to emphasise the core questions of judicial competence and separation of powers inherent in the justiciability doctrine. There would be clear advantages to such an approach.

One such advantage is that justiciability concerns are likely to be more closely and directly scrutinised in a transparent environment. Presently, these concerns have been allowed to prevail without being put to any rigorous evidentiary test in the tax context. For example, in the estoppel context, competing public interests could be weighed more readily against the non-fetter principle. The fact that the public interest entails at least some consideration of individual interests might also be acknowledged. Consequently, valid questions might be raised about what is gained through encouraging behaviour in administration of our taxation system which would otherwise be viewed as unconscionable, for fear of offending the justiciability doctrine.

At least two beneficial outcomes might result from bringing justiciability directly into question in estoppel claims against the Commissioner in this way. First, the emphasis would shift away from the non-fetter principle per se. Instead, the justiciability issues would be weighed against the ramifications for the proper administration of the taxation system of finding for the plaintiff taxpayer. There is academic support for such a shift in emphasis:

The appropriate criteria to decide whether estoppel ought to be allowed should be the proper functioning of public administration. We should not be concerned about whether to allow an estoppel in a particular case would fetter public powers but rather whether as a general rule is more or less conducive to better public administration.

A second benefit is that justiciability might cease to be seen as an all-or-nothing issue and, consequently, better promote improvements in tax administration practices. This could be achieved through applying appropriate remedies which respect justiciability concerns, provide the taxpayer with a remedy and encourage better tax administration practices through the taxpayer’s success. For example, to bind the Commissioner to a clear but erroneous representation to a taxpayer, reasonably and detrimentally relied upon by that taxpayer, might clearly offend core justiciability concerns. The problem, however, is that to render such matters non-justiciable does nothing to promote error-free and conscionable tax administration practices.

It may, however, be possible to reconcile these apparently conflicting concerns through application of the appropriate remedy in an estoppel action. For example, imposing a

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54 Mason CJ in *Attorney-General v Quin* (1990) 170 CLR 1, 18, acknowledged that public interest necessarily comprehends an element of justice to the individual: ‘[A]s the public interest necessarily comprehends an element of justice to the individual, one cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the public interest by causing grave injustice to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of the discretion.’ These comments have been positively acknowledged in the tax literature in Rider, above n 40.

55 The aim of estoppel is to discourage unconscionable behaviour. Thomson points out that ‘the basic purpose of private law estoppel is to prevent a person from unconscionably departing from a representation upon which another party has relied, where departure from this representation would cause detriment to the second party.’ See Joshua Thomson, ‘Estoppel By Representation in Administrative Law’ (1998) 26 *Federal Law Review* 83, 89-90. This is consistent with judicial comments such as those of Brennan J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 419, to the effect that ‘[t]he element which both attracts the jurisdiction of a court of equity and shapes the remedy to be given is unconscionable conduct on the part of the person bound by the equity’. See also the discussion of the requirement of ‘unconscientious conduct’ by Deane J in *Commonwealth v Verwayen* (1990) 170 CLR 394.

56 Pagone, above n 31, 281-282.

57 The ‘all or nothing’ tendency of the justiciability doctrine is questioned extensively by Bayne, above n 46.
monetary penalty on the Commissioner in these circumstances instead of injuncting or reversing the decision of the Commissioner respects traditional justiciability concerns. In addition, though, it provides the taxpayer with recompense and sends an unambiguous signal of disapproval of unacceptable tax administration practices. A transparent and direct approach to dealing with justiciability would more readily allow for such a lateral-thinking approach to the notion of justiciability and its proper place in our tax administration system.

Having conceded that the abandonment of the existing tools for dealing with justiciability is unlikely, and that a transparent approach to application of those existing tools is the next best alternative, one final question arises. The question is whether there is any common thread among the current diverse approaches to the question of justiciability which could be used to recalibrate those existing tools and be applied across the boundaries of common law and equity.

There is only one existing tool which has potential to achieve this — the policy/operational dichotomy. The first reason is that the dichotomy has been, and continues to be, applied across common law and equitable boundaries. In tort, as noted in part II, while the dichotomy has lost favour as the primary determinant of public authority immunity from suit in negligence cases, it remains a relevant concern in the modern incremental approach to novel tortious claims.

In the estoppel context, the relevance of the policy/operational distinction has come to the fore as a qualification to the Southend-on-Sea principle and has been applied in a number of cases. The most notable example is Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic. In that case, Gummow J stated:

The planning or policy level of decision making wherein statutory discretions are exercised has, in my view, a different character or quality to what one might call the operational decisions which implement decisions made in exercise of that policy … where a public authority makes representations in the course of implementation of a decision arrived at by the exercise of its discretion, then usually there will not be an objection to the application of a private law doctrine of promissory estoppel.

In addition to its capacity to cross common law and equitable boundaries, it is also capable of capturing both the competency-based and separation of powers concerns inherent in the justiciability doctrine. Polycentricity concerns go hand in hand with assessments of political or high-level policy decisions which would be caught as non-justiciable through application of the dichotomy. Similarly, high-level policy decisions will capture those subject matters considered fundamentally unsuitable for judicial revisitation, such as questions of national security. Operational matters of an implementation character, and/or carried out by low-level public servants, are unlikely to raise separation of powers

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58 There is no limitation on damages being awarded in estoppel actions. The various State Supreme Court Acts give the courts express powers in this regard. For example, the Supreme Court Act 1970 (NSW) provides, in s 68: ‘Where the court has power (a) to grant an injunction against the breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act; or (b) to order the specific performance of any covenant, contract or agreement, the court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance.’ This legislation mirrors 19th century British legislation known as the ‘Lord Cairns’ Act’, the Chancery Amendment Act 1858 (UK).

59 The objections raised to such an approach are usually founded on the inadequacy of a monetary penalty for plaintiffs in many circumstances. This would not be expected to be a significant issue in the tax context where almost all claims would concern questions of monetary liability of the taxpayer in any event. For a general discussion of this issue, see Pagone, above n 31, 278.

60 It has also successfully crossed the public private law divide through application in administrative law boundaries which, of itself, indicates its suitability for resolving justiciability concerns, as these lie at the heart of all applications for judicial review of administrative action. See, eg, the comments of Hayne J in Brodie v Singleton Shire Council (2001) 206 CLR 512, in which His Honour pointed out the link between the policy/operational dichotomy and the administrative law Wednesbury unreasonableness test. See also Bayne, above n 46, 7-8; Richard Spann, Government Administration in Australia (1979), 17-18; and Robert Stewart Parker, ‘Policy and Administration’ in Richard Spann and Geoffrey Curnow (eds), Public Policy and Administration in Australia: A Reader (1975) 144, 145.

61 (1990) 21 FCR 193. For a good discussion of the relevant cases see Allars, above n 31, 88-90.

concerns through being subjected to judicial scrutiny. These matters would be considered justiciable through application of the policy/operational dichotomy.

None of the other existing judicial tools devised to address the issue of justiciability have this breadth or compatibility with the concept of justiciability. Further, the uncertainty in determining where the dividing line between policy and operational acts should be drawn, which has been the source of much of the criticism of the dichotomy, can be turned to advantage when applied to questions of justiciability. This flexibility allows for the nebulous and fluid nature of the justiciability doctrine to be accommodated within a well-established framework. This fact has not escaped the notice of some commentators:

Another argument which is commonly invoked by dissenters is that the policy-operational distinction is inherently uncertain. Yet, uncertainty is effectively unavoidable ... There is no acceptable bright-line method of delimiting justiciable and non-justiciable issues. It is inevitable that the courts will need to look closely at the factual basis of claims to ascertain whether it is appropriate for it to reassess a particular administrative act ...

Of course, this does lead us to an obvious and inescapable truth: the application of the policy/operational dichotomy to determine the justiciability issue in a transparent and overt manner should not, and cannot, be looked upon as a solution to the inherent challenges in applying the doctrine of justiciability, which will undoubtedly continue to be raised in some difficult tax cases. It would, however, be an advance on the current treatment of justiciability in tortious and equitable estoppel cases involving the Commissioner of Taxation.

IV. CONCLUSION: THE DOCTRINE OF JUSTICIABILITY AS A MOVEABLE PLAINTIFF-PROOF BARRIER

It is clear from the preceding analysis that justiciability is a complex issue which has vexed, and continues to vex, judges in tort and equity. In the taxation context, the need to protect Commonwealth tax revenue from undue challenge gives rise to a strong case for ensuring an appropriate boundary is drawn between justiciable and non-justiciable cases against the Commissioner of Taxation. This allows the Commissioner substantial immunity from suit. However, as the analysis in part II of this paper has illustrated, the balance to date has been heavily skewed in favour of the protection of revenue, without significant express judicial exposition of the reasons for this protective stance. There are two particular challenges highlighted in this paper which must be addressed in any attempt to redress, or at least assess, the balance between taxpayer rights, good tax administration practices and the protection of revenue.

The first challenge is to determine a method of assessment of justiciability concerns which is direct, consistent and transparent. In this regard, ideally, justiciability should be dealt with as a specific and overt threshold concern in its own right. Alternatively, if the existing judicial tools for determining justiciability are to continue to be used, they need to be recalibrated to emphasise their role as tools for determining questions of justiciability. This could be most efficiently achieved by applying the policy/operational dichotomy which has already been applied in a number of tortious and equitable cases in the past.

The second and most difficult challenge lies in determining the boundary between justiciable and non-justiciable matters. This paper offers no bright-line delineation of justiciable and non-justiciable matters in answer to this challenge. The fact remains that the complex considerations of judicial competency and the constitutional separation of powers

63 See the comments cited, above n 11.
that lie at the core of the question of justiciability cannot be categorically and uniformly resolved in all cases.

The proposed broad-based application of the policy/operational dichotomy can assist in predicting the approach that will be taken to the issue in any particular case, but cannot alter this fundamental fact. In essence, it is conceded that the line dividing the justiciable from the non-justiciable must remain a moveable barrier. A moveable barrier, however, is far preferable to the present largely impenetrable and invisible barrier to the justiciability of negligence or estoppel cases against the Commissioner of Taxation.
NEGLIGENT INVESTIGATION BY POLICE: CAN A DUTY OF CARE BE FOUND USING THE EXISTING NEGLIGENCE PRINCIPLES IN AUSTRALIA?

JENNIFER YULE

I. INTRODUCTION

There is a struggle in the courts to find a balance between allowing public authorities to function properly and protecting the public from a failure by public authorities to exercise their power appropriately. In October 2007, the Supreme Court of Canada controversially brought down its decision in Hill v Hamilton-Wentworth Regional Police Services Board (‘Hill’). The facts involved a man being wrongly convicted of a crime, suing the police, being successful in terms of the court finding a duty of care owed to him, but ultimately receiving no compensation. The tort of negligent investigation was first recognised in the Canadian province of Ontario in 1995 in Beckstead v Corporation of the City of Ottawa Chief of Police and was affirmed by the Ontario Court of Appeal in 1997. Some other provinces in Canada have recognised the tort, such as Quebec, while other jurisdictions in Canada have rejected the tort, for example, Alberta. The tort had not been considered by the Supreme Court until Hill. The decision in the Supreme Court overrules the lower court decisions, and now the tort is recognised in all Canadian provinces. In Australia and the United Kingdom, the courts do not refer to a tort of negligent investigation but rather consider whether there is a duty of care within the existing tort of negligence. In the United Kingdom, the tort has been rejected by the House of Lords. The tort has been rejected by lower courts in Australia and New Zealand. Therefore it is still open for the higher courts in Australia and New Zealand to decide whether or not to follow the approach of the House of Lords or the Canadian Supreme Court. The focus of this paper will be on the relationship between the police and the accused. This paper will consider the Canadian case and decision, and whether an Australian court would find for the plaintiff in similar circumstances. This is important when considering the powers that police are given as well as the function of the law of torts.

II. CANADIAN CASE OF HILL

A. Facts

Between December 1994 and January 1995, there were 10 robberies of trust companies, credit unions and banks in Hamilton, Ontario. After the seventh robbery, Jason Hill, an Ontario man, became a suspect after the police had received a tip from the public. There were a number of issues, during the police investigation, with the conduct of a line-up, the interviewing of witnesses, and the failure to reinvestigate when there was new evidence. The other participants in the line-up, which included Hill, who was a young Aboriginal man, were 11 Caucasian foils. In the 10th robbery, the two tellers had enlarged photos of Hill, which had been released by police, on their desks. The two bank tellers were

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1 [2007] SCC 41.
5 Dix v Canada (Attorney General) [2003] 1 WWR 436.
6 [2007] SCC 41.
10 Hill v Hamilton-Wentworth Regional Police Services Board [2007] SCC 41 [6].
interviewed by police together. Despite receiving a tip that Hill was not the robber, but rather two Hispanic men, Hill was arrested by police in 1995 and spent 20 months in jail. He was charged with 10 counts of robbery; however, nine of the charges were gradually dropped. The police proceeded with the charge for the 10th robbery and Hill was found guilty and sentenced to three years in prison. Hill appealed against his conviction, which was allowed, and a new trial was ordered at which he was acquitted of the robbery charge.

Hill began civil proceedings against the Hamilton-Wentworth Police Services Board and individual police officers, claiming malicious prosecution, negligence and breach of his rights under the Canadian Charter of Rights and Freedoms. At trial, the judge found that Hill had been wrongly convicted but that his rights had not been violated, nor was any tort committed. Hill appealed this judgment, which was dismissed by the Ontario Court of Appeal. The Court of Appeal was unanimous in its support of the tort of negligent investigation but was divided on its application. Three judges held that the standard of care was not breached while two judges found the police conduct did amount to a breach of the tort of negligent investigation. Hill appealed to the Supreme Court of Canada and the respondents cross-appealed.

**B. Reasons of the Majority**

In *Hill*, the majority of the Supreme Court were very clear about the existence of the tort of negligent investigation. As McLachlin CJ stated at the beginning of the judgment, delivered on behalf of the majority with Binnie, LeBel, Deschamps, Fish and Abella JJ:

I conclude that the police are not immune from liability under the Canadian law of negligence, that the police owe a duty of care in negligence to suspects being investigated, and their conduct during the course of investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted. The tort of negligent investigation exists in Canada, and the trial court and Court of Appeal were correct to consider the appellant’s action on this basis. The law of negligence does not demand a perfect investigation. It requires only that police conducting an investigation act reasonably. When police fail to meet the standard of reasonableness, they may be accountable through negligence law for harm resulting to a suspect.

In Canada, the *Anns v Merton London Borough Council* (‘*Anns’*) approach is used to determine whether a duty of care is owed by a defendant to a plaintiff. In *Anns* the council was sued for failing to inspect foundations. Lord Wilberforce stated the test as involving two stages. The first is to ask if there is a sufficient relationship of proximity between the parties. If the answer to that question is ‘yes’, then it is necessary to consider

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11 Ibid [7].
14 The judges found that the trial judge’s conclusions were not unreasonable or insufficient and that the police officers had not acted maliciously or for an improper purpose: see *Hill v Hamilton-Wentworth Regional Police Services Board* (2005) 76 OR (3d) 481.
16 Ibid [156] (Feldman and LaForme JJA).
17 The appellant appealed the finding that the police were not negligent and did not pursue the claim under the *Canadian Charter of Rights and Freedoms*. Hill alleged that the police investigation was negligent, first because the identifications by the two bank tellers were not conducted according to non-mandatory guidelines that they be interviewed separately and they had newspaper photos of Hill on their desks identifying him as the suspect. Second, Hill objected to the administration of the photo line-up. Third, Hill alleged that the police failed to adequately reinvestigate the robberies when new evidence emerged to cast doubt on his initial arrest.
18 The respondents cross-appealed the finding that there was a tort of negligent investigation.
19 Until this judgment, the question of whether there was a duty of care owed to a suspect by an investigating police officer was not settled in Canadian law.
20 *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] SCC 41, [3].
22 Ibid.
whether there is any reason to negate that duty. Since 2001, the approach in Canada has involved a three-stage process involving the reasonable foreseeability of the injury, the relationship of proximity and any residual policy considerations which ought to negate or limit the duty of care. The policy considerations are ‘not concerned with the relationship between the parties but with the effect of recognising a duty of care on other legal obligations, the legal system and society more generally’.

The Court stressed that this case, in Hill, only involved the relationship between the police and a suspect. Other relationships, such as victims and police and the families of victims, should be subjected to a fresh Anns approach. Here, the Court found that the relationship between Hill and the police was personal, close and direct. He was not in a pool of potential suspects but had been singled out and identified as a particularised suspect at the relevant time. There was also Hill’s personal interest in the conduct of the investigation, being his freedom and reputation, as well as the public interest:

Recognizing an action for negligent police investigation may assist in responding to failures of the justice system, such as wrongful convictions or institutional racism. The unfortunate reality is that negligent policing has now been recognized as a significant contributing factor to wrongful convictions in Canada. While the vast majority of police officers perform their duties carefully and reasonably, the record shows that wrongful convictions traceable to faulty police investigations occur. Even one wrongful conviction is too many, and Canada has more than one. Police conduct that is not malicious, not deliberate, but merely fails to comply with standards of reasonableness can be a significant cause of wrongful convictions.

The Court concluded that an investigating police officer does owe a duty of care to a particular suspect and rejected the argument that recognition of the duty of care would create a conflict between the duty owed by the police officer to the suspect and the police officer’s duty to the public.

The Court found that there was no compelling policy reason why a duty of care should not be found in the circumstances. In fact, the Court found there were policy reasons supporting the finding of a duty of care. The Court considered the policy reasons raised by the respondents, namely: the ‘quasi-judicial’ nature of police duties; the potential for conflict between the duty of care and other duties owed by the police; the amount of discretion needed in police work; the negative effect on the investigation of crime; and the floodgates argument. The Court stated that such policy considerations need to be more than speculative and ‘a real potential for negative consequences must be apparent’. It was found that according to such a standard, ‘none of these considerations provide a

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23 Ibid 751, where Lord Wilberforce stated: ‘In order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.’
25 Cooper v Hobart [2001] 3 SCR 537, [37].
27 Hill v Hamilton-Wentworth Regional Police Services Board [2007] SCC 41, [27].
28 Ibid [33].
29 Ibid [36].
30 Ibid [39].
31 Ibid [40].
32 Ibid [47].
33 Ibid [48].
34 Ibid.
convincing reason for rejecting a duty of care. With regard to the negative impact on policing, the Court said:

In theory, it is conceivable that police might become more careful in conducting investigations if a duty of care in tort is recognized. However, this is not necessarily a bad thing. The police officer must strike a reasonable balance between cautiousness and prudence on the one hand, and efficiency on the other.

The Court found that there was a lack of evidence of the negative effect on policing and noted that:

Many police officers (like other professionals) are indemnified from personal civil liability in the course of exercising their professional duties, reducing the prospect that their fear of civil liability will chill crime prevention.

On the issue of opening the floodgates, the Court found that the requirement of sufficient proximity between the investigating police officer and the suspect, as well as the element of compensable injury, ensured that there would not be indeterminate liability. The Court considered the experience of the provinces of Ontario and Quebec, where the tort has been recognised for some years, and found that there was no evidence that the floodgates had opened.

The best that can be said from the record is that recognizing a duty of care owed by police officers to particular suspects led to a relatively small number of lawsuits, the cost of which are unknown, with effects on the police that have not been measured. This is not enough to negate the prima facie duty of care established at the first stage of the test.

Having found that a duty of care was owed, the Court then considered what the standard of care was and whether it had been breached. It held that the standard was that of a reasonable police officer in all the circumstances and that the standard had not been breached in the current case, even though there were faults in the investigation. These faults included the conduct of the investigation during 1995, the conduct of the photo line-up and the lack of reinvestigation when new information emerged. The Court applied the standard of a reasonable police officer at the time, which "allows for minor mistakes and misjudgements."

The Court found that for the final element, damage, the plaintiff must show a suffering of compensable damage and a causal connection to a breach of the standard of care owed:

It is important as a matter of policy that recovery under the tort of negligent investigation should only be allowed for pains and penalties that are wrongfully imposed. The police must be allowed to investigate and apprehend suspects and should not be penalized for doing so under the tort of negligent investigation unless the treatment imposed on a suspect results from a negligent investigation and causes compensable damage that would not have occurred but for the police’s negligent conduct.

The Court concluded that while a duty of care was owed to the plaintiff, it had not been breached. There were mistakes made in the investigation, but not enough to amount to a breach. The Court found that the standard at the time in 1995 was not as high as it would

35 Ibid.
36 Ibid [56].
37 Ibid [58].
38 Ibid [59].
39 Ibid [60].
40 Ibid [61].
41 Ibid [61].
42 Ibid [89].
43 Ibid [77].
44 Ibid [81].
45 Ibid [84].
46 Ibid [77].
47 Ibid [92].
be if today’s standards were being applied, particularly with the racial make-up of the police line-up. It was held that the police conduct was not unreasonable, especially since, at the time, there were no guidelines or rules about how to conduct the line-up. With regard the decision not to reinvestigate, the Court held that even though the decision was flawed, ‘it has not been established that Detective Loft breached the standard of a reasonable police officer similarly placed’.

C. Reasons of the Minority

Charron J, with Bartarache and Rothstein JJ, delivered the judgment on behalf of the dissenting judges on the cross-appeal. The minority decision found that there should not be a tort of negligent investigation in Canada.

A private duty of care owed by the police to suspects would necessarily conflict with the investigating officer’s overarching public duty to investigate crime and apprehend offenders. The ramifications from this factor alone defeat the claim that there is a relationship of proximity between the parties sufficient to give rise to a prima facie duty of care. In addition, because the recognition of this new tort would detrimentally affect the legal system, and society more generally, it is my view that even if a prima facie duty of care were found to exist, that duty should be negatived on residual policy grounds.

With regard to whether a duty of care is owed, Charron J considered the Anns test and searched for analogous categories in other jurisdictions such as the United Kingdom, New Zealand and Australia, where there are authorities which hold that no duty of care is owed by the police to suspects in a police investigation. Charron J concluded that there was a lack of proximity in the relationship between the investigating officer and the suspect.

Even if there was some proximity, the policy reasons, from the third stage of the process to determine whether there was a duty of care owed to the plaintiff, would preclude the finding of a duty of care. One of the policy reasons was the exercise of the police discretionary power and the fear that if a private duty of care was found to be owed, then the exercise of this power may not be used to ‘advance the public interest as it should be, but out of fear of civil liability’. Another policy reason was that the tort would not be limited to plaintiffs who had been wrongly convicted, but also applied to plaintiffs where the investigation is terminated at an earlier point. Charron J also pointed out the differences between civil actions and criminal trials, in particular, the different burdens of proof and the rules of evidence and procedure. Charron J stated:

On the one hand, there is no question that negligent police investigation may contribute to the wrongful conviction of a person who did not commit the crime … On the other hand, a negligent investigation will often be the effective cause of an acquittal … Numerous evidentiary and procedural safeguards are built in the criminal trial process to guard against wrongful convictions.

These policy concerns about the difference between the public and the private areas of the law were not resolved, according to Charron J, by defining the standard of care. Taking all these concerns into consideration:

The private nature of the tort action necessarily narrows the focus of the criminal investigation to the individual rights of the parties and, in the process, it is almost

48 Ibid [80].
49 Ibid [89].
50 Ibid [112].
53 Hill v Hamilton-Wentworth Regional Police Services Board [2007] SCC 41, [148].
54 Ibid.
55 Ibid [149].
56 Ibid [154].
57 Ibid [160].
58 Ibid [169].
inevitable that courts lose sight of the broader public interests at stake. In short, tort law simply does not fit.\textsuperscript{59}

Charron J found that the existing torts of false arrest, false imprisonment, malicious prosecution and misfeasance in public office are sufficient to deal with negligent police practice and that these torts do not give rise to policy concerns.\textsuperscript{60} Charron J concluded by considering the government inquiries and studies into police practice and stated that ‘compensation for the wrongfully convicted is a matter better left for the legislators in the context of a comprehensive statutory scheme’ rather than ‘left to the vagaries of the proposed tort action.’\textsuperscript{61}

\textbf{D. Summary}

There was a conflict in the judgments between the private versus public nature of the duty and the policy reasons involved. While the minority found there was a lack of proximity in the relationship between the police and the suspect, the majority found that the proximity was enough for the floodgates not to open. The minority found it was not necessary to find a new tort as existing torts were sufficient, whereas the majority found a new tort was necessary. The policy reasons the minority relied on were found to be no more than speculative by the majority. The police discretion, which the minority found meant there should not be a duty of care, was a reason the majority found there was a duty of care owed. Both referred to other jurisdictions such as the United Kingdom and Australia.

There have been a number of articles written on this case since the decision was handed down only 12 months ago. Erika Chamberlain has described the majority judgment as naïve and the minority judgment as more realistic when considering the conflict of duties.\textsuperscript{62} However, Chamberlain points out that the Court was sympathetic to police intuition and was ‘unwilling to second guess the exercise of discretion’.\textsuperscript{63} Jennifer Freund expressed concern that the decision ‘seems to be a simplistic view of the complex nature of policing’.\textsuperscript{64} Whereas Rakhi Ruparelia has found it ‘disturbing’ that there was a minority judgment at all and that the standard used meant that there was an ‘impossibly high standard for plaintiffs to prove police negligence’.\textsuperscript{65} Ruparelia argues that the change is ‘more symbolic than real’.\textsuperscript{66}

\section*{III. APPROACH IN THE UNITED KINGDOM}

It is also relevant to consider what is happening in the United Kingdom in this area. The current English approach as to whether a duty of care is owed is to use the three stages from \textit{Caparo Industries v Dickman}.\textsuperscript{67} The House of Lords has taken a very conservative approach when dealing with the issue of police and their duties with regards to their investigations compared with the Canadian Supreme Court. In \textit{Hill v Chief Constable of West Yorkshire},\textsuperscript{68} the House of Lords held that police officers did not owe a duty to individual members of the public who might suffer injury through their careless failure to apprehend a dangerous criminal. Lord Keith of Kinkel pointed out that the conduct of a police investigation involves a variety of decisions on matters of policy and discretion,
including decisions as to priorities in the deployment of resources. To subject those decisions to a common law duty of care, and to the kind of judicial scrutiny involved in an action in tort, was held to be inappropriate.69

In *Brooks v Commissioner of Police for the Metropolis & Ors,*70 the House of Lords upheld *Hill v Chief Constable of West Yorkshire.*71 However, Lord Steyn reformulated the principle in terms of an absence of a duty of care rather than a blanket immunity.72

It is, of course, desirable that police officers should treat victims and witnesses properly … But to convert that ethical value into general legal duties of care … would be going too far. The prime function of the police is the preservation of the Queen’s peace … A retreat from the principle in *Hill* would have detrimental effects for law enforcement.73

**IV. APPROACH IN AUSTRALIA**

**A. Existing Negligence Principles**

The current approach in Australia as to whether a duty of care is owed is to be found in *Sullivan v Moody*74 where the High Court considered whether a duty of care was owed by a public authority to parents for the negligent investigation of child sexual abuse. The Court held:

> There are cases, and this is one, where to find a duty of care would so cut across other legal principles as to impair their proper application and thus lead to the conclusion that there is no duty of care of the kind asserted.75

The Court stated that ‘[a] duty of the kind alleged should not be found if that duty would not be compatible with other duties the respondents owed.’76 The Court also considered with approval the English authorities and concluded:

> But if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists. Similarly, when public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regards to the interests of another class of persons where that would impose upon them conflicting claims or obligations.77

*Tame v New South Wales; Annetts v Australian Stations Pty Limited (‘Tame’)*78 applied the principles from *Sullivan v Moody.* The facts of *Tame* involved a police officer incorrectly recording the blood alcohol content of the plaintiff on the accident report. When the plaintiff was later told of this mistake, which had already been rectified, the plaintiff suffered psychiatric injury. Gleeson CJ found no duty of care was owed because the primary duty of the police officer in making the accident report was to his or her superiors. Therefore, to find a duty of care to the person being investigated would be inconsistent with that primary duty.79 Gummow and Kirby JJ found that:

> It is unlikely that an investigating police officer owes a duty of care to a person whose conduct is under investigation. Such a duty would appear to be inconsistent with the police officer’s duty … fully to investigate the conduct in question.80

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72 *Brooks v Commissioner of Police for the Metropolis & Ors* [2005] UKHL, [27].
73 Ibid [30].
75 Ibid 580.
76 Ibid 581.
77 Ibid 582.
79 Ibid 333.
80 Ibid 396.
Hayne J stated that:

Police officers investigating possible contravention of the law do not owe a common law duty to take reasonable care to prevent psychiatric injury to those whose conduct they are investigating. Their duties lie elsewhere and to find a duty of care to those whom they investigate would conflict with those other duties. 81

The current Australian approach, when faced with a novel category, is to go to general principle 82 and refer to analogous cases. 83 Factors such as responsibility and relationship, vulnerability, control, reliance, other areas of law and coherence of the law are all relevant considerations.

B. Australian Cases Involving Police Investigation

There have been a number of cases recently which have considered whether police owe a duty of care in their investigations and considered the English authorities. Some cases have involved the relationship between the police and the accused and others with the victims of crime. This paper is limiting its focus to the former but it should be explained that in Australia, Hill v Chief Constable of West Yorkshire 84 was distinguished in Batchelor v Tasmania 85 on the basis that there was a police policy to arrest a person in such circumstances as were present in that case. The circumstances in that case involved a wife being shot by her husband after she had gone to the police to seek assistance. It was alleged that the police officers were negligent in failing to arrest the husband, in informing him of their plans to go the house, and in not evacuating the house when it was noticed that one of the husband’s firearms was missing. 86

It is also relevant to consider Cran v State of New South Wales (‘Cran’) 87 for fears about defensive policing. 88 In that case, the police failed to get a certificate of analysis by the next court date and the plaintiff ended up spending 62 days in jail. The New South Wales Court of Appeal found that there was no duty of care owed to the plaintiff for the investigation of the case and that policy considerations were paramount. 89 The Court considered the dependence of the plaintiff on the defendant, the vulnerability of the plaintiff, the nature of the function being performed, the relevant police guidelines and, by analogy, other cases. 90 However, Santow JA stated:

While it may be said that calling police to account for failure to perform ministerial tasks actually enhances the performance of their duty, I do not consider that that resolves the fundamental difficulty. It is that by subjecting by way of exception mechanical tasks to a duty of care, courts are thereby affecting police priorities in the allocation of resources. Subjecting even ministerial tasks to prospective civil liability thus has policy implications. 91

Another example was in November 2007 when a university student in Queensland was unsuccessful in an action against the police and the government in negligence and false imprisonment. 92 Justice Lyons found there had been no negligence in the arrest and imprisonment and that it was not necessary to ‘precisely examine the nature and extent of

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81 Ibid 418.
82 Carolyn Sappideen, Prue Vines, Helen Grant and Penelope Watson, Torts Commentary and Materials (9th ed, 2006) 208.
86 Ibid [4].
88 Harold Luntz and David Hambly, Torts Cases and Commentary (5th revised ed, 2006) 207.
89 Cran v State of New South Wales [2004] NSWCA 92, [77].
90 Ibid [31].
91 Ibid [51].
92 Mark Oberhardt, ‘Kill Suspect Fails to Win Damages’, The Courier Mail (Brisbane), 1 November 2007.
the duty of care owed to the plaintiff. It should be noted that the case was primarily decided on the issue of false imprisonment.

Since the decision of Hill, there have been some decisions in Australia involving police and whether they owe a duty of care or not. State of New South Wales v Tyszky was held not to involve investigation by police but rather with the discretion exercised by the police to deal with a fallen tree and a drainpipe. The Court of Appeal held that the police did not owe a duty of care to the plaintiff because he was not in a more vulnerable position than other members of the public and there was nothing in the relationship that was different from the rest of the public. Kirkland-Veenstra v Stuart was also held not to involve investigation by police but, rather, the failure to exercise a statutory power. The Court of Appeal held that no duty of care was owed by the police. This case has gone on appeal to the High Court. In Cumming v State of NSW, Harrison AsJ held that the police did not owe a duty of care to the family of a person reported as a missing person. It was held that there are four main reasons for courts to decide that there is no duty of care when considering circumstances involving police investigation. The first is that it would impose a duty to an indeterminate class of people. The second is that it would inhibit fearless investigation of criminal activity. Third, there may be a conflict of duties. The final reason is it would involve the court intruding on matters of police policy and discretion, including decisions made as to priorities in the deployment of resources.

C. Summary of Position in Australia

It would seem, from a consideration of the Australian cases involving police investigation, that the courts are not prepared to find a duty of care owed. This is so even though there may be factors such as closeness in the relationship between the parties, control and vulnerability. The overarching consideration seems to be a concern about the coherence of the law and conflicts with other duties and policies.

However, the courts have not ‘unreservedly committed to the public policy immunity prevailing in England’ and have, therefore, left open the door to an ‘exceptionally egregious situation where courts could find liability for negligent investigation’. There is some consideration of the powers that police are given as well as the function of the law of torts. A duty of care would only be found if all the relevant factors were present. If there was a case where there was a sufficient relationship between the parties, vulnerability of the plaintiff was high, control of the defendant was high, there was coherence in the law and no interference with existing laws, and there were guidelines in place that had not been complied with, then a duty of care could be found to exist. The facts in Cran appear to fit that scenario but the Court of Appeal was not prepared to find such a duty. It would seem that it will take the High Court to find such a duty.

V. CONCLUSION

The decision by the majority of the Canadian Supreme Court in Hill has been criticised by some commentators on the basis that finding a duty of care owed by an investigating police officer to a particularised suspect will hamper police and will produce defensive policing. However, it can be argued that it is actually a good result for the public. It has the potential to protect individuals and set standards. There is an argument that the police need to be accountable, like other groups in the community who provide services and have

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93 Ferguson v State of Queensland [2007] QSC 322, [134].
95 [2008] VSCA 32.
96 [2008] NSWSC 690.
97 Ibid [66].
98 Rush v Commissioner of Police [2006] FCA 12, [99].
99 Freund, above n 63, 470.
responsibilities. There needs to be a balance between the rights of a person’s liberties with the right of the police to do their job and, ultimately, to protect the public. This decision should be put in context. Canada has had a number of cases involving negligent investigation and, therefore, it is an issue very much in the public consciousness at the present.102 There were a number of wrongful convictions and Royal Commissions dealing with the ‘systemic racism in the criminal justice system’.103 This situation should be contrasted with other jurisdictions which may have other issues more in the public domain, for example, police corruption.

Should this decision have any repercussions in Australia? While this case demonstrates that the police should have nothing to fear from the tort, it is more likely that Australia would follow the House of Lords rather than the Supreme Court of Canada. However, it is important to remember that people do suffer damage as a result of poor, or arguably negligent, investigation by the police. Cran104 is an example of the damage that can result from negligent investigation. Police are given many powers and the public expects them to be accountable. Why should they not be liable, as other groups such as doctors, lawyers and engineers are? With regards to the argument about the burden on the individual, police can be insured, similarly to other groups owing a duty of care. Also, the application of vicarious liability will shift the burden to the employers who are also in the position of being able to make changes to existing practices in order to improve guidelines and methods used in the investigation process.105

One of the ideas underpinning torts and the law of negligence is the loss-spreading function and compensating someone when they have suffered damage.106 Of course, if everyone who suffered damage was compensated, the floodgates would certainly open.107 However, as long as there is a sufficiently close relationship between the investigating police officer and the suspect, that fear can be dealt with. Therefore, if, as the majority concluded in Hill,108 the suspect must be singled out and particularised, the potential number of plaintiffs will be limited. If proper limits are clearly established, the potential for unlimited liability can be confined.

There is also the argument that one of the functions of torts is the incentive effect and that this will hamper the public duty performed by police officers and make their difficult work more difficult rather than improve the standard of their work.109 However, there has not been an economic analysis of the effect of taking precautions, so this argument is merely an assertion.110 From a public policy perspective, it would seem arguable that the precautions would be a burden that the public would be willing and prepared to bear. If police are compared to health professionals, it would seem that ‘as long as the courts maintain a deferential stance in terms of the standard of care, there is no reason for police to fear that their discretion will be constantly second-guessed’.111

The case of Hill112 illustrates that finding a duty of care owed by investigating police to suspects does not automatically lead to compensation being paid. It is not a tort of strict liability. Rather, there must be a breach of the duty of care for liability to arise. The standard of care is what is reasonable to expect in the circumstances. Why should jurisdictions in Australia, New Zealand and the United Kingdom not protect suspects from negligent investigation? Police have nothing to fear from such a standard and the public is justified in expecting such a standard to be complied with. However, if a fact scenario

102 Chamberlain, above n 61, 208.
103 Ruparelia, above n 64, 52.
105 Chamberlain, above n 61, 209.
107 Ibid.
109 Keith Stanton, ‘Decision-making in the Tort of Negligence in the House of Lords’ (2007) 15 Tort Law Review 93,
101.
110 Ibid.
111 Chamberlain, above n 61, 207.
similar to Hill\textsuperscript{113} came before an Australian court, it would seem from the result in Cran\textsuperscript{114} that the plaintiff would be unsuccessful. It would take the High Court to find such a duty of care owed, using the existing negligence principles, and that would seem unlikely at present.

\textsuperscript{113} Ibid.
\textsuperscript{114} (2004) 62 NSWLR 95.
I. INTRODUCTION

Novel developments in tort law pose interesting challenges for the law of remedies. Common law, and other countries around the globe, are demonstrating strong interest in protecting rights, the invasion of which often results in intangible, non-physical, non-economic loss or injury. Privacy is one such right. Invasion of privacy has developed recently, or is developing, as a tort in a number of jurisdictions, by a variety of means. In the United Kingdom, this has occurred through the transformation of the equitable action for breach of confidence, whereas New Zealand courts have recognised a stand-alone tort of invasion of privacy. Australia seems almost certain to introduce such a tort by statute rather than developing the common law. Four Canadian provinces also have statutory privacy torts, whilst some rely on the common law. In the United States of America, where privacy is guaranteed constitutionally, common law development of privacy can be traced back to the turn of the 20th century. The US now recognises four distinct privacy torts, incorporated into the Restatement of the Law, Second, Torts.

This paper considers the implications for the law of remedies of these novel developments in tort, starting with a discussion of the existing law on damages for non-economic loss. The new torts raise interesting broad questions about the elasticity and flexibility of the common law of remedies. Jurisdictions protecting privacy by statutory means are of course free to craft new remedies and/or adapt old ones as desired, free of constraint, and may be instrumental in driving common law change.

The standard chicken-and-egg question that we ask our students — whether ubi ius ibi remedium correctly expresses the relationship between rights and remedies, or whether it should be ubi remedium ibi ius instead — is more than just semantics. The traditional ‘monist’ view that sees rights and remedies as ‘congruent’, so that in the absence of a recognised remedy there can be no right, reflects the latter version of the maxim. In contrast, a ‘dualist’ view ‘asserts that there is a valid distinction, in theory and practice, between an independent antecedent right and the remedy a court may order for a breach of that right’.

Brown v Board of Education could be considered the ‘paradigm’ case of a sharply dualist perspective. There the US Supreme Court held that racial segregation was
constitutionally impermissible, but because of the severe social dislocation that would inevitably result from immediate desegregation, ordered desegregation (in Brown No 2) ‘with all deliberate speed’. Grant Hammond comments that ‘court undertaking the remedial task, on this view, is “fashioning” a remedy.’ This has implications for judicial discretion and law-making in novel contexts because it suggests that theoretically new ‘rights’, such as a right to privacy, could be recognised at common law even in the absence of a suitable remedy. This would then provide the impetus for crafting, adapting or ‘fashioning’ suitable remedies. According to Michael Tilbury et al, a dualist view means that once liability has been determined, ‘the court grants a remedy after a context-specific evaluation of what is most appropriate in the circumstances … the court could, theoretically, order the defendant to undergo an educational training programme’. This recognises a broad and flexible scope for courts in making the remedy fit the right, rather than allowing the absence or unsuitability of a traditional remedy to deny a right which is compelling on normative grounds.

As in other areas of injury, compensation for invasion of interests in personality or dignity is likely to be the principal remedial goal, and the existing law on damages for non-economic loss is a useful starting point for considering how privacy invasions might be remedied. Damages for non-economic loss are well entrenched in the common law, in torts such as defamation, assault and false imprisonment, and in the form of general damages for personal injury. At the heart of compensation for non-economic loss lies the conundrum of incommensurability, reflected in the remedial goal of ‘fair’ rather than ‘full’ compensation. This problem has led many commentators to argue for a reduced or nil role for non-economic loss in damages awards, especially for personal injury. This paper argues that, in view of the upswing in interest in protecting rights and dignitary interests, the law of remedies needs to move in exactly the opposite direction, refining its approach to redressing non-economic loss as well as availing itself of the ‘rich smorgasbord’ of remedies potentially open to it. Flexibility and openness in regard to remedy is both essential and possible.

II. DAMAGES FOR NON-ECONOMIC LOSS

A. Personal Injury

The fundamental objective of compensation is restitutio in integrum. At least since the late 19th century, English law has recognised the need to give plaintiffs ‘fair compensation for the pain, inconvenience and loss of enjoyment’ associated with bodily injury. Various other torts, notably defamation, assault and false imprisonment, are specifically aimed at redressing non-physical invasion. Implicit in all such awards is compensation for injury to feelings and emotions, and intangibles such as dignity and health.

Notwithstanding that non-economic losses are ‘incommensurable with money’ or ‘not susceptible of measurement in money’ (emphasis in original), it is clear that damages for non-economic loss are well entrenched in Western legal systems, albeit now widely subject to legislative caps and thresholds and other limiting devices. As noted by Harold Luntz, ‘with non-pecuniary loss, since restitutio in integrum is impossible, no award of damages

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9 Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, 39 (Lord Blackburn).
10 Phillips v London & South Western Railway Co (1879) 5 QB 78, 80 (Field J) (Court of Appeal). See generally, Harold Luntz, Assessment of Damages for Personal Injury and Death (4th ed, 2002), 211.
12 Wright v British Railways Board [1983] 2 AC 773, 777 (Lord Diplock). See also Luntz, above n 10, 212.
13 See, eg, Civil Liability Act 2002 (NSW) s 16; Defamation Act 2005 (NSW) s 35. The general intent of such legislation is to narrow the scope of liability and reduce quantum of damages, based upon views about personal responsibility. It may turn out to be the case that privacy damages awards would require comparability with negligence and personal injury awards, in line with the requirement in defamation since Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44.
can ever be “perfect”; yet “fairness” to the defendant does not require an amount that is less than “full” or “adequate”.

B. Defamation

Defamation, a long-established tort with a well-developed jurisprudence of remedies for dignitary injury, has significant areas of overlap with privacy, and some common ground with other dignitary torts. Defamation damages are ‘at large’, meaning that a global figure is awarded, rather than the approach used in personal injury of compartmentalising loss into separate defined categories. Plaintiffs are not required to prove damage, which is presumed. The purposes of an award of damages are: a) consolation for the personal distress and hurt to the plaintiff; b) reparation for harm done to the plaintiff’s personal or professional reputation; and c) vindication of the plaintiff’s reputation. Consolation and reparation include factors such as hurt, anxiety, loss of self-esteem, sense of indignity and outrage. Vindication refers to restoring the plaintiff’s standing in the community. In *Uren v John Fairfax & Sons Pty Ltd*, Windeyer J acknowledged that vindication, solatium and consolation are not strictly compensatory, and contain an element of punitive damages. That such damages go beyond restitutio in integrum is plain, since factors such as the defendant’s malice, provocation on the part of the plaintiff, the plaintiff’s prior reputation, and existence of an apology can all be taken into account. Like general damages for other forms of non-economic loss, ‘what is awarded is thus a figure that cannot be arrived at by any purely objective computation’ and is ‘essentially a matter of impression’.

Defamation has recently become the subject of uniform legislation in Australia, which operates in conjunction with the common law. In addition to damages, the uniform legislation provides for resolution of civil disputes without litigation, by way of offers of amends and apologies. Injuries such as hurt, anxiety, loss of self-esteem, sense of indignity and outrage, included in the notion of consolation and reparation for defamation, frequently apply in relation to privacy and other dignitary invasions, making defamation a useful comparison in the search for appropriate remedies.

C. Intentional Torts

Intentional torts are actionable per se, meaning that they protect dignitary interests such as liberty, personal autonomy and emotional wellbeing independently of any requirement to prove harm. Assault addresses apprehension of imminent contact rather than contact itself, going to emotional wellbeing, and battery involving minor contact falling well short of physical harm protects the individual’s right to autonomy. Cases like *Collins v Wilcock* and *Plenty v Dillon* also serve to define the boundaries of appropriate conduct between state and citizen, acting as a watchdog on civil liberties. The remoteness limitation on damages in torts such as negligence and nuisance may not apply to intentional torts. Certainly this is so for deceit and cases involving fraud. *Tilbury* argues that similar reasoning based on motive and intent will justify the exclusion of the remoteness limitation.

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14 Luntz, above n 10, 7, citing *Victorian Railways Commissioners v Hale* [1953] VLR 477, 494-6 (Federal Court); *Proctor v Shum* [1962] SR (NSW) 511, 516 (Federal Court).
15 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60-1 (Mason CJ, Deane, Dawson and Gaudron JJ) (‘Carson’).
17 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.
18 *Rookes v Barnard* (1964) AC 1129.
19 *Broome v Cassell & Co Ltd* (1972) AC 1027.
21 *Defamation Act 2005* (NSW) pt 3 div 1, div 2.
22 [1984] 1 WLR 172: police officer liable in battery for holding suspected prostitute by the arm.
23 (1991) 171 CLR 635: process server attempting to serve summons liable in trespass to land where consent expressly denied.
25 Tilbury, above n 4, 87.
in many cases of intentional tortious conduct, including battery. The damages in an action for false imprisonment are generally awarded not for a pecuniary loss, but for a loss of dignity, and for mental suffering, disgrace and humiliation.

III. PROTECTING PRIVACY: JUDICIAL OR STATUTORY DEVELOPMENT OF A NEW TORT?

A. Judicial Development:
Adapt Existing Concepts or Recognise a New Tort?

Privacy, and how and whether to protect it, has attracted a great deal of attention in recent years in the common law world. The ‘lack of precision of the concept of privacy’ means that it encompasses a wide variety of interests, although there is clear support in Australia for the view that ‘the foundation of much of what is protected … is human dignity.’ Concerns exist about the interface between citizen and state, the drawing of appropriate boundaries between public and private in a mass media society, national security and democratic rights, human rights, and sometimes also about commercial exploitation of attributes, likenesses or spectacles associated with celebrities and public figures. Autonomy, or the right to be self-determining, is a strongly protected value in the common law. Intrusions on privacy threaten privacy on all fronts.

Privacy is at the heart of many actions brought under other torts, especially by public figures. Tort protection of personal privacy has been recognised in recent decisions at the highest levels in the United Kingdom and New Zealand. The Australian High Court has taken some tentative steps in that direction in Lenah. In its recent report, For Your Information: Australian Privacy Law and Practice, the Australian Law Reform Commission (ALRC) recommended the creation of a statutory right to sue (as opposed to a tort) for serious invasions of privacy. Approaches vary, but adaptation of the equitable notion of breach of confidence as a privacy tort has gathered most support at common law.

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Attempts to reinvigorate *Wilkinson v Downton* to the same end have met with some success, although not in the United Kingdom. It is argued that the alternative of creating a new tort of invasion of privacy, as New Zealand has, is to be preferred, either through normal common law processes of judicial crafting or the creation of a statutory tort. Given the very long lead time between recommendations of the ALRC on uniform defamation laws and actual implementation, it may be prudent for Australia not to write off common law avenues just yet.

Despite the lack of recognition of a privacy tort by the Australian High Court, there have been two interesting lower court decisions in support: *Grosse v Purvis* (*Grosse*) and *Jane Doe v Australian Broadcasting Corporation* (*Jane Doe*). *Grosse* built substantially upon *Lenah*, taking the ‘bold step’ of recognising a tort of invasion of privacy for what amounted to stalking by a former lover and colleague. The plaintiff, a well-known local government figure, sued for invasion of privacy, harassment, intentional infliction of physical harm, nuisance, trespass, assault, battery and negligence. She sought compensatory, aggravated and exemplary damages, as well as a permanent injunction. Skoien J noted that ‘within the individual judgments [in *Lenah*] certain critical propositions can be identified … to found the existence of a common-law cause of action for invasion of privacy,’ and concluded, ‘it is a bold step to take … the first step in this country to hold that there can be a civil action for damages based on the actionable right of an individual person to privacy … In my view there is such an actionable right.’ This parallels the United States ‘intrusion upon seclusion’ privacy tort.

The essential elements of any such tort, according to Skoien J, would include a ‘willed act by the defendant’ and ‘such a degree of seriousness that the ordinary person should not reasonably be expected to endure it’. Further, a defence of public interest should be available, although it was not open on these facts. Skoien J agreed with Jeffries J in *Tucker v News Media Ownership Ltd* (*Tucker*) that the ‘right to privacy … seems a natural progression of the tort of intentional infliction of emotional distress and in accordance with the renowned ability of the common law to provide a remedy for a wrong’. The plaintiff was awarded compensatory, aggravated and exemplary damages for breach of privacy totalling $178,000. The compensatory component, most of which was for non-economic loss, was $108,000, consisting of $50,000 for post-traumatic stress disorder (PTSD), $20,000 for ‘unpleasant emotions such as upset, worry, anger, embarrassment and annoyance (“non-PTSD wounded feelings”)’ and, interestingly, $25,000 for vindication. This last is clearly drawn from defamation principles, being very unusual outside that context, and reflects the close affinity between privacy and defamation. Some allowance was made for modest economic loss and, lastly, $50,000 was awarded as aggravated damages for ‘the hurt to feelings, humiliation, and dignity’ because of the nature of the defendant’s conduct, and $20,000 for exemplary damages. Exemplary but not aggravated damages have fallen out of favour for defamation in many jurisdictions, and have been

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36 [1897] 2 QB 57 (Wright J): plaintiff told, as a practical joke, that her husband was injured, leading to expense and physical and emotional injury. Expenses were recovered under tort of deceit; illness also compensated as the defendant had ‘wilfully done an act calculated to cause physical harm to the plaintiff … and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act’.


40 [2007] VCC 281 (*Jane Doe*).

41 Above n 3.

42 *Grosse* [2003] QDC 151, [422] (Skoien J).

43 Ibid [444].

44 [1986] 2 NZLR 716 (*Tucker*).

45 First recognised in *Wilkinson v Downton* [1897] 2 QB 57. See comments above n 35.

precluded in Australia under uniform defamation legislation since 2006.\textsuperscript{47} Similar provisions exist under civil liability legislation.

\textit{Jane Doe},\textsuperscript{48} decided in the County Court of Victoria, took the privacy debate in Australia a step further. This case, representing another ‘bold step’, might be seen in conjunction with \textit{Grosse} as an unusual example of lower courts signalling their dissatisfaction with the High Court’s cautious pace on privacy. \textit{Jane Doe} concerned a rape victim who sued the Australian Broadcasting Commission, a reporter, and a subeditor, for naming and/or identifying her in three separate broadcasts in 2002. The publication seriously worsened the plaintiff’s emotional condition dating from the rapes, and she developed PTSD. The journalist and subeditor subsequently pleaded guilty under the \textit{Judicial Proceedings Reports Act 1958} (Vic), and both signed a written apology to the victim.

The plaintiff sought damages, including aggravated and exemplary damages, for breach of statutory duty,\textsuperscript{49} negligence and breach of privacy, and equitable compensation including exemplary damages for breach of confidence. Hampel J upheld the claim on all four grounds, finding first that the legislation conferred a right on the plaintiff to sue for compensation and, secondly, that there had also been a breach of a common law duty of care. The breach of confidence claim had to overcome the impediment imposed by the decision in \textit{Giller v Procopets} (‘\textit{Giller}’).\textsuperscript{50} Hampel J declined to follow \textit{Giller}, basing her decision on the recent expansion of breach of confidence claims in the common law, particularly in the United Kingdom. Her Honour noted the impact of the \textit{Human Rights Act 1998} (UK) and the \textit{European Convention on Human Rights}\textsuperscript{51} in the UK, but considered that the UK decisions she relied on ‘all concern the common law development of breach of confidence and breach of privacy causes of action.’ She went on to hold that the English approach also represented the common law development of breach of confidence in Australia, based on comments by Gleeson CJ in \textit{Lenah}. This may be somewhat optimistic.

Applying this to the facts in \textit{Jane Doe}, the plaintiff had a ‘reasonable expectation of privacy’ because the disclosure related to a sexual matter, and even more so because it was non-consensual sex. Hampel J recognised that in Australia, which has jealously guarded the separation between law and equity despite legislative fusion, merging tortious and equitable doctrines to reshape breach of confidence is problematic, not least at the remedial level, and went on to recognise a new tort relating to disclosure of private facts as an alternative ground for allowing compensation. This would apply in relation to unjustified (rather than wilful) publication of personal information which the plaintiff reasonably expected would remain private.

Unlike Skoien J in \textit{Grosse}, Hampel J engaged in considerable discussion of her approach to the task of assessing damages. Her Honour bemoaned the absence of any like cases for comparison, but on the basis that ‘assessment of damages is a question of fact, judgment and degree’, assessed damages at $234,190, including general damages of $85,000 for the PTSD symptoms caused by the broadcasts under the tortious cause of action.\textsuperscript{52} Further sums were awarded for special damages, totalling $118,332 for loss of

\footnotesize{\textsuperscript{47} See, eg, \textit{Defamation Act 2005 (NSW)}, ss 37 (abolish exemplary damages), 35(1) (cap on non-economic loss), 35(2) (aggravated damages retained).

\textsuperscript{48} [2007] VCC 281. This section draws in part on Des Butler, ‘\textit{Jane Doe v ABC and Media Liability for Disclosing Personal Information: Four More Bold Steps … In Four Different Directions}’ (Paper presented at the Australasian Law Teachers Association 62nd Annual Conference, Perth, 23-26 September 2007).

\textsuperscript{49} Duty pursuant to s 4[1A] of the \textit{Judicial Proceedings Reports Act 1958} (Vic).

\textsuperscript{50} [2004] VSC 113 (‘\textit{Giller}’): unsuccessful action for breach of confidence, intentional infliction of mental harm, and breach of privacy, for distress and humiliation over threatened distribution of video of plaintiff engaging in consensual sex. Held: common law remedies of general damages for physical or mental injury, distress or upset not available in equitable action. The decision was subsequently overturned in \textit{Giller v Procopets} [2008] VSCA 236. The Court of Appeal upheld Ms Giller’s three claims for damages: breach of confidence (following the English decision of \textit{Campbell}), assault, and an adjustment of the property interests of the parties, respectively. The court determined that because the case was based on breach of the confidential relationship between sexual partners, the court did not have to decide whether Australian law recognised an independent right to recover damages for breach of privacy.

\textsuperscript{51} Above n 1.

\textsuperscript{52} \textit{Jane Doe} [2007] VCC 281, [176].}
earnings and $5,858 for medical and like expenses. It was noted that reimbursement of sums received by way of criminal injuries compensation was likely to be required. Hampel J stated that separate assessment for the breach of confidence necessarily involved a degree of artificiality as ‘the appropriate measure of compensation is by reference to common law principles’, but went on to award $85,000 for psychiatric injury caused by the breach of confidence. The ‘hurt, distress, embarrassment, humiliation, shame and guilt’ experienced by the plaintiff was assessed at $25,000.

Finally, on the question of aggravated and exemplary damages, Her Honour was scathing about the ‘oppressive, unfair and inappropriate’ manner in which the ABC had conducted the litigation and other matters, all of which ‘made the apology … meaningless’.53 Despite this, she declined to award exemplary damages because the concerns were about the conduct of the litigation, not the original wrong of publication. This case makes an important contribution to the development of privacy protection in Australia.

The United Kingdom has led the development of a tort of privacy as an extension of breach of confidence, which is well established in equity, where it is restrained as unconscionable conduct akin to breach of trust. Breach of confidence is disclosure ‘in circumstances importing an obligation of confidence’.54 The extension of the concept began with Argyll v Argyll,55 which recognised an implied obligation of confidence in marriage, and developed to encompass not only information supplied by the plaintiff, but also information about the plaintiff.56 Since Attorney-General (UK) v Guardian Newspapers Ltd (No 2),57 the requirement of an initial confidential relationship between the parties has disappeared, and the law now imposes a ‘duty of confidence’ whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential.58 In Hellewell v Chief Constable (‘Hellewell’),59 Laws J, hypothesising disclosure of an unauthorised photograph of another engaged in some private act, said that this would amount to a breach of confidence and ‘in such a case the law would protect what might reasonably be called a right of privacy, although the … cause of action would be breach of confidence’. John Fleming60 said of Hellewell that ‘in effect a new tort was born, though disguised by a more familiar name’.

The passage of the Human Rights Act 1998 (UK) gave further impetus to privacy, requiring English courts to take the European Convention on Human Rights into account in their decision making, including art 8 which mandates ‘respect for … private and family life … home and … correspondence.’ By 2001, Sedley LJ in Douglas v Hello!61 considered that ‘[t]he law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.’

The House of Lords again considered privacy in Wainwright v Home Office,62 this time based on Britain’s international obligations and Wilkinson v Downton,63 rather than breach of confidence. The plaintiffs argued that, because of Britain’s international obligations under the European Convention, a tort of privacy had always existed. Alternatively, in the absence of a general tort of privacy, the House should comply with the Convention by

53 Ibid [190].
55 [1967] Ch 302. See also Prince Albert v Le Strange (1849) 32 De G & Sm 652, 64 ER 295.
56 For example, disclosure of hospital records identifying a person as suffering from AIDS, as in X v Y [1988] 2 All ER 646; or identifying a person as an informer, as in G v Day [1984] 1 NSWLR 24.
63 [1897] 2 QB 57.
extending Wilkinson v Downton.\textsuperscript{64} Lord Hoffman, delivering the main judgment, confirmed that the UK still does not recognise a general tort of invasion of privacy, and expressed views on Wilkinson v Downton that cut off that avenue of development, at least for the UK.

Breach of confidence was also the preferred approach in Campbell v Mirror Group Newspapers (‘Campbell’).\textsuperscript{65} The plaintiff, supermodel Naomi Campbell, sued for breach of confidence and compensation under the Data Protection Act 1998 (UK) over publication of two newspaper articles. She won at trial a ‘modest’ £2,500 plus £1,000 in aggravated damages. Lord Nicholls reaffirmed that there was ‘no overarching, all-embracing cause of action for breach of privacy in the UK’ but continued: ‘protection of various aspects of privacy is a fast-developing area of the law’, instancing the New Zealand decision in Hosking v Runting (‘Hosking’),\textsuperscript{66} and pointing to the effect of the Human Rights Act 1998 (UK). Campbell concerns only the wrongful disclosure of private information. According to Lord Nicholls, ‘confidential’ is an awkward term, the ‘more natural description is … private. The essence of the tort [of breach of confidence] is better encapsulated now as misuse of private information.’\textsuperscript{67} Further, ‘the values enshrined in arts 8 and 10 of the European Convention are now part of the cause of action for breach of confidence’. In the most recent UK case, Murray v Big Pictures,\textsuperscript{68} the celebrity author J K Rowling successfully sued in relation to publication of photographs of her children taken in a public place. The Court of Appeal held that the children had an arguable claim to privacy pursuant to art 8 of the UN Convention on the Rights of the Child\textsuperscript{69}, reversing the lower court decision based on Campbell.

Bradley v Wingnut Films (‘Bradley’)\textsuperscript{70} and Tucker\textsuperscript{71} were the first two New Zealand decisions to consider privacy in tort. The plaintiff in Bradley sued for intentional infliction of emotional harm under Wilkinson v Downton, breach of privacy and defamation. He lost on the facts, but the High Court held that a tort of invasion of privacy did form part of the common law of New Zealand. Its essential elements included public disclosure of private facts, and that the disclosure must be highly offensive and objectionable to a reasonable person of ordinary sensibility.

Two recent cases, Hosking\textsuperscript{72} and Brown v The Attorney-General of New Zealand (‘Brown’)\textsuperscript{73} took the law further. The male plaintiff in Hosking was a television celebrity. He and his wife sought an injunction to restrain publication of pictures of their babies taken in a public shopping centre, on facts similar to those in the JK Rowling case. The New Zealand Court of Appeal rejected the application for injunction unanimously, but recognised a new tort of invasion of privacy by a majority of 3:2.\textsuperscript{74} The New Zealand Bill of Rights Act 1990 (NZ) does not recognise a right to privacy, although it affirms New Zealand’s commitment to the International Covenant on Civil and Political Rights (ICCPR), which includes protection of privacy in art 17. In view of this, and other New Zealand legislation protecting privacy,\textsuperscript{75} the majority concluded that the courts should act alongside Parliament to protect privacy and give a civil remedy for its invasion. The central elements of a privacy tort were identified as the presence of facts where a reasonable expectation of privacy existed, and publicity given to private facts that would be highly offensive to the objective reasonable person.

\textsuperscript{64} Ibid.
\textsuperscript{66} [2005] 1 NZLR 1 (‘Hosking’).
\textsuperscript{67} Ibid [14].
\textsuperscript{68} [2008] EWCA Civ 446.
\textsuperscript{70} [1993] 1 NZLR 415 (‘Bradley’).
\textsuperscript{71} [1986] 2 NZLR 716.
\textsuperscript{72} Hosking [2005] 1 NZLR 1.
\textsuperscript{73} [2006] DCR 630 (‘Brown’).
\textsuperscript{74} Hosking [2005] 1 NZLR 1 (Gault P and Blanchard J) (Tipping J concurring).
\textsuperscript{75} See, eg, Privacy Act 1993 (NZ); Harassment Act 1997 (NZ); Broadcasting Act 1989 (NZ).
Thus the New Zealand Court of Appeal restricted the new tort to wrongful publicity given to private lives, arriving ‘although by a different route … [at a result] not substantially different’ from that adopted in the UK in *Campbell*. The requirement of ‘harm’ contained in the second limb does not depend upon proof of personal injury or economic loss, since the harm is ‘in the nature of humiliation and distress’. It was accepted that public figures have less reasonable expectation of privacy than others, and that a defence of ‘legitimate public concern’ would be needed to balance individual privacy and freedom of speech. The main remedy envisaged was damages, with injunctions being rarely granted, as in defamation.

In *Brown*, a convicted paedophile successfully relied on *Hosking* to obtain damages against the police for violating his privacy upon his release from prison on parole. The police had publicised his name, criminal background and photograph in a leaflet drop titled ‘Convicted Paedophile Living in Your Area’. The Wellington District Court in *Brown* awarded the plaintiff $25,000 for breach of privacy and breach of confidence. What constitutes private information was seen as ultimately a ‘matter of degree and circumstance … to be assessed on an individual case basis’, within the *Hosking* test of ‘reasonable expectation’ of privacy, as determined by an ‘objective observer’ standard. In *Tucker*, a 20-year-old criminal record was private in the circumstances, but in *Brown*, the criminal history was clearly public information as the five-year sentence was still ongoing at the time of parole.

The crux of the decision for the plaintiff was that the police had gone further than simply releasing information already available in the public domain. The public use of the plaintiff’s photograph and street address constituted breach of confidence, since although he had consented to being photographed for ‘legitimate police business’, he was not informed that it was to be used in a leaflet drop to the public, and such use fitted the ‘highly offensive’ second limb of the *Hosking* test.

**B. Statutory Models: USA, Canada and Ireland**

In 1960, Prosser reviewed over 300 US cases, claiming that four separate judicially developed privacy torts could be identified, ‘tied together by the common name but otherwise hav[ing] almost nothing in common except … an interference with the right … to be let alone’. 76 These are now incorporated into the *Restatement of the Law, Second, Torts.* Privacy is specifically protected under the 14th Amendment to the *United States Constitution*, which has been broadly interpreted.78 The four torts concern intrusion upon seclusion or into private affairs; appropriation of the plaintiff’s name or likeness for the defendant’s advantage; publicity given to private life; and publicity placing a person in a false light.79 The separation into different torts overcomes many of the definitional issues which bedevil privacy, and allows for autonomy and human rights based approaches to coexist with protection of commercial interests. Whilst the *Restatement* is not legislative, the US approach gives some idea of how a statutory tort of privacy might look, and might operate in practice.

Additional protection for public figures has been conferred in California through the enactment of a cause of action for physical invasion of privacy, including technological invasions (constructive invasion).80 Under the legislation, damages including punitive damages may be obtained and these are reinforced by stringent penalties, including up to

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77 Section 652A provides that ‘one who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other’. The Restatement (1977) found the right to privacy invaded by acts that constitute: Unreasonable intrusion upon the seclusion of others Appropriation of the other’s name or likeness Unreasonable publicity given to the other’s private life Publicity that unreasonably places the other in false light before the public.
80 *Civil Code of the State of California* (1872), s 1708.8 (a).
three times the amount of general or special damages awarded (‘treble damages’), and possible forfeiture of any proceeds or consideration obtained. 81

The US is not directly comparable to Australia, because of the constitutional guarantee of privacy contained in the 14th Amendment, which has been interpreted very broadly. 82 Commentators have frequently pointed out the tension between the First Amendment, guaranteeing freedom of speech, and the 14th Amendment, 83 and the strength of the ‘newsworthy’ defence. David Anderson 84 claims that when competing interests such as freedom of the press collide, ‘privacy almost always loses … The sweeping language of privacy law serves largely to mask the fact that the law provides almost no protection.’ 85

The Canadian Charter of Rights and Freedoms 1982 does not specifically protect privacy. However, the Supreme Court has recognised a general ‘right to be let alone by other people’ in Hunter v Southam. 86 Section 8 of the Charter has been interpreted as guaranteeing freedom from unreasonable search and seizure, including a reasonable expectation of privacy in relation to governmental acts. 87 The province of Quebec guarantees ‘a right to respect for … personal life’ in the Quebec Charter of Human Rights and Freedoms. 88 Canadian privacy law is a mixture of common law, statutory torts or, in some provinces, a combination of both. British Columbia was the first province to introduce a statutory tort, in 1968. The BC Law Institute 89 recently recommended the addition of a third privacy tort, stalking, 90 to the existing torts of wilful violation of privacy, and unauthorised use of name or portrait. 91 Saskatchewan, British Columbia, Manitoba, and Newfoundland and Labrador also protect an individual’s right to privacy by statutory torts. 92 A typical formulation is that of Saskatchewan, which provides that ‘it is a tort, actionable without proof of damage, for a person willfully and without claim of right, to violate the privacy of another person.’ 93 Remedies include damages, injunction, account of profits and an order for delivery up of material. 94 Interestingly, there has been little litigation in Canada and no pattern of privacy being used as a tool for celebrities or the wealthy. Damages have typically been very moderate.

Ireland 95 introduced a Privacy Bill in 2006, proposing a tort actionable without proof of damage, but limited to deliberate and intentional conduct, without lawful authority. 96 The Bill stated that a person is entitled to privacy that is ‘reasonable in all the circumstances having regard to the rights of others and to the requirements of public order, public

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81 Civil Code of the State of California (1872), s 1708.8 (d).
82 See, eg, Griswold v Connecticut 381 US 479 (1965); Roe v Wade 410 US 113 (1973).
83 Note that a similar tension exists between arts 8 (privacy) and 10 (freedom of speech and the press) of the European Convention on Human Rights, a tension which has been explicitly incorporated into the common law cause of action for breach of confidence (invasion of privacy) in the United Kingdom in Campbell, [2004] 2 AC 457, [14] (Lord Nicholls).
86 R v Dyment [1988] 2 SCR 47, 426. See also Godbout v Longueuil (City) [1997] 3 SCR 844, 913. Section 8 of the Canadian Charter of Rights and Freedoms guarantees a sphere of individual autonomy for all decisions relating to ‘choices that are of a fundamentally private or inherently personal nature’: Canadian Charter of Rights and Freedoms, s 8, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11. See discussion in ALRC, above n 35, s 74.23.
87 Charter of Human Rights and Freedoms (1975) (Quebec) RSQ c H-4.5. Generally, see the discussion of privacy law in Canada in Husking v Bunting [2005] 1 NZLR 1, [60]–[65].
89 Note the parallels with the Australian case of Grosse [2003] QDC 151, in which stalking was recognised as an invasion of privacy at common law.
90 Privacy Act RSBC 1986, c 373, s 3.
91 Privacy Act RSBC 1996 (British Columbia); Privacy Act CCSM s P125 (Manitoba); Privacy Act RSS 1978, c P–24 (Saskatchewan); Privacy Act RSNL 1990, c P–22 (Newfoundland and Labrador). The British Columbia legislation differs somewhat from the statutes in force in the other provinces.
92 Privacy Act RSS 1978, c P–24, s 2 (Saskatchewan). See also Privacy Act RSBC 1996, c 373, s 1(1) (British Columbia); Privacy Act CCSM, s P125, s 2(1) (Manitoba); Privacy Act RSNL 1990, c P–22, s 3(1) (Newfoundland and Labrador).
93 See, eg, Privacy Act RSS 1978, c P–24, s 7 (Saskatchewan).
94 ALRC, above n 35, s 74.25.
95 Privacy Bill 2006 (Ireland), cl 2(1), 2(2).
morality and the common good.’ The Bill was dropped in response to stringent criticism by the media concerning freedom of speech and freedom of the press.

IV. CONCLUSION

The time is right for Australia to recognise a tort of invasion of privacy. The UK, New Zealand, Canada and the US have all arrived at this conclusion by different paths. Many of the possible options have been explored and tested through the courts, the dominant preferred approach being the development and metamorphosis of existing torts, in particular breach of confidence and Wilkinson v Downton. Creation of a separate stand-alone tort of invasion of privacy would avoid many of the problems that flow from stretching and distorting existing causes of action. However, as the preceding survey demonstrates, the traditional manner of common-law development is to ‘gropfe forward cautiously along the grooves of established legal concepts … rather than make a bold commitment to an entirely new head of liability.’ 96 In part, this caution stems from concerns about the legitimacy of non-elected judicial officers undertaking major law reform without direct accountability to the people.

Australia and the High Court have shown little sympathy for ‘judicial creativity’ or activism since the Mason years, as evidenced by the very cautious and incremental approach adopted in Lenah. It is too early to predict where the High Court led by Justice French will stand. Law Reform Commissions in Australia have played a very active role in the privacy debate, 97 the ALRC having recently recommended recognition of a right to sue for serious invasions of personal privacy, where the individual; a) had a reasonable expectation of privacy; and b) the conduct complained of would be regarded as highly offensive to a reasonable person. In addition, the plaintiff would need to satisfy the Court that c) the public interest in privacy outweighs other matters of public interest, such as freedom of the press. 98

Creation of a statutory cause of action as favoured by both the NSW Law Reform Commission (NSWLRC) 99 and the ALRC 100 would speed up and unify the protection of privacy, avoid fragmented and piecemeal protection across jurisdictions, and provide a firm foundation for subsequent judicial development, ‘filling in the gaps’ in the present legislative protection. 101 Although most of the cases to date have dealt with celebrities and media intrusions upon their privacy, there is no reason in principle to regard privacy as excluded from the realm of ordinary citizens. This is amply demonstrated in Wainwright v Home Office, Brown, Bradley and Jane Doe. The potential for further extensions into the civil liberties arena is strong, as recognised in Canada. 102 The NSWLRC has considered the question of remedies in detail, 103 identifying the principal remedies as injunctions and damages. The NSWLRC proposes the inclusion of damages, including aggravated damages, but not exemplary damages; account of profits; injunction; orders requiring apologies; correction orders; orders for the delivery up and destruction of material;
declarations; and other remedies or orders that the Court thinks appropriate in the circumstances.\footnote{104}{Ibid 202.}

A statutory tort, built on extensive and comparative investigation and recommendation by many law reform bodies past and present, which takes into account common-law developments over the last two decades, seems a fruitful and probably inevitable way forward for Australia, if there is sufficient political will. Whether this is best done by the Commonwealth\footnote{105}{For example, pursuant to the modern doctrine as to the scope of the external affairs espoused by Dawson J in \textit{Polyukhovich v The Commonwealth} (1991) 172 CLR 501, 632, on the basis of Australia’s ratification of international human rights instruments. See also \textit{Polyukhovich} (1991) 172 CLR 501, 528-531 (Mason J), 599-603 (Deane J), 695-696 (Gaudron J), 695-696 (McHugh J).} or at State level will need to be worked out. Any such tort is sure to be founded on principles of personal autonomy and protection of dignitary interests, excluding corporations and the commercial interests that are also protected in the US. It is clear that both at common law, and under the formulations suggested by the NSWLRRC and ALRC, there is ample power in the law of remedies to respond to novel developments in tort by creating a raft of options for courts to choose from in protecting privacy rights. Where the preferred remedy is general damages, Australian courts have already demonstrated that they are prepared to take rights seriously, awarding sizeable sums for invasions of privacy.
I. INTRODUCTION

The question of whether the judiciary or the legislature should intervene to deal with unfair terms in business to business contracts involving small businesses has long been debated. This debate has its origins in the early 1990s and directly led to the enactment of s 51AA of the Trade Practices Act and continued through the 1990s with the subsequent push to enact s 51AC of the Trade Practices Act. At the heart of the debate is the need to balance long held notions of freedom of contract against a growing realization that the contractual vulnerability of a small business may be exploited by larger businesses through the inclusion of terms in contracts that are not reasonably necessary for the protection of the larger business’s legitimate commercial interests. This debate was most notably acknowledged in a Report by the House of Representatives Standing Committee on Industry, Science and Technology that was tabled in May 1997. In that Report the Committee specifically considered the competing issues and, in particular, noted the vulnerability of small businesses in their dealings with larger businesses.¹

In Australia the question of fairness within business to business contracts involving small businesses has traditionally been confined to judicial and statutory concepts of unconscionable conduct. These existing concepts have, in turn, focused on procedural unconscionability. Indeed, the focus has been on the larger business’s behaviour towards the small business in the making of the contract or during the course of their relationship rather than specifically on the fairness or otherwise of the actual terms of the contract. This judicial and statutory emphasis on procedural unconscionability has resulted in very little attention having been placed on substantive unconscionability or unfairness of contract terms.

This steadfast refusal by Australian Courts to review claims based specifically on the alleged unfairness of contract terms has resulted in such claims being rarely tested before the Courts. This refusal by Australian Courts to consider the fairness or otherwise of contract terms in their own right is clearly seen in the Full Federal Court decision in Hurley v McDonald's Australia Ltd.² While there may be examples of where claims involving substantive unconscionability in consumer contracts and business to business contracts involving small businesses may come before the Courts, these only tend to occur where procedural unconscionability is also being alleged by the weaker party. This is not only the case in relation to sections 51AB and 51AC of the Trade Practices Act, but is also the case in relation to the Contracts Review Act 1980 (NSW). Consequently, the procedural unconscionability bias of the exiting judicial or statutory concepts of unconscionable conduct has meant that unfair contract terms in both consumer contracts and business to business contracts involving small businesses have received scant judicial attention. Failing such judicial scrutiny, there has been a surge in interest amongst law reform and other policy development bodies, both in Australia and the United Kingdom, as to whether or not there should be a new legislative framework dealing with unfair contract terms. This surge of interest can be seen from the various reports discussed below in which the issue of

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unfair terms, especially within business to business contracts involving small businesses, has been raised.

Within this setting the paper will explore the limitations of the existing concepts of unconscionable conduct in relation to business to business contracts involving small businesses and assess the work by law reform and other policy development bodies regarding the need for a new legislative framework to deal with unfair terms in business to business contracts involving small businesses such as franchise agreements and retail leases. In such contracts, small businesses are vulnerable to abuses of contractual power in the same manner as traditional consumers are in their dealings with large businesses. It is this vulnerability that has been identified in the work of law reform and policy development bodies both in the UK and in Australia as the basis for the need to review the fairness or otherwise of contract terms in business to business contracts involving small businesses.

II. SHOULD THE COURTS OR THE LEGISLATURE BE CONCERNED WITH THE FAIRNESS OR OTHERWISE OF CONTRACT TERMS?

While the courts and legislatures have allowed allegations of procedural unconscionability to be reviewed, this willingness has generally not been extended to consideration of the fairness or otherwise of the contract terms themselves. No doubt, this is simply because of the adherence to the long held notions of freedom of contract where the Court will in the absence of a vitiating factor seek to give effect to the terms of the contract. This notion has come under increasing attack as legislatures and law reform bodies around the world have as outlined below recognized that the growing disparity in the bargaining power of the parties in some contracts could result in conduct by the stronger party that is unethical rather than ‘unconscionable’ as narrowly defined by the courts. Thus, we find more and more that both consumers and small businesses are being viewed by legislatures as being increasingly vulnerable to exploitative or unethical conduct by large businesses. While initially such concern was confined to consumers, more recently such concerns have as outlined below increasingly been raised in relation to small businesses in dealings with larger businesses.

Such concerns have undoubtedly been related to the growing use of standard form contracts and the inability of consumers and small businesses to renegotiate the terms of such contracts. These concerns led directly to the United Kingdom and more recently Victoria enactment legislation dealing directly with unfair terms in consumer contracts. With the sole focus of this legislation being to deal with unfair terms in consumer contracts, it is readily apparent that the legislation provides a targeted mechanism for dealing with contract terms that go beyond what is reasonably necessary to protect the legitimate commercial interests of the stronger party.

Importantly, the enactment of this consumer oriented legislation has prompted considerable debate as to whether a growing imbalance of bargaining power between small businesses and large businesses may similarly lead to those larger businesses drafting contracts which include unfair contract terms in their dealings with small businesses. This debate has been fueled by discussion papers prepared by law reform bodies in both Australia and the United Kingdom. In January 2004 the Australian Standing Committee of Officials of Consumer Affairs (SCOCA) released a discussion paper on the issue of unfair contract terms in which it called for comment on the possible inclusion of business to business contracts in any legislation dealing with unfair contract terms. Likewise, in 2002

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3 Ibid.
4 Ibid.
5 The UK legislation was implemented first and is now found in the Unfair Terms in Consumer Contracts Regulations 1999. These Regulations came into force on 1st October 1999.
6 The Victorian legislation is found in Part 2B of the Fair Trading Act 1999 and came into force on 9 October 2003.
7 See also The Standing Committee of Officials of Consumer Affairs (SCOCA), Unfair contract terms: A discussion paper, 2004, 54.
the English Law Commission issued a consultation paper on unfair terms in contracts in which it considered extending the protection against unfair contract terms to businesses. Both papers have identified unfair terms in business to business contracts involving small business as a significant issue needing to be urgently addressed. In short, while both papers recognized the commercial character of business to business contracts and the possibly greater commercial sophistication of small companies as compared to consumers, both papers expressed concern that small businesses in many cases faced comparable imbalances in bargaining power in dealing with larger businesses as the imbalances faced by consumers when dealing with large businesses.

Likewise, both papers also felt that the increasing use of standard form contracts offered on a take it or leave it basis within a business to business context could, as in the case of consumer contracts, possibly lead to the inclusion of unfair terms in contracts between small businesses and larger businesses. In both papers standard form contracts were seen as a particular problem area as these types of contracts restricted the ability of the small business to readily renegotiate the terms of the standard form contract.

Importantly, both papers identified examples of what could potentially be seen as unfair contract terms in a business to business environment. For instance, the English Law Commission identified the following contract terms as potentially going beyond what was reasonably necessary to protect the legitimate interests of the larger business:

- deposits and forfeiture of money paid clauses;
- high default rates of interest;
- clauses allowing unilateral variation in price;
- termination clauses allowing one party to terminate in a wider set of circumstances than allowed for the other party;
- unequal notice periods; and
- arbitration and jurisdictional clauses which seek to severely restrict the rights of a party to choose the forum for dispute resolution.

Thus, while both papers acknowledged that the potential problems with unfair contract terms could, when compared to consumer contracts, be less severe in business to business contracts involving small businesses, such problems did arise and, accordingly, needed to be addressed.

III. DO EXISTING LAWS ALLOW THE COURTS TO DEAL DIRECTLY WITH UNFAIR CONTRACT TERMS?

The reluctance of the Court to rely on statutory notions of unconscionable conduct to deal with the issue of substantive unconscionability is readily seen from a brief review of some key Australian cases. Such cases reveal that procedural unconscionability remains the focus of even the statutory prohibitions against unconscionable conduct. Indeed, in its decision in *ACCC v C G Berbatis Holdings Pty Ltd* a commercial tenancy case, the High Court has made it clear that an inequality of bargaining power on its own will not give rise to a special disadvantage under s 51AA of the *Trade Practices Act*. Provided a person is capable of understanding the nature of the transaction, an inequality of bargaining or even a taking advantage of that inequality of bargaining power by the stronger party will not be sufficient to invoke the equitable doctrine of unconscionable conduct. This position clearly emerges from the following comments by Gleeson CJ in that case.

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9 Ibid 16.
10 Ibid.
11 Ibid.
12 Ibid.
13 Ibid.
One thing is clear ... A person is not in a position of relevant disadvantage ... simply because of inequality of bargaining power.

... 

Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence.15

Similar comments were made by Gummow and Hayne JJ:

... It will be apparent that the special disadvantage of which Mason J spoke in [the Amadio case] was one seriously affecting the ability of the innocent party to make a judgment as to that party's own best interests.

In the present case, the respondents emphasise that point and stress that a person in a greatly inferior bargaining position nevertheless may not lack capacity to make a judgment about that person's own best interests. The respondents submit that the facts in the present case show that Mr and Mrs Roberts [as tenants] were under no disabling condition which affected their ability to make a judgment as to their own best interests in agreeing to the stipulation imposed by the owners for the renewal of the lease, so as to facilitate the sale by Mr and Mrs Roberts of their business. Those submissions should be accepted.16

As the retail tenants in the case understood the nature of the transaction in which they were involved, the High Court considered that they were able to make a decision about what was in their best interest even in the face of the obvious disparity of bargaining power between the landlord and tenant and despite being in a take it or leave it situation.

Such a rigid approach is increasingly being applied to the supposedly broader s 51AB and s 51AC of the Trade Practices Act. Indeed, the Federal Court has noted that the terms of a contract cannot, on their own, form the basis of an action under s 51AB and s 51AC of the Trade Practices Act. According to the Full Federal Court in Hurley v McDonald's Australia Ltd17 something more is required than merely pointing to the terms of the contract:

24 No allegation of unconscionable conduct is made in ... relation to the making of the alleged contracts between McDonalds, on the one hand, and the Applicant and the group members, on the other. The allegation is simply that it would be unconscionable for McDonalds to rely on the terms of such contracts.

29 There is no allegation of any circumstance that renders reliance upon the terms of the contracts unconscionable. For example, it might be that, having regard to particular circumstances it would be unconscionable for one party to insist upon the strict enforcement of the terms of a contract. One such circumstance might be that an obligation under a contract arises as a result of a mistake by one party. The mistake is an additional circumstance that might render strict reliance upon the terms of the contract unconscionable. Mere reliance on the terms of a contract cannot, without something more, constitute unconscionable conduct.

31 Before sections 51AA, 51AB or 51AC will be applicable, there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract ‘unfair’ or ‘unreasonable’ or ‘immoral’ or ‘wrong’.

These comments have more recently been repeated by Nicholson J in Australian Competition and Consumer Commission v Lux Pty Ltd18

16 Ibid 168.
18 [2004] FCA 926.
94 … To ground a finding of contravention of s 51AB, there must be some circumstance other than the mere terms of the contract itself which renders reliance on the terms of the contract unconscionable…

Thus, existing statutory prohibitions against unconscionable conduct such as s 51AB and s 51AC of the Trade Practices Act cannot be used by a party to prevent the enforcement of a contract term unless that party can point to some additional circumstance arising from the particular case that would render the enforcement of that contract term unconscionable. Clearly, under s 51AB and s 51AC of the Trade Practices Act a party to a contract is, in the absence of procedural unconscionability on their part, unable to challenge a contract term as unfair. In such circumstances, absent procedural unconscionability, existing statutory prohibitions against unconscionable conduct will be of little or no value in dealing directly with unfair terms in for example business to business contracts involving small businesses.

Significantly, this judicial restraint has equally applied to the interpretation of the Contracts Review Act 1980 (NSW). Indeed, McHugh J in West v AGC (Advances) Ltd stated that:

… under this Act, a contract will not be unjust as against a party unless the contract or one of its provisions is the product of unfair conduct on his part either in the terms which he has imposed or in the means which he has employed to make the contract.19

In short, the focus on procedural unconscionability equally remains the central consideration of matters under the Contracts Review Act (1980).

IV. A GROWING ACKNOWLEDGEMENT OF THE PRESENCE OF UNFAIR TERMS IN CONTRACTS INVOLVING SMALL BUSINESS

The difficulty of bringing action under s 51AC of the Trade Practices Act has been recently acknowledged in a number of State Government reports and discussion papers discussed below. In each case, the consensus is that s 51AC or equivalent State and Territory provisions is being too onerously interpreted by the Courts and, as a result, there is a need to either reform those provisions or adopt a new approach to unfairness in business to business contracts involving small businesses.

One example of the growing acknowledgement that s 51AC has not been interpreted in keeping with its original parliamentary intention is found in a recent report by the South Australian Parliament into the franchising sector. In its report titled – Franchises – the Economic and Finance Committee of the South Australian House of Assembly made the following observations:20

The problem with section 51AC, as put to the Committee, is that the section has not been effective despite its broader remit. The Committee was told that despite the inducements in the provision to consider a wider definition, judicial interpretation of statutory unconscionability has tended to rely on so-called ‘procedural’ aspects of unconscionability, restricting its scope to cases of serious misconduct during the formation and performance of the contract. 21 That approach seems to exclude instances where harsh contractual terms have been inserted in otherwise procedurally valid contracts.22

Controversy surrounding the application of the section is provoked by the cautious approach adopted by Australian judges to interpreting it.23

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19 (1986) 5 NSWLR 610, 622.
The Report especially identified the omission of a definition of the concept of ‘unconscionable conduct’ as representing a considerable challenge in taking action under s 51AC of the Trade Practices Act:

The fact the TPA does not provide a definition of the term “unconscionable conduct” appears to represent a challenge for the ACCC, the agency responsible for enforcement of the prohibition. While the ACCC is responsible for developing and testing the law in this area, the understanding of the provision remains very limited ten years after its introduction. However, as some witnesses pointed out, the reason for that lack of success may be the original construction of the provision and a lack of guidelines pointing to the intended meaning of the term “unconscionability”. Many of those who contributed to the inquiry also stressed that the uncertainty surrounding the meaning of unconscionability makes litigators and lawyers very reluctant to rely on section 51AC as a chosen cause of action. The inability to resort to any other similar provision creates a situation where businesses are denied legal remedies in disputes that often severely impact their interests.24

In view of these concerns and of the considerable evidence put before the Committee, the Report took the position that legislative reform of s 51AC of the Trade Practices Act was required:25

The Committee is of the opinion that section 51AC of the TPA, as it currently stands, is not being effectively utilised because of a combination of drafting imprecision and judicial caution. The section has the potential to provide a clear course for redress for franchise disputes and those factors currently obstructing its use should be identified and resolved, even if this requires revisiting the Act. Any such examination of the Act should be done in consultation with the franchising industry, with the needs of franchisees given equal weight with those of franchisor advocates.

The Committee recommends section 51AC of the Trade Practices Act 1974 (Cth) be amended by the inclusion of a statutory definition of unconscionability or alternatively by the insertion in the Act of a prescribed list of examples of the types of conduct that would ordinarily be considered to be unconscionable.

In short, the Report provides further recognition of the limitations of s 51AC of the Trade Practices Act and, in particular, of how the provision has been narrowly interpreted by the Courts.

A further example of the growing acknowledgement that s 51AC or equivalent provisions are too narrowly interpreted by the Courts or Tribunals is found in a recent discussion paper issued in New South Wales in relation to the retail leasing industry in that State. Indeed, the discussion paper titled - Issues affecting the retail leasing industry in NSW: Discussion paper – February 2008 – specifically acknowledged the onerous interpretation being given to the New South Wales equivalent to s 51AC. That provision, which is found in s 62B of the Retail Leases Act 1994, was described in the following terms in the discussion paper:

Section 62B sets out a non-exhaustive list of matters to which the Administrative Decisions Tribunal may have regard in assessing whether particular conduct is unconscionable:

... 

Since 2002, the Administrative Decisions Tribunal has heard 29 cases alleging unconscionable conduct. These authorities indicate that a finding of unconscionable conduct under s 62B can only be made if the conduct can be described as 'highly unethical' and involves 'a high degree of moral obloquy’— s 62B unconscionable conduct

24 Ibid 44-45. 
25 Ibid 46.
will not be found simply because conduct is ‘unfair’ or ‘unjust’. The outcomes of the 29 cases were as follows:

- Unconscionable conduct was found in five cases (however two of these were overturned on appeal on grounds unrelated to the unconscionable conduct claims);
- One matter was transferred to the Supreme Court;
- The unconscionable conduct claims were withdrawn in five cases;
- Unconscionable conduct was held not to be made out in 13 cases;
- It was held unnecessary to consider the question of unconscionable conduct in six cases.

Analysis of the unconscionable conduct cases heard by the Administrative Decisions Tribunal to date indicates the test is onerous and the threshold for a finding of unconscionable conduct is very high. Because of the narrow interpretation of s 62B in accordance with equitable doctrine, the unconscionable conduct provisions have not operated as intended. There are many instances of unfair conduct on the part of landlords where tenants are unable to avail themselves of the remedy in s 62B due to the onerous test imposed.

Significantly, the discussion paper raised similar concerns with s 51AA of the Trade Practices Act:

Similar criticisms have been levelled at s 51AA of the Trade Practices Act 1974 (Cth), which contains specific provisions aimed at providing increased protection where there may be an imbalance of bargaining power between small businesses and their larger business suppliers or customers. This section was introduced in 1992 to extend the unconscionability provisions. The ACCC noted in its submission to the 2007 Productivity Commission inquiry that it had been anticipated these provisions would be of particular use to tenants and franchisees in unequal bargaining positions with their landlords or franchisors. It noted however that s 51AA had not lived up to its expectations in respect of retail leasing matters due to the court’s limited interpretation of s 51AA in accordance with equitable doctrine. Despite making enforcement of s 51AA a priority, the ACCC has been unable to build a single case that would succeed in relation to complaints from retail tenants in shopping centres.

Having recognized these concerns, the discussion paper takes the view that there is scope for legislative reform in dealing with unfair conduct within a retail leasing context:

Given that neither s 62B of the Retail Leases Act nor s 51AA of the Trade Practices Act have operated to provide the protection intended, there is clearly scope for legislative reform in this area.

There are a number of legislative reforms that could be introduced in order to protect parties from unfair conduct. One option is to extend and clarify the criteria to which the ADT may refer in determining whether conduct is unconscionable.

A second option is to introduce a test to deal with unfair conduct in an effective and efficient manner.

A third option is to introduce a provision into the Act which allows the Administrative Decisions Tribunal to vary or void any unjust provisions in the lease agreement (similar to s 106 of the Industrial Relations Act 1996 or ss 7 and 8 of the Contracts Review Act 1980).

Clearly, while such proposals are aimed at dealing with unfair conduct, they fall short of providing a new legislative framework for dealing with unfair contract terms in a direct and proactive matter. Further, the proposals are limited to retail leasing agreements and do

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28 Ibid 19.
not extend generally to business to business contracts involving small businesses. This is a significant limitation as any proposals for dealing with unfair terms in business to business contracts involving small business would need to apply beyond merely the retail leasing sector for the simple reason that the vulnerability of small businesses is also found in other sectors of the economy, most notably within the franchising sector.

Further recognition of the need to implement a new national legislative framework dealing with unfair contract terms can be found in the Productivity Commission’s report following its review of Australia’s consumer policy framework. 30 Given the nature of the Commission’s Inquiry, this recognition relates merely to ‘consumer’ contracts, with the Commission referring only to possible benefits to small businesses as ‘consumers’ of goods or services rather than recommending that small businesses be explicitly included in their own right in any new legislative framework dealing with unfair contract terms. 31 Thus, any benefits to small businesses under the Productivity Commission’s recommendation in relation to unfair consumer contract terms would only arise if small businesses were considered consumers of products sold by larger businesses rather than by explicitly applying a new legislative framework against unfair terms to business to business contracts involving small businesses. Ultimately such alleged benefits depend on what definition of a ‘consumer’ is adopted and given that the Productivity Commission has recommended that the current thrust of the definition of a ‘consumer’ continue under the Commission’s proposed generic national consumer law such benefits to small businesses may in reality be illusory. 32

A further limitation of the Productivity Commission’s recommendation dealing with a new legislative provision dealing with unfair consumer contract terms is that its recommended provision diverges from existing legislative frameworks in the UK and Victoria dealing within unfair terms in consumer contracts. 33 In doing so, the Commission’s recommendation creates business uncertainty and will require time to be tested in court. In contrast, as discussed below, the UK and Victorian legislative frameworks for dealing with unfair contract terms have been in place for many years and, accordingly, provide an existing body of law that can be readily drawn upon if a new legislative framework against unfair contract was extended to explicitly cover business to business contracts involving small businesses.

V. NEW DIRECTIONS IN DEALING WITH UNFAIR TERMS IN CONTRACTS INVOLVING SMALL BUSINESS

In view of the growing acknowledgement of the judicial reluctance to use existing notions of unconscionable conduct to consider allegations based solely on the unfairness of contract terms, the question arises as to whether or not a suitable legislative framework is available to deal directly and effectively with such allegations. In dealing with this question, the recent enactment of a new statutory framework by the United Kingdom and Victoria for dealing with unfair terms in consumer contracts provides clear evidence of the availability a legislative framework that could easily be applied within a commercial context.

Significantly, the UK and Victorian legislative frameworks begin with a definition of what constitutes an unfair term. The inclusion of a clear definition of what constitutes an unfair contract term is essential in any legislative framework dealing with unfair contract terms in business to business contracts involving small businesses. Indeed, as noted above the failure of the legislature to define the concept of ‘unconscionable’ in the existing statutory prohibitions such as s 51AC of the Trade Practices Act has led the courts to take

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31 Ibid vol 2, 320.
32 Ibid 4.
33 Ibid 168-169.
a narrow view of the concept. This experience should be avoided by including a clear definition of ‘unfair contract term’ in a new legislative framework to deal with unfair contract terms.

In the UK and Victorian legislation unfair terms are defined primarily by reference to the concept of good faith and a significant imbalance in the contractual rights and obligations of the parties to the detriment of the consumer. Within this context, the concept of good faith is a key part of the definition of an unfair contract terms that must be applied by the Court rather than mentioned as merely a factor that could possibly be considered by the Court as is the case under s 51AC of the Trade Practices Act. While the two pieces of legislation have these common elements to the definition of an unfair term, there are some differences in the definitions. For example, the UK legislation targets unfair terms in standard form contracts, while Victorian legislation targets unfair terms in consumer contracts generally. In particular, under Regulation 5 of the UK legislation the focus is on terms not individually negotiated by the parties:

5. - (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
   (2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.
   (3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.
   (4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

Regulation 5 of the UK legislation includes various safeguards to ensure that only genuinely negotiated contract terms will be considered to be individually negotiated, with the onus under the UK legislation falling on the seller or supplier. In comparison, s 32W of the Victorian legislation refers to a consumer contract which can include both standard and individually negotiated terms:

A term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

Under the Victorian legislation ‘consumer contract’ is defined to mean ‘an agreement, whether or not in writing and whether of specific or general use, to supply goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, for the purposes of the ordinary personal, domestic or household use or consumption of those goods or services.’ This clearly excludes business to business contracts involving small businesses.

Although the Victorian legislation does not directly exclude individually negotiated terms from its coverage, the issue of whether the term is individually negotiated remains, along with other matters, a factor to be taken into account under the Victorian legislation. This list of factors is found in s 32X of the Victorian legislation and is particularly significant as it provides valuable insight as to the types of contract terms that may be considered unfair under the Victorian legislation:

**32X. Assessment of unfair terms**

Without limiting section 32W, in determining whether a term of a consumer contract is unfair, a court or the Tribunal may take into account, among other matters, whether the term was individually negotiated, whether the term is a prescribed unfair term and whether the term has the object or effect of—

34 See for example s 51AC(3)(k) of the Trade Practices Act 1974 (Cth)
35 See s 3 of the Fair Trading Act 1999 (Vic).
(a) permitting the supplier but not the consumer to avoid or limit performance of the contract;
(b) permitting the supplier but not the consumer to terminate the contract;
(c) penalising the consumer but not the supplier for a breach or termination of the contract;
(d) permitting the supplier but not the consumer to vary the terms of the contract;
(e) permitting the supplier but not the consumer to renew or not renew the contract;
(f) permitting the supplier to determine the price without the right of the consumer to terminate the contract;
(g) permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract;
(h) permitting the supplier unilaterally to determine whether the contract had been breached or to interpret its meaning;
(i) limiting the supplier's vicarious liability for its agents;
(j) permitting the supplier to assign the contract to the consumer's detriment without the consumer's consent;
(k) limiting the consumer's right to sue the supplier;
(l) limiting the evidence the consumer can lead in proceedings on the contract;
(m) imposing the evidential burden on the consumer in proceedings on the contract.

A similar list is provided in Schedule 2 of the UK legislation. Where a term is found to be unfair, Regulation 8 of the UK legislation provides that (i) the term will be unenforceable against the supplier, and (ii) the remainder of the contract is binding provided it can continue without the unfair term. Under s 32Y of the Victorian legislation an unfair term in a consumer contract is void, with the contract also continuing to bind the parties where it is capable of existing without the unfair term.

VI. CONCLUSION

In conclusion, the UK and Victorian legislative frameworks could be used as a model for drafting a new legislative framework for dealing with unfair terms in business to business contracts involving small businesses. The reason for drawing on these UK and Victorian legislative frameworks is that they provide a targeted mechanism for dealing directly with unfair contract terms. Indeed, dealing with unfair contract terms is the sole focus of both the UK and Victorian frameworks and this allows the enforcement agency in the jurisdiction to pursue such unfair contract terms in a direct manner. This ability to proactively deal with unfair contract terms in a timely manner has been of considerable benefit to consumers in both the UK and Victoria. Not only do the UK and Victorian legislative frameworks clearly define the nature of an unfair contract term covered by the framework, but the legislation also provides valuable guidance on the types of contract terms likely to be considered unfair. These are considerable advantages that would equally be valuable within the context of a new legislative framework dealing with unfair terms in business to business contracts involving small businesses such as franchise agreements and retail leases. Importantly, these advantages are backed up by the ability under the UK and Victorian frameworks to take timely action to prevent the continued use of unfair contracts terms. Once again, this ability to take timely action would be of considerable benefit in relation to unfair terms in business to business contracts involving small businesses. In such circumstances, the UK and Victorian frameworks could easily be used as a model for a new legislative framework for dealing with unfair contract terms in business to business contracts involving small businesses.