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I am delighted to welcome readers to the 2010 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 was established by the Australasian Law Teachers Association (ALTA) in 2008 and 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 are also included in ALTA membership. The journal also reflects appropriately the prestige, maturity and development of ALTA as an organisation which now represents well over 1000 members.

Following the publication of our inaugural ‘bumper’ issue in 2008, the response to the 2009 and 2010 issues of JALTA has been very strong. For the 2009 issue, we received 34 submissions for consideration with 23 of those ultimately being published and, for the 2010 issue, we received 24 submissions of which 13 are published in this issue. All submissions undergo a rigorous double-blind peer review before being published.

In closing, 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 Kaushalya Matararatchi for her exceptional work in proofreading, Maureen Platt for her efforts in typesetting, and to CCH Australia Ltd for their generous sponsorship and continued support of the journal. Lastly, I need to record a special thanks to Katherine Poludniewski who was ALTA’s Administrative Coordinator and ALTA Secretariat. Katherine was responsible for bringing the inaugural 2008 and subsequent 2009 issues of JALTA to fruition. She worked tirelessly on all aspects of JALTA and was supremely organised and efficient. I can safely say that, without Katherine’s contributions, previous issues of JALTA would simply not have been produced in such a timely and professional manner. Nathalie Poludniewski has joined the team as Katherine’s successor and the transition between ‘Kat’ and ‘Nat’ has been seamless. I would like to record my sincere appreciation for all Nat’s efforts in bringing this issue to completion. Well done, Nat!

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

Professor Dale Pinto
Editor-in-Chief
JALTA
This paper draws on staff reflections and student feedback on the pilot stage of a Second Life Mooting project conducted during Autumn Semester 2010 at the University of Western University (‘UWS’). It presents preliminary findings as to the feasibility of more wide-spread uses of Second Life as a platform for mooting. The paper examines positive and negative outcomes of the pilot study and argues that, on balance, further developments in this area should be pursued, notwithstanding the need for more work on some of the drawbacks, including some technical difficulties. The paper also explores the potential for Second Life to be used for moot training, and to host national and international mooting competitions. The potential for cross-institutional, interdisciplinary and even international collaboration with networks presently evolving around the use of Second Life in tertiary education is also discussed.

I. INTRODUCTION AND PROJECT BACKGROUND

Second life is a three-dimensional virtual world. Users each have a stylised avatar through which they interact in a manner similar to real life. Avatars can talk, move about, shop, meet and socialise with other avatars, construct objects and even conduct business. In 2009, the authors of this paper set out to investigate whether second life could be used to support students learning practical and clinical legal skills. We initially determined that the technology has potential for use in this way subject to some possible, but not insurmountable, constraints. We concluded that a pilot study was necessary to test our theories and determine what, if any, further trials we should undertake. Accordingly, a small pilot study on mooting in Second Life was conducted in Autumn 2010 at UWS. Our umbrella Second Life project has a broader scope, evaluating the use of Second Life to teach practical and clinical legal skills, including negotiation and interviewing. This pilot represents the first stage of the larger project, and focuses on mooting in Second Life. Mooting was selected for the pilot for a range of reasons, including the important role mooting plays in training advocates generally, as well as the potential Second Life presents for enhancing that training and providing more opportunities for students to practise. We were also interested in the feasibility of developing mooting competitions in Second Life.

2 Preliminary research and findings are described in Michelle Sanson, Jennifer Ireland and Paul Rogers, “‘Fake it till you make it’: Using Second Life to Teach Practical Legal Skills’ (2009) 2 Journal of the Australasian Law Teachers Association 245.
II. NARRATIVE: THE PILOT STUDY — AUTUMN 2010

A. The Participants

Our 2010 International Humanitarian Law (‘IHL’) Moot team, Jared Bennett, Bridget Kennedy and Lucy Liang, volunteered their time to help us with this pilot. All participants had mooted before for assessment and represented UWS at the Australian Law Students’ Association Conference in 2010 in the IHL Moot. One had some experience of real life advocacy work in the courts. One had heard of Second Life before, but the other two had not, and none had used it before. One student had intermediate level user skills with video games in general.

B. Preparations and Conduct of the Pilot — May 2010

We had not yet constructed our own virtual moot court at the time the pilot took place. However, we had previously met and had been in regular contact with Jay Jay Jegathesan, the creator of the University of Western Australia’s (‘UWA’) Virtual Campus, which includes a Virtual Moot Court.4 With the endorsement of the Dean of the Faculty of Law (Professor William Ford), Jay Jay allowed us and our students access to the UWA Virtual Moot Court for the purpose of conducting our pilot.

Other preparations included creating a set of ten avatars for student use during this project.5 Another valuable contact we had already made earlier in the project, Crystal Porto,6 volunteered to ‘style’ the overall appearance of the avatars and to create appropriate clothing for each of them. During the pilot we used a program called Fraps,7 a video capture software, to record what are known as ‘machinima’8 in Second Life. From this footage of our activities in Second Life we created a short video on the pilot.9

On the evening of the pilot, we met in person in the UWS Moot Court at Parramatta, and began by introducing the students briefly to Second Life and showing them how it worked, as none had used it before. Once our participants were reasonably familiar with the interface and how to operate the avatars and make them speak, two went into the UWA Virtual Moot Court and Paul went onto the bench to act as judge. At this point we had some technical difficulty with one of our computers running too slowly in Second Life to be usable for the trial.10 A replacement laptop was available but we could not make the sound work in Second Life on it.11 As a result, only one of our student advocates was able to speak and be heard by the judge at a time. Two of our participants took turns presenting their arguments, as prepared for the IHL moot. However, Crystal was also present at the pilot as an observer, and volunteered to take the role of the other advocate for us. This allowed us to simulate a short moot court scenario with two advocates and a judge present who could all communicate with each other in real time. Crystal’s presence also allowed us to involve a remote participant who was not physically present with us at the time. Although unplanned, this was an interesting addition to our pilot.

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4 Manager, School of Physics, University of Western Australia. Jay Jay uses the name Jayjay Zifanwe for his avatar in Second Life. For more information on the University of Western Australia Virtual Campus see Raphaella Nightfire, UWA Leads the Way (2010) (CNN iReport) http://ireport.cnn.com/docs/DOC-426490 at 11 November 2010.
5 For further information on these preliminary steps in the project, see Sanson, Ireland and Rogers, above n 2, 252–3.
6 Crystal is a special needs educator who works with autistic children, and is investigating the use of Second Life to increase her students’ level of engagement. Crystal lives and works in the United States. Crystal uses the name Crystal Caerntown for her avatar in Second Life.
7 Fraps is a commercial, but relatively inexpensive software, available at <http://www.fraps.com>.
9 The video will be available on YouTube shortly.
10 ‘Netbook’ computers usually do not have graphics cards, which was the problem here.
11 The sound card on a more powerful laptop was not operating properly.
III. FEEDBACK FROM PILOT PARTICIPANTS

Although there are only three members of the IHL moot team, our pilot participants provided plenty of detailed and interesting qualitative feedback, both in an informal focus group and also in a survey completed after the pilot. Our pilot results are not statistically significant, in view of the numbers involved, but they have given us a preliminary snapshot of the students’ perspective on virtual mooting as well as qualitative input that we found very helpful in determining our next steps for the project. The students’ feedback is described below.

A. Using Second Life

Bearing in mind that the avatars had already been created for the students before the pilot, none of the participants reported significant difficulty using Second Life for the first time. One even referred to it as ‘user friendly’, although the other two did report a little difficulty working out how to manoeuvre the avatar at first.

B. Comparisons between Real Life and Second Life Mooting

Students reported both positive and negative comparisons between their initial experience of Second Life mooting and their real life mooting experience. Students told us there was no immediate sense of being in a court room and interacting with the judge, such as one would have in a real life moot. As one student put it:

Second Life cannot be a substitute for advocacy training in person; standing physically before a Judge or Arbiter adds a theatrical element that tests the students abilities that might not be present in a Second Life moot.

However, another found sitting in front of a screen no less ‘nerve-wracking’ than being in the real moot court, and commented that one actually had a sense of being closer to the bench than in real life. All our participants also commented on the need to operate the program and the avatar in addition to presenting arguments, but none felt it was a terribly serious barrier to the conduct of the moot.

Positive comparisons with real life mooting included the potential to practise in the virtual moot court without needing to travel. The students all saw potential for remote or even international mooting through Second Life. Both students who did the mooting commented that they could concentrate more on their speaking and their vocal delivery than in real life. One student described this as being able to slow down the delivery and use more pauses to emphasise certain points. One also thought it seemed ‘less formal, less daunting’ than a real life moot.

C. Using Second Life Mooting to Improve Real Life Mooting Skills

We next asked whether the participants thought Second Life could be used to improve their own mooting, or to practise for competitions. Notwithstanding their existing experience with mooting, all three participants thought it could be used to make improvements, or ‘as a training tool’. In addition to offering more opportunities to practise, wherever and whenever they choose, students could also focus on their diction and particularly the speed of delivery, as discussed above.

D. Second Life for First-Time Mooters?

We then asked our mooters to consider the position of students earlier in their courses, perhaps facing a moot for the very first time, and to cast their minds back to their own first mooting experiences. Our expectation, explained elsewhere, was that a virtual moot court would

12 NEAF approval is in place for this project.
13 Sanson, Ireland and Rogers, above, n 2.
provide students who had no prior public speaking experience with a place to practise in, perhaps in private at first. Students could get used to speaking out loud, without reading or listening to their own voices as they speak, and we thought this would be useful to first-time mooters. We wanted to know whether the students who had actually had that experience more recently than we had ourselves would agree with this perception. All three agreed. One student also suggested Second Life could be helpful for showing what a moot is like and could be used in orientation or mooting workshops to good effect. All three thought it would be good for introverted students to help build their confidence and start to control any nerves.

E. Second Life for Mooting Competitions

Finally, we asked students to comment on the concept of mooting competitions conducted entirely in Second Life, and the potential this might hold for mooting internationally against overseas universities. In relation to the benefits students gain from mooting on the international stage, one student’s comment was as follows:

International mooting is a learning curve that develops the student’s ability to adapt to foreign and unknown legal contexts and orient his or her way through the abstraction to find an understanding of the relevant principles. That skill puts him or her above the rest, and international mooting is very much desirable for this reason. The greatest limitation on the law student’s opportunities presently (in respect of mooting) is the fact that to compete internationally requires resources. Therefore the opportunities are few and far between. However, the student with experience in cross jurisdictional mooting will be far better off than the student who does not have such experience. If second life can adequately give this opportunity to students, students will be better equipped generally.

Another student commented on the networking opportunities with overseas students and universities that could accompany virtual moot competitions. To the extent that virtual mooting competitions could facilitate international moots, but without the resources usually required, it is our position that this medium can offer real opportunities to our students. As the students’ comments, above, suggest, these benefits are not limited to involvement in the actual moot itself.

F. Overall Merit of Second Life Mooting

At the end of the survey we asked our participants whether they thought virtual mooting had merit as a concept. All three agreed that it did and one noted that it was ‘a bit of fun’ too. This was notwithstanding a degree of technical difficulty at the actual time of the pilot. The idea that busy LLB students could have access to something, albeit voluntary, in their degrees that was described as ‘fun’ was pleasing.

IV. The UWS Virtual Moot Court

Following the pilot, we felt sufficiently satisfied as to the merit of Second Life mooting to go ahead with the construction of our own virtual moot court, as several other law schools have done before us. We commissioned a designer/builder who works within Second Life to create a replica of the UWS Moot Court at Campbelltown, New South Wales, itself modelled on the original Campbelltown Court House, built in 1886. So, like many other virtual campuses and courts, our virtual moot court has a deliberate link with our real world buildings and also with some of the history of our Campbelltown campus and its region.

14 Nyx Breen in Second Life.
V. ANALYSIS: POSITIVES AND NEGATIVES

A. Drawbacks and Problems

We previously identified a range of problems we thought could occur when using Second Life to teach practical legal skills.\textsuperscript{17} These included training and equipment needs, initial IT support and cost, as well as equity, privacy and other legal issues, such as the need to avoid defamation and intellectual property infringement. The very real potential for technical problems, such as we experienced ourselves on the night of the pilot, was of particular concern to us. Apart from those technical difficulties, no significant problems of any of these types occurred during the pilot.\textsuperscript{18} However, as the pilot took place in a private, controlled area of Second Life, the potential for such problems should not be dismissed, and may need further investigation in future, larger trials.

The technical problems we experienced obviously point to the importance of ensuring all equipment has been thoroughly tested and has adequate capacity and browser software to run Second Life at a suitable speed.\textsuperscript{19} For the pilot we worked without dedicated IT support, using our usual computers\textsuperscript{20} and broadband connections, but we would certainly recommend arranging dedicated IT support and testing, particularly for any formal use of Second Life. Further, despite our own testing since the pilot, we are still experiencing intermittent, and for that reason, unpredictable, problems with the sound in Second Life.\textsuperscript{21} Obviously the sound, and being able to make the avatar speak, is of central importance to any use of Second Life for mooting, and we would welcome greater reliability in the sound overall. For these reasons, our earlier view that Second Life should only be used in a voluntary, extra-curricular context and should not be built into any formal assessment regime,\textsuperscript{22} was amply borne out by the pilot study. However, we do not think this entirely obviates its value as an informal medium for students to practise in.

The pilot brought a few new shortcomings to our attention. During the pilot, we realised there could be problems confirming the identity of each mooter in the absence of any real-life image. For Salmon and Hawkridge, establishing identity is one of the most significant challenges of using virtual learning environments: ‘[f]or both academics and their students, establishing

\textsuperscript{16} Created by Raphaella Nightfire (in Second Life) from the University of Western Australia.
\textsuperscript{17} Sanson, Ireland and Rogers, above n 2.
\textsuperscript{18} Costs for the pilot were negligible. Second Life is free, as is the Emerald browser described below, and we used our usual UWS or personal computers, without modification. Microphones, headsets and/or speakers would be a small additional cost for computers without these peripherals.
\textsuperscript{19} We used Emerald browser, which we consider to be the best browser at present. On technical difficulties in Second Life more generally see Steven Warburton, ‘Second Life in Higher Education: Assessing the Potential for and the Barriers to Deploying Virtual Worlds in Learning and Teaching’ (2009) 40(3) British Journal of Educational Technology 414, 418 (describing ‘one of the most negative in-world effects, that of ‘lag’ — where heavy loads caused by too many objects in a single location slow the experience to one which can feel jerky, unstable and frustrating’).
\textsuperscript{20} Running either Windows XP or Vista: we did not discern an appreciable difference in speed between these operating systems.
\textsuperscript{21} Warburton describes similar difficulties for other users: above n 19, 422.
\textsuperscript{22} Sanson, Ireland and Rogers, above n 2, 254.
identity is a key stage in developing trust between them. In virtual worlds the means in the real world of doing so are scarcely available.23 One suggestion is using Skype to identify students at the start of the moot (perhaps as part of appearances) and, as the voice heard through Second Life is the speakers’ own voice, there is minimal chance of substitution once the moot is underway. The further potential for mooters to get help from others who may be present would be an issue for assessable tasks, although conferral is sometimes allowed within the rules of competition moots.

We also had concerns about aspects of authenticity of the task. From our perspective as judges, and compared with our experiences judging real life moots, the avatar’s lack of facial expression or movement while speaking made the exercise seem somewhat artificial. Also, like the students, we found ourselves focusing much more attention on the spoken aspects of their performance. A greater focus on the content of arguments, without factors such as demeanour and the general requirements of etiquette to consider may be beneficial in some contexts, such as while developing and practising arguments for competitions. However, demeanour and etiquette are also very important aspects of mooting and advocacy, and difficulty assessing those aspects is a significant barrier to the use of Second Life for competitions or for assessment. On the issue of authenticity in virtual learning environments generally, Herrington, Reeves and Oliver argue that exact physical reality is not strictly necessary, as the learning value comes from the authenticity of the ‘task itself’.24 Barton, McKellar and Maharg also argue that an exact ‘replication of aspects of reality’ does not generate authenticity by itself.25 However, in relation to virtual mooting specifically, Yule, McNamara and Thomas report concerns about the loss of ‘nonverbal cues’ and the ‘crude gestures’ available to the avatars.26 It may be that these shortcomings can be addressed in future versions of Second Life, or in purpose-built virtual learning environments that are specifically designed for learning and teaching.27 but we agree that, at present, they are a significant drawback. However, our overall position is that this drawback does not entirely outweigh the benefits described below, particularly that of being able to practise without travelling.

Shortcomings in authenticity of the exercise as preparation for real-world advocacy must also be acknowledged. Yule, McNamara and Thomas point out that ‘[v]ideoconferencing facilities are now in widespread use in Australian courts in procedural and substantive settings ranging from preliminary proceedings through to appeals’.28 Koo argues that legal education should incorporate more of the technologies students will encounter when they go into practice.29 While we are not suggesting Second Life could be used in the courts, we suggest that student use of virtual moot courts can provide exposure to, and a degree of comfort with, the use of technology in the courtroom setting and to remote advocacy as a general concept. While we acknowledge that videoconferencing has greater authenticity in terms of matching the real world court system,30 our suggestion is that virtual mooting can still serve different, although related, purposes, particularly facilitating remote practice.

26 Yule, McNamara and Thomas, above n 3, 242.
27 Daniel Livingstone, Jeremy Kemp and Edmund Edgar, ‘From Multi-User Virtual Environment to 3D Virtual Learning Environment’ (2008) 16(3) Association for Learning Technology Journal 139 (describing the development of ‘Sloodle’ which combines Moodle with Second Life to produce a dedicated virtual learning environment, as distinct from using the virtual world alone, which was not designed primarily as a learning environment).
28 Yule, McNamara and Thomas, above n 3, 235.
B. Benefits

Feedback from the pilot confirmed our expectations\(^\text{31}\) that students would benefit from having access to a simulated moot court in which to practise rather than practising ‘in front of a mirror or long suffering family and friends’, as one of our participants explained it. Interestingly, although certainly not surprisingly, two participants independently used the term ‘nerve wracking’ with reference to real life mooting, particularly the first experience in a court room. Although it goes without saying that this must be the experience of most students, it serves to emphasise again that providing some opportunity to practise in a simulation of a real court could only be of benefit, whether students are practising for assessment or for competitions.\(^\text{32}\)

Coupled with this, the opportunity to practise what one student referred to as the ‘interactive dynamic’ of mooting, such as by practising together with another student or group of students, was considered to be of value. At UWS, opportunities to practise advocacy are particularly important as bail applications and moots form part of compulsory assessment in core subjects,\(^\text{33}\) as well as several of our electives. Not all UWS mooters are seeking to compete or represent the University — many want to practise only for the purpose of upcoming assessments.

We were particularly interested in the feedback about Second Life allowing students to focus more attention on their vocal performance than they could in a real life moot. Those who have worked with first time or less experienced mooters will know that they often need to speak more slowly, pause more often, and that their clarity or diction frequently needs improvement.\(^\text{34}\) The potential for students to improve this aspect, perhaps even before their first moot, was something we had not anticipated as a benefit of a virtual moot court. Further, although our participants did not raise this directly themselves, we think it follows from their observations that Second Life could also be used as a training tool for students to get used to presenting their arguments without reading from a script — a really important step for new mooters in improving their overall performance.\(^\text{35}\)

The benefit of being able to moot, or to practise mooting, without having to travel came through very strongly in the pilot feedback, and we consider this to be one of the real strengths of virtual mooting.\(^\text{36}\) Surveys conducted at Queensland University of Technology also point to location as a significant impediment to participation in competition moots.\(^\text{37}\) When one considers the possibility of competing against overseas universities without having to travel, something that is impossible in real life, the potential benefits are even clearer. However, it is also important to consider whether Second Life has advantages over alternatives such as teleconferencing, Skype or other similar technologies.\(^\text{38}\) We prefer Second Life to videoconferencing because it is low cost to the student, and can be used from anywhere, including from home, without needing complex and expensive videoconferencing equipment. We acknowledge that Elluminate has a similar degree of portability and can also be recorded,\(^\text{39}\) but it is not free,\(^\text{40}\) and it requires a moderator which may make it less suitable for informal practice.\(^\text{41}\) Group videoconferences have recently become available in Skype and we will also be investigating that as an alternative platform for virtual mooting in future stages of this project.

We expect our virtual moot court will be used primarily by students for informal moot practices, possibly as part of a moot club presently being established by the UWS Law Students’

\(^{31}\) Sanson, Ireland and Rogers, above n 2, 252.

\(^{32}\) See Yule, McNamara and Thomas, above n 3, 240.

\(^{33}\) Criminal Law and Property Law.


\(^{35}\) Ibid, 84–5. See also Butler and Mansted, above n 29, 294.

\(^{36}\) On the use of computer-based simulations to facilitate remote communications see Koo, above n 29, 20.

\(^{37}\) Yule, McNamara and Thomas, above n 3, 240.

\(^{38}\) Ibid.


\(^{40}\) Pricing appears to vary according to the number of users and the package. Second Life, by comparison, is free for non-premium users.

Association. The UWS Virtual Moot Court will be available to these and other students to practise in if they cannot meet in person, without requiring staff involvement. As our primary objective is to support independent practice for internal assessment as well as for competition mooting, we consider Second Life to be the best fit with the uses we will be making of virtual mooting at UWS at present.

C. Opportunities for Cross-Disciplinary, Cross-Institutional and International Collaboration

The reader will probably have noticed the number of people whose help we have acknowledged in this paper. We have made excellent contacts with people both in Australia and overseas who we met in Second Life and almost certainly would not have met in the real world. Most are from other universities, and many work in other disciplines, but their help with vital aspects of our project has been uniformly generous. This was an aspect of the project that we did not fully anticipate at the outset, but it has become an especially positive feature for each of us. For those who remember the early days of the internet (1.0), there is a similar ‘pioneering’ feel about the use of Second Life in education, and a ready willingness to collaborate across institutions as well as across disciplines. As we proceed, we expect to continue widening our circle of contacts in this evolving area and we consider this to be a significant benefit of the project.

VI. THE FUTURE … WHERE TO FROM HERE?

A. Larger Scale Trial

As the initial pilot produced what we consider to be positive overall feedback from the participants, we will continue to explore the potential for virtual mooting in Second Life through a further trial, involving larger numbers of participants with different levels of exposure to both mooting and Second Life. In particular we will involve more students at the start of their degrees, ideally with no prior exposure to mooting, to assess how useful, or otherwise, they find the virtual moot court to practise in ahead of their first moot. The pilot participants’ comments about being able to give more attention to their speech, particularly their tone, pace and diction, disclosed a real benefit of Second Life that we had not previously anticipated and which we will be exploring further in our larger trial. We will also test the outcomes of the pilot to see whether they are confirmed by other students with similar levels of mooting experience to those who participated in the pilot.

As discussed above, technical problems with Second Life cannot be discounted at this point. This is another aspect we will be examining closely in our next trial, to establish whether these problems can be controlled sufficiently to allow use of the technology for more formal assessment or other purposes. One solution in fairly common use is to have Skype running in the background while using Second Life, with Skype providing the sound. At the time of the pilot, Skype did not support group video conferencing, only sound was available for more than two callers. Using Skype in combination with Second Life gave the sense of a real-time moot, with added sound reliability, that would not have been possible using either Skype or Second Life alone. However, with the release of group video conversations in Skype, as mentioned

43 See, for example, John Bransford and Drue Gawel, ‘Thoughts on Second Life and Learning’ (Foreword to Proceedings of the First Second Life Education Workshop, Second Life Community Convention, Fort Mason Centre, San Francisco, CA, August 18th – 20th, 2006.).
44 On the growth of interest in virtual learning environments in higher education around the globe, particularly in the UK and the US, see Salmon and Hawkridge, above n 23, 402–8.
45 Yule, McNamara and Thomas, above n 3, 240 make a similar recommendation, although indicating that the project at QUT will focus on comparing Elluminate with Second Life.
above, we will now give further consideration to the use we make of Skype in the next stages of this project.46

B. Construction of a Courtroom Simulation

The area in which virtual reality has arguably been used most effectively, outside gaming, is in the creation of simulations for various interactive training scenarios. Virtual simulations are in use in the United States space program and the military, as well as a host of medical, engineering and architectural uses47 and also in legal education.48 Maharg and Owen describe a fascinating simulation of a virtual Scottish town, called Ardcalloch, in which students in the Glasgow Graduate School of Law operate a virtual law firm as part of their professional legal education.49 On a more modest scale, we plan to develop a simulated version of a simple courtroom interchange with the Bench, perhaps part of a typical bail application, or even just making appearances, with a ‘bot’ as the judge. Shortened from ‘robot’, bots can be programmed with artificial intelligence (‘AI’) and could potentially be set up to ask mooters a range of set questions. This would allow students to practise and to familiarise themselves with the inside of a court room before attempting a real moot, but without requiring staff to act as judge. As Koo points out, this is an area where technology can solve problems with existing ‘in person’ simulations, such as moots, which can be difficult to arrange and expensive in view of the staff/student ratios they involve.50 Warburton identifies simulation as one of the most important affordances Second Life brings to higher education, allowing ‘reproduction of contexts that can be too costly to reproduce in real life, with the advantages that some physical constraints can be overcome’.51 A simple courtroom simulation of the type described above should also reap several of the other benefits identified by Koo and by Warburton, particularly those of ensuring a reliable, real-life experience52 that is both consistent and scalable.53

C. Virtual Moot Court Competition

Our pilot study indicated that it would be possible to conduct a moot competition in Second Life with other institutions, real-world time differences notwithstanding.54 We demonstrated that the technology could do what we wanted it to do (assuming all machines were working properly at the time); that students could use Second Life without significant difficulty, and that it worked over distances.55 Our next trial will accordingly be geared towards identifying requirements and devising suitable arrangements for UWS, ideally in collaboration with other institutions, to host an informal, trial version of a Virtual Moot Competition in Second Life in the later part of 2011. We would be very interested to hear from other Law Schools who might be interested in collaborating with us in such a trial.56 UWS has also recently adopted

47 Herrington, Reeves and Oliver, above n 24, 82–4.
48 Des Butler, above n 8.
50 Koo, above n 29, 16, 21.
51 Warburton, above n 19, 421.
52 On authentic learning see Herrington et al, above n 30.
53 Koo, above n 29, 21.
54 In order to help us with our pilot, Crystal was in-world at 4 am US time. Each of the authors has found attending conferences in-world usually requires us to be in-world in the very early hours to synchronise with US time. For an international moot, scheduling would need significant attention to make it work at least reasonably well for all concerned.
55 We have used Second Life to connect internationally, with Crystal in our pilot, to attend conferences, and Jennifer used her avatar to present at the 2010 ALTA conference in Auckland New Zealand, from Australia.
56 We can also be contacted in Second Life: Jennifer uses the name Charlotte Wandsloth, Michelle uses the name Lex Farshore and Paul uses the name PaulRogers Actor for their avatars.
the International Virtual Moot Competition from Murdoch University and our next trial of Second Life mooting will include an evaluation of whether that competition could be hosted in Second Life in the future.

VII. CONCLUSION

As Second Life, and its use in education, is arguably still in its first generation, it seems at least likely that the technology may improve in the future, as has been the case with the internet in general. While our pilot indicates there is potential for Second Life as a platform for virtual mooting, the interface, and particularly the sound, would need to be much more reliable, more realistic and more user-friendly before we could commit to using it for any compulsory assessment or to conduct formal competitions. We therefore advise against relying on Second Life for any form of compulsory assessment, at least until there are improvements in the reliability and useability of the platform. However, this does not mean it cannot be used to good effect for training and practice in mooting and advocacy, and we conclude from our pilot study that this is a use of Second Life we should investigate further. We will therefore conduct a larger scale trial, with a focus on use of the virtual moot court for practice and, potentially, on developing simulations to aid such practice. When, and if, suitable improvements are made to the platform, Second Life could also provide opportunities for students to compete in new types of mooting competitions, particularly involving international participation. The opportunity for us to collaborate with other disciplines and other institutions as we continue to evaluate this and alternative technologies for use in virtual mooting only adds to these benefits.

57 With many thanks to Associate Professor Kate Lewins and Dr Ken Shao from Murdoch University for hosting the IVM previously, and for their generous help during the transfer of the moot. See also Yule, McNamara and Thomas, above n 3, 237.
CRIMINALISATION OF CARTEL CONDUCT:
COMPELLING COMPLIANCE WITH ANTI-COLLUSION
LAWS

BRENDA MARSHALL*

Following the enactment of the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (Cth) (‘Cartel Conduct Act’), this article explains the key elements of the cartel provisions now found in Part IV Division 1 of the Trade Practices Act 1974 (Cth) (‘TPA’) and the features of the supporting administrative arrangements agreed between the Australian Competition and Consumer Commission (‘ACCC’) and the Commonwealth Director of Public Prosecutions (‘CDPP’). The article also reviews the contextual background to, and the arguments in favour of, a criminal enforcement regime for the regulation of cartel conduct as opposed to a civil regime underpinned by significant pecuniary penalties.

I. INTRODUCTION

Criminalisation of cartel conduct became a reality in Australia when the Cartel Conduct Act came into force on 24 July 2009. The enactment of this legislation has been widely applauded by those who support criminal penalties for ‘serious cartel conduct’, an umbrella term for anti-competitive arrangements between competing businesses involving price-fixing, market-sharing, output restrictions and bid-rigging.1 Certainly, such behaviour undermines the rivalrous competition on which a free market depends and has been rightfully condemned as a ‘cancer on the Australian economy’.2

Although no criminal cartel prosecutions have been instituted under the Cartel Conduct Act to date, it is timely to reflect on the place of this legislation in Australia’s regulatory landscape. Accordingly, this article explains the key elements of the cartel provisions now found in Part IV Division 1 of the TPA3 and the administrative arrangements to support their implementation agreed between the ACCC and the CDPP. Operationally, the cartel conduct regime depends on four interrelated instruments — the Memorandum of Understanding between the CDPP and the ACCC regarding Serious Cartel Conduct (2009)4, the ACCC’s Approach to Cartel Investigations (July 2009),5 the ACCC’s Immunity Policy for Cartel Conduct (July 2009)6 and

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2 ‘ACCC Chiefs Past and Present in Stand Against Price Fixing’, CCH News Headlines (Sydney), 25 June 2007, quoting the Chair of the ACCC, Mr Graeme Samuel.

3 Courtesy of the Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth), the TPA will be renamed the Competition and Consumer Act 2010 (Cth) as from 1 January 2011.

4 Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct (2009) (hereafter ‘MOU’).


the CDPP’s Annexure to the Prosecution Policy of the Commonwealth (November 2008) — the scope and effect of which are outlined in the article.

To begin with though, the article reviews the steps toward, and the arguments in support of, a criminal enforcement regime for the regulation of cartel conduct as opposed to a civil regime underpinned by significant pecuniary penalties.

II. PATH TO CRIMINALISATION

In June 2001, the then Chairman of the ACCC, Professor Allan Fels, began championing the introduction of criminal penalties for ‘hard core breaches’ of Part IV of the TPA.9 Within a year, during which the Howard Government constituted the Trade Practices Act Review Committee (‘the Dawson Committee’)9 and charged it with reviewing Australia’s competition laws,10 the ACCC was formally calling for criminal sanctions to operate in conjunction with the prevailing civil penalty regime.11 The ACCC’s reasoning was simple and direct: civil penalties are not strong enough and other countries have already taken this step.12

The Dawson Committee was persuaded. A critical recommendation in its report, Review of the Competition Provisions of the Trade Practices Act (‘Dawson Report’), released in April 2003, was that criminal penalties, including imprisonment, should be introduced into the TPA for ‘serious’ cartel behaviour.13 Other significant recommendations contained in the report were that the TPA should be amended by increasing the amount of existing civil pecuniary penalties, by preventing corporations from indemnifying their officers for payment of pecuniary penalties, and by granting courts the power to disqualify individuals found to have contravened the TPA from managing a corporation.14

The immediate reaction of the Commonwealth Government was to accept ‘in principle’ that criminal penalties could provide more effective deterrence of cartel conduct than civil penalties.15 Yet it was February 2005 before the then Treasurer, the Honourable Peter Costello MP, announced planned amendments to the TPA which would introduce criminal sanctions for serious cartel conduct.16

A further two and a half years drifted by without any amendments materialising. Then, suddenly and quite independently, circumstances evolved to create a real impetus for change. By late 2007, the ACCC’s action for price-fixing in the corrugated fibreboard packaging industry against the Visy corporation and its billionaire owner, Mr Richard Pratt,17 had become a media sensation, with much of the attention focused on government inaction since the release of the Dawson Report more than four and a half years previously.18 No doubt sensing the opportunity, new ACCC Chairman, Mr Graeme Samuel, continued to reiterate his agency’s earlier calls for criminal sanctions.19

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9 Named for its chair, former High Court Justice Sir Daryl Dawson.
14 Ibid recommendation 10.2.
17 ACCC v Visy Industries Holdings Pty Ltd (No 3) [2007] FCA 1617.
In this environment, the political momentum shifted too. During the October-November 2007 Federal election campaign, the Opposition promised the introduction of criminal cartel penalties within the first twelve months of a Labor Government.20 In January 2008, the newly elected Rudd Government released the exposure draft of the proposed Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth). Some eighteen months later, the Bill was passed into law.

In contrast, the other important recommendations of the Dawson Committee noted above were acted on with a greater sense of urgency. The Trade Practices Legislation Amendment Act (No 1) 2006 (Cth) increased the civil pecuniary penalties for corporations from a maximum of $10 million to the greater of $10 million, three times the benefit gained from the contravention, or if that cannot be determined, 10% of the annual turnover of the corporation during the period of 12 months ending at the end of the month in which the contravention occurred.21 The maximum pecuniary penalty for individuals remained unchanged at $500,000.22

The 2006 amendments also gave the courts the power to disqualify individuals in breach of the TPA from managing a corporation.23 Since 1 January 2007, these measures have supplemented other remedies the ACCC can seek for contraventions of Part IV, such as declarations of unlawfulness,24 injunctions banning repeat conduct,25 damages for those who have suffered loss,26 orders for community service27 and adverse publicity orders.28

III. Why Criminalisation?

The principal justification for the introduction of criminal penalties for cartel conduct is that this will provide more effective general deterrence than civil penalties for first time offenders. As a general rule, effective deterrence will be achieved if the penalties for contravening a law exceed the gains from its violation. In legislating against cartel conduct, the concern has always been that civil pecuniary penalties, when combined with the small risk of detection of cartel activities, do not meet this requirement, so that alternative sanctions need to be considered.29 Although some researchers have found that the seriousness of the penalty does little to increase deterrence of many kinds of crime,30 white-collar crime appears to be an exception.31 This is because white-collar crime offenders are more inclined to undertake a rational cost-benefit analysis of their actions, carefully factoring in the severity of potential punishments.32

This analysis has even greater force when the possibility of criminal sanctions, particularly imprisonment, is introduced into the equation.33 A criminal conviction severely damages the defendant’s image and reputation, and the associated stigma and negative publicity far outweigh the inconvenience and embarrassment of an adverse decision in a civil proceeding.34 For senior executives, the thought of imprisonment is especially ‘abhorrent’ and too great a risk to run.35

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21 TPA s 76(1A)(aa).
22 TPA s 76(1B).
23 TPA s 86E.
24 TPA s 163A.
25 TPA s 80.
26 TPA s 82.
27 TPA s 86C.
28 TPA s 86D.
31 Clarke, above n 29, 148.
32 Ibid 149; Hoel, above n 1, 109.
33 Clarke, above n 29, 151; Graeme Samuel, ‘The ACCC Enforcement Perspective on Serious Cartel Conduct’ (2009) 17 Trade Practices Law Journal 244, 244.
34 Comino, above n 29, 438.
35 Calvani and Calvani, above n 1, 132.
In short, the argument here is that the threat of criminal sanctions, particularly incarceration, is more likely to provide effective deterrence against cartel conduct than any amount of pecuniary penalties.

Another important justification for criminalising cartel conduct is that this will promote fairness and consistency with other forms of white-collar crime. The question has to be asked: why should cartel conduct be exempt from criminal sanctions while other white-collar crimes in Australia attract criminal penalties? It is challenging to think of any reason at all, when ‘hard core collusion ... is a form of theft and little different from other white-collar crimes (including insider trading and obtaining a benefit by deception) that already attract criminal sentences.’

The analogy of cartel conduct with common theft is a powerful one. Indeed, it has been pointed out although a common thief may cost an individual victim a few thousand dollars, cartel conduct often costs multiple victims combined losses running into millions of dollars. From this perspective, it is difficult to see why the thief is subject to criminal law, while the business executive who participates in cartel conduct remains immune from criminal sanctions. The criminalisation of cartels goes some way towards redressing this inequality.

Bringing Australia into line with international best practice is the third line of argument typically advanced in support of the criminalisation of cartel conduct. Cartel activity is unlawful in over 100 jurisdictions around the world, with sanctions ranging from quasi-criminal and financial penalties levied on businesses and individuals, to criminal fines and imprisonment. A number of advanced economies, including the United States, Canada, United Kingdom, Ireland, France, Germany, Norway, Japan and South Korea, provide for criminal fines and gaol terms for the contravention of their cartel provisions, while also permitting concurrent civil remedies.

**IV. Cartel Conduct Provisions**

**A. Criminal/Civil Regime**

The new Part IV Division 1 of the TPA, as introduced by the Cartel Conduct Act, attempts to define cartel conduct with specificity. Pursuant to s 44ZZRD, a ‘cartel provision’ is a provision of a contract, arrangement or understanding between parties that are, or are likely to be, in competition with each other which has, or is likely to have, the purpose or effect of:

- fixing prices for the supply, re-supply or purchase of goods or services; preventing, restricting or limiting production of goods or capacity to supply goods or services;
- allocating customers, suppliers and geographical areas in connection with the supply or purchase of goods or services; or
- bid-rigging.

Section 44ZZRF of the Cartel Conduct Act then criminalises making a contract or arrangement, or arriving at an understanding, that contains a cartel provision; and s 44ZZRG criminalises giving effect to a contract, arrangement or understanding that contains a cartel provision. The equivalent civil penalty provisions are found in ss 44ZZRJ and 44ZZRK, which, respectively, render it a contravention of the TPA to make a contract or arrangement, or arrive at an understanding, that contains a cartel provision or give effect to a contract, arrangement

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36 Clarke, above n 29, 152.
37 See TPA Part VC for examples of deceptive practices that lead to criminal sanctions under the TPA.
39 Clarke, above n 29, 152.
40 Comino, above n 29, 429.
41 Clarke, above n 29, 154.
or understanding that contains a cartel provision. This arrangement is intended to permit a "proportionate" response, with criminal prosecution targeted at serious cartel conduct, while minor conduct is pursued civilly.  

The distinguishing feature between the criminal and civil penalty provisions is the so-called 'fault' element inherent in ss 44ZZRF and 44ZZRG of the *Cartel Conduct Act*. Drawing on principles of criminal responsibility under the *Criminal Code Act 1995* (Cth), these sections require that the corporation intended to make or give effect to a contract, arrangement or understanding containing a cartel provision and knew or believed that the contract, arrangement or understanding contained a cartel provision. It is also necessary to prove the offences beyond reasonable doubt and obtain a unanimous verdict of the jury. The lesser civil provisions do not involve any element of knowledge or belief, and the corresponding standard of proof is on the balance of probabilities.

Clearly, ss 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK of the *Cartel Conduct Act* have been drafted with the longstanding civil provision in s 45(2) of the *TPA* in mind. This will permit guidance from existing precedents and provide businesses with a general sense of the conduct to be avoided.

Section 45(2)(a)(ii) of the *TPA* prohibits making a contract or arrangement, or arriving at an understanding, if a provision of the proposed contract, arrangement or understanding has the purpose, effect or likely effect of substantially lessening competition; and s 45(2)(b)(ii) of the *TPA* prohibits giving effect to a provision of a contract, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition.

In contrast to the cartel conduct provisions, these are not *per se* prohibitions, but are linked to certain requirements in respect of a substantial lessening of competition.

**B. Sanctions**

Strengthened civil sanctions have applied to parties in breach of s 45(2) of the *TPA* since 1 January 2007. Corporations are principally liable and face pecuniary penalties capped at $10 million, or three times their gain from the illegal conduct, or, where the gain cannot be readily ascertained, 10% of their annual turnover during the 12 month period ending at the end of the month in which the conduct occurred — whichever is greatest. Individuals may be liable as accessories ‘involved in’ a contravention of the *TPA*, incurring pecuniary penalties of up to $500,000.

These penalties apply equally to all parties in breach of the new civil cartel conduct provisions in ss 44ZZRJ and 44ZZRK of the *Cartel Conduct Act*, and also to corporations found criminally liable under ss 44ZZRF and 44ZZRG, although the language in the latter provisions changes to ‘fine’. Individuals convicted of involvement in the criminal cartel

44 MOU, above n 4, [1.2].
45 Pursuant to the *Criminal Code Act 1995* (Cth) ch 2, a person has ‘knowledge’ of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events. The term ‘belief’ is not defined, but presumably refers to a level of awareness less than knowledge.
46 Approach to Cartel Investigations, above n 5, [6].
47 The composite expression ‘contract, arrangement or understanding’ is thus a familiar one. These three concepts have been held to represent ‘a spectrum of consensual dealings’, with the term ‘contract’ apt to describe a more formal agreement, consistent with its general law meaning, while ‘arrangement’ suggests something looser than ‘contract’, and ‘understanding’ implies something even looser than ‘arrangement’: *ACCC v Leahy Petroleum Pty Ltd* [2007] FCA 794, [24]–[27] (Gray J). Interestingly, however, the case law to date reveals no material distinction between the two latter terms. In fact, the balance of authority is that both ‘arrangement’ and ‘understanding’ involve a ‘meeting of minds’, requiring communication between the parties and commitment to a course of action, rather than a mere hope or even an expectation that a course of action will be followed: *Apco Service Stations Pty Ltd v ACCC* [2005] FCAFC 161, [45] (Heerey, Hely and Gyles JJ).
48 *TPA* s 76(1A)(aa).
49 *TPA* s 75B(1).
50 *TPA* s 76(1B).
51 *TPA* ss 76(1A) and 76(1B).
52 *TPA* ss 44ZZRF(3) and 44ZZRG(3).
offences in ss 44ZZRF and 44ZZRG face maximum penalties of imprisonment for 10 years and/or a fine of $220,000.53

In so far as the monetary penalty for individuals has been set higher for a civil cartel provision contravention than for the contravention of a criminal provision, this discrepancy reflects the likelihood that a period of incarceration will be imposed in the latter instance and recognises the broader ramifications of a criminal conviction for an individual.54

C. Exceptions

Authorisation of a cartel provision is available under s 44ZZRM of the Cartel Conduct Act. Additionally, the new regime provides a limited number of statutory exceptions to a charge of either criminal or civil cartel conduct.

Under s 44ZZRL of the Cartel Conduct Act, an exception to a criminal or civil charge of cartel conduct arises where notification of collective bargaining is provided to the ACCC. In these circumstances, a corporation may not be considered to have committed prohibited conduct while the notice is in force.55 The provision stipulates that for the purposes of obtaining such notification, a corporation must supply the ACCC with the particulars of the relevant contract, arrangement or understanding.56 The defendant bears the evidential burden when relying on this exception.57

Pursuant to s 44ZZRN of the Cartel Conduct Act, it is an exception to a criminal or civil cartel provision charge to show the contract, arrangement or understanding is exclusively between related bodies corporate. If it can be shown that the only parties to the contract, arrangement or understanding are bodies corporate that are all related to each other, the contract, arrangement or understanding will not be regarded as anti-competitive for the purposes of the TPA.58 Again, the evidential burden lies with the defendant.59

Section 44ZZRO of the Cartel Conduct Act creates an exception to a criminal cartel charge if the cartel provision is for the purposes of a joint venture established for the production and/or supply of goods or services. Section 44ZZRF does likewise in respect of a civil cartel charge. Once more, the defendant bears the evidential burden under these provisions.60

V. ADMINISTRATIVE FRAMEWORK

A. Investigation and Prosecution of Cartel Conduct

The Memorandum of Understanding between the ACCC and CDPP outlines the respective roles of these agencies in dealing with cartel conduct. Much of the content of the Memorandum of Understanding is repeated in the ACCC’s Approach to Cartel Investigations.

According to these documents, the ACCC must investigate each instance of alleged cartel conduct to determine whether or not it is ‘serious’.61 In making this determination, the ACCC examines the following factors:62

- Duration — was the conduct longstanding?
- Detriment — did the conduct cause a substantial detriment to consumers?
- Past history — do the alleged participants have a history of participating in cartel conduct?

53 TPA s 79(1). Note, also, the effect of s 6(2)(b) of the TPA and the Schedule version of Part IV of the Cartel Conduct Act in extending principal liability under ss 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK of the TPA to persons who are not corporations.
54 Explanatory Memorandum to the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) [2.45]–[2.49].
55 TPA s 44ZZRL(1)(c).
56 TPA s 44ZZRL(1b).
57 TPA s 44ZZRL(2).
58 TPA s 44ZZRN(1).
59 TPA s 44ZZRN(2).
60 TPA ss 44ZZRO(1)–(1B) and 44ZZRP(2).
61 MOU, above n 4, [2.3]; Approach to Cartel Investigations, above n 5, [8], [10].
62 MOU, above n 4, [4.4]; Approach to Cartel Investigations, above n 5, [14].
• Value of affected commerce or bids — did it exceed $1 million within a 12-month period?

If the conduct is not considered to be serious, the ACCC will pursue the matter itself under the civil cartel provisions of the TPA.63 If the conduct is found to be serious, the matter will be referred to the CDPP, who must then decide whether to prosecute under the TPA’s criminal cartel provisions.64 Where conduct leads to both civil and criminal actions, the ACCC and CDPP have agreed to manage this ‘in an integrated fashion’.65

The CDPP’s decision to prosecute is guided by the two ‘pillars’ of its Prosecution Policy:66 (i) whether there is sufficient evidence to prosecute the case with reasonable prospects of conviction;67 and (ii) whether the public interest requires a prosecution.68 Of course, it is always open to the ACCC to pursue a civil case if the CDPP decides not to commence a criminal prosecution.69

Both the ACCC and the CDPP regard criminal cartel prosecutions as ‘non-negotiable’. The ACCC takes the view that a party will not be permitted to seek to ‘trade-off’ a possible criminal prosecution with civil settlement.70 Similarly, the CDPP’s Prosecution Policy stipulates that charges should not be laid with the intention of providing scope for subsequent charge negotiation.71

B. Immunity Policy

Given the secretive and deceptive nature of cartels, the ACCC relies on its Immunity Policy for Cartel Conduct72 to assist in the detection of cartel conduct. In other words, the prevailing justification for letting culpable participants of cartels ‘off the hook’ is that the illegal conduct would otherwise go undetected. While some might argue that the benefits afforded to an immunity applicant are too great, the prosecution of cartel participants provides prospective plaintiffs with an opportunity to recover their loss. If the cartel remained a secret, this opportunity would not exist and losses would continue to flow.73

As agreed between the ACCC and the CDPP, all requests for immunity from civil and criminal proceedings are received by the ACCC and assessed in accordance with its Immunity Policy for Cartel Conduct.74 The ACCC decides on civil immunity and makes a recommendation to the CDPP if the application relates to criminal immunity.75 Although the CDPP exercises an independent discretion on this question,76 Annexure B (‘Immunity from Prosecution in Serious Cartel Offences’) to the Prosecution Policy of the Commonwealth stipulates that the CDPP must apply the same criteria set out in the ACCC’s Immunity Policy for Cartel Conduct.77

Accordingly, with the exception of the cartel ringleader, a party involved in a cartel, who did not coerce others to participate in the cartel, will be eligible for immunity where that party is the first ‘whistleblower’ to approach the ACCC, admit its conduct, cease its involvement in the cartel, and agree to disclose all information and fully cooperate with investigations.78

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63 MOU, above n 4, [4.3]; Approach to Cartel Investigations, above n 5, [21].
64 MOU, above n 4, [2.2]; Approach to Cartel Investigations, above n 5, [12].
65 MOU, above n 4, [6.2]; Approach to Cartel Investigations, above n 5, [32].
68 Ibid [2.10] — itemises twenty-four factors relevant to this issue.
69 Approach to Cartel Investigations, above n 5, [21].
70 Ibid [38].
71 Prosecution Policy, above n 66, [2.21].
72 Immunity Policy, above n 6.
73 Reid and Henderson, above n 42, 202.
74 MOU, above n 4, [7.2]; Immunity Policy, above n 6, [3].
75 MOU, above n 4, [7.2].
76 Ibid; Immunity Policy, above n 6, [4].
77 Annexure to Prosecution Policy, above n 7, [1.3].
78 Immunity Policy, above n 6, [9]; [17].
VI. CONCLUSION

Criminal cartel provisions are now in force in Australia under the *TPA*. In the main, their introduction has been justified by the apparent failure of the *TPA*’s civil enforcement regime to provide sufficient deterrence of cartel behaviour.

Of course, it is interesting, if speculative, to ponder whether the potential of the civil provisions was ever fully exploited. Although the pecuniary penalties available under the *TPA* were strengthened on 1 January 2007, the mean of corporate penalty levels have remained low. With courts reticent to penalise at maximum levels, it is difficult to refute claims that the civil penalty regime has failed to provide an effective deterrence of cartel conduct.79

Even the record pecuniary penalties incurred in the *Visy* case have been criticised as insufficient.81 The total sum of $36 million imposed on the Visy corporation for 37 breaches of the *TPA* translates into just under $1 million for each of the contraventions, a mere 10% of the statutory maximum applicable at the time.82 One might have thought that ‘the most serious cartel case to come before the courts in 30 years’83 would have warranted pecuniary penalties that pushed the upper limits of those allowed.84

At the individual level, the very factors that render business executives vulnerable to cartel-busting regimes — concerns about their career, wealth, social standing and good name — are, ironically, often the same reasons why courts are lenient towards them when collusion is known.85 To advocate criminal sanctions as the solution is to assume that the same judges who are reluctant to impose corporate penalties close to the legislated maximum will be willing to send corporate executives to gaol.86 Only test cases will reveal whether this assumption is naïve. At present, with the first criminal cartel prosecution yet to be instigated, it is impossible to know whether the theory behind the introduction of criminal sanctions will be matched in practice by any regularity and/or severity in their application.87

Moreover, the debate is not just about criminal sanctions versus pecuniary penalties. This is too narrow a perspective, when a range of other remedies exists under the *TPA*, including orders for community service and disqualification from participation in the management of a corporation. Arguably, these options have not been sufficiently utilised to date.88 Effective deterrence of cartel conduct depends on the regulatory authorities and the courts taking full advantage of the cache of penalties available to combat cartels.

79 ‘Campaign against Cartels Denounced as all Talk’, *The Sydney Morning Herald* (Sydney), 22 February 2008, 3.
81 Ibid 15.
82 Ibid.
83 *ACCC v Visy Industries Holdings Pty Ltd (No 3) [2007] FCA 1617*, [320] (Heerey J).
84 Beaton-Wells and Brydges, above n 80, 15.
85 Castle and Writer, above n 12, 24.
86 Beaton-Wells and Brydges, above n 80, 22.
87 Castle and Writer, above n 12, 25.
88 Ibid.
The early months of 2010 have not proved propitious for regulators but, contrary to commentary and criticism, there has been persistence in legal action against perceived ‘corporate wrongdoers’. Two high profile pursuits, in Australia and Ireland, illustrate the cost in investigation and court time in proceeding with these actions in the public interest. The decisions in these instances rest partially on judicial evaluation of the price sensitivity of corporate information and the legal interpretation of the ‘materiality’ test in both codes. Discussion was also focused on the supportive role of legal oversight and advice, and whether corporate intent and the honesty of directors measured up to the standards required by law.

I. INTRODUCTION

This paper discusses three important issues relating to securities law in the context of both the above cases; one resulting from a prominent Irish case and the other a contentious decision in the Australian courts. The issues emerge from similarities between the two cases. Each case illustrates the difficulty in enforcing regulation that is dependent on definitions, particularly those of ‘price sensitivity’ or the ‘material effect’ of specific information on a company’s share price.

The ongoing debate concerning the judicial interpretation of ‘materiality’ in this context contributes to the considerable risk for a regulator in undertaking an action for breach of either the insider trading or continuous disclosure provisions. In Australia, each of these provisions relies on a complex analysis of the likely ‘material effect’ from the point of view of a ‘reasonable investor’. However, the Irish Supreme Court decision endorses the advantage of applying a straightforward ‘material effect’ test. A further two issues arise in both the cases discussed in this paper: the relevant decision taken by the company’s director regarding the corporate information is based on ‘legal advice’; and, is thereby construed as an action taken ‘reasonably and honestly’.

In 2006 in the Federal Court in Perth, the Australian Securities and Investments Commission (ASIC) sought civil penalties against Fortescue Metals Group Limited (FMG), a listed mining company, and for the first time against an individual, the chief executive, for being knowingly involved in the company’s continuous disclosure contravention. These proceedings were dismissed by the Federal Court in December 2009. The court found that FMG had a genuine and reasonable basis for the opinion that underpinned its disclosures, and this was reasonably and honestly held by the company’s board and chief executive. ASIC, after assessing these
findings of Gilmour J,6 filed a notice of appeal on 4 February 2010. Among other issues, ASIC believes that the findings ‘warrant review by an appeal court’ as they raise important questions ‘as to the proper interpretation and application of provisions of the Corporations Act 2001 that govern company announcements such as…the continuous disclosure provisions’.7

Just over two weeks prior to this notice of appeal by the Australian regulator, the corporate regulator in Ireland also received a setback. This other high profile case had been running in the Irish courts for a decade and concerned the sale of shares in Fyffes plc by a former director who at the time was in possession of confidential board information. In the most recent development, the Irish High Court released the ‘Report of its Inspector’ on 19 January 2010 (the investigation by an inspector had been requested in the ‘public interest’ by the Director of Corporate Enforcement, the Irish equivalent of ASIC).

II. THE FYFFES CASES

A. ‘Material Effect’: Irish High Court Decision8

Fyffes plc (‘Fyffes’), the issuer of the securities, and DCC plc (‘DCC’) were listed on the Irish Stock Exchange and also the London Stock Exchange. Fyffes alleged that one of its non-executive directors, James Flavin, who later resigned from the board of the company, had dealt in Fyffes’ shares in advance of a profit correction being announced by Fyffes to the Stock Exchanges. This sale of more than 31 million Fyffes’ shares in February 2000 was potentially an unlawful insider dealing within the meaning of Part V of the Companies Act 1990 (IE).

The transactions were investigated by the stock exchanges but neither the Director of Public Prosecutions in Ireland nor the corporate regulator took action at this time. As a result, a civil liability action was taken by Fyffes against one of its own directors, James Flavin, and the company he had founded, DCC. The decision at first instance in the High Court rested on the judicial interpretation of price sensitivity of the information and whether the defendant knew that the information could have a material effect on the price of Fyffes’ shares at the time of the transaction. The specific information contained in the reports to the board was not generally available, so it was the materiality or price sensitivity of the information that was contentious.9

Applying the ‘reasonable investor’10 test in the 2005 Irish High Court decision,11 Laffoy J found that the relevant information had no material effect as it was not ‘price sensitive’12 and therefore could not provide the basis of a claim for insider trading. In her decision, Laffoy J

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9 Report of the Inspector, above n 8, [12.1.4] — in July 2008, Kelly J gave judgment in which he agreed with the Director that the appointment of an inspector was in the ‘public interest and was not disproportionate’.
11 Ibid 228–9.
12 The corresponding test in the Australian legislation is: Corporations Act 2001 (Cth) s 1042D:
   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.
14 The meaning of ‘price sensitive’ in this context is taken to equate to the materiality of the information or its ‘material effect’ on the price or value of the relevant securities.
pointed out that there was very little guidance in the statute as to how the price sensitivity test in section 108(1) of the Irish Companies Act 1990 (IE)\(^1\) should be applied and, as this was the first claim for civil remedies, there was no authority within the jurisdiction to assist the Court.\(^1\)

Laffoy J handed down her decision on 21 December 2005 in which Fyffes failed in its petition for €106 million compensation for the alleged insider dealing by Flavin and DCC. Laffoy J concluded that the defendant was not in possession of price sensitive information at the date of the share sales. It followed that the Fyffes share transactions by Flavin in February 2000 were not unlawful under section 108 of the Companies Act 1990 (IE) and no civil liability arose under section 109.\(^1\) Fyffes announced on 8 April 2006 that it would appeal against this single finding of the decision to the superior court, the Irish Supreme Court.

**B. Material Effect: Irish Supreme Court Appeal Decision**\(^1\)

In 2007, Fyffes succeeded as all five justices of Ireland’s highest court unanimously allowed the appeal against Flavin and DCC.\(^1\) Damages, considerably less than the compensation claimed at first instance, were awarded to Fyffes, costing DCC over €42 million in costs and compensation. The Supreme Court had deemed that the “reasonable investor” test was inappropriate and, in the words of Fennelly J, “[Laffoy J] should have adopted a straightforward test of market effect”.\(^1\) The High Court had erred in using this test and the ‘reasonable investor’ concept was of no assistance as ‘it was derived from the jurisprudence of the United States and was developed in relation to a quite different statutory regime with differently worded provisions’.\(^1\)

Denham J in the Supreme Court had abandoned the ‘reasonable investor’ test for insider trading as it was construed by Laffoy J in the High Court. He reasoned that it was more appropriate to apply a retrospective (ex post) test of materiality by viewing the impact of the information on the share price of the relevant securities once the information had been made available to the market.\(^1\)

The real issue was the effect of the information on the share price in the market and Laffoy J in the High Court had ‘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 … was ultimately released to the market’.\(^1\) The earlier High Court decision had rejected the post-disclosure events as having no evidential value and had relied on the opinion of experts. However, the Supreme Court conceded that:

> while expert evidence is of value, where, as here, there are serious conflicts in the same, the court may have to rely on common sense. In this regard post-disclosure market events, properly evaluated, constitute objective evidence.\(^1\)

\(^1\) Fyffes plc v DCC plc [2005] IEHC 477, 22–3, 30–1. Section 108 of the Irish Companies Act 1990 (IE) declares that:

> It shall not be lawful for a person who is, or at any time in the preceding 6 months has been, connected with the company to deal in any securities of that company if by reason of his so being, or having been, connected with that company he 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.

\(^1\) Fyffes plc v DCC plc [2005] IEHC 477, 206.

\(^1\) Ibid 366–7.

\(^1\) Fyffes plc v DCC plc [2007] IESC 36.

\(^1\) Fyffes plc v DCC plc [2007] IESC 36, 7(iii).

\(^1\) Report of the Inspector, above n 8, [11.3.5].

\(^1\) Fyffes plc v DCC plc [2007] IESC 36, 88.

\(^1\) Ibid 22. TSC Industries Inc v Northway Inc 426 US 438–49 (1976) 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’.

\(^1\) Fyffes plc v DCC plc [2007] IESC 36, 7(iii).

\(^1\) Ibid 88.

\(^1\) Ibid.
This was the basis of an *ex post* simplified ‘material effect’ test as set out in section 108(1) of the *Companies Act 1990* (IE). Denham J concluded:

> 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. For all these reasons I am satisfied that the information was price sensitive. This finding determines the appeal. For the reasons given I would allow the appeal.\(^{27}\)

**C. Report of the Irish High Court Inspector\(^{28}\)**

It had already been determined by the Supreme Court on appeal that Flavin and DCC had breached the insider dealing provisions. However, the Director of Corporate Enforcement\(^{29}\) remained concerned that others, in addition to Flavin, may have facilitated the share transactions and could have been implicated in the ‘insider dealing’.\(^{30}\) The role of the Director was to ensure the highest standards of corporate compliance in Ireland: ‘He is both a corporate “policeman”, ensuring compliance with the requirements of the Companies Acts, and the enforcer of good corporate behaviour and governance’.\(^{31}\) The Director’s authority included the power to apply to the High Court for the appointment of an Inspector to investigate issues in the ‘public interest’.\(^{32}\)

On 19 January 2010 the Irish High Court released the report of its Inspector, as requested by the Director of Corporate Enforcement. The Inspector noted that ‘at the root of the application to appoint Inspectors lay a suggestion that DCC and its officers and directors did not take their compliance obligations seriously’.\(^{33}\) The Inspector’s approach was more lenient. Although the Supreme Court held that Flavin had been in possession of price sensitive information at the time of dealing, the Inspector believed that Flavin’s was an error of appreciation and judgment: judgment as to what the Supreme Court would find as a matter of law to constitute ‘price sensitive’ information. Flavin’s conclusion that he was not in possession of price sensitive information had a rational, if legally wrong, basis.\(^{34}\)

1. ‘Honesty and Integrity’

The Inspector also agreed with the findings of Laffoy J in the earlier High Court decision that there was no evidence of dishonesty on the part of Flavin or DCC: ‘I did not understand the Plaintiff to assert dishonesty on the part of any of the Defendants. In any event, I find that dishonesty was not established on the Evidence.’\(^{35}\)

The Inspector concluded that ‘... on the basis of all the evidence which I have heard from all of the witnesses and from Mr Flavin himself, that there was no deliberate wrongdoing or dishonesty on his part’.\(^{36}\)

In spite of the Supreme Court decision, the Inspector supported the earlier findings of Laffoy J in the High Court that although Flavin was in possession of the confidential information at the time, he had not used or relied on the Fyffes trading ‘information in dealing and, further, that the information did not in any way motivate the share sales are findings which I believe have been surprisingly overlooked’.\(^{37}\) These were considered important findings with regard to the reputation of Flavin and DCC and the investigation into the Fyffes share sales were said to

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26 Ibid 31.
27 Ibid 32.
29 Director of Corporate Enforcement, Paul Appleby.
30 Report of the Inspector, above n 8, [11.3.1]–[11.3.3].
31 Ibid [12.1.1].
32 Ibid [12.1.4].
33 Ibid [12.1.5].
34 Ibid [11.3.87]–[11.3.88].
37 Ibid [11.3.90].
‘reflect the honesty and integrity’ of all the DCC officers and directors interviewed during the investigation.  

2. ‘Rational, if Legally Wrong’

The Inspector was satisfied that Flavin had maintained the confidentiality of the Fyffes reports and only communicated the trading information in discussions with the compliance officer and the company solicitor. The Inspector considered it was to Flavin’s credit that he sought legal advice when it was appropriate and ‘followed such advice when it was offered’. Unfortunately, Flavin’s conclusion that ‘he was not in possession of price sensitive information had a rational, if legally wrong, basis’. This third chapter in the Fyffes saga appears to have reached a conclusion when the Director of Corporate Enforcement admitted that the inquiries were ‘at the end of the road’. The Director acknowledged the Inspector’s findings that DCC directors had followed advice from a ‘trusted’ legal adviser to the company:

If, as the Inspector has found, the directors were quite entitled to do that — even if the legal advice was wrong — there is very little I can do. There’s no way that any court would sanction a director for having followed the company’s legal advice. This is at an end, really, at this stage.

Will a similar obituary apply to the Fortescue case in Australia?

III. THE FORTESCUE CASE

A. Australian Securities & Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586

On 2 March 2006 in the Federal Court in Perth, ASIC initiated proceedings seeking civil penalty orders of up to $3 million against Fortescue Metals Group Limited (‘FMG’), a mining company listed on the Australian Securities Exchange (‘ASX’). In an unprecedented action, the regulator also sought penalties of up to $600,000 against Andrew Forrest, the chief executive, for being knowingly involved in the company’s continuous disclosure contravention. Following a referral from the ASX, the regulator commenced its investigation in May 2005. ASIC alleged that Andrew Forrest had failed to ensure that FMG complied with its disclosure obligations, which would have prevented misleading and deceptive conduct regarding various contracts with Chinese parties. The continuous disclosure obligations were said to have been breached on 23 August and 5 November 2004.

38 Ibid [11.3.90].
39 Ibid [12.1.15].
40 Ibid [12.1.6].
41 Ibid [11.3.87]–[11.3.88].
44 Civil penalties are available for contravention of the amended continuous disclosure provision, Corporations Act 2001 (Cth) s 674(2) Note 2: this subsection is also a civil penalty provision (see s 1317E of Corporations Act 2001 (Cth)): For relief from liability to a civil penalty relating to this subsection, see s 1317S. Section 674(2) of the Corporations Act 2001 (Cth) is a civil penalty provision under the extended s 1317E(1)(ja). Civil penalties and compensation provide an alternative to criminal liability and Schedule 3 penalties. Section 1317E of the Corporations Act 2001 (Cth) was amended effective 11 March 2002.
45 Corporations Act 2001 (Cth) s 674(2A) Contravention by an individual — A person who is involved in a listed disclosing entity’s contravention of s 674(2) contravenes this subsection; Note 2: s 79 defines involved — A person is involved in a contravention if, and only if, the person: (a) has aided, abetted, counselled or procured the contravention; or (b) has induced, whether by threats or promises or otherwise, the contravention; or (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or (d) has conspired with others to effect the contravention.
ASIC filed a new statement of claim against FMG on 27 April 2006 to include reference to an ASX announcement of 8 November 2004.\(^{47}\) As with the Director of Corporate Enforcement in his application to the Irish High Court,\(^{48}\) ASIC believed that this action was in the ‘public interest’ as ‘keeping markets properly informed underpins confidence in the integrity of our markets and in doing so, it assists in keeping the cost of capital low which is important as our companies recapitalise.’\(^{49}\)

Proceedings commenced on 6 April 2009 before Gilmour J and were dismissed by the Federal Court on 23 December 2009. It was found that neither Andrew Forrest nor FMG had engaged in misleading and deceptive conduct or failed to comply with continuous disclosure obligations.\(^{50}\)

The primary issue before the court was the company’s obligation to disclose information to ASX under section 674 Chapter 6CA Corporations Act 2001 (Cth) concerning the feasibility study of a mining project and the legal effect of related agreements. Other issues that occupied the court’s attention, as had also been the case with \textit{Fyffes},\(^{51}\) were whether an \textit{ex ante} or \textit{ex post} inquiry was the correct approach for the materiality test. In addition, the court deliberated whether FMG had received legal advice concerning the effect on the share market of its agreements and disclosure obligations.\(^{52}\)

### B. Issue of Materiality

Although the court found that relevant information was not of the kind that FMG ought to have been aware and therefore the company did not contravene section 674(2) of the \textit{Corporations Act 2001} (Cth), Gilmore J still discussed the issue of the materiality\(^{53}\) with an analysis of sections 674(2)(c)(ii) and 677.\(^{54}\)

Gilmore J agreed with the submissions of both ASIC and FMG that the above provisions and ASX listing rule 3.1 required ‘the issue of materiality to be determined on an \textit{ex ante} basis, that is a forward, not backward, looking exercise’,\(^{55}\) with notification to ASX of information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of FMG’s shares. However, the contrary interpretation was also accepted, ‘that evidence of the actual effect of the information actually disclosed on FMG’s share price may be relevant to assist the Court in its determination of whether s 674(2) has been contravened’.\(^{56}\)

This approach, identical to the one adopted by the Irish Supreme Court in the \textit{Fyffes} appeal case,\(^{57}\) would involve an \textit{ex post} test of the effect of the information once it was released to the market and could provide a ‘relevant cross-check as to the reasonableness of an \textit{ex ante} judgment about a different hypothetical disclosure’.\(^{58}\)

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\(^{48}\) See above n 28.

\(^{49}\) Australian Securities & Investments Commission, ‘ASIC Takes Action Against Fortescue Metals and CEO Andrew Forrest’ (Press Release, 3 April 2009).


\(^{51}\) See above n 20.

\(^{52}\) The Irish High Court appointed Inspector had considered it highly relevant to his investigation of the \textit{Fyffes} share sales that Flavin had sought legal advice and had ‘followed such advise when it was offered’. See above n 37.


\(^{54}\) \textit{Corporations Act 2001} (Cth) s 677 (see also sections 674 and 675) — Material Effect on Price or Value: For the purposes of sections 674 and 675, a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.


\(^{56}\) Ibid 477.

\(^{57}\) See above n 20.

\(^{58}\) Ibid 477.
1. Macdonald Case

Gilmore J made reference to *Australian Securities & Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199, 1067, citing Gzell J ‘[w]here likelihood of the occurrence of an event is in issue and relevant facts are available, they are to be preferred to prophecies’. 59 Gilmore J distinguished the market sentiment in the *Macdonald* case, as opposite to the situation in the *Fortescue* case where the market held a positive view of FMG, but following the November notification the mood became negative. Gilmore J also noted that Gzell J had found in *Macdonald* that the contraventions had been made out ‘without analysis of quantitative or statistical information’. 60 Gzell J also did not apply the statutory ‘reasonable investor’ test from section 677 of the *Corporations Act 2001* (Cth) and its former equivalent section 1001D. Instead, Gzell J referred to the direct question under sections 674(2) and 1001A(2) of the *Corporations Act 2001* (Cth), whether a reasonable person would expect the information, if it were generally available, to have a ‘material effect’ on the price or value of the shares. Gilmore J supposed that in the *Macdonald* case it would appear that the question under ss 677 and 1001D, namely, whether the information would have had the relevant influence on investors, would have been answered affirmatively by Gzell J on the basis that … the reduction and severing of the company’s possible connection to asbestos claims was likely to reduce negative sentiment. 61

2. Jubilee Mines

Such an inquiry was also considered in *Jubilee Mines NL v Riley* (2009) 253 ALR 673, 33 4 where Martin CJ in the Court of Appeal of the Supreme Court of Western Australia upheld the appeal of the company and set aside the lower court judgment of Master Sanderson. Master Sanderson, at first instance, had observed the ‘material effect’ on the company’s share price, following an announcement made in June 1996, and acknowledged the US Supreme Court decision *TSC Industries Inc v Northway Inc* [1976] USSC 119; (1976) 426 US 438. 62 Master Sanderson adopted that formulation. Applying that test, I am satisfied that a reasonable person would expect the information to have a material effect. This was good news… it can be seen that the expectations of the reasonable person were proved right. 63

On appeal, Martin CJ was unimpressed by this application of the test from the US Supreme Court. These sentiments are similar to those of the Irish Supreme Court in 2007 when it overturned the High Court decision and dismissed the ‘reasonable investor’ concept as being of no assistance. 64 Martin CJ stated that:

in the result, nothing appears to turn on this, these paragraphs reflect an erroneous approach to the construction of the Corporations Law… Further, the ‘material effect’ referred to in s 1001A and s 1001D is the effect on price, whereas the materiality referred to in the case cited by the Master is the materiality of information’. 65

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61 Ibid 556.
62 The Court said: ‘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 available.’
63 *Kim Riley in his capacity as Trustee of the Ker Trust v Jubilee Mines NL* [2006] WASC 199 (Unreported, 6 September 2006) 290. On 6 September 2006, Master Sanderson in the Supreme Court of Western Australia awarded damages of $1.856 million to a private plaintiff for the negligent failure by Jubilee Mines NL to notify ASX of certain material information required under the old listing rule 3A. The action arose under the original s 1001A(2) and was only a matter of weeks after the provision became effective on 5 September 1994. The former s 1005 provided damages for a person who suffered a financial loss from a contravention of Pt 7.11 of the Corporations Law if the action was commenced within six years of this contravention. The company successfully appealed the decision.
64 See Finnegan J above n 18, 19.
Martin CJ concluded that the Jubilee Mines information as a whole was not information that was likely to have influenced persons who commonly invest in securities.66 Master Sanderson ‘should have concluded that, when all relevant information was taken into account, Jubilee was under no obligation to make disclosure’.67 McLure JA and Le Miere AJA agreed with the Chief Justice.

3. Expert Evidence
Returning to the Fortescue case, given that the market was aware of conditional nature of the project, Gilmore J did not consider that information concerning FMG’s agreements would be likely to influence investors to acquire these securities. However, there was detailed deliberation of the ‘materiality’ evidence given by the three experts called by ASIC. Although the evidence ‘traversed an ex ante approach and an ex post, statistically based, approach’ in considerable detail, the court did not find it particularly helpful.68

In the Fyffes 2005 Irish High Court decision, Laffoy J had utilised the opinions of a number of experts in formulating a ‘reasonable investor’ test to establish the materiality of the confidential information. However, on appeal the Supreme Court, similar to Gilmore J in Fortescue, was circumspect concerning the value of expert evidence.69

C. Legal Advice
One aspect of ASIC’s submission was that ‘the failure by FMG to obtain legal advice is a relevant consideration’.70 The regulator argued that if such advice had been obtained, then a responsible company or board of directors could not have made misleading statements. To support this contention, ASIC referred to Gzell J’s findings in Macdonald that the regulator had successfully made out its case. In that case, the company, James Hardie Industries Limited, was found to have negligently failed to disclose information:

in that it did not obtain any legal advice as to whether it should disclose the DOCI Information and in that neither the board nor management of JHIL considered disclosure of the DOCI Information.71

In the Fortescue case, Gilmore J was unconvinced by this argument and accepted that Peter Huston, ‘as a qualified, experienced and practicing commercial solicitor’ had ‘joined the company as in-house counsel shortly before 3 October 2004 although he had acted as FMG’s solicitor on a private basis before that’.72 Emails confirmed that the chief executive, Andrew Forrest, on behalf of FMG:

was relying on Huston in his capacity as a lawyer to oversee and ensure that agreements entered into by FMG were legally enforceable. They also confirm that Huston in performing that role had given advice (instructions) to FMG to that end in relation to some contracts. It is not clear that Forrest was speaking here of the framework agreements, although they may well have been included.73

On this issue Gilmore J concluded that according to the email referred to above, Huston had been employed by FMG principally to ensure its agreements were legally enforceable.74 The evidence demonstrated, ‘contrary to ASIC’s assertion, Huston did give legal advice to FMG as to the legal enforceability of the framework agreements’.75

67 Ibid 125–36.
69 See Denham J, above n 22. In contrast to Gilmore J’s decision in Fortescue Metals Group [2009] FCA 1586, (Unreported, 23 December 2009), the Irish Supreme court regarded post-disclosure market events, when properly evaluated, constituted the most objective evidence.
70 Ibid 363.
73 Ibid 373.
74 Ibid 380–1.
75 Ibid 391.
Reliance on legal counsel, even if this advice was later shown to be limited or inappropriate, emerged as a defining argument in defence of the FMG management in *Fortescue*. As previously discussed, the Irish High Court Inspector highlighted reliance on legal advice as an attribute to the credit of James Flavin in the Fyffes’ share sales.76

D. Honestly and Reasonably

‘Was the opinion of FMG and Forrest honestly and reasonably held?’ This was the question posed by Gilmore J and answered in the affirmative. The opinions of Forrest and FMG that the agreements were legally binding were reasonably and honestly held.78 The honesty of the company was dependent on that of its chief executive and the members of its board. Gilmore J considered that ASIC had failed to show that there was a reasonable basis to contend dishonesty.79

The court employed the definition of ‘aware’ in ASX listing rule 19.12 to decide that FMG was not aware of the information and was under no obligation to disclose it to the ASX. FMG did not have information at the relevant times and the disclosures to the market operator in August and November 2004 were sufficient to satisfy the listing rules. ASIC’s case under section 674(2) of the *Corporations Act 2001* (Cth) failed for this reason.80 It followed, as a consequence of Gilmore J’s findings, that if FMG did not contravene:

then Forrest could not have been a person who was involved in a contravention ... [and] at all material times, he believed, on reasonable grounds, and took all necessary steps to ensure, that FMG was complying with its obligations under s 674(2) of the Act.81

Gilmore J, in conclusion, reiterated these findings:

I have already concluded that FMG by its directors including Forrest was not ‘aware’ of the legal effect of the framework agreements propounded by ASIC. I have also found that FMG’s opinion which underpinned its disclosures as to the legal effect of the framework agreements was reasonably and honestly held by it through its board including Forrest.82

IV. Conclusion

Following this decision of Gilmour J in the Federal Court, ASIC filed a notice of appeal on 4 February 2010 in respect of the dismissal of its application for civil penalty orders. Among other issues, ASIC believed that the findings of Gilmore J warranted review by an appeal court since the decision raised important questions ‘as to the proper interpretation and application of provisions of the *Corporations Act 2001* that govern company announcements such as the … the continuous disclosure provisions’.83

To proceed with an appeal against the decision is a hazard to be considered carefully by ASIC, as Gilmore J stated: ‘I am well satisfied that Forrest acted reasonably to ensure that FMG both complied with s 674 of the Act and did not contravene s 1041H of the Act. He did not breach s 180(1) of the Act as alleged by ASIC.’84

76 See above n 36–38.
78 Ibid 71.
79 Ibid 353, 394.
80 Ibid 466–7.
81 Ibid 468.
82 Ibid 903.
Further action taken in the ‘public interest’ was considered unwarranted following the regulator’s failure to obtain a penalty in either the Rich or Citicorp cases. In the former case, ASIC initially lodged a notice of intention to appeal in the NSW Court of Appeal. This related to the dismissal on the 18 November 2009 in the NSW Supreme Court of ASIC’s civil penalty proceedings against One.Tel’s former joint managing director, Jodee Rich and the finance director, Mark Silbermann. The NSW Supreme Court made orders on 5 February 2010 as to ASIC’s legal costs in the One.Tel proceedings. The court ordered ASIC to make payments towards the defendant’s legal costs and interest as ASIC had reconsidered and ‘[p]ublic interest considerations, cost and effluxion of time were key factors in deciding not to appeal’. In spite of the cost of these setbacks, the Chairman of ASIC has pointed out that the regulator has listened and responded to these events. For example:

Major litigation we have reviewed our approach to major litigation and made changes (as part of the strategic review). These include improving the way we run cases and explaining their strategic importance (win or lose) to the market.

Regarding the result of the Fortescue litigation, one commentator has stated that ‘… there is simply no way ASIC can leave the decision unchallenged. The first step will be a court challenge, and if that fails it will try to change the law’. In anticipation that the ASIC appeal against the Fortescue will proceed, it is hoped that the court will achieve the ‘proper interpretation’ of the provisions desired by the regulator, in particular section 677 of the Corporations Act 2001 (Cth) and ‘material effect’. If a court challenge is unsuccessful, then, as suggested above by the commentator, in what way could ASIC ‘try to change the law’? One suggestion would be a clarification of the test to determine ‘price sensitive’ information. As the common law ‘reasonable investor’ test, adapted from TSC Industries Inc v Northway Inc, has been found by both the West Australian Federal Court (in Fortescue) and the Irish Supreme Court (in Fyffes case) to be of no assistance, then the choice is narrowed to the statutory ‘reasonable investor’ test found in the Australian statute. This test offers the options of ex ante, as adopted by Gilmore J, or on occasion the ex post interpretation of the materiality of the information. Hence, as discussed previously, the confusion that arose in both cases between relying on the opinions of experts as to the likely ‘material effect’ of the information if it is made public, or evaluating the effect on the share price after the information

Australian Securities & Investments Commission v Rich 236 FLR 1 (‘Rich’). In 2001, ASIC had commenced proceedings against One.Tel’s directors based on the duties and obligations of officers to disclose a company’s financial position to the board and the market.

Australian Securities & Investments Commission v Citigroup Global Markets Australia Pty Limited [2007] FCA 963 (Unreported, 28 June 2007) (‘Citigroup’) was an unsuccessful civil penalty action against a corporate entity.


Australian Securities & Investments Commission, ‘NSW Supreme Court Makes One.Tel Civil Penalty Cost Orders by Consent’ (Press Release, 5 February 2010).

Australian Securities & Investments Commission, ‘ASIC Not to Appeal One.Tel Decision’ (Press Release, 26 February 2010).

Tony D’Aloisio, ‘Implications of a Fast Changing Regulatory Landscape’ (Speech delivered at the Australia – Israel Chamber of Commerce, Brisbane, 21 July 2010) 70.


Corporations Act 2001 (Cth) s 677 (see also sections 674 and 675) — Material Effect on Price or Value: For the purposes of sections 674 and 675 of the Corporations Act 2001 (Cth), a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities if the information would, or be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities. Also, at s 1042D of the Corporations Act 2001 (Cth) — 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 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.

was made public. The alternative is to circumvent even a statutory ‘reasonable investor’ test by applying a simplified ex post ‘material effect’ construal as adopted in the Fyffes appeal case.\textsuperscript{95}

Regulators in both jurisdictions also require clarification from the courts on the related issues; the circumstances in which company directors can be considered to be acting ‘reasonably and honestly’ when relying on ‘legal advice’ concerning the likely ‘material effect’ of confidential corporate information. These are important issues that ASIC rightly believes ‘warrant review by an appeal court’. For the Irish regulator, the Report of the High Court’s Inspector has resolved these issues, if not to the satisfaction of the regulator, for the time being. In the words of the Irish Director of Corporate Enforcement already quoted, this is the ‘end of the road’: ‘There’s no way that any court would sanction a director for having followed the company’s legal advice’.\textsuperscript{96}

Concluding on a contrary note, can ASIC take heart from a positive side to these unsuccessful attempts at regulatory enforcement? Does it mean that such regulatory persistence, as evidenced by the Fyffes cases is unnecessary? As the optimistic closing statement of the Irish Inspector’s Report in January 2010 suggests:

The good news from the perspective of the Director of Corporate Enforcement, and corporate compliance in Ireland, is that the Court, the public and the market can be reassured and take comfort from the fact that one of Ireland’s largest listed public companies had a well developed culture of compliance, maintained high corporate standards and was a good corporate citizen, notwithstanding the costly error of appreciation by its then Chief Executive.\textsuperscript{97}

\textsuperscript{96} Paul Cullen, ‘Inquiry at “End of the Road”, says Appleby’, above n 43.
\textsuperscript{97} Report of the Inspector, above n 8, [12.1.17].
**LIMITING LAW SO AS TO RESPECT THE LAW: AN APPLICATION OF LIMITING PRINCIPLES TO GANG LEGISLATION**

**Feona Sayles’**

I. **INTRODUCTION**

Gangs pose a serious problem for communities worldwide. In 2008 members of the New Zealand police association estimated that 75% of the 1.5 billion dollar methamphetamine trade is controlled by gangs. Over the years there have been a number of legal responses to the ‘gang problem’ in different jurisdictions. Some recent responses in New Zealand and Australia have seen the enactment of legislation that seeks to punish gang related activities rather than gang related offending. South Australian legislation implemented the ability to punish non-gang members for communicating with a member of a gang that is a ‘declared organisation’, even if the communication is not intended to pursue criminal offending. In Whanganui, New Zealand, there is now the ability to prevent the wearing of gang insignia in specified locations, regardless of whether the wearing of the insignia was for a criminal purpose.

Whilst it is not denied that gang offending poses an unacceptable harm to the community and is deserving of criminal sanctions, it is suggested that legislation which focuses on gang activities may cause greater harm to the community by eroding the core principles of criminal law. Criminal law protects the interests of society by demanding compliance through the use of penalties that deter and punish ‘undesirable’ behaviour. However, when ‘undesirable’ behaviour is criminalised this represents a limitation on the liberty of a person to behave in a particular manner. The principles of criminal law recognise that if members of society are subject to numerous and excessive limits on liberty this can ‘enhance contempt for the law in general’ and lead to non-compliance. In effect, legislation which seeks to resolve issues such as the ‘gang problem’ through excessive use of criminal law may create a less law-abiding society.

As such, the use of criminal law should be restricted in its use so as to preserve its ability to control behaviour in society. Legal literature identifies several principles that identify ways in which the use of criminal law can be limited so as to preserve respect and compliance with the law. These principles include; respect for personal autonomy, the presence of harm, morality, and the need for culpability. This paper focuses on the principle of respect for autonomy and relates this to the *Wanganui District Council (Prohibition of Gang Insignia) Act 2009* (NZ) (‘Gang Insignia Act’) so as to demonstrate the potential problems that arise when limiting principles are given insufficient consideration.

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1 *Serious and Organised Crime (Control) Act 2008* (SA).
II. **Wanganui District Council (Prohibition of Gang Insignia) Act 2009 (NZ)**

The Gang Insignia Act 2009 (NZ) came into force in 2009 and s 6 prohibits the ‘display’ of ‘gang insignia’ within ‘specified areas’ of the Whanganui District. A person who, without reasonable excuse, is in breach of this prohibition will be convicted and fined up to $2000.00. Police have the power to arrest without warrant any person suspected of displaying gang insignia and may seize the gang insignia (with force if necessary) that has been or is being displayed. Any gang insignia that has been seized is forfeited to the Crown. There is also the power to stop a vehicle without warrant if there is reasonable suspicion that a person who has displayed gang insignia is in the vehicle. If a vehicle had been stopped for this reason, the police may search the vehicle and request any person in the vehicle to provide their name, date of birth, address, or any other detail requested by the police. A failure, without reasonable excuse, to comply with this or the request to stop will result in a conviction and a fine of up to $1000.00.

Gang insignia is defined as being any sign, symbol, representation that shows affiliation or support for a ‘gang’. The Law and Order Committee had initially recommended that tattoos be included so as to prevent ‘an increase in the use of tattoos by gang members to intimidate the public’ but the Wanganui District Council (Prohibition of Gang Insignia) Bill 2008 (NZ) was later amended so that any ‘gang insignia’ will not include tattoos. Section 4 of the Gang Insignia Act defines a gang as being the seven listed gangs and any organisation, association of group identified in a bylaw made in accordance with s 5 of the Gang Insignia Act. In order to identify such a group as a gang, the Council must be satisfied that the group has a common name, signs and symbols and its members, associates, supporters promote, either individually or collectively encourage or engage in a pattern of criminal activity. Section 5 of the Gang Insignia Act 2009 (NZ) also allows for the Council to make bylaws to designate areas of the Wanganui District as ‘specified places’.

These powers are in theory restrained by the requirement that the Council use special consultative procedures prior to making the bylaw(s) and that the bylaw can only be made if it is necessary to prevent public intimidation or gang confrontations. In relation to designating specified places, any bylaw cannot be made if the effect would be to have all public places in the District as ‘specified places’. The bylaw passed by the Whanganui District Council in 2009 included more ‘gangs’ and made the entire urban area a specified area. Although geographically this area does not comprise the entire District, it is where 90% of the population lives.

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3 There was a recent call to have the District revert to its correct Maori term of Whanganui. The District Council has not yet fully implemented this and the legislation was made under the old name, hence the use of different spellings for Whanganui in this paper.

4 Gang Insignia Act (NZ) s 7(1).

5 Gang Insignia Act (NZ) s 7(2).

6 Gang Insignia Act (NZ) s 8(1).

7 Gang Insignia Act (NZ) s 8(4).

8 Gang Insignia Act (NZ) s 8(5).

9 Gang Insignia Act (NZ) s 4.

10 This is the select committee that reviews reports and submissions made in relation to bills that impact on law and order. The Law and Order committee provides recommendations to Parliament as to whether the Wanganui District Council (Prohibition of Gang Insignia) Bill 2008 (NZ) should be enacted and any amendments that should be made to it.


12 Gang Insignia Act (NZ) s 5(3).

13 Gang Insignia Act (NZ) s 5(2).

14 Gang Insignia Act (NZ) s 5(4).

15 Gang Insignia Act (NZ) s 5(5).

16 Wanganui District Council (Prohibition of Gang Insignia) Bylaw 2009 (NZ).
III. Protecting Autonomy

Personal autonomy is the ability to exercise free will in regard to life choices. The concept of autonomy and its relationship to criminal law is twofold. First, acceptance of the autonomous individual means limiting the law so that the ability to self-regulate is maintained.17 Second, the recognition that individuals are capable of self-regulation imports the concept of responsibility for their choices and lays the foundation for culpability in relation to criminal acts.18 If the criminal law seeks to limit the autonomy of the individual then there must be a compelling reason to do so. Often this reason will occur where the exercise of one person’s free choice will restrict the exercise of other people’s equally valid choices. Considering this, the principle of respect for personal autonomy is often modified as being: criminal law should not restrict the liberty of one person to engage in certain conduct unless it unduly restricts other people’s exercise of free choice. This principle is strongest when the exercise of free choice is in relation to a right as opposed to a privilege.

Actions pursued by the individual may be ‘rights’ or they may be ‘privileges’. A right is a valid claim against others to exercise a freedom.20 A freedom is the ability to pursue a certain action without being subject to interference or requiring the permission of another.20 So exercising a right is validly claiming the ability to pursue a course of action without interference. This claim is valid when the action can be justified by the value or benefits produced by the action. These benefits may be to either the individual or society as a whole. If the benefit is to the individual, it must be compatible with the ‘good’ of society as a whole. If the action cannot be justified in this way, the ability to pursue it cannot be validly claimed.21 For example, it would be difficult to justify the ability to kill people with red hair, even if it gave personal benefit to the killer. This means there would be no valid claim to kill redheads, so therefore there is no ‘right’ to kill redheads. In essence the exercise of any right ‘is only as powerful as its justification can make it’.22

Whilst a valid right is subject to justifications, a privilege in contrast requires more than justification — it also requires permission in order that the actor may pursue the particular action. As an example, the choice to walk on your own land is a freedom whilst the choice to walk on the land of another person is a privilege.23 Since a privilege requires permission it is easier to understand how the exercise of choice to engage in the privilege can be limited by the criminal law — essentially the criminal law removes the permission granted when certain

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18 C A Campbell, In Defence of Free Will (1967) argues that ‘free-will is the pre-condition of moral responsibility’— that is, that without the freedom to do otherwise a person is not capable of gaining the ability to be morally responsible. Blame or praise that comes from labelling the person responsible for their acts can only occur if (a) the person is sole cause of the act; and (b) has the ability to act in alternative ways — that is, they have the freedom to choose their actions. The degree to which a person has the ability to act in alternative ways can be dependant on social and economic factors. This does not mean, however, that a lack of alternatives reduces the ability to be responsible, as pointed out in J Fischer, ‘Responsibility and Control’ (1982) 79 Journal of Philosophy 24, where it is argued that, even in situations where the result is inevitable (meaning there is no real alternatives or freedom to do otherwise), responsibility can still be attributed to ‘free, uncompelled’ actions (p37). In this respect, Fischer states at p38:

Thus the reason why lack of control normally rules out responsibility is that it normally points to actual-sequence compulsion. But when lack of control is not accompanied by actual-sequence compulsion, we need not rule out responsibility.

This view is also taken in J Gardner, ‘On the General Part of Criminal Law’ in A Duff (ed), Philosophy and the Criminal Law (1998), which explains the differences between moral autonomy and personal autonomy and concludes that moral responsibility or culpability arises through moral autonomy which is neither ‘necessary or sufficient’ for personal autonomy, hence a person may be held responsible even where there is a lack of personal autonomy (or availability of choices).
21 This requirement leads to the view that freedoms are essentially ‘good’, or the ability to do ‘good’, as opposed to the ability to do any action.
circumstances are present. Driving can be classed as a privilege as it requires the permission of others (through the licensing systems) so there are limits as to how this privilege may be exercised, for example by imposing speed limits, or restricting driving after drinking.

In New Zealand, rights that are recognised as having justification and fundamental importance to its citizens are contained within the *New Zealand Bill of Rights Act 1990* (NZ) (‘NZBOR’).

When the NZBOR was first introduced as a bill it was intended to have a substantial impact on civil rights and to act as a safeguard against the excesses of government:

A Bill of Rights for New Zealand is based on the idea that New Zealand’s system of government is in need of improvement. We have no second House of Parliament. And we have a small Parliament. We are lacking in most of the safeguards which many other countries take for granted. A Bill of Rights will provide greater protection for the fundamental rights and freedoms vital to the survival of New Zealand’s democratic and multicultural society. The adoption of a Bill of Rights in New Zealand will place new limits on the powers of Government. It will guarantee the protection of fundamental values and freedoms. It will restrain the abuse of power by the Executive branch of Government and Parliament itself. It will provide a source of education and inspiration about the importance of fundamental freedoms in a democratic society. It will provide a remedy to those individuals who have suffered under a law or conduct which breaches the standards laid down in the Bill of Rights. It will provide a set of minimum standards to which public decision making must conform.24

Whilst originally intended to be entrenched and gain priority status the NZBOR obtained assent on the condition it remained subordinate to all other legislation. This means that although the NZBOR places duties on each branch of Government and other public actors to observe the statutory rights, it does not provide a mechanism to fully ‘restrain the abuse of power’.

The NZBOR allows for rights to be limited by such reasonable limits prescribed by law ‘as can be demonstrably justified in a free and democratic society’.25 This section has the twofold purpose of defining the extent to which a limit may be imposed and also providing acknowledgment that rights can be limited in certain circumstances — essentially rights are not absolute. The extent to which legislation does limit a particular right needs to be considered in terms of s 6 of the NZBOR which provides for ability of the Court to prefer meanings (to the extent that the legislation is open to such interpretation) which would uphold rights in the NZBOR. This section has been described as creating an added dimension to statutory interpretation,26 but even with broader power, the Court must still ensure that it is interpreting rather than legislating.27 This means that although a NZBOR consistent meaning ‘can’ be given by the Courts, it ‘must be a meaning that is tenable on the text and in the light of the purpose of the enactment’.28 If legislation is still inconsistent after a consideration of the extent to which the right may be properly limited, this does not mean that the inconsistent provision may be struck down as a s 4 of the NZBOR creates an ability to legislate contrary to the rights in the NZBOR by providing that any legislation cannot be invalidated by the courts due to reasons of inconsistency with the NZBOR. There is some debate as to the interrelationship between ss 4, 5 and 6 of the NZBOR, as to whether the enactment should first be justified in terms of s 5 of the NZBOR and then (if the limitation is unreasonable) interpreted in a consistent manner in accordance with s 6 of the NZBOR with the result that if any inconsistency still exists it will still be preserved due to s 4 of the NZBOR; or if a s 6 based interpretation should first be applied and then this interpretation should be the focus of the section 5 assessment if the consistent interpretation still contains limitations.29

For the purposes of this paper, a section 5 NZBOR


25 NZBOR s 5.


28 R v Hansen [2007] 3 NZLR 1, [25].

29 Cf R v Hansen [2007] 3 NZLR 1 to the approach in Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (CA) (‘Moonen’).
assessment of the Wanganui District Council (Prohibition of Gang Insignia) Bill 2008 (NZ) in its original form will be discussed and then the revised Act will be considered in terms s 6 of the NZBOR as to the extent that the provisions may accommodate relevant NZBOR rights.

A preliminary safeguard against unwarranted limitations on rights is the requirement in s 7 of the NZBOR that the Attorney-General report to the House of Representatives as to any potential inconsistencies with the NZBOR contained within newly introduced bills. However, there is no obligation on the part of Parliament to comply with the report; instead the report merely acts as guidance. In compiling such a report the Attorney-General will first ascertain if the legislation will have the effect of limiting a right. If there is a potential for one of the statutory rights to be limited, the Attorney-General will then consider if the limitation is justified in terms of s 5 of the NZBOR.

To determine if a limitation on a right is justified, a balancing of the right to be limited against the right that will be protected through the limitation is often required. There are two ways in which this balancing may be achieved — either by ‘definitional balancing’ or by ‘ad hoc balancing’. Definitional balancing perceives freedoms as having inherent limitations, which automatically attach to them. In the situation of freedom of speech, this would mean speech is automatically limited when it contains, for example, obscenities, regardless of the exact situation in which the obscene speech has occurred. The danger in using this approach was recognised by Tipping J in Quilter v Attorney-General:

if restrictions which may be legitimate or justified in some circumstances are built into the right itself the risk is that they will apply in other circumstances when they are not legitimised or justified.31

Due to the restrictions that this form of balancing has, the approach of the New Zealand Courts has been to adopt ad hoc balancing which ‘starts with a more widely-defined right and then legitimises or justifies a restriction if appropriate’. This approach was used and further developed in the case of Moonen v Film and Literature Board of Review, where the Court considered that after establishing that the legislation had the capability of breaching a provision of the NZBOR the correct test to ascertain whether the limitation was justified was to:

[First] ... identify the objective which the legislature was endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective.... The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective.34

The Moonen ‘justifiable limitation test’ is essentially a three part test that first identifies the ‘rights’ (valid claims to freedoms) that the legislation seeks to protect. The second part of the test, ‘the rational connection’ determines whether the exercise of the right to be limited does infringe the other right that the legislation seeks to protect. If the exercise of the right does not infringe upon the other right, there can be no justification in limiting the right. The third part of the test introduces the actual balancing exercise — whether the limitation on the right is accurately balanced against the strength of the right that is being protected.

32 Ibid.
33 Moonen [2000] 2 NZLR 9 (UA).
34 Ibid [18].
35 The full test set out by Moonen [2000] 2 NZLR 9 (CA) involves five steps for interpreting legislation that may breach a right within the NZBOR. The first step ascertains if the legislation is open to an interpretation consistent with the NZBOR, the second step identifies a meaning that imposes the least limitation on the right, and the third step is to determine the extent of the limitation. The fourth step is the ‘justifiable limitation test’ where it is considered whether the limitation is justified. The fifth step is for the court to indicate its finding of whether the justification is limited.
IV. APPLICATION TO THE WANGANUI DISTRICT COUNCIL (PROHIBITION OF GANG INSIGNIA) ACT 2009

The Moonen ‘justifiable limitation test’ can be seen in the report issued by the Attorney-General for the Wanganui District Council (Prohibition of Gang Insignia) Bill 2008 (NZ). In the report the Attorney-General first established that the Bill in its current form raised issues of consistency with s14 of the NZBOR, which is the right to free expression. As there was an issue of consistency, the Attorney-General then proceeded to the three step Moonen test and first identified and assessed the objectives of the legislation. The objective was stated as being to reduce the likelihood of gang confrontations and intimidation of members of the public. As these objectives had the aim of protecting public order and preserving the rights of others they were considered to be ‘significant’ enough (they are a valid right) to warrant limiting the right to free expression in some circumstances.

The next step was to assess whether there was a rational and proportionate connection between the objectives and the limitation on free expression. In doing this the Attorney-General could have referred to a range of evidence and research to establish and support the link between the prohibition on gang insignia and intimidation/gang warfare. The report does not refer to any such evidence. Instead, in relation to gang warfare, it was merely stated that removing one of the means by which gangs identify each other should logically reduce the likelihood of gang warfare. This ‘rational connection’ suggests that gang insignia not only identifies but also ‘marks’ a person as a target for confrontation.

There are some difficulties with this suggestion. As this observation notes, gang insignia is just one method of identifying gang membership. There are many other means of gangs identifying each other. Often gang membership will be created due to family or neighbourhood associations within a particular community so there is a community awareness of who is in a certain gang. Several gang related attacks have been on houses of gang members, so this would support that it is community knowledge rather than the wearing of insignia that leads to the identification of gang members. There have been some incidents where members of the public who are not gang members have been subject to abuse due to the wearing of gang colours, which on face value gives credence to the concept that insignia is a source of gang confrontations. However, in the situation of a young child who was harassed for the colour...
of his shirt, the condemning comments in the media by gang members as to this behaviour suggests that this form of victimisation is not common or sanctioned gang conduct.\textsuperscript{42}

Given this, it would seem that mere display of insignia that is associated with gangs has a limited effect on confrontational gang behaviour. Gangs are able to distinguish between ‘innocent’ wearers and those who are likely to be gang members, so the insignia does not appear to be the real cause of confrontations. This indicates there is a much reduced connection between the objective and the provision to prohibit gang insignia. A stronger link between the objective and the prohibition could have been achieved if it was established that the wearing of gang insignia acts as a provocative statement to rival gang members rather than just a mere form of identification. However, in the absence of research to support these links it is difficult to state with any degree of certainty that removing gang insignia will or will not be a logical step in reducing gang warfare.

In regard to intimidation of members of the public it was stated by the Attorney-General that the provision would not reduce intimidation caused by the presence of gang members in a group and their behaviour. It was suggested that the gang insignia may cause intimidation as it ‘conveys a message’ to the public that the wearers are members of a group known for violence and unlawfulness.\textsuperscript{43} Again, a lack of research undermines the strength of this statement that identification of a group association rather than actual conduct is the source of intimidation. What is known is that in a survey of the Whanganui public in 2009,\textsuperscript{44} out of the 161 residents (from a total of 409 surveyed) who said they felt unsafe in the city, 27% had said the reason for this was youth/street kids, 27% had said it was undesirable people, and only 16% had said gangs were the reason. The higher polling groups do not wear forms of identification (particularly with the ‘undesirable people’ group) so this could suggest that it is the actual conduct of the people rather than images of association with a particular group (or gang) that is the main cause of public intimidation.

Even if the survey did reveal that the unsafe feeling was due to the ‘message’ sent by the gang insignia that the person is a member of a lawless group, this may not be sufficient to justify the prohibition on the gang insignia unless there were other valid reasons to support the fears held by the public. This is because to allow laws that limit liberty based on the concerns of a minority that mere membership to a group poses a threat, without the need to further justify a reason for the concern, could lead to discriminatory practices. To illustrate, Maori males are statistically more likely to be convicted compared to non-Maori,\textsuperscript{45} so it could be said that being a Maori male sends a message that the person is a member of a (racial) group that is prone to criminal activity. This could lead some members of the public to feel fearful or intimidated by the presence of Maori males — regardless of whether those actual Maori men are exhibiting any aggressive behaviour. If the view of the Attorney-General was accepted then this unsupported fear held by members of the public due to the ‘message’ sent could justify limiting the liberties of Maori men. It is suggested that when considering whether there is a rational connection, the infringing conduct should only be ‘connected’ to legitimate instances of the harm which are the object of the legislation.

Although the Attorney-General considered that there was a ‘tenuous’ connection between the objective and the relevant provision, when it came to proportionality it was considered that there would be a disproportionate impact on freedom of expression. In order to understand this

\begin{footnotes}
\item[42] See Tanya Katterns and Mike Watson, ‘Gang Vows to Punish Young Boy’s Attacker’, \textit{Dominion Post} (New Zealand), 13 May 2010 <http://www.stuff.co.nz/national/crime/3689417/Gang-vows-to-punish-young-boys-attacker> at 24 November 2010. Also, in the case of Paul Shane Kumeroa who was attacked when he walked down the street wearing a red ‘hoodie’ there was a family connection to the mongrel mob (which associates with the colour red). So it is possible that it was this family link rather than the mere display of colour that produced the attack. See ‘Wanganui killing may be related to Jhia Te Tua drive-by shooting’, \textit{TV3 News} (New Zealand), 25 September 2008 <http://www.3news.co.nz/Wanganui-killing-may-be-related-to-Jhia-Te-Tua-drive-by-shooting/tabid/423/articleID/73191/Default.aspx> at 24 November 2010.
\item[43] New Zealand Government, Attorney-General Office, above n 36, 4.
\item[45] For further information refer to: Department of Corrections Policy, Strategy and Research Group, \textit{Over-Representation of Maori in the Criminal Justice System — An Exploratory Report} (September 2007).
\end{footnotes}
conclusion, further clarification on the right to freedom of expression and the way in which it may be balanced against other rights is needed.

Expression is not limited to words. It can also take the form of symbols and signs designed to impart a particular meaning. The test devised in *Spence v Washington* as to whether symbols are ‘expression’ requires an intent to convey a particular message and likelihood that the message will be understood by those who view it. The context in which the symbol or conduct occurs will also be important as this may help to provide the intended meaning. In New Zealand Courts, the idea of what constitutes expression has been defined broadly as being: ‘as wide as human thought and imagination’ so it appears there is a vast array of conduct and symbolism which may be regarded as expression.

Free expression has an ancient tradition within society and is often associated with the notion of democracy, although its application and worth is further reaching than just political comment. As Emerson commented, free speech is valued for several reasons:

- The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfilment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society.

Not all of these justifications may be present in a particular exercise of speech. For example in *Brooker v Police* (*Brooker*), a man (Brooker) positioned himself outside of the house of a policewoman who has issued a search warrant for his house. Brooker then proceeded to sing a ‘protest’ song about the warrant. This exercise of free speech may have satisfied (1) and (4) by allowing him to express his anger against the warrant in a non-violent way, but was highly unlikely to have satisfied (3).

The case of *Brooker* also highlights a common theme in New Zealand and overseas jurisdictions — that expression which is a form of protest should be afforded a high level of protection, this is represented by the following observation in *Brooker*:

In assessing the particular weight to be given to freedom of speech in a protest context, respecting the freedom to choose the means of protesting which are seen to be most effective is important. Respect for protest as a means of pressing for change in official policy or conduct is very much part of New Zealand’s culture and societal values. A protest concerning perceived overbearing police conduct is well within the spirit of the right to freedom of expression.

Since each exercise of free speech is capable of providing different justifications and core values, it is impossible to have a ‘blanket rule’ as to what is a reasonable limit. Instead each situation must be assessed separately to decide which value is present, and whether that particular value should be subject to any limits. For example, if the expression only serves the value of self-fulfilment it may have a weaker argument against other broader rights that impact on the community as a whole but could have equal status with other ‘individual’ rights.

This means legislation that is incapable of differentiating between the values provided by the

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47 The ability to have the message understood appears to be at the heart of the cases where ‘individual’ symbolic expression has not gained protection. Although the author of the symbol may have intended a particular message, due to the personalised meaning of the expression, it is not a message where there is a likelihood of it being understood by others. See *Villegas v Gilroy Garlic Festival* No 05–15725 (9th Cir, 3 September 2008) and also *Bivens v Albuquerque Public Schools* 899 F Supp 556 (D New Mexico, 1995) where in both cases it was stated that the subjective message would not be apparent to those who viewed it.
48 For example, in *R v Morse* [2009] NZCA 623 in relation to a protest that involved a flag being burnt it was stated at [34] that: ‘By itself, the flag-burning had no particular meaning (except perhaps being anti-state). It derived its meaning from its association with the other activities of the protestors’.
49 Moonen [2000] 2 NZLR 9 (CA).
51 *Brooker* [2007] 3 NZLR 91.
52 Ibid [16].
expression cannot be accurately balanced against the competing rights — since all core values of free expression are potentially limited all of these values must be weighted against the other right. It would only be in exceptional circumstances that all values of free expression would be denied.

This sentiment of the need for exceptional circumstances was expressed in *Terminiello v City of Chicago*, where it was stated in regard to free speech that:

> It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute… is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest.

In the situation of gang insignia, this is capable of conveying a variety of meanings. One meaning is that the wearer is intending to send a message that they support (through membership or association) their ‘organisation’ and its beliefs. According to the promoters of the legislation this message of support is a threat to public order as the organisation is one that stands for crime and violence. By expressing support for a gang, the wearer also expresses support for crime and violence. However this is not the only message that the support demonstrates. Gangs and their insignia can also be a form of rebellion and protest. For example, the ‘Black Power’ insignia portrays the clenched fist that is associated with civil rights protests against the oppression of African people. The Mongrel Mob name and insignia represents anger against colonial oppression and the British systems in place — including the justice system. So a blanket prohibition on the wearing of insignia also suppresses expressions of protest.

This was noted by the Attorney-General who stated that the prohibition would cover a large range of expressions and would not differentiate between the display of insignia that intended to be confrontational or intimidating and displays that were not intended to have this effect. The tentative connection to the objectives of reducing intimidation and gang confrontations means the conduct did not provide a ‘clear and present danger’. As such, the omission of a *mens rea* requirement that would have separated expression with little social value (eg the intimidation ‘statements’) from those with greater social value and deserving of protection meant the legislation cast a net over the right to free expression wider than what the objectives of the legislation justified. Hence the Attorney-General concluded that the *Wanganui District Council (Prohibition of Gang Insignia) Bill* 2008 (NZ) presented an inconsistency with s 14 of the *NZBOR* that could not be justified.

As commented previously, even when there is a report from the Attorney-General highlighting inconsistency with the *NZBOR* there is no obligation on the part of Parliament to comply with this report and abandon the inconsistent legislation. The Law and Order Committee considered the report but made only minor alterations to the *Wanganui District Council (Prohibition of Gang Insignia) Bill* 2008 (NZ) as a result. It is argued that these amendments, even with a *NZBOR* consistent interpretation, may not adequately address the concerns raised by the report from the Attorney-General, and that the legislation still creates an unwarranted intrusion on personal autonomy.

First the defence of ‘without reasonable excuse’ was inserted into the provision for displaying gang insignia and a failure to stop or provide information. While this inclusion may appear to...

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54 Refer to the comments (particularly those of Chester Borrows) in New Zealand, *Parliamentary Debates, Wanganui District Council (Prohibition of Gang Insignia) Bill* — Second Reading, Volume 652, 1642.
58 For example, by requiring that the display be done with the intent or knowledge that the display will intimidate or provoke confrontation.
resolve the issue of ‘valuable’ expression being protected, in reality it could prove ineffectual. The reasoning for this is as follows. The defence of reasonable excuse allows a defendant to escape conviction if it is shown their behaviour will not create or increase the type of risk that the legislation seeks to prevent.\textsuperscript{59} In this situation, the legislation prohibits displaying gang insignia (which includes gang colours) on the premise that this display identifies the person as a member or supporter of a particular gang. The risk of harm this behaviour poses is that a person displaying the insignia may intimidate others, or may identify themselves as a target for confrontations from rival gang members. Whilst it may be possible to distinguish displays that increase the risk of intimidation from those that do not, the legislation does not isolate offences where the displays intimidate from those that increase confrontations. This means that if it is shown the display will increase the risk of confrontations then it will not matter that the person displaying the insignia would have a valid excuse in relation to intimidation. The legislation has been justified due to the idea that gangs use insignia to establish targets for confrontations. Therefore all displays not just those done by gang members/supporters must create the risk of gang confrontations since it is the display rather than any associations which are considered to be the provocation. The result is that either the defence of reasonable excuse will not be available to a large number of ‘innocent’ people displaying colours associated with gangs, or, if the defence does extend to these people, then the legislation has been incorrectly justified as it would mean it is not the mere display of insignia that creates the risk to public order.

This reasoning may also impact on a NZBOR consistent interpretation as to the second amendment that was made. The word ‘wear’ was removed so that it is only the ‘display’ of gang insignia that is prohibited. According to the Law and Order Committee, this was done to ‘be more consistent’ with the NZBOR so that ‘the wearing of an item that cannot be seen would not be inadvertently captured’.\textsuperscript{60} With respect, this reasoning misses the point of freedom of expression. The key element of this right is that an idea, comment, or statement is expressed — it is put into the public sphere. The right is different to a right to freedom of thought, where the belief may be held but not acknowledged to the public. If the gang insignia is not seen there is no ‘expression’. Protecting the wearing of items that cannot be seen is not protecting the right to express views in public.

Although the reasoning given as to the alteration appears misguided, the use of the word display in association with other defined terms in the legislation may create an avenue for an interpretation which lessens the impact on freedom of expression. To display means to ‘expose to view, exhibit or show’.\textsuperscript{61} Each of these terms can be taken to indicate that the person must do the act intentionally,\textsuperscript{62} that is a person must intentionally exhibit gang insignia. A NZBOR consistent interpretation of ‘gang insignia’, using the reasoning in Moonen,\textsuperscript{63} would mean that only signs or symbols that have the effect of encouraging or advocating a particular gang would be regarded as ‘gang insignia’.\textsuperscript{64} So for a person to breach Section 12 of the Gang Insignia

\begin{footnotesize}
\bibitem{59} The idea that the objective of the legislation must be considered can be seen in \textit{Lister v Lees} 1994 SCCR 548, 553:

\begin{quote}
Although ‘good reason’ is a different expression from ‘reasonable excuse’, in our opinion the same approach falls to be adopted when the court is considering whether what has been put forward on behalf of an accused amounts to ‘good reason’. Each case must depend on its own facts and circumstances and, in determining the issue, the court should have regard to the general purpose of the legislation, and where the legislation contains a general prohibition, the court must determine whether the reason advanced appears to constitute a justifiable exception to the general prohibition contained in the legislation.
\end{quote}

\bibitem{60} New Zealand Government, Law and Order Committee, above n 11, 2.


\bibitem{62} Refer to the comments in \textit{Police v Starkey} [1989] 2 NZLR 373 in regard to how the term ‘publish’ was treated similarly to ‘display’.

\bibitem{63} [2000] 2 NZLR 9 (CA).

\bibitem{64} In regard to whether conduct ‘supported’ exploitation it was stated in \textit{Moonen} [2000] 2 NZLR 9 (CA) (at para 29) that:

\begin{quote}
The concepts of promotion and support are concerned with the effect of the publication, not with the purpose or the intent of the person who creates or possesses it. The concepts denote an effect which advocates or encourages the prohibited activity, to borrow the words of Rowles J of the British Columbia Court of Appeal in an allied context in \textit{R v Sharpe} (1999) 136 CCC 3d 97 judgment given on 30 June 1999 at para 184. Description and depiction (being the words used in s 3(3)(a) of the Act) of a prohibited activity do not of themselves
\end{quote}
\end{footnotesize}
there must be an intentional exhibition of a sign or symbol that has effect of encouraging or advocating a particular gang. This, in combination with the defence of reasonable excuse, would eliminate the possibility of displays such an elderly woman or very young child wearing blue being in breach of the legislation.

However, as the intent aspect would only go to the showing of the sign or symbol (meaning that a person would not come within the provision if the insignia became visible accidentally or unintentionally) rather than an intent that the display have the effect of advocating a particular gang this would mean, as with the defence of reasonable excuse, that young men who are not gang members or supporters (but who could be mistaken for gang supporters) who deliberately wear colours associated with gang identity would be in breach of the legislation. It also does not remove the problem that even if the display is done by a gang member/supporter, it may still be done as part of, for example, legitimate protest rather than an act of intimidation/confrontation so there is still suppression of harmless expression — unless a NZBOR consistent interpretation could be taken one step further.

A further progression of an interpretation that is consistent with the NZBOR would be to consider that the legislation is only intended to penalise displays that have the effect of advocating or encouraging gang intimidation and warfare not just the effect of advocating a particular gang. This interpretation would place the least limitation on freedom of speech as it would only capture expressions that are intended to have a harmful effect. Support for this could come from s 5(5) of the NZBOR which requires that any bylaw can only be made if it is reasonable necessary to prevent or reduce the likelihood of intimidation or confrontation. Since the legislation envisions that the powers of the Whanganui District Council will only be implemented where there is the risk of intimidation/confrontation, it is arguable that enforcement of the legislation is only intended where these risks are present.

There are some difficulties with accepting this interpretation of the legislation. First, when the legislation was debated supporters of the bill maintained that the ban on gang insignia was justified as gang insignia itself was intimidating rather than the conduct of the wearer or the situation when it was worn. This view of the supporters should be taken as a clear intention on the part of Parliament that all displays regardless of the intention of the displayer or the effect of the display were to be prohibited. The second problem is that allowing an interpretation where only displays that have the effect of intimidation/confrontation are prohibited could create uncertainty in the law and possible discrimination. Each situation would be assessed by the Police to see if the risk factors were present, this assessment may not coincide with the understanding or assessment of the person displaying the insignia and in some situations may be based on facts that are unknown to the person so the exact circumstances that would give rise to the offence would be unknown or uncertain. This may lead to a perception on the part of

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necessarily amount to promotion of or support for that activity. There must be something about the way the prohibited activity is described, depicted or otherwise dealt with, which can fairly be said to have the effect of promoting or supporting that activity.

65 Wanganui District Council (Prohibition of Gang insignia) Act 2009 (NZ).
66 Refer to passage from Moonen [2000] 2 NZLR 9 (CA) [at para 29] extracted above at n 62.
67 Refer to the comments of Chester Borrows in New Zealand, Parliamentary Debates, Wanganui District Council (Prohibition of Gang Insignia) Bill — Third Reading, 6 May 2009, [Volume:654;Page:2944].
68 If the law was selectively enforced this would most likely target gang members. Since the legislation does not state that only gang members are subject to the restriction this would mean less protection of NZBOR rights for gang members, a situation that has been expressly condemned in R v Wharewaka (2005) 21 CRNZ 1008 where it was stated at [30]: ‘The law protects the rights of all persons; gang members are no exception. Gang membership or association is not of itself prohibited by law; on the contrary ss 16–17 of the Bill of Rights provide: 16. Freedom of peaceful assembly, everyone has the right to freedom of peaceful assembly. 17. Freedom of association, everyone has the right to freedom of association. See also Tamara Walsh and Monica Taylor, ‘“You’re Not Welcome Here”: Police Move-On Powers’ (2007) 30(1) UNSW Law Journal Volume 151, as to possible discrimination where police are given broad discretion as to whether the circumstances of the offending is present.
'offenders' that they are being targeted by Police, which in turn may increase attitudes against the Police and law enforcement.70

This does not mean that the current bylaw is not open to challenges that would limit or restrict the impact on free expression. One challenge would be as to the extent of the area that has been made a ‘specified place’. The Law and Order Committee had seen the need to limit the imposition of the ban by specifically including a clause that any bylaw should not have the effect that all public places are specified places.71 Also, as commented above, there is the requirement that the council must be ‘reasonably satisfied’ that the bylaw is necessary to prevent or reduce intimidation/confrontations.72 This would indicate that any bylaw should only be imposed within an area where it is considered that the public would most be at risk of intimidation or the fallout from gang warfare. The current bylaw covers the entire urban area so appears to cover areas that were not intended to be subject to the prohibition. If using the reasoning in *Drew v Attorney General*73 then it could be argued, using a *NZBOR* consistent interpretation of the empowering legislation, that the bylaw is *ultra vires* as the power to create the bylaw was only to the extent of prohibiting insignia in ‘risk’ areas so as to reduce the limitations placed on expression.

The potential for the bylaw to be limited means that there is a practical need for the legislation to be subject to judicial assessment,74 however, protection for fundamental rights should come from Parliament demonstrating a better understanding of the principles for limiting the use of criminal law so as to avoid the need for prolonged and costly litigation to ensure rights are upheld.

V. CONCLUSION

The principles associated with limiting criminal law are intended to preserve respect for the law. Following these rules require Parliament to understand and evaluate the law, the liberties that it seeks to protect, and the limitations that can be rightly placed on either. More than that, these limiting rules are also designed to ensure that laws enacted by Parliament are made because they represent the most effective means of dealing with disorder rather than being a convenient short cut. The criminal law should not be used as a quick measure; it should be enforced when it is the most effective measure.75

If these rules are misunderstood or ignored there is a risk that the law can antagonise the situation that the law sought to correct. For example it was noted by Greene and Pranis that:

Heavy handed suppression efforts can increase gang cohesion and police community tensions, and they have a poor track record when it comes to reducing crime and violence. This is problematic in that ‘the more cohesive gang usually is the more criminally involved.’76

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70 Beth Bjerregaard, ‘Antigang Legislation and Its Potential Impact: The Promises and the Pitfalls’ (2003) 14 Criminal Justice Policy Review 171, 176 states that ‘suppression techniques targeted at specific communities can lead to a highly adversarial climate in which communities and police view each other suspiciously.’

71 Gang Insignia Act (NZ) s 5(6).

72 Gang Insignia Act (NZ) s 5(5).


74 Even where there is no possibility of striking out a bylaw the process can still be of value as commented on in *Moonen* [2000] 2 NZLR 9 (CA), [19], by stating that even if the court indicates that there is an unjustified limitation the court may ‘declare this to be so, albeit bound to give effect to the limitation in terms of s 4 [New Zealand Bill of Rights Act 1990].’ The Court in *Moonen* [2000] 2 NZLR 9 (CA), [20] did go on to comment that the exercise may not be entirely futile as:

Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum. In the light of the presence of s 5 in the Bill of Rights, New Zealand society as a whole can rightly expect that on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified there under.


Also, when using the law as a short cut the legislators miss the opportunity to address the real causes of the social problems and therefore do not resolve the main concerns. Baker\textsuperscript{77} demonstrates this problem in the context of begging laws by referring to observations in a Sampson and Rudenbush study which found that:

The active stimulus for criminality was structural disadvantage and attenuated collective efficacy more so than disorder. They held that attacking public disorder through strong-handed policing may be a politically popular approach to reducing criminality, but is an analytically weak strategy as ‘it leaves the common origins of both, but especially the last, untouched.’\textsuperscript{78}

In the situation of trying to resolve the ‘gang problem’, the use of an injunction that has limited ability to resolve issues of intimidation and gang confrontation and which may increase tensions between the law and gang members does not seem to be the most effective means of dealing with the problem. Removing the identifying symbols of gangs may drive gangs further underground so will increase the difficulty of monitoring gang activity and offending, and could cause gangs to migrate to less policed areas which might antagonise the ‘gang problem’.\textsuperscript{79} Also, it may serve to foster alienation of gangs from the rest of the community so that gang membership and unity will become even more important than community values and co-operation.\textsuperscript{80} Due to the extent of the prohibition there is also the risk that non-gang members/supporters will be innocently convicted, thereby increasing the effects of reduced respect for the law.

This paper has intended to demonstrate the need to understand and comply with principles for limiting criminal law. These principles may be criticised as being unworkable ideals that do not bear out when meeting the practical needs of society.\textsuperscript{81} However, when ideals are lost the essence of what the law represents is also eroded. Ideals, and the principles that seek to uphold them, give faith to society as to why law is needed. If the New Zealand Parliament had adhered to the limiting principles of criminalising behaviour when enacting the \textit{Wanganui District Council (Prohibition of Gang Insignia) Act 2009} (NZ) they may have been able to better identify the issues that are required in order to successfully resolve the ‘gang problem’ in a way that does not jeopardise respect for criminal law.

\textsuperscript{78} Ibid 380.
\textsuperscript{79} For example in a US study it was found that the implementing of a gang injunction into less disordered communities had a negative effect. Several causes were nominated by the researchers, which included migration and also less police enforcement of the injunction in this area. See pp44-46; Cheryl L Maxson et al, ‘Can Civil Gang Injunctions Change Communities? A Community Assessment of the Impact of Civil Gang Injunctions’ (2004) \textit{National Institute of Justice, U.S. Department of Justice}.
\textsuperscript{80} Bjerregaard, above n 68, 176.
PRIVATE SECURITY IN AUSTRALIA: SOME LEGAL MUSINGS

RICK SARRE

Given the rapid expansion of the private security commercial sector, one might assume that careful attention would have been paid to the legal framework within which the activities of security personnel take place. Unfortunately, this has not been the case. The legal rights and powers of private security providers are determined by little more than a piecemeal array of common law principles, practical assumptions and ad hoc legislation that was designed principally for property owners and private citizens. The powers and immunities of private security personnel are thus unclear, inconsistent, change from jurisdiction to jurisdiction, and differ markedly from those of the public police even though they are often carrying out many of the same tasks in the same locales. As policing moves more and more into private hands, the legal powers and immunities that apply to private security personnel need attention. This paper looks at the legal options available to policy-makers to address the situation.

I. INTRODUCTION

The law that impacts private security personnel emanates from a range of sources usually unrelated to security issues. These may include common law and legislation relating to the protection of property, the use of reasonable force in self-defence, arrest, and the use (or misuse) of surveillance devices to name but a few. The law is thus often confusing not only for security providers but the public at large. This paper identifies these issues with a view to making some recommendations for reform.¹

Who are we talking about when we refer to ‘private security personnel’? For the purposes of this paper they are defined as people who are employed or sponsored by a commercial enterprise on a contract or ‘in-house’ basis, using public or private funds, to engage in tasks (other than vigilante action) where the principal component is a security or regulatory function.²

This definition acknowledges the importance not only of privately employed crowd controllers and other security guards who are very much the visible face of the industry, but also those non-state personnel who are financed and managed by governments and local (public) instrumentalities to engage in policing roles that are not entirely public or private. For example, this definition includes private investigators in government welfare departments, or security staff working in a public organisation such as a hospital or university. It includes the people who screen air travellers or who monitor CCTV at sports grounds. It includes static guards at public venues, debt collectors, bailiffs, and private investigators. The numbers are significant, and growing.³

Given the rapid expansion of the presence of private personnel in security activities, it is surprising that so little attention has been paid to the legal framework under which they work.⁴ One of key reasons is the vast array of settings in which security personnel operate. The

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¹ Law Discipline, School of Commerce, University of South Australia
³ There may be more than 100,000 such personnel in Australia today; ibid 21.
sheer panoply of options militates against any attempt to legislate for (and regulate) security personnel other than on an ad hoc basis. True, there has been legislation passed in all Australian jurisdictions concerning the registration, licensing, identification and training of private legal personnel, especially in the past decade. However, the main aim of this legislation is to require licences for those who operate within the industry, and to check those who wish to enter it against certain criteria and minimum training standards. The legislation does not deal with powers per se. There is very little in Australian legislation, and even less in the common law, that permits security guards, even licensed guards, to use specific powers. Indeed, in two jurisdictions it is specifically mentioned in security licensing legislation that no powers are to be associated with the holding of a licence. Section 8 of the Security Industry Act 1997 (NSW) says that the holder of any licence can carry out the functions authorised by the licence but that ‘[a] licence does not confer on the licensee any function apart from a function authorised by the licence.’ Section 15(1) of the Security and Investigation Agents Act 1995 (SA) goes a little further, stating that ‘[a] licence does not confer on an agent power or authority to act in contravention of, or in disregard of, law or rights or privileges arising under or protected by law.’ Section 15(2) then repeats the NSW legislative proscription that applies to those who would try to bluff the public into thinking that they have police-type powers. It states that ‘[a] licensed agent must not hold himself or herself out as having a power or authority by virtue of the licence that is not in fact conferred by the licence.’

This lack of clear law should be of concern, given the rapid expansion of the security industry and its importance to the modern policing landscape. It is not uncommon to hear commentators say that the private security industry now undertakes almost every function that the public police do. The public has witnessed over the last three decades a dramatic growth in the numbers of state-based specialist security officers. It should be of some concern that their numbers and duties have expanded with so little thought given to questions of powers, immunities and liabilities.

The paucity of law guiding this field of endeavour is confusing for security personnel and the public alike. There are few legal decisions and precedents emerging from the courts. Hence it is difficult to find, let alone describe, a satisfactory body of law on the subject.

In contrast, public police have coercive and intrusive powers. There are thus distinct differences between the powers of public and private officers and agents. For example, public police are given statutory immunity from civil suit in circumstances where their beliefs and acts are ‘reasonable.’ Private personnel are afforded no such luxury. Indeed, private security remain vulnerable and constantly run the risk of being sued in the torts of assault, false imprisonment, intentional infliction of mental distress, defamation, nuisance and trespass to land and to the person. This is not to say that police do not run these risks, but because they have legal immunities at their disposal, they are far less likely to find themselves on the losing end of a civil suit brought by an aggrieved litigant.

Moreover, public police may act to prevent the commission of an offence before it actually happens (acting upon a suspicion). This concession is not granted to private security personnel (or anyone else for that matter). Public police powers, duties, rights, responsibilities and immunities have been so often debated in the courts that there is now a large and continually expanding body of law on these issues. The same cannot be said for private security law.

In short, the public police have considerable powers to arrest, search and interrogate. Liberty is at stake if these powers are abused; hence they have been debated in Parliaments and tested in
courts for decades. By contrast, the law relating to the activities of private security personnel, who often engage in many of the same tasks, remains largely untested.

II. POWERS AND IMMUNITIES: SPECIFIC EXAMPLES

The legal powers, rights and immunities of private security personnel are located generally across four legal fields: the criminal law; the law of property; the law of contract (both in terms of contracts of employment, and the contracts that apply to paying customers whenever they enter a private sports or entertainment venue); and employment law.

The two issues that are the subject of this paper are the use of force in defence of property, and the power of arrest. These issues have been chosen because they are activities in which both public police and private security personnel are regularly called upon to act. In both of these examples the law applicable to police is reasonably clear, but the rules relating to private security personnel are a hotchpotch. They vary from place to place, which can be very confusing for the security personnel who have licences in more than one jurisdiction.

Following the outline of the relevant law (below) is a discussion of whether the current situation is a tenable or untenable one, and, if the latter, whether legislative intervention is required and appropriate.

A. The Use of Force in Defence of Property

In most States and Territories, the common law power of property owners to defend their property from uninvited trespassers and not face criminal prosecution has been reinforced by statute. Although it has not been tested in court, one could argue that the security personnel (as agents) defending their principal’s property should be given the same latitude as those principals. This may include using force to thwart unlawful taking, damage or interference, or to prevent criminal trespass to any land or premises and to remove a person committing a civil or criminal trespass. The rules, as we shall see, vary widely from jurisdiction to jurisdiction.

In South Australia, the Criminal Law Consolidation Act 1935 (SA) has a substantially subjective test: did the accused have reason to believe that his or her life or property was in danger when acting in a defensive manner? If she or he did, then she or he will be able to establish a defence. But the actual section is convoluted and lengthy, making it difficult to interpret.

15A—Defence of property etc

(1) It is a defence to a charge of an offence if—

(a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable—

(i) to protect property from unlawful appropriation, destruction, damage or interference; or

(ii) to prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or

(iii) to make or assist in the lawful arrest of an offender or alleged offender or a person who is unlawfully at large; and

(b) if the conduct resulted in death—the defendant did not intend to cause death nor did the defendant act recklessly realising that the conduct could result in death; and

(c) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist ... [emphasis added]
If the accused can satisfy a judge or jury of his or her genuine belief, then he or she will not be found guilty of any assault or battery that may have occurred during that defence of property. In the Criminal Code 1899 (Qld) there is a roughly equivalent section (277(1)), but it persists with a more objective test. Unlike the South Australian law, it specifically extends the right to an agent (for example, a security guard) of the property owner or occupier, thus:

It is lawful for a person who is in peaceable possession of any land, structure, vessel, or place, or who is entitled to the control or management of any land, structure, vessel, or place, and for any person lawfully assisting him or her or acting by his or her authority, to use such force as is reasonably necessary in order to prevent any person from wrongfully entering upon such land, structure, vessel, or place, or in order to remove therefrom a person who wrongfully remains therein, provided that he or she does not do grievous bodily harm to such person. [emphasis added]10

This legislative power also extends to those who are trying to prevent someone from thieving. This is found in section 274 of the Criminal Code 1899 (Qld):

It is lawful for any person who is in peaceable possession of any moveable property, and for any person lawfully assisting him or her or acting by his or her authority, to use such force as is reasonably necessary in order to resist the taking of such property by a trespasser, or in order to retake it from a trespasser, provided that the person does not do grievous bodily harm to the trespasser. [emphasis added]

So the power to use force extends to agents. The force to be used is limited, too. It cannot cause grievous bodily harm.

There is a similar provision in Western Australia (both as to objectivity and extension to agents) under the Criminal Code Act 1913 (WA). Section 254 of this Act allows an occupant some latitude in determining what amounts to ‘reasonable’ force:

254 (1) …
(2) It is lawful for a person (‘the occupant’) who is in peaceable possession of any place, or who is entitled to the control or management of any place, to use such force as is reasonably necessary
(a) to prevent a person from wrongfully entering the place;
(b) to remove a person who wrongfully remains on or in the place; or
(c) to remove a person behaving in a disorderly manner on or in the place;
provided that the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm to the person.
(3) The authorisation conferred by subsection (2), as limited by the proviso to that subsection, extends to a person acting by the occupant’s authority except that if that person’s duties as an employee consist of or include any of the matters referred to in subsection (2) (a), (b) or (c) that person is not authorised to use force that is intended, or is likely, to cause bodily harm. [emphasis added]

The effect of section 254(3) of the Criminal Code Act 1913 (WA) is to differentiate the powers of landowners (who can use force up to grievous bodily harm) from those of their agents (who must not have intended any bodily harm, that is, a lesser amount of harm). In other words, the Western Australian Parliament is more wary when it comes to the power of agents to use force on behalf of their principals.

There is a similar provision in the Criminal Code (NT). By virtue of section 27, force in self-defence, defence of property and arrest ‘is justified provided it is not unecessary force and it is not intended and is not such as is likely to cause death or grievous harm.’ Such force can be used by agents of owners as permitted by section 27(k) of the Criminal Code (NT):

10 Criminal Code 1899 (Qld) s 277(1).
in the case of a person who is entitled by law to the possession of moveable property, or a person acting by his authority, and who attempts to take possession of it from a person who neither claims right to it nor acts by the authority of a person who claims right to it and the person in possession resists him, to obtain possession of the property, provided he does not intentionally do him bodily harm. [emphasis added]

New South Wales, too, has legislated concerning the defence of one’s property, but it does not appear to extend to agents of the owner or occupant and there is no standard of harm mentioned. Section 418 of the Crimes Act 1900 (NSW) states:

(1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:

(a) to defend himself or herself or another person, or

(b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or

(c) to protect property from unlawful taking, destruction, damage or interference, or

(d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

and the conduct is a reasonable response in the circumstances as he or she perceives them.

By virtue of section 419 of the Crimes Act 1900 (NSW), the prosecution has the onus of proving, beyond reasonable doubt, that the defendant was not acting in self-defence. Significantly, self-defence is not available in New South Wales if the death of the attacker has resulted11 but it may reduce murder to manslaughter12.

Section 462A of the Crimes Act 1958 (Vic) allows any person (presumably including an agent of a property owner or any citizen) the right to use force:

not disproportionate to the objective as he believes on reasonable grounds to be necessary to prevent the commission, continuance or completion of an indictable offence or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence.13

In the Australian Capital Territory, there is no provision in the Crimes Act 1900 (ACT) that grants a defendant a ‘defence of property.’

Thus it is clear that, at both common law and in the Code jurisdictions, legitimate force can be used to protect one’s own property, and in self-defence. But the provisions are widely diverse and inconsistent between jurisdictions, especially with regard to owners or occupants giving agents (private security) authority to undertake defence of property roles on their behalf. One can safely say, however, that excessive force is, as a rule, penalised by the criminal law unless there are exceptional reasons for its deployment. What is ‘excessive’ and ‘exceptional’ depends upon the facts of each case and the jurisdiction concerned.14

11 Crimes Act 1900 (NSW) s 420.
12 Crimes Act 1900 (NSW) s 421.
13 This assumes, of course, that people understand the distinction between indictable and non-indictable offences.
14 If there has been negligence, trespass, nuisance or breach of statutory duty, the liability of police officers rests on the same general principles that apply to individuals; see Northern Territory v Mengel (1995) 129 ALR 1. However, there may be a category of a duty of care in circumstances where governments should have foreseen harm and did not take steps to ensure their officers knew and observed the limits of their power. See Charles Sampford, ‘Law, Institutions and the Public/Private Divide’ (1991) 20 Federal Law Review 185; Margaret Allars, ‘Private Law But Public Power: Removing Administrative Law Review from Government Business Enterprises’ (1995) 6 Public Law Review 44.
Because of their simplicity and clarity, the New South Wales provisions are certainly the easiest to comprehend. Moreover, the reversal of onus of proof (requiring the prosecution to prove that the person was not acting in self-defence) makes the NSW approach rather appealing. Having said that, the Western Australian and Northern Territory approaches that differentiate between the latitude given to owners as opposed to their agents to use force in defence of property makes very good sense. It is an approach that ought to be adopted by all other jurisdictions.

B. The Power of Citizen’s Arrest

Police officers can detain any person upon suspicion of that person committing an offence by virtue of specific legislation or the common law. If their suspicions turn out later to be incorrect, they are generally immune from civil suit. In addition, all police officers have the right to arrest any person without a warrant on suspicion that an offence is about to be committed. By virtue of their discretionary powers, police officers, generally speaking, are permitted a general defence of reasonable suspicion or honest exercise of power.

Private citizens (including security officers acting on instructions from their principals, or, indeed, civilian police auxiliaries), on the other hand, have no power to detain or arrest any persons without their consent unless they are given authority to do so either by some specific legislative power or in circumstances where their actions are justifiable by virtue of the common law. Even then, the ‘citizen’s arrest’ is limited to detaining the suspect until the public police arrive. That is, private citizens (including private security agents) do not enjoy the immunities that public police officers have, and do not have a defence of reasonable suspicion or honest exercise of power if they make an incorrect judgment. Moreover, they cannot arrest any persons on suspicion of their being about to commit an offence.

The rules relating to citizen’s arrest in Australia are unnecessarily complicated. They change from jurisdiction to jurisdiction. In some jurisdictions, the right of private citizens, security guards and police auxiliaries to make an arrest is limited to ‘indictable’ matters as opposed to ‘summary’ offences. It is unlikely that a citizen or security guard will know what that means. In the Code jurisdictions the law is more clearly stated. Let us turn to each now.

In South Australia the citizen’s arrest power is outlined in section 271 of the Criminal Law Consolidation Act 1935 (SA). Under this section, persons can arrest and detain any person whom they find in the act of committing (or having just committed) an indictable offence, larceny, offence against the person, or offences against property.

In Victoria, section 462A of the Crimes Act 1958 (Vic) allows any person the right to use force:

not disproportionate to the objective as he believes on reasonable grounds to be necessary to prevent the commission, continuance or completion of an indictable offence or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence.

In New South Wales the law is governed by section 100 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW). A citizen can arrest another person where: (a) the person is in the act of committing an offence under any Act or statutory instrument, or (b) the person has just committed any such offence, or (c) the person has committed a serious indictable offence for which the person has not been tried.

So, in each of these jurisdictions, private citizens would need to know the difference between indictable and non-indictable offences, and the elements of the offence. Moreover, in Victoria, they would need to be able to establish whether the circumstances of the arrest could legitimately support their use of force.

It was only in 2004 that the Western Australian Parliament repealed the provisions of the former section 47 of the Police Act 1892 (WA) which allowed any person to arrest without a warrant:

any reputed common prostitute, thief, loose, idle or disorderly person, who, within view of such person apprehending, shall offend against this Act, and shall forthwith
deliver him to any constable or police officer of the place where he shall have been apprehended, to be taken and conveyed before a Justice, to be dealt with according to law …

That jurisdiction now locates its citizen’s arrest powers in section 25 of the Criminal Investigation Act 2006 (WA). Sub-section (2) states that ‘[a]ny person may arrest another person (the suspect) if he or she reasonably suspects that the suspect has committed or is committing an arrestable offence.’

Section 546 of the Queensland Criminal Code Act 1899 (Qld) allows for any person to arrest another person in circumstances where an offence has been committed or is being committed. It stops short of allowing a pre-emptive arrest. An arrest, too, can only occur ‘by night’ if a person has ‘reasonable grounds for believing that the other person is committing the offence, and ... does in fact so believe...’

Under section 441(2) of the Criminal Code of the Northern Territory, any person can arrest another whom he or she finds committing an offence or behaving such that he or she believes on reasonable grounds that the offender has committed an offence and that an arrest is necessary for a range of specified reasons. Likewise, section 218 of the Crimes Act 1900 (ACT) permits a citizen’s arrest.

By virtue of section 55(3) of the Police Offences Act 1935 (Tas), any person may arrest any other person whom they find offending where they have reasonable grounds to believe that the conduct will create or may involve substantial injury to another person, serious danger of such injury, loss of property or serious injury to property. Of especial interest is subsection (4) which could be interpreted to allow a citizen a pre-emptive arrest:

For the purposes of this section, an offence shall be deemed to involve any of the matters specified in subsection (3) if the person arresting has reasonable grounds for believing that such matter has been, or will be, the consequence of any act of the offender in committing such offence. [emphasis added]

But subsection 55(5) of the Police Offences Act 1935 (Tas) appears to dispute any such interpretation by using the terminology ‘found offending’ and ‘committed an offence against this Act’ which is clearly in the past tense.

One can safely conclude, generally, that where it is clear on the evidence that a private citizen, or security officer, in detaining a suspect, acted reasonably and the suspect unreasonably, then it is likely that the court will find in favour of the citizen or security officer and against the suspect if that suspect chooses, later, to sue the citizen for assault or false imprisonment. In other circumstances where, say, a property owner (or an agent) arrests a thief in a manner, and in circumstances, disproportionate to the likely harm to the victim, and in clear defiance of the rights of the suspect (for example, to be taken forthwith to a police station), then the court is very likely to find in favour of the suspect (guilty or otherwise) in a later civil suit.

In the High Court case of Williams v The Queen (1986) 161 CLR 278 Mason and Brennan JJ articulated the balancing act required. The case involved police officers, but the principles espoused could apply equally to cases involving citizen’s arrest:

The jealousy with which the common law protects the personal liberty of the subject does nothing to assist the police in the investigation of criminal offences. …The competing policy considerations are of great importance to the freedom of our society and it is not for the courts to erode the common law’s protection of personal liberty in order to enhance the armoury of law enforcement.16

The courts thus look for a middle path.17 For its clarity, simplicity and brevity in achieving a balanced approach, and its avoidance of the potentially confusing use of the word ‘indictable’, the Western Australian provisions are to be preferred as a model for other jurisdictions.

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15 Criminal Code Act 1899 (Qld) section 546 (e).
16 Williams v The Queen (1986) 161 CLR 278, 296 (Mason and Brennan JJ).
III. SPECIFIC POWERS GRANTED TO NON-POLICE

Given the possibility for confusion between the rights of security personnel as members of the public and their powers as persons exercising authority on behalf of others, there have been some attempts by Australian Parliaments to grant powers to specified officers in certain settings. These powers, however, remain strictly within each manifestation. It is useful to review some of them here.

A. Australian Protective Service Officers

The Australian Protective Service (‘APS’) was established in 1984 as a government agency that provides specialist protective security to government departments on a contractual ‘fee-for-service’ basis. Its core business responsibility is to provide security services at, for example, Parliaments and government residences, foreign diplomatic missions, the Australian Nuclear Science and Technology Organization (‘ANSTO’) and defence establishments, and to staff counter-terrorism units at major airports. Australian Protective Service officers (‘PSOs’) are invested with specific protective security law enforcement powers beyond those enjoyed by private sector operatives, but less than those available to Australian Federal Police. They are empowered by the Australian Protective Service Act 1987 (Cth), the Crimes Act 1914 (Cth); and the Australian Federal Police Act 1979 (Cth) to arrest without warrant any person contravening specific Commonwealth laws.18

B. Maritime and Aviation Security Officers

Under the Maritime Services Act 1935 (Cth) and the Aviation Transport Security Act 2004 (Cth), appropriately trained and licensed private security officers assume the powers that are vested in them by these Acts. These officers are empowered to carry out security duties especially designed to preserve the integrity of critical infrastructure.

C. Protective Security Officers (SA)

The Protective Security Act 2007 (SA) created the position of Protective Security Officer (PSO). PSOs are not linked to any specific body of police, nor are they engaged for a specific event. They are not sworn police officers. PSOs are appointed and managed, however, by the Police Commissioner, who has power to discipline them. They are empowered to provide a first response to terrorist incidents and to protect buildings, vehicles, officials and designated places. Consequently they are resourced with a range of tactical options that can include the use of firearms, batons and capsicum spray. PSOs are not expected, nor are they required, to become involved in complex police activities or investigations. They do not have powers of a constable. Some PSOs have the power to wear and to deploy firearms.20 PSOs have the authority to give reasonable directions, refuse entry, direct a person to leave a location, require persons to state their reason for being at a certain location and require persons to state their name and address and to provide identification when requested. They are able to conduct searches on persons,
vehicles or property under certain circumstances, and seize items and evidence. They can detain a person for a ‘Protective Security Offence.’

D. Project Griffin volunteer officers

Project Griffin is the name given to the program where certain privately-based security personnel are ‘on call’ for emergency responses. These officers remain employed principally in other ‘security’ occupations, usually as security managers of selected Central Business District (‘CBD’) buildings. Project Griffin was developed by the City of London Police in 2004. The idea of the project is to have, at the ready, a significant number of private security officers, specifically ‘Griffin-trained’, available to help police if there is a major incident, such as a terrorist attack. The powers of these officers (and they are very limited powers indeed) only come into play when a terrorism incident occurs and they are called up for ‘critical incident management’ duty, principally to man police cordons and control access to areas affected by terrorist acts. A variety of Project Griffin has been launched by Victoria Police (‘VicPol’) and operates, in a limited fashion, around the Melbourne CBD under the auspices of VicPol’s Counter-terrorism Coordination Unit which was set up in 2005.

IV. DISCUSSION

When exceptional authority is bestowed upon those who administer and enforce the law, it requires legislative action through Parliamentary debate. For that reason, the rules regulating public policing are set out prospectively to authorise the taking of particular action, and also retrospectively to show interested forums, such as the courts and Parliaments, that the action was justified in the circumstances.

Private security personnel and private operatives are now undertaking many of the same policing roles as police officers, but the laws that apply to empower and restrict them are not in the same league, and there is an argument that they should be better articulated by Parliaments. Broadly-based legislation giving specific powers to all licensed agents, however, does not exist in Australia. Australian Parliaments have, for the most part, simply set up licensing regimes. They have not specifically set out powers and immunities.

True, there is ad hoc legislation that applies to issues such as defence of property and citizen’s arrest as described herein. But this legislation applies to all people including security personnel and is thus not specific to them. In other words, Parliaments have avoided broadly-based legislation that covers the powers and immunities of private security officers more generally. One can sympathise. It is a difficult task to specify private police powers across the board, given the many forms and varieties of private operatives that exist and the multitude of activities in which they may be engaged. In addition, many private security firms are, or are becoming, national and transnational corporations, and thus any general attempt to set legislated rules which transcend national and international boundaries would be difficult to do, let alone to implement and enforce.

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21 Such an offence is committed if a person is caught failing to obey reasonable directions, failing to state his or her reason for being on certain premises, failing to give his or her correct name and address, failing to produce identification, hindering or assaulting or resisting a PSO in the execution of protective security duties, and impersonating a PSO.

22 The name is taken from the fictitious creature of eagle/lion that is the symbol of the City of London.

23 According to anecdotal reports, there could be up to 4000 security officers working privately in the London CBD on any given day.

24 In a similar move, South Australia Police (‘SAPOL’) has initiated a Project Griffin Steering Group (made up of SAPOL representatives and a selection of private security managers) to progress the implementation of the initiative in the Adelaide metropolitan area. Other than these variations on a ‘Griffin’ theme, there are no Griffin-style programs currently running elsewhere in Australia.


Where should we proceed from here? Should Parliaments address the powers and immunities that may apply to the vast amount of policing that is now conducted by ‘private’ agents? For example, could we foresee a situation where personnel could safely rely upon immunities from suit more generally? Two initiatives that could be implemented without too much difficulty are offered here.

A. Bona Fide Acts Immunity

The idea of a person being protected from legal suit when exercising good faith is not novel. For example, s 74(2) of the Civil Liability Act 1936 (SA) states that ‘[a] good Samaritan incurs no personal civil liability for an act or omission done or made in good faith and without recklessness in assisting a person in apparent need of emergency assistance.’ There is a good argument to suggest that Parliaments enact a ‘reasonable suspicion and good faith’ immunity for those engaging in a bona fide act of crime prevention. This could easily be done by amending civil liability legislation. The legislation might also consider a distinction between bodily harm and grievous bodily harm if providing a defence to a criminal charge.

B. Griffin-Style Empowerment

It is also possible to envisage legislation capable of matching and accommodating all of the circumstances in which private personnel could be called upon to assist in a Griffin-style operation. That legislation could specify what personnel can or should do in certain circumstances, what they are required to avoid doing, and when they can safely rely upon immunity from legal suit if they make a mistake. Clearly, any such legislation could only be activated once there was satisfaction that the required levels of training and regulation would accompany implementation.

V. Conclusion

As policing moves more and more into private hands, the traditional legal powers that apply to ‘policing’ are becoming outdated. The powers and immunities of private security personnel are often unclear and inconsistent, dependent upon fine distinctions, differ from jurisdiction to jurisdiction, and differ markedly from those of the public police even though security personnel are often carrying out many of the same tasks in the same precincts. The examples of rules regarding the protection of property and citizen’s arrest, as illustrated above, bear this out, and one would be forgiven for expressing some despair. By the same token, if it is possible to create legislation regarding citizen’s arrest and defence of property, it is possible to devise a legislative scheme that directs its attention more specifically to the powers and immunities of security personnel.

What should be done to remedy this situation? There is a good argument to continue to explore specific legislated immunities for private security personnel who have been suitably trained and who are engaged in bona fide acts of crime prevention. There is also a good argument to continue to explore legislative powers and immunities for ‘Griffin-trained’ personnel when they are called upon to engage in security tasks.

Pursuit and promotion of specific legislation and legal powers will, arguably, lift training standards for some personnel, improve public confidence, improve response capacity, and may enhance accountabilities at the same time. Each of these things would go a long way to enhancing effective policing in our communities, too.
LESSONS LEARNED; ACCOUNTABILITY AND CLOSURE: IS THE CORONIAL PROCESS PROVIDING WHAT IS NEEDED TO INDIGENOUS COMMUNITIES?

MANDY SH棘ORE

On Friday the 14 October 2005, the Department of Immigration and Multicultural and Indigenous Affairs (‘DIMIA’) owned monitoring vessel, the Malu Sara, sunk while travelling from Sabai Island to Badu Island in the Torres Strait. All five of the people on board, including two Indigenous Departmental officers and three passengers drowned. The findings of the coronial inquest into the loss of the vessel confirms that the tragedy was entirely preventable and highlights the appalling and parlous state of services provided to Indigenous and Torres Strait Islander persons living in remote communities. From the commissioning of vessels, to the building and inspection process, to the training of Movement Monitoring Officers, to the response to the calls for assistance, through to the initial investigation into the loss of the vessel, the tragedy is riddled with incompetence, apathy, racially motivated and inappropriate assumptions and a lack of accountability.

For the Indigenous communities involved who are seeking answers including how the tragedy was allowed to occur, how such occurrences in their communities will be prevented in the future, and whether parties involved will be held to account for their conduct; questions remain as to whether the coronial process in Queensland are able to adequately address such concerns. Using the Malu Sara inquest as a case study, this paper will look at how provisions under the Coroners Act 2003 (Qld) have recently been interpreted and applied, with particular emphasis on the intersection between the role of the Coroner and the criminal process.

I INTRODUCTION

On Friday the 14 October 2005, the DIMIA owned monitoring vessel, the Malu Sara, sank while travelling from Sabai Island to Badu Island in the Torres Strait.1 All five of the people on board, including two Indigenous Departmental officers and three passengers drowned. The findings of the coronial inquest into the loss of the vessel confirms that the tragedy was entirely preventable and highlights the appalling and parlous state of services provided to Indigenous and Torres Strait Islander persons living in remote communities.2

From the commissioning of vessels, to the building and inspection process, to the training of the Movement Monitoring Officers (‘MMOs’),3 to the response to the calls for assistance, through to the initial investigation into the loss of the vessel, the tragedy is riddled with incompetence, apathy, racially motivated and inappropriate assumptions and a lack of accountability. Unfortunately this tragedy is not an isolated incident in remote Indigenous communities. High

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1 From the time of the loss of the Malu Sara to the date of the inquest the name of the Department of Immigration and Multicultural and Indigenous Affairs changed to Department of Immigration and Citizenship. In this paper, as in the inquest, the Department will be referred to as either ‘DIMIA’ or the ‘Department’. Currently Indigenous affairs are administered under the Department of Families, Housing, Community Services and Indigenous Affairs.

2 Inquest into the Loss of the Malu Sara (Unreported, Queensland Coroner’s Court, State Coroner Michael Barnes, 12 February 2009).

3 Movement Monitoring Officers (‘MMOs’) were employees of the Department, recruited from local Torres Strait Islander residents, to record arrivals and departures from the Islands and to manage the flow of people between Papua New Guinea and the Torres Strait Islands.
profile coronial inquests into the deaths of Mulrunji Doomadgee in Queensland and Mr Ward in Western Australia continue to remind us that the police and correctional services have failed to learn the lessons from the Royal Commission into Aboriginal Deaths in Custody. While others, including the inquest into the loss of the Malu Sara, remind us that for people living in remote communities, substandard services and disregard for human life continue to have devastating, yet avoidable consequences.

As the forum where unexpected deaths are explored, the coronial inquest has the potential to explain the causes and circumstances of a death and to make recommendations with a view to preventing similar deaths in the future. In this sense the coronial process has often been identified as having the ability to ‘speak for the Dead to protect the living’. Yet for remote Indigenous communities who continue to experience preventable deaths, these ideals are far from realised.

This paper considers how the modern coronial process operates to provide answers and accountability for Indigenous communities. By way of case example the paper will begin with a brief overview of the facts and findings of the inquest into the Malu Sara. The paper will then outline the preventative role of the modern Coroner’s court, with particular reference to the court in Queensland and consider its effectiveness. The fourth part focuses on the relationship between the Coroner’s court and the criminal process and examines the removal, in most jurisdictions, of the ability of the Coroner to attribute guilt. In conclusion it will argue that in order to provide greater accountability and answers for Indigenous communities there is a need to further refine and clarify the role of the Coroner.

II. FACTS AND FINDINGS OF THE INQUEST INTO THE LOSS OF THE MALU SARA

In 2005, the DIMIA, through its regional manager, sought tenders for the design, manufacture, supply and maintenance of six vessels for inshore patrol operations in the Torres Strait. The vessels were to be operated by local Torres Strait Islander MMOs, employees of DIMIA whose job involved patrolling the waters of the Torres Strait. The tender process was found to be severely lacking:

(i) it was conducted by a regional manager who had limited experience in the procurement of marine vessels and who deliberately misrepresented that the waters in which the boats would be operating in were ‘smooth and partially smooth waters’ instead of ‘open waters’; and

(ii) this deflected the need for an independent marine surveyor to inspect the vessels prior to being put into survey.

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4 There have been three inquests into the death of Mulrunji Doomadgee including *Inquest into the Death of Mulrunji* (Unreported, Queensland Coroner’s Court, Acting State Coroner Clements, 27 November 2006) and *Inquest into the Death of Mulrunji* (Unreported, Queensland Coroner’s Court, Acting Deputy Chief Magistrate Hine 14 May 2010).
5 *Inquest into the Death of Ian Ward,* (State Coroner of Western Australia, Alastair Hope, 12 June 2009).
6 Commonwealth, Royal Commission into Aboriginal Deaths in Custody (*RCIADIC*), *National Report* (1991). As will be noted below, the coroner in the *Inquest into the Loss of the Malu Sara* raised concerns regarding the appropriateness of the police investigation into the loss of the vessel, similar to concerns raised regarding investigations in the *RCIADIC*.
7 See *Coroners Act 2003* (Qld) s 3, Objects of Act.
9 The original draft of the Request for Tender referred to the boats as being required for ‘inshore and offshore patrol operations in smooth, partially smooth and open waters’, however without explanation the regional manager deleted the words ‘offshore’ and ‘open waters’. *Inquest into the loss of the Malu Sara* (Unreported, Queensland Coroner’s Court, State Coroner Michael Barnes, 12 February 2009) 16.
10 Ibid 17.
11 The contract was entered into with *Subsee* boat building company which was not an accredited boat builder or boat designer at the time of the tender, although the proprietor of the company ‘Mr Radke’ was accredited. Ibid 22.
The tender was awarded to the boat builder who provided the most cost effective quotation, and who (among other things) failed to build the boats with adequate flotation devices pursuant to requirements under the relevant safety codes. The boat builder deliberately employed shortcuts leading to unsatisfactory workmanship, unacceptable boat building and inadequate quality control (the certification of the boat builder was found to be flawed and invalid). The regional manager and the tender evaluation panel failed to request certification from the boat builders and failed to identify deficiencies in the design of the vessel.

A local marine repairer who inspected the prototype noted a number of deficiencies with the vessel and recommended its return to Cairns for modification. This was considered by the regional manager to be too expensive and instead some minor rectifications were made to the vessel onsite. Local MMOs also listed a number of concerns about the design and manufacture but these too were ignored by the regional manager as minor and ‘to be expected’. Of greatest concern was the lack of safety and navigation equipment aboard the vessels, the latter of which was requested by the MMOs. As was noted by the Coroner:

An explanation of Mr Chaston’s [the regional manager] failure to ensure the vessels were properly equipped might be found in the attitude he displayed when discussing the issue with two local marine equipment suppliers….. Mr Chaston said words to the effect; ‘the MMOs are two generations behind and would not be able to handle this type of equipment’.

The Coroner found that the failure to fit the GPS ‘almost certainly contributed to the sinking of the Malu Sara’. The construction process was hampered by staff shortages, an unrealistic timeframe, incompetence and a lack of inspection and accountability.

Training for the MMOs who were to skipper the boats was minimal (particularly in relation to training regarding the use of new satellite phones which were the only source of communication). Shortly after use, problems associated with the vessel were noted however there was limited or no investigation into the problems undertaken.

Two days before the fatal voyage, the regional manager was advised that the boat sat too low in the water and that the void of the Malu Sara had taken water, but again, this was not adequately investigated. Despite requests made by the skipper on the day prior to the tragedy to delay the voyage due to weather conditions the regional manager gave permission for the vessel to take a passenger on a journey from Saibai to Badu Island. On the day of the tragedy, weather conditions had deteriorated further.

Mistakes were not limited to the construction and commission of the boats. On the day of the tragedy when the boat became lost in the fog in strong winds and seas, the skipper advised the Department base that the vessel was taking water, but no action was taken until nightfall (even then the regional manager failed to advise the Search and Rescue Mission Coordinator (Sergeant Flegg) that the boat had experienced a similar incident (with water entering a supposedly watertight bilge) two days earlier). Although communication over the satellite phone between the Department officer and the skipper was disjointed and interrupted, it was evident that selective and misrepresented information about the boat’s distress was passed onto the Australian Search and Rescue Service by both the regional manager and Sergeant Flegg.
The Coroner found that the response to the Malu Sara’s calls reflected a cynical view within the police department that EPIRB’s were used in the Torres Strait when people ‘were inconvenienced rather than in peril’. 24 Such an attitude was evident from Sergeant Flegg’s report to the AusSar officer that ‘the report about the boat being out of oil was probably an exaggeration because the boat’s occupants were “sick of being out there and want to get home”’. 25 It was noted by the Coroner that this comment was flippantly made at a time when the boat was most likely sinking and people on board were ‘frantically trying to save themselves’. 26

The Coroner further found that Sergeant Flegg failed to take effective action, and inaccurately represented the seriousness of the Malu Sara’s predicament in his log the following day. 27 Sergeant Flegg denied that he had been told by the Department officer who was in communication with the skipper of the Malu Sara that the vessel was sinking. He mistakenly believed the AusSAR helicopter was not operational (but did not check) and instead contacted the volunteer marine rescue organisation (VMR) to determine if a crew could attend and assist the Malu Sara. He did not advise that the vessel was sinking, instead stating that ‘they’re starting to take a bit of water in and they’re bailing out’. 28

Reminiscent of police investigations into deaths in custody, Sergeant Flegg conducted the Queensland Police Service (‘QPS’) investigation into the incident, despite the fact that he was an integral part of the failed response. Although the Commissioner of Police accepted this was appropriate, the Coroner found that the investigation was flawed and should have been conducted by independent officers. 29

All five people aboard, including a young child passenger drowned after the boat sank.

III. THE CORONER’S RECOMMENDATIONS

A. The Power To Make Comment

Much has been written on the evolution of the coronial process in Australia over the last 25 years. 30 Of particular importance has been the move to a more preventative health role that provides Coroners with powers to make recommendations to prevent future avoidable deaths. While under the previous regime the Coroner had the power to make ‘riders’ on findings, these ‘riders’ were subsidiary to, and not part of, the determination of the cause of death and the possible commission of criminal offences. 31 The elevation of the functionality of comments and recommendations, has provided the Coroner with the ability to consider both the wider systemic issues surrounding particular deaths as well as what may be done to prevent similar deaths in the future.

24 Ibid 69. There was evidence that authorities in the Torres Strait would often refer to activated EPIRB’s as ‘Empty Petrol I Require Boat’.
25 Ibid.
26 Ibid.
27 Ibid 68. The Coroner was unable to conclude whether this was deliberate to cover up the inadequacy of the response, or was due to misinformation by others.
28 Ibid 73.
29 Ibid 3. It should be noted that in June 2010, the Queensland Crime and Misconduct Commission criticised the Commissioner of Police for presiding over a culture of self protection, referring to the police handling of the investigation of the death of Mulrunji Doomadgee in police custody in December 2004 - Crime and Misconduct Commission, CMC Review of the Queensland Police Service’s Palm Island Review (June 2010).
31 See, eg, the now repealed Coroners Act 1958 (Qld) s 43 (5A), which provided that ‘a rider shall not be or be deemed to be part of a coroner’s findings but it may be recorded if the coroner sees fit’.

58
In Queensland the object of the Coroners Act 2003 (Qld) includes to:

- help to prevent deaths from similar causes happening in the future by allowing coroners at inquests to comment on matters connected with deaths, including matters related to —
  (i) public health or safety; or
  (ii) the administration of justice.  

Included with these wider powers of inquisitorial investigation and fact finding, the Coroner is empowered to compel witnesses to give evidence, even where such evidence would incriminate the witness.  

While this more expansive inquisitorial role has been embraced as having the potential to protect human rights and promote therapeutic outcomes, criticism has been levelled as to the limited ability of the coronial process to affect change and provide adequate redress for families of the deceased. This criticism has been directed at the lack of sufficiently qualified judicial officers to determine complex health and safety issues, as well as the lack of resources to allow officers to investigate and address complex policy issues.  

The greatest impediment affecting the effectiveness of coronial inquest is the lack of enforcement measures to ensure that recommendations receive adequate consideration and are implemented. Calls have been made to legislatively compel responses to coronial recommendations, yet only in Victoria has this been comprehensively addressed. In Queensland, where the comments relate to a government entity the Coroner must provide a written copy of the comments to the Attorney-General, the responsible Minister and the chief executive officer of the entity. However, there is no requirement for any response to the recommendations or follow up on what, if any, action has been taken to consider or implement the recommendations.  

In both the Australian Capital Territory (‘ACT’) and the Northern Territory (‘NT’) the Coroner’s comments, at least in relation to deaths in custody, require a response. In the ACT this includes a written response to be provided by the custodial agency to the responsible Minister, who must then provide a copy to the Coroner, who in turn must forward the response to each person or agency to whom the comments were directed. In the NT the relevant agency must respond to the Attorney-General, who must then report to the Coroner and provide a copy of the report to the Legislative Assembly.  

The most progressive reforms to date have occurred in Victoria. After extensive community consultation and recommendations from the Victorian Law Reform Commission that the Coroners Act 1985 (Vic) be amended to empower the Coroner to require a written response from any individual or agency, the new Coroners Act 2008 (Vic) requires a public authority or entity who has received recommendations from the Coroner to provide a written response within three months of the action that will or has been taken. The response must then be provided by the Coroner to interested parties and published on the internet.  

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32 Coroners Act 2003 (Qld) s 3.  
33 Coroners Act 2003 (Qld) s 39.  
38 See Watterson, Brown and McKenzie, above n 30, 19.  
39 The recently enacted Coroners Act 2008 (Vic) is discussed further below.  
40 Coroners Act 2003 (Qld) s 46(d).  
41 Coroners Act 1997 (ACT) s 75, 76.  
42 Coroners Act (NT) s 46B.  
43 Coroners Act 2008 (Vic) s 72.  
44 Coroners Act 2009 (Vic) s 72.
The Victorian reforms should be considered as a first step (a minimum requirement) to perform a preventative function of the coronial process. In cases such as the Malu Sara where the recommendations, as outlined below, involve a number of government processes, agencies and statutory bodies, confidence can only be restored in these bodies where their response (and action) to coronial recommendations can be publically interrogated. The community, who generally at great emotional and personal cost relive the pain of the loss of a loved one through the coronial process have the right to know of the reasons where such a body fails to implement the coronial recommendations.45

B. The Coroner’s Recommendations — Inquest into the Loss of the Malu Sara

Apart from the comments referring to prosecution and disciplinary action which are discussed in the next part of this paper, the Coroner made ten recommendations in the inquest into the loss of the Malu Sara. The recommendations included:

• That the QPS review the performance of the Search and Rescue Mission Co-ordinator (‘SARMC’) and consider whether further training was required. In particular it was noted that ‘senior members of the water police with search and rescue responsibilities have developed a cavalier attitude to marine incidents’.46
• QPS policies be reviewed to determine the appropriateness of providing the SARMC with the power to task a rescue helicopter.
• Where a search and rescue operation has resulted in a death/s, these deaths should be investigated by independent police officers not involved in the search and rescue activities and who are appropriately qualified to undertake independent investigations.
• Department procurement policies and procedures should be reviewed to address the mistakes that were made in the procurement process for the Malu Sara.
• Maritime Safety Queensland should address weaknesses in its boat building and boat designer accreditation and/or take steps to rescind all existing accreditations and advise the public accordingly.
• That there be a review of Australian Maritime Safety Authority’s paper based boat surveys, which at the time allowed boats to be brought into survey without proper independent inspection.
• The Department provide MMOs with appropriately equipped and seaworthy vessels, equipment and appropriate training.
• The Department should develop an appropriate emergency response plan and ensure that staff in the Torres Strait region receive appropriate training.
• That AusSAR officers receive further training.
• AusSAR and the QPS review the adequacy of search assets routinely available in the Torres Strait.47

With no requirement for responses by government and QPS to the above recommendations, there is no guarantee for the people of the Torres Strait that such a tragedy would not occur again. The Australian government relies on the activities of the MMOs in the Torres Strait to patrol movement into Australia, and prevent the smuggling of prohibited goods and border incursions. Yet as the Malu Sara case demonstrates, the regard for the safety of these officers was lacking at all levels of government activity.

45 See, eg, Watterson, Brown and McKenzie, above n 30, 4.
46 Inquest into the Loss of the Malu Sara (Unreported, Queensland Coroner’s Court, State Coroner Michael Barnes, 12 February 2009), 93.
47 Ibid 93, 94.
IV. THE INTERFACE BETWEEN THE CORONIAL AND THE CRIMINAL PROCESSES

A. Issues Arising from the Prohibition on Statements Attributing Guilt

As discussed above, the removal of the power to commit for trial in Australian jurisdictions has allowed the coronial inquiry to assume a more inquisitorial function and to compel witnesses to give evidence, even where to do so would lead to self-incrimination. To protect witnesses from self-incrimination, the Coroners Act 2003 (Qld) provides that evidence is not admissible against the witness in any other proceeding (other than a proceeding for perjury). Similar provisions apply in other Australian jurisdictions. While few would doubt that this has significant benefits in providing for a more open inquiry, it is argued that the inability to attribute guilt has the potential to lead to further distress for families of the deceased.

For Indigenous communities it has been said that the ‘purpose of a traditional Aboriginal investigation into a death was to identify those responsible and was likely to be followed by a revenge expedition’. While the Coroners Act 2003 (Qld) mandates referral to the appropriate prosecuting authority in situations where the Coroner reasonably suspects that an offence has been committed, this section has recently been read in conjunction with sections 45(5) and 46(3) of the Coroners Act 2003 (Qld) which precludes the Coroner from making any statement in their findings or comments, that a person is, or may be guilty of an offence or civilly liable. In the inquest into the loss of the Malu Sara the Coroner held that this prevented the Coroner from including in the findings any statement that a referral had been made to prosecuting authorities. To do otherwise, it was stated, would necessarily infer that a person may be guilty of an offence. No suggestion was made in the case by the Coroner that the families would be advised separately of any decision to refer the matter for prosecution. As will be discussed further below, the approach by the state Coroner in this regard (in relation to the intersection between the coronial and criminal processes) has been far from consistent.

While the section preventing statements that a person may be guilty of an offence may seem clear, a number of issues remain uncertain. How does it affect the Coroner’s power to make findings of fact, which may by their very nature infer potential guilt? And where such inferences can be drawn are parties advised of any decision to refer to prosecuting authorities? Does the section prevent submissions being made on behalf of interested parties that a person may be guilty of an offence and / or that a referral should be made to prosecuting authorities? Do the sections prevent a Coroner from making findings that a person is not criminally responsible? Each of these questions will be considered in turn.

B. Findings of Fact

It has been held that similar provisions in other jurisdictions must be construed in the context of the object of the coronial process, that is, to investigate the death and to make findings of how the person died and the cause of death. Care must be taken in the way findings are expressed however the Coroner is still compelled "to find the facts, from which others may, if necessary, draw legal conclusions".

In referring to section 26(3) of the Coroners Act 1975 (SA), her Honour Nyland J stated:

[Section] 26(3) refers not only to findings of criminal or civil liability, but also any ‘suggestion’ thereof. The addition of the word ‘suggestion’ is liable to cause confusion as it might be argued that the mere finding of certain facts can, in cases such as the present,

48 Coroners Act 2003 (Qld) s 37;
49 Coroners Act 2003 (Qld) s39. Similar provisions exist in other jurisdictions.
50 Coroners Act 2009 (NSW) s 61; Coroners Act 2008 (Vic) s 57; Coroners Act 2003 (SA) s 23; Coroners Act 1995 (Tas) s 54; Coroners Act 1996 (WA) s 47; Coroners Act (NT) s 38.
51 See Brazil, above n 8, 45.
52 Inquest into the Loss of the Malu Sara (Unreported, Queensland Coroner’s Court, State Coroner Michael Barnes, 12 February 2009), 95.
suggest or hint at criminal or civil liability and hence breach the section. This is due to the fact that certain acts, such as, in this case, sending a bomb, appear to have no possible legal justification. However, I do not think that s 26(3) should be read in such a way. The mere recital of relevant facts cannot truly be said, of itself, to hint at criminal or civil liability. Even though some acts may not seem to be legally justifiable, they may often turn out to be just that. For example a shooting or stabbing will, in some circumstances, be justified as lawful self-defence. As I have stated, criminal or civil liability can only be determined through the application of the relevant law to the facts, and it is only the legal conclusions as to liability flowing from this process which are prohibited by s 26(3). Thus, the word ‘suggestion’ in this section should properly be read as prohibiting the coroner from making statements such as ‘upon the evidence before me X may be guilty of murder’ or ‘X may have an action in tort against Y’ or statements such as ‘it appears that X shot Y without legal justification’. In other words, the term ‘suggestion’ in s 26(3) prohibits speculation by the coroner as to criminal or civil liability…[^54]

Thus it is permissible for the Coroner to set out to how the death occurred and who may be responsible for the death (provided the Coroner refrains from ‘using language that is applicable to decisions made by criminal and civil courts when they adjudicate upon the same issues’).[^55] Accordingly the sections should not adversely impact upon the ability of the Coroner to make frank and open findings of fact, even where such findings may be by their nature infer potential guilt.

Where such frank and open findings of fact may be interpreted to infer a suspicion of guilt, there may be a genuine expectation from families and community members that those persons be brought to account before the full force of the law.^[56] How this expectation is realised is far from clear. While natural justice requires that those suspected of committing criminal offences be afforded the opportunity to a fair hearing and a right to refrain from giving self-incriminating evidence, the Coroners Act 2003 (Qld) empowers the Coroner to compel such evidence where it is in the public interest to do so.[^57] Protection is provided to the witness, as the evidence, including derivative evidence is not admissible against the witness in any other proceeding (other than perjury).[^58] Although it should be noted that protection is not absolute. Once the witness raises incriminating material, evidence relevant to the material may be sought and obtained through other avenues. It has further been held that natural justice requires that where referrals are made to prosecuting authorities, opportunity must be provided to the person to whom the referral relates to privately make submissions to the Coroner;[^59] this is considered a separate and discrete matter from the Coroner’s public findings.[^60]

However, the notification process must be devised in a manner where the defence is not compromised. It is submitted that to assist in obtaining closure and ensuring accountability, families of the deceased should be advised of any intended referral to prosecuting authorities. In the second Inquest into the death of Mulrunji Domadgee, the Acting State Coroner noted that she was required not to include in the findings, any information which would offend the prohibition contained in sections 45 and 46 of the Coroners Act 2003 (Qld) (that is she could

[^54]: Perre v Chivell [2000] SASC 279 (Unreported, 24 August 2000) [57]. Note that section 26(3) of the Coroners Act 1975 (SA) provided that: ‘A coroner holding an inquest must not in the inquest make any finding, or suggestion, of criminal or civil liability’.


[^56]: It must be acknowledged that while the coronial inquest and findings may infer a suspicion of guilt, this is distinct from the criminal process, where facts must be established beyond reasonable doubt and issues regarding the Defendant’s mental state and appropriate defences/excuses are tested.

[^57]: Coroners Act 2003 (Qld) ss 39(2) and 39(3).

[^58]: Coroners Act 2003 (Qld) ss 39(3) and 39(4).

[^59]: Annetts v McCann (1990) 170 CLR 596.

[^60]: See Glen Cranny, ‘Coronial Inquests’ (June, 2006) Proctor 26; Annetts v McCann (1990) 170 CLR 596.
not make comment on the referral of the matter for potential prosecution). She noted however that:

[T]here is the competing interest of the family of the deceased who have a legitimate interest in knowing how the coroner has discharged this statutory obligation, if it arises. I simply indicate that I will consider my statutory obligation to inform prosecuting authorities, which would include informing the legal representatives of parties who may be affected and the family of the deceased. I emphasize that any decision to prosecute rests solely with other authorities.62

It would appear that there is nothing to prevent a Coroner communicating privately with the families of deceased persons as to whether the Coroner has formed a reasonable suspicion that a person has committed an offence and that a referral to a prosecuting authority has been made. This is a critical aspect of the coronial process and for Indigenous communities (who require those responsible to be accountable for their actions), this should be a minimum requirement. There are no coronial guidelines addressing this issue, and no consistent approach by Coroners. In the inquest into the Malu Sara the Coroner did not make any public statement as to his view on whether such a communication could be made and did not indicate whether he would recommend that submissions made by counsel should be followed; rather families were left to ponder whether any further criminal action would be taken. This approach also appears inconsistent with the interpretation the Coroner has taken in other inquests where he was prepared to state in his findings that a referral had been made to the Director of Public Prosecutions (‘DPP’).63

C. Counsel Submissions

Under the previous Queensland legislation, parties were not permitted to make submissions to the Coroner, except where the Coroner was considering committal for trial, and such submissions were restricted to issues of law.64 No such prohibitions exist under the Coroners Act 2003 (Qld), although it has been suggested that the restriction imposed upon the Coroner of making statements attributing guilt will prevent submissions by counsel on such issues.65 These arguments are drawn from authorities where similar provisions have been considered. In the Tasmanian Supreme Court case of R v Tennent ex parte Jager,66 Cox J concluded that a similar provision in the Coroners Act 1995 (Tas) prevented parties from making submissions concerning legal responsibility and attribution of guilt. Cox J stated:

The focus of an inquest conducted under the Act being the ascertainment of facts without deducing from those facts any determination of blame, and the mischief sought to be avoided being the public naming of persons as suspected of criminal activity when they may never be charged, submissions to the coroner that he or she should form a belief that a named person has committed an indictable offence in connection with a death being investigated by the coroner would serve little purpose but to frustrate the intention of Parliament by attracting the very attention from the press and the public which the prohibition seeks to avoid……In my view, the submissions of counsel in their addresses to the Coroner should be confined to the matters relevant to the factual findings which she is required to make and should not address the issue of any belief which she might form as to the commission of a crime committed in connection with a death which she has been investigating. 67

62 The Inquest into the Death of Mulrunji (Unreported, Queensland Coroner’s Court, Acting State Coroner Clements, 27 November 2006), above n 4, 34.
63 See, eg, Inquest into the Death of Andrew John Bornen (Unreported, Queensland Coroner’s Court, State Coroner Michael Barnes, 16 July 2010).
64 Coroners Act 1958 (Qld) s 43(5A), provided that ‘a rider shall not be or be deemed to be part of a coroner’s findings but it may be recorded if the coroner sees fit’.
65 See Cranny, above n 60.
66 [2008] 9 Tas R 111.
In the inquest into the *Malu Sara*, counsel assisting the Coroner argued in written submissions that referral to the DPP should be made in respect of the boat builder’s conduct in building the vessel. Counsel for the boat builder submitted that:

the scheme of legislation in the Coroners Act (by reason of a reading of s 48 with sections 45(5) and 46(3) did not intend to give rise to and encourage public debate about the existence of reasonable suspicion’ amongst the legal representatives and the Coroner.

He further noted that:

[a] consequence of the alternative view, namely a public debate about the existence of reasonable suspicion is permitted, is that a possible suspect is forced by reason of adverse publicity to join the debate and potentially disclose legal argument that would best be directed to the DPP in submissions.

In his findings and comments the Coroner made no reference or determination in relation to these issues, noting only that he was of the view that no statement could be made regarding a referral pursuant to section 48(2) of the *Coroners Act 2003* (Qld).

D. Findings of No Reasonable Suspicion

In referring to the legislative intention in removing the Coroner’s power to commit for trial in Victoria, Calloway JA in the case of *Keown v Khan* noted:

It follows that a person who kills necessarily contributes to the cause of death and that that is none the less true where the killing is in lawful self-defence. A coroner is not concerned with the latter question but will ordinarily set out the relevant facts in the course of finding how death occurred and the cause of death. The facts will then speak for themselves, leaving readers of the record of investigation to make up their own minds about lawful self-defence or any similar issue.

This view appears consistent with the Queensland Coroner’s Guidelines, which at 8.7.5 state that while findings of fact can include conclusions regarding a person’s or organisation’s responsibility for the death, the Coroner ‘must refrain from using language that is applicable to decisions made by criminal and civil courts when they adjudicate upon the same issues’. While the state Coroner refrained from making any comments in the inquest into the *Malu Sara*, he has appeared willing to do so in other cases particularly where he has determined that no referral would be made. In two recent inquests both involving police shooting, the Coroner has fully explained his application of the criminal law to the facts as found at the inquest. In doing so he determined that the self-defence provisions under the *Criminal Code 1899* (Qld) afforded protection on the facts to the officers and therefore no ‘reasonable suspicion’ arose, which he noted was a prerequisite to referral to prosecuting authorities. Reasonable suspicion was interpreted to require consideration that the Crown could prove all the elements of the offence.

68 Outline of Counsel Assisting the Coroner [520] – [522] presented to the *Inquest into the Loss of the Malu Sara*, above n 2. The submission was that the boat builder’s conduct be referred to the DPP for consideration of a charge of manslaughter.


70 Ibid [17].

71 *Inquest into the Loss of the Malu Sara*, above n 2, 95.

72 [1999] 1 VR 69, 72, 73.

73 Queensland Coroners Guidelines, above n 55, 8.14 [8.7.5].

74 *Inquest into the Death of Brett Thomas Johnstone* (Unreported, Queensland Coroner’s Court, State Coroner Michael Barnes 10 March 2010); *Inquest into the Death of Alan Kent Dyer* (Unreported, Queensland Coroner’s Court, State Coroner Michael Barnes 29 September 2010).

75 Ibid.

76 *Inquest into the Death of Brett Thomas Johnstone* (Unreported, Queensland Coroner’s Court, State Coroner Michael Barnes 10 March 2010), 11. See, also *Inquest into the Death of Alan Kent Dyer* (Unreported, Queensland Coroner’s Court, State Coroner Michael Barnes 29 September 2010), 13.
While such a finding is not strictly prohibited by the legislation and would clearly satisfy persons who may have been subject to a referral to prosecuting authorities, it is suggested it is inconsistent with the current legislative scheme and the role of the modern Coroner. It appears inconsistent with the views of Calloway JA above, and commentators. Such a finding involves the public airing of issues of criminal responsibility, a function it is submitted, is now outside the role of the Coroner.

E. **Referral for Disciplinary Action**

Under the Coroners Act 2003 (Qld) a Coroner may give information about official or police misconduct to the Crime and Misconduct Commission and information about a person’s conduct to their relevant professional or trade disciplinary body. Such information may be provided where the Coroner believes the information “might cause the body to inquire into, or take steps in relation to, the conduct”. There is no prohibition on the Coroner publishing the reasons for determining that such information should be and is to be provided.

In the inquest into the *Malu Sara*, the Coroner referred the conduct of the regional manager to the Head of the Department to consider breaches of the *Public Service Act 1999* (Cth). The Coroner also formed the view that Sergeant Flegg’s conduct could be found to amount to misconduct or that he acted incompetently in the discharge of his duties and that appropriate action could be taken under the *Police Service ( Discipline) Regulations 1990* (Cth).

There is no provision in the *Coroners Act 2003* (Qld), requiring the disciplinary bodies to report on what, if any actions are taken in accordance with that referral.

V. **Conclusion**

Families of the people who lost their lives when the *Malu Sara* sank have been seeking compensation through the Commonwealth ComCare scheme. They have not been advised whether criminal proceedings against any of the parties will be brought. There is no public mechanism to advise them of which, if any, of the recommendations have been implemented, and of any reasons why recommendations may not be adopted. Despite the coronial inquest being the only forum in their community where the tragedy was fully and openly explored, many questions still remain.

It is suggested that in relation to Coroners’ recommendations, reforms similar to those recently enacted in Victoria are required in Queensland. Bodies should be mandated to respond to a Coroner’s recommendations and to provide assurances to communities that all has been done to prevent future similar deaths. In Indigenous communities where the death has occurred due to issues involving racist attitudes and inappropriate training, such a mechanism is vital to restore faith in bureaucratic processes. As death statistics in Indigenous communities continue to suggest, lessons from the past are still to be learned.

The interface between the criminal and the coronial process needs greater clarification and consistency of approach. At present there are too many questions that remain unanswered, which is unsatisfactory for both the potential subject of the referral and the families of the deceased. Until such matters are addressed the role of the Coroner remains clouded and the ability of the coronial process to provide answers for Indigenous communities and to prevent future deaths remains unfulfilled.

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77 *Coroners Act 2003* (Qld) ss 48(3) and 48(4).
78 *Coroners Act 2003* (Qld) s 48(4).
79 *Inquest into the Loss of the Malu Sara* (Unreported, Queensland Coroner’s Court, State Coroner Michael Barnes, 12 February 2009), 96, 97.
80 Ibid.
This article reports the findings of a study into the effect on student performance, of the provision of annotated exemplars to students in an interdisciplinary law unit. The authors conclude that for the cohorts studied, there appears to be a positive correlation between the provision of annotated exemplars and improved student performance, as measured by an increase in the grade levels awarded. This result was repeated over two cohorts in separate semesters. The article discusses similar research conducted into the use of exemplars, and explores how some benefits and drawbacks of using exemplars asserted in relevant literature, relate to this study. Scope for further research is suggested, as are possible means to add value for students to the use of exemplars in assessment practice generally, as well as in the specific interdisciplinary law unit the subject of the study. This research is the second part of a long term project, the first part of which explored student perceptions on the value of providing annotated exemplars.

I. INTRODUCTION AND CONTEXT: THE SECOND PART OF A LONG TERM RESEARCH PROJECT

In Summer Session 2007/2008, the authors commenced a long term project intended to examine the value to students (in an interdisciplinary law unit), of providing annotated exemplars of past students’ exam scripts. The project sought to investigate two separate, but interrelated, aspects of this potential value to students. The first part of the project examined student perceptions of the value of exemplars as a tool to improve the validity of an assessment task. The aim of that project was to, from a student’s perspective, measure the benefits of being exposed to annotated exemplars of exam question responses. In brief, the results of the first part of the project (obtained via a survey of students) demonstrated clearly that annotated exemplars were perceived by students to be of value.

The second part of the project, reported in this paper, questioned whether the provision to specific cohorts of students, of the annotated exemplars of past students’ exam scripts, would have a statistically significant effect on those cohorts’ performance in the final exam. Our answer to that question is an (albeit tentative and qualified) yes.

The first part of the project therefore elicited subjective information — whether the students thought that exemplars were of benefit to them, whereas the second part of the project inquires into whether there was an objective measurable impact upon student performance.

The limitations of this research are acknowledged. Variables between the cohorts compared in the study are an inevitable fact, as no two groups of students are homogenous. The size of data sets (student numbers) also varied between cohorts, due to factors beyond the research team’s control. The aim of this paper is to present the data and draw inferences from a comparison of the marks awarded, between cohorts exposed to annotated exemplars and those that were not, in different sessions of the same unit.

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II. WHAT IS MEANT BY ‘EXEMPLAR’ FOR THE PURPOSES OF THIS RESEARCH?

In this study, the term ‘exemplar’ refers to past student papers from a written examination. Past cohorts volunteered their papers as exemplars. Samples were selected at each possible grade level (Fail, Pass, Credit, Distinction, High Distinction), and each paper was extensively annotated. Annotations were linked to published criteria and standards for the assessment task, to explain to what extent the past paper met the criteria and standards, and justify the grade allocated. The project methodology is described in greater detail below.

III. SIMILAR RESEARCH PROJECTS CARRIED OUT IN THIS AREA

Karen Handley and Lindsay Williams’ project, is both the most recent and most relevant to the subject matter of this paper. Handley and Williams’ study involved a subject with large student numbers and a correspondingly large team of tutors. The methodology used was the posting of marked exemplars (from a past cohort) onto the university’s online learning facility, together with various interactive tools, such as a self-testing quiz, and an invitation to post queries about the exemplars to academic staff on the online discussion board for the subject. Students accessed the exemplars, but did not avail themselves of the online discussion option. Of greatest interest for this paper was the finding by Handley and Williams that ‘student marks did not significantly improve following introduction of the exemplar facility’. They note, however, that other variables in course delivery may have been responsible for this outcome.

Mark Huxham compared student preferences for two types of feedback on formative assessment: personalised comments and exemplars in the form of model answers (ideal, or 100% answers). Huxham’s study then compared the effect on student performance in summative assessment, of the provision of the two types of feedback. The results of the study indicated that students preferred personalised comments, however exemplars had a markedly better effect on performance in summative assessment.

Chris Rust, Margaret Price and Berry O’Donovan conducted a series of voluntary ‘marking workshops’ wherein students marked two exemplar papers, referring to criteria and standards, engaged in small group discussions with a tutor, and were then provided with the two exemplar papers as annotated and marked by the tutor. Students participating in the voluntary workshops showed a significant improvement in performance. This result was repeated over three years. Rust et al observed in a later publication that tracking of two of the cohorts involved in the study, revealed that improvement in performance was sustained ‘at a significant, if somewhat diminished, level’ in assessment tasks with similar criteria undertaken a year or more later.

Ros Ballantyne, Karen Hughes and Aliisa Mylonas, designed a project to develop peer assessment procedures for use in large classes. The project was refined over three ‘phases’, and by the third and final phase exemplars were incorporated reflecting varying levels of quality. The project team added the exemplars to address student feedback requesting more detailed explanations of assessment criteria.

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3 Ibid, 7.
4 Ibid, 8.
9 Ibid, above n 8, 432.
Paul Orsmond, Stephen Merry and Kevin Reiling conducted a study in which groups of biology students constructed their own marking criteria for an undergraduate assignment, using exemplars as a catalyst for discussion and a reference point for constructing criteria. The study measured the efficacy of exemplars in communicating standards, as well as student perceptions of that efficacy. The study’s conclusions included the finding that exemplars can improve student understanding of criteria and standards.

IV. Benefits and Drawbacks of Exemplars

When discussing the alleged merits or otherwise of using exemplars, it must be borne in mind that various meanings are ascribed by the literature to the term ‘exemplar’. ‘Exemplar’ can refer to samples of work at different levels, such as the annotated exemplars at each grade level used by this study. The term can also be taken to mean an ‘ideal’ or model sample of work generated by academic staff, which would receive a mark of 100%. Sadler’s classic formulation states that exemplars are ‘key examples of products or processes chosen so as to be typical of designated levels of quality or competence’. (As noted above, our use of the term ‘exemplar’ in this study refers to annotated exam scripts, volunteered by students from a past cohort, with scripts selected at each possible grade level.)

The benefits attributed in the literature, to the provision of exemplars to students were many and varied. Exemplars were claimed to be able to lessen student anxiety about writing in an unfamiliar format or genre, (eg the IRAC legal problem-solving model, structured presentation of legal analysis, or a legal letter to a client) and clarify discipline-specific skills. Exemplars were further said to assist students in transferring knowledge or skills acquired in one situation to perform a different task, and provide context, allowing students to see how individual pieces of information are assembled together. Exemplars were repeatedly cited as an important tool in communicating and clarifying standards and criteria. This beneficial aspect of using exemplars is discussed in more detail below.

How could these asserted benefits relate specifically to students undertaking the law for non-lawyers unit used as the basis of this study? As the students are non-law students, they are unfamiliar with the discipline-specific legal problem solving methodology (IRAC) they are required to use as the basis for their answers in the final exam for the subject. The students have to, in their responses to the final exam problem questions, take the individual pieces and principles of case law and statute law studied in tutorials and lectures, and assemble

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12 Huxham, above n 5, 603.
17 Tracy, above n 15, 309; Huxham, above n 5.
those pieces into a structured answer. It can be hypothesised from these observations that the provision of exemplars would assist students in undertaking the final exam with a corresponding improvement in performance as measured by grades.

As noted above, the communication of standards and criteria to students is a central concern of the literature on the use of exemplars. Exemplars are suggested as a tool to transfer tacit knowledge (that is, knowledge gained via experience rather than via written instructions) regarding assessment standards and criteria, to students. These two claimed advantages of using exemplars were discussed in greater detail in our article reporting on the first part of this study. It can be hypothesised that student performance in the final exam the subject of this study, would be improved by exposure to exemplars as student comprehension of, and ability to meet, standards and criteria would be enhanced.

Exemplars are also put forward as a vehicle to initiate and induct students into a shared ‘community of practice’ with academics. Whilst a primary focus of the literature on communities of practice concerns commonality and standardising of teaching and assessment practice amongst academics, the idea articulates with the more established notions of communication of standards and criteria to students, and communication of tacit knowledge to students. The same techniques employed to expound criteria and standards between academics (eg members of a marking team in a large student cohort) can be used to ‘open up the nature of quality’ to students so that they can ‘identify and remember techniques’ which make a piece of work successful.

Balanced against these asserted positive consequences of using exemplars are the concerns raised by a number of writers. One leitmotif in the literature was the worry that students ‘parrot’ from exemplars, and that ideal or model answers may ‘tempt’ students to mimic without thinking or analysing for themselves. A claimed drawback of exemplars was the tendency to foster ‘unhealthy dependence’ on models, with students ‘blindly imitating’ model answers and thus failing to develop independent professional lawyering skills. Plagiarism was also raised as a potential problem, both formally in the literature and informally in discussions with colleagues regarding this study.

Whilst it is acknowledged that these concerns are valid, in this study there were certain mitigating factors present. In the subject concerned, different questions are set between exams from one session to the next, and the questions can address any area of law covered in the subject. The potential for exact mimicry or plagiarism is therefore minimised. A student copying directly from an exemplar, in their final exam, would not be rewarded as the exam responses would be relatively nonsensical as answers to a different set of questions than those in the exemplars. Further, in a law for non-lawyers unit, it is not a critical concern that students fail to develop independent lawyering skills, as the goal of the unit and course is not to produce lawyers.

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22 Newlyn and Spencer, ‘Using Exemplars in an Interdisciplinary Law Unit: Listening to the Students’ Voices’, above n 1, 123–5.
24 Price, above n 20, 216.
26 Sadler, ‘Grade Integrity and the Representation of Academic Achievement’, above n 21, 824.
27 Tracy, above n 15, 341.
28 Montana, above n 14, 3; 2010; Coughlin, McElroy and Patrick, above n 19.
30 Montana, above n 14, 8; Handley and Williams, above n 2, 4; Hendry, Bromberger and Armstrong, above n 16.
A final noteworthy drawback of using exemplars is the burden on teaching staff, in drafting model answers. This is a reality we conceded in our paper reporting the first part of this project.

### V. TIMING OF FEEDBACK — EXEMPLARS AS A MEANS OF IMPROVING UTILITY AND FAIRNESS

As a general rule, we as academics provide the bulk of our feedback to students, regarding assessment performance, when it is too late for them to apply that feedback to the task assessed. The grade awarded for the task becomes part of the student’s indelible overall grade for the subject — as Sadler states, ‘by definition, all student works that contribute to course grades are summative’. In a list of propositions as to what constitutes ‘fairness’ for students, Sadler includes the assertion that ‘there should be few if any surprises’ for students, in academics’ judgment of the students’ work.

Handley and Williams see this dilemma as being best resolved by ‘time-shifting’ feedback, so that it is of more use to students. Their study employed exemplars as the vehicle to move feedback back along the timeline of assessment, using the example of past students’ work to make the current cohort ‘vicarious learners’.

Carless’ study recorded a ‘gap in perceptions’ between tutors and students regarding assessment feedback, concluding that addressing this gap requires ‘assessment dialogues’ between tutors and students. His study reported notable differences in tutor and student perceptions surrounding assessment feedback, and partially attributed student underachievement to a failure to engage in ‘assessment dialogues’. Of interest was the observation that students found feedback on drafts of greater utility than feedback on final versions of their assignments.

In plain terms, what academics view as optimal timing of feedback is at odds with what students value, and is also perhaps in conflict with what constitutes ‘fairness’ for students in assessment practice. In this context the provision of exemplars prior to the submission date for the assignment can function in lieu of feedback on a draft version, particularly when the marking load which would be associated with providing feedback on every student’s draft makes that form of ‘assessment dialogue’ too burdensome.

As the assessment task used in this study was a final exam, the provision of ‘time-shifted’ feedback in the form of annotated exemplars has added value in that students do not generally obtain any feedback on formal final exams other than a mark.

### VI. SCOPE FOR FURTHER RESEARCH

A frequent theme in the surveyed literature in this area was the desirability of using exemplars not merely as stand-alone documents provided to students, but in concert with other explanatory mechanisms such as workshops, tutorial discussions and lectures. Whilst it is acknowledged that such further elaboration would very probably add to the value of the exemplars in improving student performance, there are obstacles to providing this in a unit with large student numbers. One suggestion in the literature was that this obstacle could be overcome using peer assessment. This was outside the scope of the methodology of this project, but is noteworthy.

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31 Coughlin, McElroy and Patrick, above n 19, 32; Montana, above n 14, 8.
32 Newlyn and Spencer, ‘Using Exemplars in an Interdisciplinary Law Unit: Listening to the Students’ Voices’, above n 1, 127.
33 Sadler, ‘Grade Integrity and the Representation of Academic Achievement’, above n 21, 808.
34 Ibid, 809.
35 Handley and Williams, above n 2, 3.
36 Ibid.
37 Carless, above n 21, 220.
38 Ibid, 225.
39 Handley and Williams, above n 2, 3; cf Elwood and Klenowski, above n 23 (a study involving a group of 23 postgraduate students with 2 tutors, in which a one-day workshop was offered to students, who marked exemplars prior to presenting and receiving feedback on a draft essay prior to submission of the final version of that essay).
40 Carless, above n 21; Handley and Williams, above n 2, 4; Montana, above n 14, 6–7; Tracy, above n 15, 317; Parker, above n 29.
41 Elwood and Klenowski, above n 23, 249.
as a recommended enhancement to the use of exemplars to assist students in unpacking the discourse of assessment criteria and standards. Future research could explore the effect on student performance of some or all of the above in concert with the provision of annotated exemplars.

VII. INTRODUCTION TO BUSINESS LAW

The project was conducted within the unit Introduction to Business Law (‘IBL’), a popular interdisciplinary unit offered by the School of Law at the University of Western Sydney. The unit is primarily designed for students who are not undertaking a law degree. It regularly attracts student numbers in excess of 2500 per annum. The unit is usually offered during both of the main regular semesters (Autumn and Spring), but is also regularly offered during the shortened Summer Session. The Summer Session offering is delivered in a condensed format, usually being conducted in around half of the time available for the two main semesters. To maintain consistency, the face to face hours, content and assessment methods are the same in Summer Session as in the main semester offering.

During the past four years the formal assessment for IBL has consisted of three items. Assessment consists of an online multiple choice quiz (20%), a take home assignment (20%) and a two hour end of semester formal final exam (60%). The research reported in this paper involved the final exam.

VIII. PROJECT METHODOLOGY

As discussed above, this second part of the project explored whether the provision to specific cohorts of students, of the annotated exemplars of past students’ exam scripts, had a statistically significant effect on those cohorts’ performance in the final exam.

At the end of the operation of Summer Session in 2007/2008 an invitation was made to all of the students who completed the unit, to make their final exam answers available for use as annotated exemplars, to be used with future students and to be used as part of a research project which would measure and formally report the value of these annotated exemplars. 104 students completed the final exam in the 2007/2008 offering of the unit. Of this number, 42 consented to the potential use of their exam answers. The authors selected suitable exemplars from the available scripts which could be used to represent the grades of Fail (F), Pass (P), Credit (C), Distinction (D) and High Distinction (HD), in accordance with the criteria for the awarding of grades as specified in the unit outline. One example of each grade was selected. The research team received both ethical approval from the university and consent from the students concerned for this project.

The next step of the process was to annotate the exam scripts with comments which reflected the grade criteria, to make evident to future students exactly why the exam script received the grade allocated, and then to package these annotated exemplars into one document.

Annotations (comments) made on the exam papers were both negative and positive, and as explicit as possible. Naturally all reference to a student’s identity was removed from the annotated exemplars, as de-identification was important to protect student confidentiality. This entire process took some considerable time, with tasks including selecting appropriate exemplars, scanning the papers and writing the annotations.42

Once the final document of collated annotated exemplars was produced, it was made available to all students enrolled in IBL in the subsequent Summer Sessions (2008/2009 and 2009/2010) via the website for the unit. To draw students’ attention to the availability of the annotated exemplars document, notice was given on the unit’s website. Whilst no specific discussion of the exemplars took place during scheduled class time, some students did raise specific questions about the exemplars during designated consultation times.

42 Further details of this project and a description of the final ‘product’ are outlined in Newlyn and Spencer, ‘Using Exemplars in an Interdisciplinary Law Unit: Listening to the Students’ Voices’, above n 1.
The research project was designed to measure the impact, on student performance in the final exam, of exposure to annotated exemplars of past student final exam papers. Impact on performance was measured by reference to student marks. No attempt has been made to specifically identify which students downloaded and used the exemplars and/or exactly how any of the students may have used the exemplars that were made available.\footnote{We can report that there was a record of 212 students downloading the exemplars document in Summer Session 2008/2009 and 84 students in 2009/2010. We readily acknowledge that these numbers are greatly in excess of the actual number of students who were enrolled in the course at any one time, and that therefore this is a flawed method of recording which students actually downloaded the document, and/or the exact number of students who downloaded the documents and used them to any extent in preparation for completing the final exam. These figures record only the number of times that the document was downloaded. No record of which individual students downloaded the document was possible to obtain, given the limits of the e-learning environment.}

In order to achieve this stated objective, data on student marks is presented from:

(a) two corresponding Summer Session offerings of IBL, where no use of or exposure to annotated exemplars was undertaken;
and compared to data on student marks from
(b) two offerings of IBL, where students were exposed to annotated exemplars provided by the teaching staff.

The two cohorts which did not have an exposure to annotated exemplars were Summer Session offerings in 2006/2007 and 2007/2008. The two cohorts where students were exposed to annotated exemplars, and for comparison purposes, are Summer Session offerings in 2008/2009 and 2009/2010.

At the outset we state clearly that these are not homogenous groups. We fully acknowledge the inevitability of many variables between these groups. These variables include the most obvious possible differences such as gender and age, but extend potentially ad infinitum, to include differences such as educational background, tertiary entrance scores, whether students obtained examples from previous students at this or other tertiary institutions or from other commercially available sources and whether or not the student may have undertaken the unit previously and not been successful.\footnote{The problems associated with comparing data sets have been extensively examined. Further information about this matter can be found at Barbara G Tabachnick and Linda S Fidell, Using Multivariate Statistics (3rd ed, 1996); Thomas Black, Doing Quantitative Research in the Social Sciences: an Integrated Approach to Research Design, Measurement and Statistics (1999); and William S Cleveland, Visualizing Data (1993). These issues are also acknowledged in Handley and Williams, above n 2, 8.} This report seeks only to present the data as we find it, that is, we offer a comparison of the marks awarded between those students who were exposed to annotated exemplars and those that were not in different sessions of the same unit.\footnote{We report only on those students who attempted the final exam in each of the identified sessions. No account is made of students who may have completed interim items of assessment but attempted the final exam.}

Given the total number of results for the unit, the authors calculated the average mark, the median mark and the percentage of students who achieved an F, P, C, D and HD for the final exam.
The following table displays all of these results.

Table 1. Full statistical results

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Number of results = 128</td>
<td>Number of results = 104</td>
<td>Number of results = 95</td>
<td>Number of results = 30</td>
</tr>
<tr>
<td>Average = 21.8/60</td>
<td>Average = 25.3/60</td>
<td>Average = 36.1/60</td>
<td>Average = 37.6/60</td>
</tr>
<tr>
<td>Median = 24.2/60</td>
<td>Median = 26.4/60</td>
<td>Median = 37.0/60</td>
<td>Median = 37.9/60</td>
</tr>
<tr>
<td>F (0–49%) = 49%</td>
<td>F (0–49%) = 43%</td>
<td>F (0–49%) = 22%</td>
<td>F (0–49%) = 11%</td>
</tr>
<tr>
<td>P (50–64%) = 35%</td>
<td>P (50–64%) = 38%</td>
<td>P (50–64%) = 45%</td>
<td>P (50–64%) = 24%</td>
</tr>
<tr>
<td>C (65–74%) = 8%</td>
<td>C (65–74%) = 9%</td>
<td>C (65–74%) = 20%</td>
<td>C (65–74%) = 40%</td>
</tr>
<tr>
<td>D (75–84%) = 6%</td>
<td>D (75–84%) = 7%</td>
<td>D (75–84%) = 8%</td>
<td>D (75–84%) = 15%</td>
</tr>
<tr>
<td>HD (85–100%) = 2%</td>
<td>HD (85–100%) = 3%</td>
<td>HD (85–100%) = 5%</td>
<td>HD (85–100%) = 10%</td>
</tr>
</tbody>
</table>

The details of the percentile changes to grades are better illustrated by the following chart.

Chart 1. Percentile changes to grade pre/post annotated exemplar exposure

X. DISCUSSION AND CONCLUSIONS

A number of important statistical changes from the data presented above are evident.

It is, for example, apparent that the average and mean for students increased in all cohorts exposed to the annotated exemplars provided. That is, in the pre exposure session of 2006/2007 the average was 21.8 and the median was 24.2 and in 2007/2008 the average was 25.3 and the median was 26.4. This can be compared to the same statistics in the post exposure sessions of 2008/2009 and 2009/2010 where the averages were 36.1 and 37.6 and the medians were 37.0 and 37.9 respectively. This is a pronounced change and demonstrates a significant increase in the scores awarded.

Some significant changes to the percentages of various grades awarded for the final exam papers are also evident. It is apparent, for the most part, that there has been a noteworthy reduction in the awarding of F grades and a proportionately greater awarding of the higher grade levels.
The exception to this statement lies with the awarding of P grades. Pre-exposure to exemplars in 2006/2007 and 2007/2008, 35% and 38% of students respectively were awarded a P grade. This changed in the post exposure to exemplar sessions to 45% and 24% in 2008/2009 and 2009/2010. Therefore in the 2009/2010 session the proportion of P grades actually decreased, although an analysis of the higher grades of C, D and HD reveals uniformly that these grades all increased, in some instances quite dramatically.

A specific examination of the awarding of the F grade reveals that it changed in the pre-exposure cohorts of 2006/2007 and 2007/2008, from 49% and 43% of all grades awarded, to 22% and 11% in the post exposure cohorts of 2008/2009 and 2009/2010. Again, this is a significant achievement, representing a significant decrease in the number of students who had previously failed the final exam.

At the other end of the spectrum, HD results have increased from very low pre-exposure cohort results of 2% and 3%, to post exposure cohort results of 5% and 10%.

As discussed above, the limitations of the study are acknowledged. A relatively uncomplicated comparison has been offered, presenting the data as found, and inviting inferences to be drawn. A further limitation associated with comparing the different data sets available, is the number of results available. Table number 1, above, shows that this has been falling since the 2006/2007 offering. The significant reduction in 2009/2010, of only 30 results, is due to the fact that the unit changed from a government sponsored HECS offering to a full fee paying unit during the Summer Session offering. This is a factor which has not been taken into account in the comparing of data sets and which was beyond the control of the research team.

We also acknowledge that there has been no attempt to classify results, by classifying students according to who may have downloaded the annotated exemplars or otherwise obtained them from friends, and referencing this against how students actually used the annotated exemplars. It is therefore plausible that only a small number of students actually looked at the annotated exemplars and that the changes in results could be due to other external factors. The reality is that many of these potential variables would be difficult or impossible to measure and account for.

What this article does present is evidence of changes to the averages, medians and percentages achieved for individual grade ranges, between cohorts of students who were never presented with annotated exemplars, directly contrasted with cohorts of students who were presented with annotated exemplars. We are aware of no other obvious or specific event or variable which could be used to account for such dramatic changes to the results as are presented above.

Based on the data available as a result of this research project, we suggest quite strongly that in this interdisciplinary law unit, it can be inferred that annotated exemplars have had a significant and positive impact upon student performance in the final exam assessment, as measured by the marks which students received for their final exam papers. There appears to be a positive correlation between the provision of annotated exemplars and improved student performance. This result was repeated over two cohorts in separate semesters. The results of the study indicate that the effort involved in the production and supply of annotated exemplars to students was worthwhile as it has resulted in a significant improvement in the assessment performance of the students.
LEGAL LANGUAGE AND THE NON-LAW RESEARCH STUDENT

Edwin Tanner

The article isolates and explicates those characteristics of legal language which may cause difficulties to non-law graduate students undertaking interdisciplinary research theses requiring an understanding of law. These characteristics consist of three categories. The first category relates to the vocabulary of the law. The second relates to the continued use by lawyers of overlong syntactically complex sentence structures. The third relates to what James Boyd White has called the ‘unstated conventions’ by which legal language operates: a second layer of meaning underpinning legal language, but which is seldom stated in it. Linguistic schema theory is applied to these ‘unstated conventions’ to explicate them.

I. INTRODUCTION

Supervising research students is a time consuming task for the supervisor, requiring dedication and a sensitive awareness of the many potential difficulties facing research candidates. These difficulties are compounded when candidates are non-law graduate students undertaking interdisciplinary research theses requiring an understanding of law or when the candidate’s first language is not English. The purpose of this article is to explain the nature of the challenges which legal language and its multiple layers of meaning pose for such research students and their supervisors.

In this article the author has divided into three categories the characteristics of legal language which are likely to cause difficulties to non-law students undertaking interdisciplinary research requiring an understanding of legal language. The first category relates to the vocabulary of the law. The second category relates to the continued use by lawyers of excessively long syntactically complex sentence structures. The third category relates to what James Boyd White has called the ‘cultural syntax of the law’ or the ‘unstated conventions’ by which legal language operates: a second layer of meaning underpinning legal language, but which is seldom stated in it. Linguistic schema theory is applied to these ‘unstated conventions’ to explain them.

II. THE VOCABULARY OF THE LAW

Non-law postgraduate students undertaking research containing a legal component are going to have to read legislation and private legal documents which exhibit characteristics that are extreme enough to mark legal English as a distinct variety of English. It looks like everyday English, but it isn’t. Indeed, legal English has been variously labelled. Bentham referred to it as a ‘cant’ or ‘jargon’, Forshey, Charrow and Crandall all suggest that it is a ‘dialect’. Danet

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4 Linguist Brenda Danet notes that sociolinguists Veda Charrow and Jo Ann Crandall believe the lexical and syntactic differences between legal English and ordinary English are significant enough to warrant legal English being called a distinct dialect. See Brenda Danet, ‘The Language of the Legal Process’ (1980) 14 Law and Society Review 470–5.
suggested that any of the three labels, ‘dialect’, ‘register’ or ‘High’ language in a diglossic situation, are applicable. Allen and Burridge concluded that legal English is a ‘jargon’.  

What does this mean for your non-law postgraduate students undertaking research containing a legal component? Or more properly put, what does it mean for the supervisors when confronted by confused and sometimes frustrated students? So how can non-law postgraduate students be alerted to some of the lexical differences between ordinary English and legal English? How can a supervisor approach the task of explaining the legal lexicon to non-law postgraduate students undertaking research containing a legal component?

It is important to explain that the law as it is today is the result of evolution. Changes in social structure and the growth of social institutions, together with the imposition of a different variety of language (French) on the population of England, caused the growth of specifically legal concepts and a lexicon to match. As the social structure developed and increased in complexity and technicality it generated a need for a legal lexicon with agreed meanings. This coupled with a trend, which began in the 14th century, for judges to interpret statutes strictly, led to a recognition of the separation of powers between legislature, executive and judiciary. The text (the enacted words and the judicial decisions) became the common link and the functional basis on which the legislature and judiciary exercised their respective powers. Within this framework developed a many-tiered lexicon, including terms of art (eg natural justice), technical terms (eg manslaughter, trust), stylistic terms (eg covenant instead of promise), and referential terms (eg aforesaid). David Mellinkoff suggested that those words, which have the same meaning in all contexts within the adversary system, are ‘terms of art’. By contrast, he argued, technical terms like ‘murder’ have relatively fixed meanings. Lon Maley suggested that technical terms are legal constructs whose meaning is ‘time-bound, institution-bound, and culture-bound’. Stylistic and archaic terms are used to give the language of the law increased formality and convey a sense of legality. Once alerted to the tendency, non-law students should have few problems with these terms. Referential terms are items used to reinforce the referential process. More often than not they cause confusion and, thankfully, today most lawyers avoid them. The remainder of the lexicon includes technical terms drawn from other disciplines.

Terms of art and technical terms are essential to legal language in that they enable lawyers to communicate complex concepts concisely and precisely within the profession. The postgraduate non-law research student is most unlikely to understand the precise meaning of these terms. However, once a supervisor has identified and distinguished between terms of art and technical terms, non-law research students only have to refer to a legal dictionary to gain some insight into their meaning. If problems arise, then the student can approach the supervisor for a more detailed explanation.

Specific problems arise for non-law research students when technical legal terms are borrowed from ordinary English. For example, where the item ‘trust’ in ordinary English means ‘reliance on the integrity and justice of person or on some quality or attribute of a thing: confidence’, in law it embodies a concept that has developed over the centuries originally to frustrate the Monarch’s ability to collect feudal dues. Similar difficulties arise with words like ‘unconscionability’, ‘offer’ and ‘guarantee’.

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5 Ibid, 470–5. ‘Diglossia’ refers to the situation where two varieties of language exist in a community, each used for a separate purpose, and where one of those two varieties is a learned language.
6 Keith Allen and Kate Burridge, Euphemism and Dysphemism: Language used as a Shield and a Weapon (1991) 195.
8 Ibid.
III. EXCESSIVELY LONG SYNTAXICALLY COMPLICATED SENTENCES

A major cause of comprehension difficulties for postgraduate non-law students undertaking research with a legal component is the continued, but erroneous belief held by many parliamentary drafters (and some private practitioners) that the semantic links within a single sentence structure are clearer and more precise than where the same information is drafted in a series of shorter, carefully semantically linked sentences. The author knows of no contemporary linguist who would support this contention and has established the falsity of the view in an article published ten years ago. Much of this argument rests on research by cognitive psychologist, George Miller. Miller established that the short-term memory can hold about seven unrelated units of information at any one time before it fails. It follows that long syntactically complex sentences are likely to contain too much information for the short-term memory to process.

Whilst law students are compelled to train their short-term memories so that they can understand long syntactically complex sentences, few non-law postgraduate research students have acquired this skill. For that reason, supervisors may find themselves having to assist research students to unpack the meaning of legal rules expressed in syntactically complex sentence structures.

An extreme example of an excessively long sentence has been provided by S6/147 Australian and New Zealand bank guarantee document. This document was considered in KG and SB Houlahan v Australian and New Zealand Banking Group Ltd. In that case, Higgins J asked Counsel for the ANZ Bank to construe the first clause. That clause was 57 lines long, expressed in a single sentence of 1688 words. Counsel for the ANZ Bank was unable to construe the sentence and, as a result, Higgins J decreed that it was ‘incomprehensible legal gobbledygook’. In addition, he suggested that, if the plaintiffs had read the document before they signed it they ‘would have been little the wiser’. In fact, after six months slaving over this ‘sentence’ the author managed to unpack its syntactic structure and establish that it was grammatically flawless.

The task confronting Counsel for the ANZ Bank in attempting to construe ‘the sentence’ was difficult. It is full of alternatives. The word ‘or’ appears 153 times. This would appear to provide 153 choices. But this is not the case. For example, the words ‘loans advances credits or banking accommodation heretofore made created or given’ can be redrafted into 12 different statements when each noun phrase is matched with each verb: ‘loans made, loans created, loans given’, ‘advances made, advances created, advances given’, and so on. Consequently, if ‘the sentence’ is rewritten using a different alternative each time, there is potentially a vast number (ie 9.6 x 10^15) of different versions of the sentence. Processing this amount of information would seriously overload the short-term memory. Many provisions (sections and subsections) in contemporary legislation exceed 50 words in length. Some of the longer ones are masterpieces of grammatical construction, but are often difficult for lawyers to understand, let alone non-law postgraduate research students.

13 Ibid.
14 George Miller, ‘The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information’ (1956) 63 Psychological Review 81.
15 A word is not necessarily a unit of information. Several words taken together can form one unit of information. For example, the words ‘bacon and eggs’ go together so often, that they may form one unit.
16 As a result of KG and S B Houlahan v Australian and New Zealand Banking Group (Unreported, Supreme Court of ACT, Higgins J, 16 October 1992) (‘Houlahan’); the ANZ had this document redrafted in simpler English. However, the drafters retained the single provision/single structure convention.
17 Ibid.
18 Ibid 8.
19 Ibid 9.
21 The limitations of short-term memory were determined by Miller who established that humans have an immediate memory span of approximately seven unrelated units. See Miller, above n 14.
The ANZ document considered in *KG and SB Houlahan v Australian and New Zealand Banking Group Ltd*22 reminds the author of the tale of the brilliant Swiss clock maker who was commissioned to make a town hall clock that kept perfect time. He laboured long and hard on this task and eventually installed it in pride of place. The only problem was that he did not give the clock any hands, so that each time someone wanted to know the time, he had to climb the scaffolding and carefully calculate the time by observing the internal mechanism of the clock. In this story, the absence of the hands of the clock is a metaphor for the total reliance on the creator to interpret meaning.

But many lawyers still fiercely adhere to the convention that the semantic links within a single sentence structure are clearer and more precise than the same information expressed in a series of shorter carefully semantically linked sentences. Jeffrey Barnes23 asserted, for example:

respondents from two drafting offices in a recent survey expressly queried whether relaxing [the ‘belief’24] was required by plain language principles. The writer has been informed by a senior drafter who drafts in an office with a plain language policy that it may be that the convention is maintained to avoid rules being ‘buried’ in a narrative.

The argument that a parliamentary office has a plain English policy means little unless it is applied. The author has established that the Victorian,25 Commonwealth of Australia26 and the European Community (EC) Legal Service27 all have plain English policies which are seldom rigorously applied, and that the average sentence length of provisions exceeds 50 words. The suggestion that legal rules can become buried in a narrative demonstrates a lack of knowledge of developments in linguistics, particularly schema theory, which the author deals with later.

*Socpen Trustees Ltd v Wood Nash & Winters*28 provides another example of ambiguity rising from adherence to the ‘belief’. In that case, a client sued their lawyers in negligence for sending them a letter drafted in legalese. The letter was intended to advise the client (a landlord) of the right to evict a tenant under a ‘break clause’ in a lease. But the letter was drafted in language that was so convoluted and tortuous that the client misinterpreted it and, as a result, acted to its detriment on the basis of the misinterpretation. Jupp J awarded the client 95,000 pounds in damages and told the court that the letter was drafted in ‘very obscure English’ and ‘anaesthetized [the client] into an oblivion’.29

A more recent example which the author analysed for *The Statute Law Review* (2006)30 was the European Commission Legal Service’s Directive 2002/2/EC This Directive was drafted in excessively long, syntactically complicated sentences. Article 1.4.6 was one of several such sentences which were also demonstrably ambiguous. The EC Legal Service claims to draft its legislation in plain language. It is important to note that the Service drafts its original documents in English and French and it is from these precedents that the other 25 member States draft their own corresponding legislation. Furthermore, this particular Directive should have posed few conceptual difficulties for the drafters because it dealt with the straightforward topic of ‘the sale, distribution and storage of animal feedingstuffs’.31
IV. Schema Theory and the Second Layer of Meaning

This section applies linguistic schema theory to show how non-law postgraduate students seeking to undertake theses containing a legal component are likely to be confused by what James Boyd White referred to as the ‘cultural syntax’ of the law.32 White argued that the most serious obstacles to the comprehensibility of legal language are not the vocabulary and sentence structure employed, but the unstated conventions by which the language operates: what he called the ‘invisible discourse’ of the law.33 As a result, even where legal rules are drafted in a clear, simple and precise form, non-law postgraduate research students are unlikely to fully understand them because they are unacquainted with the schemata (the ‘cultural syntax’ or ‘invisible discourse’) on which they are based.

A. Schema Theory Explained

Schema theory holds that prior knowledge is highly organised in the memory and forms patterns by which future events are interpreted. Each pattern, or mental structure, is called by one of the synonyms, a ‘schema’, a ‘scenario’, a ‘script’ or a ‘frame’.34 Schemata represent the relationships underlying concepts, events, situations or objects. Each schema may be a composite of several sub-schemata. Once acquired, schemata are used to interpret the world.35 They are, in a sense, the scaffolding upon which the meaning of an event, situation, or the language of a text, is constructed.

Initially, schema theory was explained in terms of restaurant etiquette which is learnt from experience.36 As a further illustration, consider people who have never been to court. They have no schemata for determining, for example:

- the roles of the participants,
- the way they should conduct themselves, and
- the way in which the court should be addressed.

Once they have attended a court in session, an overall mental structure has been established. This may be modified, or extended, by subsequent visits to this and other courts, but a basic schema has been established. From this example it can be seen that a ‘schema’ consists of a set or pattern of pieces of information.

B. Speech Act Form Schema

Speech act form is a schema. It is fundamental to the adversary system and exists where the words themselves perform the act. For example, apologising, welcoming, and resigning, are all speech acts in which uttering the words achieves the outcome. Speech acts depend heavily on shared conventions and expectations. They also depend on the words used, and on the acts that those words perform.

Certain criteria, known as ‘felicity conditions’, have to be satisfied for a speech act to be successful.37 These conditions are that:

- there must be a conventional procedure having a conventional effect;
- particular persons and the circumstances must be appropriate;
- the procedure must be executed correctly and completely by all participants; and
- the persons must have the requisite thoughts, feelings, and intentions.

32 White, above n 1, 85.
33 Ibid.
35 Ibid.
36 Charles A Perfetti, Reading Ability (1985) 42.
Although not confined to the law, speech acts permeate and underpin its language and processes. They may appear to be ‘spun of cobwebs’, but are, in fact, integral to the English language.

The facilitative and regulative functions of the law are empowered by two kinds of speech act. These are directives and commissives. Directives include begging, commanding, or requesting. Commissives include, promising and guaranteeing.

Legal rules in legislation, command, empower, define or repeal. This is their illocutionary force. This force is given authority by electors speaking through their parliaments. The inclusion of the enacting formula at the commencement of a statute is an indication that the words which follow, are to have the illocutionary force of a speech act. This can only occur if they have been through a set parliamentary and executive procedure which has been followed meticulously. The words of the law will then be the law. They are authoritative as words and assumed to be ‘always speaking’. Even if they are ambiguous, or do not accurately convey Parliament’s intention, the words must stand as they are unless amended or repealed.

Rules arising from case law have a similar illocutionary force. Their legitimating authority originally derived from sovereign command, but more recently from the State.

In both legislation and case law, the illocutionary force of the words of the law is strong. The words of the law must ‘count’ if they are to regulate behaviour.

When judges say they are adhering to the principle of stare decisis they are merely saying that they are applying the doctrine of precedent. In other words, there is a previous decision on a similar issue in the court hierarchy which the court must apply to the case before it. Stare decisis is a schema.

One manifestation of speech act form in legislation is the use of the deontic modals ‘shall’ and ‘may’. These modals have special significance to lawyers in that they indicate, respectively, mandatory and discretionary authority. They have no special significance to non-law postgraduate research students. These students are unlikely to be familiar with the deontic force of these words. They may take ‘shall’ as indicating the future, and ‘may’ as conveying lack of certainty. In common usage, ‘shall’ as a deontic modal is obsolete. For example, to non-lawyers the sentence, ‘You shall do it’, no longer expresses an order. To make that sentence into an order, the word ‘shall’ has to be replaced by the word ‘must’ or some form of ‘have to’. Most drafting books acknowledge that ‘must’ is now preferable to ‘shall’ to express mandatory force. Rendering the modal ‘shall’ as the more commonly used ‘must’, does not remove its illocutionary force if used in the appropriate setting.

The drafting and interpretation of legislation assumes a knowledge of the rules of statutory interpretation. These rules form a specialised schema. They are the body of principles developed through the courts, and subsequently by Parliament, to assist in the drafting and interpretation of statutes and subordinate legislation.

The specialised technical language (ie jargon) of the law has developed within the matrix of legal schemata (the enacted words and judicial decisions). Professional ‘jargons’ exist because ordinary language cannot adequately capture all the precision necessary to express technical concepts concisely.

C. Discourse Structure Schema

The way in which the parts of a text are organised and related to each other is referred to as discourse structure. It is a schema. The discourse structure of narrative material is different

38 Bentham, above n 2.
40 Occasionally Parliament will give legislation a finite life by inserting a sunset clause.
42 Danet, above n 4, 448.
43 ‘A deontic modal’ is an auxiliary which expresses duty or obligation.
45 ‘Jargon’ here refers to a technical and specialist language.
46 Allen and Burridge, above n 6, 201.
from that of *legal material*. Stories, that is narratives, consist of a number of sentences and paragraphs and the schema for narrative material dictates that each sentence and paragraph is to be linked to those that precede and follow it. The linkage is provided when information *given* in one sentence is restated as *old* information in a following sentence and *new* information is added to it.48 This also applies to paragraphs. This process is recursive. The alternation of *old* and *new* information helps to ensure both cohesion and coherence. An example of the *old/new* discourse strategy can be found in the following narrative passage:

The man called himself Mark. He was in civilian clothes, short hair, clean shaven, probably not very much older than myself. He was left alone with me in the interrogation room. I knew that was unusual, and I wondered what was coming. He said he was with the CIA, and had previously been stationed in Syria. Now he was here to ask me if I was willing to work for them.49

The first sentence is *given* information. In the second sentence, the *old* information is ‘he’ and the *new* information consists of the rest of the sentence. In the third sentence, the *old* information is ‘he’ and ‘with me’ and the *new* information is ‘left alone’ and ‘in the interrogation room’. In the fourth sentence, the *old* information is ‘I’ and the *new* information is ‘unusual’ and ‘wondered what was coming’. In the fifth sentence, the *old* information is ‘he’ and the *new* information is ‘with the CIA’ and ‘had previously been stationed in Syria’. In the last sentence, the *old* information is ‘he was here’ and the new information consists of the rest of the sentence.

The discourse structure of legal material drafted in conventional legal language is *not* based on the *old/new* strategy. In legislation, sections and sub-sections (provisions) are expressed in single sentence structures. Expressing each provision in a single sentence structure is a schema. For example, subsection 54(4)(a) of the *Police Offences Act 1892-1972 (WA)* states:

Every person who, without lawful excuse, carries or has on or about his person or in his possession any rifle, gun, pistol, sword, dagger, knife, sharpened chain, club, bludgeon, truncheon, or any other offensive or lethal weapon or instrument is liable on conviction to imprisonment not exceeding six months.

The subsection illustrates both the precision and generality of the legal rule. Legal rules in legislation cannot be drafted to cover every possible situation. As a result they combine words which illustrate classes of persons, things, actions and circumstances. These classes need not be natural classes. They are classes to which the legal rule applies. Some rules are more general than others and can apply to wider classes. Some rules contain specific examples of the class along with an invitation to the interpreter to infer that the class can be extended. For example, in subsection 54(4)(a) appear the words ‘or any other offensive weapon or instrument’. These words invite lawyers to apply the rules of statutory interpretation (a schema) in order to decide whether a particular instrument not mentioned in the subsection falls within the class. Supervisors of research students with a non-law background will need to alert their candidates about the schema (ie the rules of statutory interpretation).

Expressing each provision in a single sentence structure has been carried through into private legal documents. As a result, sentences are usually crammed full of information. They are not semantically linked closely to sentences that follow or precede them. This is the way that legal rules are often expressed in statutes, where the links between the essentially discrete legal rules are provided by a common topic (eg bail). Within the single sentence structure of the legal rule, coherence is maintained by the use of number of conflating devices (ie ways of condensing large quantities of information into single sentence structures). This may result in a structure that is not only tightly woven and extremely dense, but also clausally complex. Legal discourse structure is likely to be foreign to non-law research students, and may make comprehension difficult, if not impossible.


The grammatical complexity of subsection 54(4)(a) could be removed by redrafting it in several sentences. This would not involve the loss of any precision. Cast in revised form it might read:

Without lawful excuse, the possession of any offensive or lethal weapon or instrument is prohibited. ‘Possession’ includes carrying or having on or about the person. ‘Offensive or lethal weapon or instrument’ includes any rifle, gun, pistol, sword, dagger, knife, sharpened chain, club, bludgeon, truncheon, or any other offensive or lethal weapon or instrument. On conviction, the penalty is imprisonment not exceeding six months.

In this form the old/new discourse structure applies. The first sentence is given information. In the second sentence, ‘possession’ is old information and the new information includes, ‘carrying or having on about the person’. In the third sentence, ‘offensive or lethal weapon or instrument’ is old information from the first sentence, and the new information includes, ‘any rifle, gun, pistol, sword, dagger, knife, sharpened chain, club, bludgeon, truncheon, or any other offensive or lethal weapon or instrument’. In the fourth sentence, ‘on conviction’ refers back to the word, ‘prohibited’ in the first sentence. The new information is, ‘the penalty is imprisonment not exceeding six months’.

In both forms, this subsection combines particularity and generality. Non-law postgraduate research students undertaking interdisciplinary theses involving law are likely to find the recast version easier to process. They are, however, unlikely to be familiar with the rules of statutory interpretation, that is, the schemata which underpin both its construction and its interpretation.

Despite the discrediting of the single provision/single sentence structure there are still legal drafters who argue for its retention. In order to cram as much information as possible into the single sentence structure a number of conflating devices are employed. These include nominalisations, reduced clauses (especially relatives), excessive use of both embedding and the passive voice and the repetition of nominals in the place of pronominals. The resultant structure may not only be tightly woven but clausally complex. It may lead to unconventional information structure. Such structures may appear to non-law research students as being ‘spun of cobwebs’. Extensive research has shown that the over-use of conflating devices impedes comprehension and clouds clarity.

D. Discourse Comprehension Schema

Non-law postgraduate research students may approach the task of understanding legal rules, in a number of ways. They can apply the schemata that they have acquired through their own life experience, or they can attempt to construct their own legal schema. Both these processes are likely to cause comprehension difficulties.

Such students will be familiar with narrative (story telling) material and will have evolved a schema for understanding narratives. As a result, they are likely to impose that schema on legal documents.

Research has shown that most stories conform to stereotypical patterns which facilitate comprehension. In stories, content schemata deal with events occurring over time. Non-law research students can be forgiven for attempting to apply narrative schemata to legal rules because legal language looks like ordinary language, particularly if cast in plain English. However, major problems occur when narrative schemata are applied to legal rules. This can be illustrated in the following way. Compare: Subsection 129(2) Credit Act 1958 (Vic):
Where a regulated contract or a regulated mortgage includes a condition referred to in sub-section (1), the condition is void.

with the statement:

Where a modified car or a modified truck lacks ethanol produced from hexose sugars, the engine is non-functional.

Syntactically these two sentences are the same. Each consists of a case clause and a main clause. Word for word each sentence contains the same parts of speech. The function of each of these sentences is, however, different. Because of their syntactic similarity it is probable that a non-lawyer would not realise that the functional difference requires the application of different schemata. Unaware of the existence of legal schemata, research students with a non-law background are likely to apply narrative schemata to the subsection, and consequently fail to appreciate the force of the legal rule expressed in it.

Narrative material contains propositions that can be assessed as being either true or false since they present a picture of the world. Their function is to tell a story. Legal rules, by contrast, are neither true nor false and present a model for the world. They prescribe or proscribe certain behaviours and state what happens when the legal rules are flouted.

Subsection 129(2) Credit Act 1958 (Vic) states that a particular type of condition as set out in subsection (1) in a regulated mortgage or regulated contract is void. In deciding whether a condition is void, lawyers will apply the schema associated with the categorisation of contractual terms. Lawyers understand that applying legal rules to particular fact situations requires knowledgeable discussion using both deductive and inductive thought processes. They appreciate that no answer is necessarily correct. Non-law research students are unlikely to be aware of this.

The statement about the modified car or truck can be assessed as either true or false since it is possible to ascertain whether a lack of ethanol makes a modified car or truck non-functional. However, because of the difference in function, the application of narrative schemata to legal material will not facilitate comprehension.

Astute postgraduate non-law students, who are aware that legal language is different, but who are unfamiliar with legal schemata, may try to construct a legal schema in order to interpret a legal rule. Case studies have shown that those familiar with technical prose construct their own schemata as reading progresses. This process may be successful with technical prose which, because it offers a picture of the world, can be evaluated as either true or false. The situation with legal rules is different.

Lawyers acquire legal schemata through education and apply them in a ‘bottom up’ process. They are warned (another schema) that they may have to choose between a number of possible meanings. These intellectual choices presuppose others have already acquired the necessary legal schemata.

To return to the quote from Jeffrey Barnes:

The writer has been informed by a senior drafter who drafts in an office with a plain language policy that it may be that the [‘belief’] is maintained to avoid rules being ‘buried’ in a narrative.

55 In the subsection the main clause consists of the subject, ‘the condition’, the verb, ‘is’, and the complement, ‘void’. The case clause consists of a conjunction, ‘where’, a subject, ‘a regulated contract or a regulated mortgage’, a verb, ‘includes’, and an object, ‘a condition’, and a reduced relative clause, ‘referred to in subsection (1)’, which qualifies the object, ‘condition’. In the statement, the main clause consists of a subject, ‘the engine’, a verb, ‘is’, a complement, ‘non-functional’. The case clause consists of a conjunction, ‘where’, a subject, ‘a modified car or a modified truck’, a verb, ‘lacks’, an object, ‘ethanol’, and a reduced relative clause, ‘produced from hexose sugars’ which qualifies the object, ‘ethanol’.
57 Ibid.
58 White, above n 1, 65.
59 Perfetti, above n 36, 41–9.
60 Barnes, above n 23.
The author has discussed the difference between legal rules and narrative material. To argue that it is important to retain the ‘belief’ of drafting sections and subsections (ie provisions) in single sentence structures in order to avoid legal rules being ‘buried’ in a narrative raises the question: What narrative can legal rules be ‘buried in’? Certainly, recasting legalese in short carefully semantically linked sentences permits the application of the old/new strategy. But it does not change the character of the legal rule or any combination of legal rules.

E. Contract Law Schema

The elements of a simple contract form a schema. A contract cannot come into existence unless both parties intend that their promises are to be enforceable at law. The commitment of the parties to the terms of the bargain must be made clear by the words used, and the acts they are intended to perform. There must be an offer and an acceptance. Sometimes this is indicated by the words, ‘I hereby accept your offer’. These, or similar words, perform a dual function. One is linguistic and the other is that the words signal the act of entering into a legally binding contract.

Take, for example, ‘an offer’, which is one of the sub-schemata of a contract schema. The ‘offer’ must conform to the sub-schema for an ‘offer’. In Fisher v Bell [1961] 1 QB 394, for example, the defendant displayed a flick knife in his shop window. It had a clearly written price tag on it. Under the Restriction of Offensive Weapons Act 1959 (UK) it was an offence to ‘offer for sale’ any offensive weapon listed by the Act. Flick knives were included. The defendant was prosecuted for offering a prohibited item for sale. To non-law research students, it would appear that, if a knife were to be displayed in a shop window with a price, it would constitute an offer to sell. But the Court held that the display of the weapon, even with a price tag, was merely an ‘invitation to treat’ ie an invitation to make an offer. Consequently, it was not an offer to sell and the offence had not been committed. In other words, not all the felicity conditions necessary for an offer were present.

‘Intention’, in contract law, involves another sub-schema. That sub-schema is in the form of a test and is objective. The test requires the court to consider what has been agreed, the circumstances surrounding the agreement, the words used by the parties, the effect of the agreement on the parties, and whether they have subsequently acted as though the agreement was binding. If the facts of the case do not fit the sub-schema, then ‘intention’ is missing. Since this ‘intention’ sub-schema was developed through case law, non-law research students are unlikely to be able to assess whether the requisite intention was present.

This case illustrates that the words used to create a binding contract perform both a linguistic and legal function. If the intention of the parties is clearly and unambiguously signaled by those words then the act of entering into a contract has occurred. This case also highlights that there must be a sharing of the conventions about the legal language and its effects, for a speech act to be successful. It is with those conventions that non-law research students are unlikely to be familiar.

Even where the minds of the parties to a simple contract have met in respect of a common purpose, the agreement will not develop into an enforceable contract unless it meets another legal requirement. To be enforceable, every promise must be supported by consideration. The word ‘consideration’ is another cross-varietal item with one meaning in ordinary English and another in law. Consideration in its legal sense is not known to any other system of law; it is peculiar to the common law and its historical development is surrounded by mystery.

Consideration represents a schema composed of a set of sub-schemata. It is present if the promisee has purchased the promisor’s promise, or if the promisee conferred a benefit on the promisor, or suffered some detriment.

63 Bunn v Guy (1803) 102 ER 803, 823 (Lord Ellenborough).
Once a simple contract has come into existence there are rules (schemata) concerning those matters which might vitiate the contract either generally or at some level. There are also rules (schemata) concerned with the termination of the contract along with remedies for breach (schemata).

The analysis of simple contracts presented here suggests that given the appropriate context, offer and acceptance are speech acts that have the force of committing the parties to the bargain provided they have the requisite intention and observe the appropriate schemata. What is crucial is that each party must intend to create in the other, the illocutionary effect of being legally committed to the bargain. The difficulty for postgraduate non-law research students is that they are unlikely to understand the schemata (the scaffolding) for a simple contract.

Consider the application of schema theory to guarantee contracts. A full understanding of a guarantee document requires a knowledge of the legislation and case law upon which much of its meaning is based, and which is implicit in the language used in it. When research students with a non-law background are faced with the statement ‘I guarantee X will be paid all the guaranteed money when it should be paid’, they are likely to assign the common usage meaning to the word ‘guarantee’. In other words, they are likely to interpret the word ‘guarantee’, as ‘promise’, and not realise that it has a specific legal meaning with legal consequences (a legal schema).

Nor are guarantors (or research students) likely to be aware that other schemata are in operation. They are unlikely to appreciate that the language of guarantee documents is designed to protect the interests of creditors (a sub-schema). Creditors seek access to all the assets of the guarantors. As a result, the document seldom reveals the extent of the guarantors’ liability (sub-schema). This information would be disclosed only in the primary loan documents that are the province of the borrower and the creditor and not the guarantor. From the guarantor’s perspective such language is designed to favour the interests of creditors. The guarantors would probably and correctly believe that they are being told, ‘not what is, but what works’. In other words, they are being told only what is necessary to get them to sign the contracts and not what is required for them to make informed decisions about their liabilities.

Further, guarantee documents may remain silent on any arrangement for possible future borrowings (sub-schema). Even from reading the contract, the guarantor (including a non-law research student) is unlikely to understand the significance of certain terms. Rules which would otherwise work in favour of the guarantor are inserted to isolate creditors from those rules derived from equity or contained in legislation.

V. CONCLUSION

Lawyers acquire legal schemata through legal education. As students, they are taught that the law deals with the regulation by legal rules of relationships within society. Legal rules provide consequences for non-observance, and are schemata, as are the patterns used by legal institutions, including Parliament, the executive and the courts, to develop and apply them. Even where legal rules are expressed in clear, simple and precise language, research students with a non-law background are unlikely to be able to understand them. It is the ‘cultural syntax’ of the law which must be understood before complete comprehension is possible. Besides this, miscommunication can arise from an inappropriate choice of words or from the over use of the single provision/single sentence structure. Supervisors who are alert to these challenges are in a better position to assist their non-law research students to navigate through the ‘wilds’ of the legal discourse.

64 Tiesma, above n 61.

65 Laura Penny, Your Call is Important to Us: the Truth about Bullshit (2005) 1.
WHAT ARE THE CHALLENGES INVOLVED AND THE STRATEGIES EMPLOYED IN TEACHING AUSTRALIAN LAW TO NON-LAW STUDENTS FROM NON-ENGLISH SPEAKING BACKGROUNDS AND CULTURES?

Alison Owens and Irene Wex*

For students who choose to study law, the attraction to law is a given but for students who study law as incidental to their degree, the intrinsic interest in law is not a given. This challenge is further magnified in the case of students for whom English is a second language and the law is foreign to their previous civic experiences. This paper begins with a brief conceptual discussion of the perceived benefits and challenges of studying Australian law as a non-law student from a non-English speaking background and culture. It then reports on the findings of focus-group research conducted with non-law students from non-English speaking backgrounds who are enrolled at the Sydney campus of CQUniversity and with the academic staff who are involved in teaching these courses. The focus group research components of the paper seek to identify the perceptions of the teachers and students engaged in the incidental study of law and the pedagogical approaches and strategies that facilitate teaching and learning in a culturally diverse teaching and learning environment. Student-participants express their opinions about studying law as part of their degree and reflect on the value of the courses in relation to their professional and personal outcomes. The lecturers and tutors discuss the challenges they have encountered and the strategies they have adopted to effectively engage these students in legal issues, processes and discourse. Effective teaching approaches, strategies, materials and assessment will be identified to assist in the education of second language, non-law students.

I. INTRODUCTION AND OVERVIEW

Australia is the third most popular study destination in the English-speaking world and there are over 200,000 international students enrolled in Australian institutions across the higher education sector.1 Australia’s international tertiary sector has proved to be resilient through the recent global economic crisis,2 although current internal and external factors, including concerns about student welfare, changes to skilled migration legislation and a high Australian dollar, have lead some commentators to predict a decline of up to 20% over 2011.3 Australian university business and accounting degrees, in particular, have attracted vast numbers of international students over the last two decades. For the successful completion of these degrees, law courses such as Contract Law, Company Law, Commercial Law and Taxation Law are compulsory. As a result, the number of university students who study law as incidental to their major discipline is likely to exceed the number of students who study law as a degree. At CQUniversity’s

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3 Tony Adams, ‘We’re in Danger of Creating a Backwater’ the Australian, Sydney, Australia, 8 June 2010; Dennis Murray, ‘Australia Talks’ Radio National, ABC Radio Australia, 8 June 2010.
Sydney Campus alone, more than 2000 international students were enrolled in Business and Accounting degrees in the first term of 2010. In order to retain the international student interest in Australian university study in an increasingly competitive market, teaching and learning approaches in all disciplines, but particularly business, can explicitly and meaningfully include culturally and linguistically diverse learners and global contexts in course content, pedagogy and assessment. As law is essential to business study, research of international non-law students and their teachers provides useful insights into how this can be achieved.

The aim of this project is to assess the benefits and the challenges of studying Australian law for non-law, non-English speaking background students. Since it is anticipated that the study of law is both beneficial and challenging, this paper will firstly provide a brief conceptual discussion of the perceived benefits and challenges of studying law as part of a non-law degree and then report on the findings of focus-group research interviews conducted with: a) current international students from non-English speaking backgrounds (NESB) who are studying law as part of an undergraduate accounting degree, and; b) their law teachers as a comparative study and analysis. Students discuss their experience of law within a non-law degree and provide opinions about the benefits and challenges they perceive to have derived from their knowledge or familiarity with Australian law. Law teachers discuss the challenges they have encountered and the strategies they have adopted to effectively engage culturally diverse, non-English speaking background students in Australian legal issues and processes. The effective teaching strategies and materials employed by the teacher participants to assist students to succeed in a culturally, cognitively and linguistically unfamiliar discipline serve to potentially assist other law teachers who teach law for a non-law qualification within a culturally and linguistically diverse teaching and learning environment.

II. THE PERCEIVED BENEFITS AND CHALLENGES OF STUDYING AUSTRALIAN LAW FOR NON-ENGLISH BACKGROUND, NON-LAW STUDENTS

For students who choose to study law, the attraction to law is a given, but for students who are required to complete law courses as part of a non-law degree (hence, for whom law subjects are subsidiary to their degree), the intrinsic interest in law is not a given. In fact, these students may find the obligatory study of law to be a daunting and perhaps unwelcome experience. These sentiments may be even further heightened in the case of students for whom English is a second language and English law a foreign law. Moreover, because legal English is a product of English history, in which Anglo-Saxon mercenaries, Latin-speaking missionaries, Scandinavian raiders, and Norman invaders have left their mark, the language of English law is a blend of languages including archaic English, Latin and French. For second language learners, the language of the law poses multiple challenges by introducing: unfamiliar English words, such as ‘appellant’ or ‘covenant’; many non-English words, such as ‘tort’ or ‘vis-a-vis’; as well as new, legally-specific meanings to English words in common use, such as ‘consideration’, ‘appeal’ and ‘reasonable’. In addition to learning the complex concepts and processes of the discipline of law, second language students confront the further cognitive burden of translating and interpreting meaning across languages as well as intra-linguistically between standard and legal English; that is, re-interpreting learned English.⁴

There are nevertheless many benefits to studying law. As a discipline, law connects with many other disciplines, including economics, history, philosophy, psychology and political science. The study of law also provides a sound education for future professions in accounting, business, banking, technology, the property market, construction, public administration, journalism, and many more. The broad generic skills that students develop during their studies in law, such

as incisive analysis, logical reasoning, creative problem-solving, clear communication, and practical negotiation therefore equip them for a variety of careers and generate valuable life skills. Indeed, over a third of law graduates choose not to practice law but to pursue a career in a discipline annexed to their law degree. Moreover, as both an intellectually and culturally enriching experience, the study of law has the further potential of contributing to enhanced international and cross-cultural understanding and building awareness of global issues, such as human rights, climate change and world peace. Since law is a mechanism for holding society together, by studying law, students become aware of the social mores in Australian society and the way in which these are reflected in the law. Moreover, students gain a greater understanding of their position within Australian society, as well as of the rights and obligations that flow from this. In this sense, the study of law can serve to empower international students by enhancing their capacity to know and deploy their rights within Australian society in which they are at risk of exploitation as a consequence of their unfamiliarity with the culture and community and their isolation from family and friends.

III. Method

As this research sought to describe and understand the benefits and challenges to the study of law for NESB and non-law students and their law teachers, sample focus group research was selected as the most appropriate and efficient method. Focus group research is frequently used in cross cultural research for such reasons as the group interview can better accommodate cultural variables. Focus group interviews allow researchers to select participants who share some feature or characteristic of interest to the research and engage them in consideration and discussion of questions related to this characteristic; in this case, to the perceived benefits and challenges to the study of law for non-law qualification. As students were NESB and culturally diverse, small focus group interviews were anticipated to be less confronting than individual interviews and also more effective and candid than a large group interview, as it allowed the students to exchange ideas and prompt each other to speak within an encouraging and non-threatening environment. For both students and teachers, the small focus group interview conducted in this research project further allowed for the possibility of valuable collegial sharing and further learning in a university context.

In order that students had adequate experience of studying law, an invitation to participate in the research was restricted to second and third year students who had completed a minimum of one or two law courses prior to their current law study. Students were from China, India, Indonesia and Nepal. Separate focus groups were formed for: a) NESB students and; b) their law teachers by seeking volunteers through email invitation and class announcement. Two focus groups of NESB students (six students in group 1 and eight students in group 2) were interviewed after their weekly law tutorial in the tenth week of term at their university campus in April, 2010. One focus group of six law teachers was also interviewed in the same week. The teachers involved in the study teach law to both law and non-law students and to both native and non-native speakers of English across various universities in Sydney, including the Sydney Campus of CQUniversity. All participants were encouraged to respond to each of the questions and these interviews were audio-taped and transcribed for analysis. Data from interview transcripts was analysed to identify common trends in perceptions and opinions as well as deviant or contradictory views expressed by each group.

6 Ibid.
7 Ibid.
11 See Appendices One and Two below.
IV. Overview of Findings

A. Student Focus Groups

All students from both focus groups strongly supported the inclusion of law courses in their accounting program variously describing law as ‘useful’, ‘necessary’, ‘essential’ and ‘fair’ (they also offered a variety of reasons for this assessment). Firstly, the knowledge of law of contracts, taxation and business would ensure that they ‘did the right thing’ as practising accountants. Students discussed the importance of ‘ethical’ practice as well as the enhanced protection — commercial, professional and personal — provided through knowledge of the law. Two or three students from different cultural backgrounds noted that this was particularly valuable knowledge for them as foreign residents in an Australian culture with which they were only partly familiar: “...we come from another country where the common sense are maybe different... some laws are common sense but common sense is maybe different from other country.” The examples of privacy and confidentiality were raised by one student in particular:

“I have to care for other peoples’ privacy... before I came to Australia I didn’t know this.”

“If I have a misunderstanding with my employer, I can go away but I cannot take any of the information from there, it is a very small matter but may lead to endangering your career.”

A common problem identified by all of the students in both focus groups was the condensed nature of material in law courses for non-law students: “...there is too much packed into the law courses.” Several students complained of the large quantity of material they had to read and remember: “Remembering the sections is the hardest!” In addition to the quantity of text encountered in studying law, the semantic density and subtlety of legal discourse was also deemed to be a problem by the majority of students:

“There is a very thin margin to separate two cases, they sound so similar but they may be contradictory to each other.”

“There are many words from other languages and these are very hard to understand. Sometimes law makes language difficult. It says, okay, that’s the law, but then you have these five sections and it makes you confused because it seems it repeats the same thing, again and again.”

“The language of law is very difficult as a second language learner, especially in assignments. I have to read it three or four times and sometimes I still don’t understand.”

As anticipated, the language of law is difficult for NESB learners on the lexical level of single words, the syntactic level of sections and subsections of sentences and how they interrelate (for example, who said what), as well as on the semantic level where a commonly meaningful notion, such as a ‘reasonable person’ or ‘law enforcement’ may elicit culturally different associations and require extensive explanation.

Although there was some debate over the relevance of commercial law to accounting work, most students felt that studying Australian law was locally and globally relevant as the Commonwealth system was highly influential in many parts of the world. An Indian student pointed out that even if the specific laws are different, the basic principles of consumer rights, for example, resonate in all laws. The majority (about ninety per cent) of students had an intention to seek work in Australia on graduation and so considered knowledge of the local legal system essential. Students argued that knowledge of the law was most significant at senior levels in the accounting profession where decision making required negotiating and consultation rather than calculations, and was therefore a career benefit. One student reported a potential employer asking him to explain ASIC sections relevant to compliance in a recent job interview which he was able to do: “If I hadn’t studied law, I would be sitting there like a dummy.” Most students (again about ninety per cent) also pointed out the relevance of laws that they had learned to daily life, including notions of negligence as well as tenancy agreements, employment contracts and sales contracts:
“If I see I bought an expired thing, I will go and see the seller and explain what they have done. It is against human law, you cannot sell this to western people and you cannot sell this to me, so I have got the same human rights as everyone has got. I have learned this from the culture.”

A significant challenge identified by about half of the students was adjusting to the discipline-specific process of legal problem solving. Students pointed out that whilst they were encouraged in their other courses to develop their own opinion on a question, this was not appropriate in legal problem solving. One student commented on this as follows:

“I failed my law course before because in accounting and other courses you can give your own opinion or conclusion, right? But law... you have to stick by the rules, you can’t just say something, you have to say on what basis, from what principles or rulings, how are you figuring it out... I got terrible marks in my assignment and went wrong in the exam as well because I was using strategies from other classes.”

Students suggested a variety of teaching approaches and strategies they considered helpful in overcoming some of the challenges in their study of law. Small class sizes were considered important by all students. The opportunity to interact with the teacher in small groups was also considered to be particularly beneficial for second language students who needed to check the meanings of words and clarify problem solving processes regularly. Ongoing linguistic analysis, explanation, re-phrasing and repetition of legal terms were considered good teaching practices by most students and the quality of English pronunciation of teachers was considered critical by all student participants. All students made continual use of legal dictionaries and practised much guess work from context in reading law text. Vocabulary development material and exercises were considered highly beneficial and glossaries, crosswords and ‘word lists’ were listed as useful learning aids by all students. Emphasising links within the course materials by explaining topic links between “last week, this week and next week”, as well as linking the course concepts and topics to real world examples in business and accounting were considered by all students to enhance student comprehension and engagement with content.

B. Teacher Focus Group

All teachers declared that they enjoyed teaching non-law and NESB students but at the same time acknowledged significant challenges in engaging these students in legal topic and overcoming language and culture barriers. Several teachers expressed the view that many international students studied accounting to gain permanent residency on the basis of skilled migration. Such extrinsic motivation was considered by these teachers to limit learner engagement with their study of law. However, all teachers described successful strategies to enhance international student engagement including the use of examples from everyday life focusing on employment contracts, tenancy agreements, student rights and consumer protection as well as including scenarios from daily newspapers and popular movies. Sourcing and deploying examples that were “simple and universal enough” was deemed an important consideration. Although all teachers acknowledged that it was difficult to overcome linguistic and cultural differences that interfered with understanding, it was also pointed out that the cultural diversity characteristic of their classes provided rich material for consideration of alternative views which is critical in legal analysis:

“I like to teach to a diverse group of students because the ideas and perspectives raised in group discussion are more comprehensive. Teaching classes with all domestic law students tends to involve a fairly narrow group where alternative views need to be introduced to them. The students take on this role themselves in culturally mixed classes.”

Teachers agreed with the view expressed by one teacher participant that law was one of the more interesting topics encountered by accounting students as it incorporates aspects of sociology and philosophy which allowed for cross cultural learning as well as a generalist understanding of society and the role of the law. In concordance with their students’ views,
however, all teachers expressed discomfort with the condensed nature of law courses for non-law students, or, as one teacher put it: “shoving everything together”.

“If you have law students and you teach tort law, they study it for a whole term or a year ... they get to tease apart little judgements and subtleties but in some of our subjects here they get one week to study torts. I think this is difficult for our teachers. You’ve got to teach the basics but our students will get an exam question that is not much different to what a law student will get and we have had to teach it in one week.”

Teachers discussed the critical importance of the design of assessment tasks and examinations in law courses for non-law, NESB learners. Most law courses include time-restricted final examinations which are always more challenging for second language learners who may take up to thirty percent longer than native speakers to absorb a second language text. Teachers also explained that the more difficult assessment is the more class time needs to be devoted to covering and rehearsing assessment material rather than examination of the breadth of topics and concepts of the course and their practical applications as well as the topics of particular interest to international students, such as indigenous issues. The assessment tasks of two specific Law courses offered within the same business program were discussed and compared in terms of complexity and relevance. The ‘Course One’ assignment is heavily skills-focused and mirrors the kinds of problems and tasks that a practising accountant, rather than a legal specialist, would be faced with. It is explained in a step by step manner using simple, short English sentences and questions requiring students to access critical information through a range of relevant online sources and resources (such as the ASX or ASIC). It includes simple procedural tasks but also more complex case-analysis and argument tasks. The ‘Course Two’ assignment was more traditionally and abstractly structured around a series of cases. Questions were complex containing multiple clauses, long (often five or six lines) and written in sophisticated legal language. Hypotheticals and speculative, multi-layered questions were posed. Students were required to consider complex cases and to advise hypothetical ‘clients’ on their legal rights and legal ramifications as a legal specialist may be expected to do. One teacher described the complexity of the case provided for the assessment in ‘Course Two’:

“The students are constantly trying to understand what the judges are saying because it is a high court decision, not just a simple trial judge on something quite simple, and of course you’ve got the high court judges stating what the trial judge said, what the tenant argued, what the landlord argued, what the full court argued at federal court before it came on appeal. The students are being asked questions like what was the high court’s view of all these arguments, what was the high court’s view of a number of cases, how did the high court interpret this lease... accountants don’t need to have this level of understanding.”

On the other hand, ‘Course 1’ required students to:

“...go to ASIC website, find out when the company was registered, then find about enforceable undertaking. What did the liquidator do? Can you find this? Find that? Next one is go to the stock exchange website, look up this... what’s the main point about corporate governance? How can you apply it? What’s recommendation 1, 2, 3? Basically,... when they come out and practice, this is the sort of thing they will need to know, you know, it’s all one mark, two marks, it takes a long time, there are easy bits, harder bits...Someone breached ASIC wants you to turn up with files, do you have to provide them? What’s the penalty, if you don’t? There are some give-aways and some hard bits, a nice skills assignment.”

Teachers agreed that there was no reason to teach law to business students as if they were law students, yet they felt assessment design over which they had limited input, did not always reflect the future professional context of business graduates or accommodate the second

language status and skills of many students. They suggested that a useful strategy was to ask accounting lecturers to read the law exams set for international accounting students and provide feedback to the law exam writers. Also referring to the professional accreditation guidelines of the Institute of Chartered Accountants and CPA Australia is a useful strategy.

Teachers acknowledged the multilayered linguistic challenges their NESB students faced in studying law in Australian university. A range of teaching strategies were deployed to assist students comprehend new words and meanings including: more writing on the whiteboard to expand points and explain language presented on PowerPoint slides; use of handouts to further support learning terminology; repetition of terms; linking and scaffolding learning from one concept and set of terms to the previous and next concepts and terms:

“I explain the differences in meanings of words, for example, I talk about the different meanings of the word ‘mean’: average, nasty, signifier, slang for great, and so on. I also do this for legal terms like ‘material facts’, ‘consideration’, ‘reservation’ and so on, so... to deconstruct or pull words apart makes it easier for second language students to understand.”

“The law I teach uses a lot of acronyms. I get students to complete an acronym quiz in week one. I also use crosswords and word searches... these types of exercises free up cognitive space so that when they are reading textbooks, they do not need to keep looking words up as they are more comfortable with the terminology.”

Finally, teachers discussed some of the cultural issues that affect student engagement with and comprehension of Australian law. It was pointed out that some overseas students originate from more authoritarian societies where questioning of authority and of law makers is discouraged so learning about Australian legal practices is also cross-cultural learning:

“The concept of the reasonable person, the relationship between citizens and the state and the questioning of authority is an important insight into Australian culture, as is the concept of precedent as they learn that even judges have restraints.”

Teachers noted that there was some tension between teaching students to question authority and also teaching them that their opinion was not important in the context of law:

“It’s not your opinion about whether older women should be doing such and such a thing at a certain age, but what is your opinion of this judgement of the law...”

International business students also tend to expect a single and correct answer and may find the ambiguity around the law confusing and frustrating. Teachers stressed the importance of demonstrating to students that an answer is not as important as the process of getting to an answer:

“Law is a process and a reflection of politics and society and is not always right. It is therefore always a work in progress.”

V. DISCUSSION OF RESULTS

Both students and teachers noted a tendency to condense or over-pack the content of law courses for business students. Treating business students in law courses as quasi-law students was described by Corbin as being ‘unrealistic’. Ensuring the relevance of course material and assessment tasks to the future work contexts of non-law students is thus recommended, particularly to enhance business student engagement with learning law.


conventionally need to closely analyse legal principles and rulings pertaining to a specific scenario in order to advise clients of a course of action, accountants and business professionals are unlikely to do this. Rather they need law courses that will allow them ‘...to become business people who will be able to order their affairs to avoid legal challenges...’ and learn skills that are relevant to an introductory understanding of law in a business setting.’ Concurringly, teachers and students in this research emphasised the importance of non-law students learning essential aspects of contracts and business law to the extent that, when they encounter legal problems or scenarios in professional practice, they will recognise the legal implications and know where to source the relevant sections and further information. Hence, an emphasis on recognising legal issues, problem solving skills and proficiency in accessing and using legal resources were considered the critical learning outcomes to non-law education. Not all law courses for non-law students in this research achieved this business-context, skills focused approach.

Many Australian universities, including, for example, CQUniversity, Curtin, La Trobe, University of Newcastle, Charles Sturt and Notre Dame operate multiple campuses across Australian states, including Sydney campuses, where international students are represented in large numbers. In this multi-campus scenario, and in the interest of consistent and equitable learning experiences, it is frequently the case that the course materials and assessment are authored by a single individual in the role of Course Coordinator. This arrangement may limit the ability of individual teachers to adapt learning material and assessment to their specific group of learners.

At the CQUniversity Sydney Campus where the research took place, the large majority of students are international business or accounting students originating from over 50 countries and many are second language English speakers. Although not all of the teachers interviewed acted in the role of Course Coordinator, all teachers practised many ‘local’ adaptations and provided supplementary materials to existing course materials to enhance understanding for international students. However, there was limited capacity for non-Coordinators to change course work or assessment which they may perceive to be inappropriate or ineffective for second language, non-law students. Revision of law courses for non-law students to properly account for increasing numbers of culturally diverse and second language learners was a strong recommendation from teacher focus group interviews. As international students now make up more than 20% of enrolments for most Australian universities, and as so many of these students study business degrees incorporating law courses, providing a culturally and linguistically inclusive and sensitive non-law course experience is a challenge that extends across the sector. A further challenge is resourcing such revision so that academic staff who are willing to review their courses and their pedagogy to better account for the learning needs and linguistic challenges of international students are able to accommodate this work in the context of increasing student numbers and workloads.

Teachers in this research displayed very high tolerance for second language learning difficulty and awareness of and respect for cultural differences and their impact on learning. An alternative ‘deficit-model’ response has been articulated in many reports on the large numbers of international students studying for degrees at Australian universities. In the deficit model international students have been negatively stereotyped as uncritical, passive, rote-learners, with

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15 Corbin, above n 13.
16 Adams, above n 3.
poor English skills and a tendency to plagiarise. Some Australian academics continue to explain international student learning difficulties as a consequence of English entry-test inadequacies and others have claimed that the participation of international students in university programs is lowering academic standards. Law teachers in this research articulated an alternative view endorsing the internationalisation of student cohorts and demonstrating intercultural sensitivity, awareness and adroitness in discussion of their pedagogical practice; acknowledging, for example, culturally different attitudes to authority as well as tolerance for uncertainty — two important dimensions of cultural difference. As accounting employers have criticised the generic skills, including communication skills, of all Australian graduates, international and domestic alike, a greater focus on providing linguistic development supporting improved English communication skills for students of law, may benefit all students.

A further and frequently linked criticism of international students in Australian universities has been the extrinsic motivation of many students to study based on potential for skills-based migration, a notion challenged by several teachers in this research as well as other studies in accounting that suggest that both domestic and international students ‘...share similar behavioural beliefs in terms of extrinsic motivation factors linked to potential financial rewards in employment that might be derived from studying in accounting.

It was evident from the interviews with international students that they had indeed enhanced their knowledge of their own rights as consumers, employees, tenants and students through their study of law. In addition to professional benefits, students demonstrated increased awareness of their rights and the rights of others in the Australian community, the workforce and the University. Phrases such as, ‘protects you’, ‘protection’ and ‘avoid being sued’, ‘avoid mistakes’ or ‘doing something wrong’ are regularly repeated in student focus group interviews. This sense of enhanced security and empowerment derived from the study of law may in part address what has been described as the ‘under-protected’ and ‘disenfranchised’ international student cohort in Australia. Perhaps all international students should enrol as non-law learners as one solution to their vulnerability?

VI CONCLUSION

Research participants in this study endorsed the study of Australian law courses for international business and accounting students. Multiple benefits were identified for these students on both a personal and professional level as a consequence of legal studies. Academic law staff was largely positive about the presence of international students in their law classes but recommended a range of material and pedagogical adaptations to ensure both relevance to business practice (rather than legal practice), as well as an accessible and equitable learning experience for second language students.

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APPENDIX ONE

QUESTIONS FOR STUDENTS’ FOCUS GROUPS

1. What was your initial reaction when you found that law courses were a compulsory component to your degree?
2. What were some of the challenges you encountered in studying law in Australia?
3. What benefits do you think you have gained from the study of law in Australia?
4. How do you think your knowledge of law will contribute to your professional career in your chosen discipline?
5. How do you think this knowledge has benefited your cultural understanding of Australia and similar communities?
6. How do you think your knowledge of law has benefitted you personally?
7. Has the study of law enhanced your problem-solving skills? How?
8. Has the study of law enhanced your critical-thinking skills? How?
9. Did you find the language of law to be very different from general English? How?
10. How did your teachers assist you to develop language skills required for legal study?
11. What strategies did you adopt to learn the language of law?
12. What recommendations do you have to improve the teaching of law subjects to international students?
13. Are there any other comments you would like to make?
APPENDIX TWO

QUESTIONS FOR TEACHERS’ FOCUS GROUP

1. Do you like teaching law to international, non-law students?
2. What are the differences between teaching law to law and non-law students?
3. What are some of the challenges students encounter in studying law in Australia?
4. What benefits do you think students gain from the study of law in Australia?
5. How do you think students’ knowledge of law will contribute to their professional career in their chosen discipline?
6. How do you think this knowledge improves students’ cultural understanding of Australia and similar communities?
7. How do you think students’ knowledge of law benefits them personally?
8. Does the study of law enhance students’ problem-solving skills? How?
9. Does the study of law enhance students’ critical-thinking skills? How?
10. Do students find the language of law to be very different from general English? How?
11. How did you assist students to develop language skills required for legal study?
12. What strategies did you adopt to teach the language of law?
13. What recommendations do you have to ensure effective teaching of law subjects to international students?
14. Are there any other comments you would like to make?
RESPONDING TO CHANGED PARAMETERS OF THE LAW STUDENT: A REFLECTION ON PASTORAL CARE IN THE LAW SCHOOL

KATE GALLOWAY∗ AND RACHEL BRADSHAW∗∗

The Bradley Review into Higher Education provides a new imperative to include so-called equity students in tertiary study.1 At James Cook University (‘JCU’), a holistic LLB curriculum seeks to address a variety of challenges faced by this increasingly diverse student cohort. The authors identify the means by which our program supports students and then highlight the gap between policies of engagement and retention, and the reality of providing front line care for students. It concludes that the role of pastoral care, while imperative to achieve the bureaucratic aims of government and institution, is gendered, undervalued and misunderstood within the law school context.

I. INTRODUCTION

Academics are all too aware of the ongoing changes to higher education in Australia over the past 20 years or so, and its movement from an elite to a mass system of education. Student fees place education in the neoliberal marketplace where universities have become an enterprise rather than a social good,2 and the student has become the consumer of education services.3

Government policy is driven by economic imperatives, evidenced by the push to provide Australia with a ‘highly skilled’ workforce, ‘to position Australia to compete effectively in the new globalised economy’.4 Currently 29% of Australian 25–34 year-olds have degree-level qualifications5 but the Bradley Report recommends a target of 40% of 25–34 year-olds having attained at least a bachelor-level qualification by 2020. This means opening up higher education to an even more diverse cohort — representing a fundamental shift in the demographics of the student population.

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4 See The Bradley Report, above n 1, Executive Summary xi.
5 Ibid.
In discussing the learning experience of this socially broader cohort, Kinnear et al point out that:

the need for individual institutions to understand the “micro-ecology” of students over time, to understand how the complexity of social, academic, and cultural factors play out for the student within the specific institutional context is an urgent and emerging one.6

Indeed Darlaston-Jones et al identify that academic, social, cultural and personal characteristics contribute to student attrition rates.7 In the context of the Bradley Review, this means that enrolling students from non-traditional backgrounds is not enough — attrition is likely to be an issue.

This is reinforced by comments made recently in the Higher Education Supplement of The Australian which reported that ‘the proportion of students who are struggling emotionally is likely to grow as universities open up to people from less privileged backgrounds. “It’s a big sleeping issue…”’8 This is of particular concern for legal academics, in light of the 2009 report on law students’ mental health.9 There is a clear link between students’ readiness for tertiary study and their emotional well-being.

Kift suggests that the way to support cohorts who ‘enter our programs with even greater diversity in preparedness and cultural capital than ever before’, is to change ‘both culturally and structurally, the prevailing character of the first year student experience…through coherent, integrated, intentional, supportive and inclusive first year curriculum design.’10

This paper reflects on the work of the first year coordinators in the LLB at JCU, in achieving this end. First this paper identifies the student context at JCU and the LLB curriculum response to that context. In particular, the focus is on the often-neglected pastoral care aspects of the co-ordinators’ roles as a key element in a curriculum responsive to students’ needs. This paper will then reflect on the care aspects of pastoral care — as a different construct from ‘support’ that is mentioned in much of the literature.11 Finally, in light of experiences of caring, this paper queries the extent to which this role is recognised or valued in a neo-liberal higher education context that increasingly seeks ‘simplified, measurable performance indicators.’12

II. OUR STUDENTS’ CONTEXT

The LLB at JCU has relatively open access compared with many universities in metropolitan Australia where students are still likely to comprise an elite (both in terms of socio-economic background and prior academic achievement). JCU students are as likely as not to be from a rural or remote area, mature-age, and first-generation university educated. They are also less likely than students of other universities to have achieved as highly academically prior to entering university. In 2010, the minimum entrance score for law at JCU was substantially lower than for all other law schools in Queensland.

JCU students themselves identify their lack of preparedness for tertiary study. Over one half of first year students believed that their final year at school did not adequately prepare them for university.

Anecdotally, the law degree is seeing an increasing number of students who are recent migrants (including refugees) and those who are dealing with adverse domestic issues. At the beginning of first year, many students report that they had only within the last two weeks decided to study law and so had moved (from elsewhere in Australia) to Cairns or Townsville. This places an additional burden on students who leave their social and family networks, and face finding accommodation and work as well as the challenge of tertiary study — and these are important factors that affect student retention.

The decrease in numbers of students receiving Austudy or Youth Allowance as their primary income has lead to an increase in students who rely on income from paid work. Like students elsewhere in Australia, JCU law students undertake paid work that keeps them off campus. Although numbers of full-time students at JCU have risen, there is an emerging trend of students spending fewer days on campus and less time in classes. In 2008, 65% of JCU law students worked more than 11 hours per week; 37% worked more than 16 hours per week. The majority of students reported spending 27 hours per week on their studies, including course contact time. A full time load (four subjects) would have required 40 hours per week spent on such activity. These data identify a significant gap between how much time teachers expect students to spend on study, and the time students actually spend. This is borne out also in national studies.

JCU first year students have identified that paid work is either their main source or only source of income and the majority of those students fear that their paid work impacts negatively on their academic performance. Students wish to complete their degree as fast as possible and they simply do not have enough time to spend on their study.

These data are concerning: students who spend less time on campus are ‘less likely to ask questions in class and contribute to class discussions.’ As learning takes place through the active behaviour of the student, a lack of engagement in educationally useful activities will counteract student learning. If institutions seek increasing numbers of graduates, then students ‘at risk’ of not participating require support. As students’ experience of learning in the transition

17 Darlaston-Jones et al, above n 7.
18 Krause et al, above n 16.
21 Krause et al, above n 16.
22 James Cook University, First Year Experience Questionnaire 2006 (2006); Galloway, above n 20.
23 Galloway, above n 20; see also Crowley-Cyr, above n 3.
24 Krause et al, above n 16, 32.
year is a ‘crucial one that can have lasting positive (or negative) effects, depending on the skill with which it is handled,’ 25 early intervention strategies are vital to facilitate ‘an active process of constructing rather than acquiring knowledge.’ 26

The challenge does not stop there however. McInnes reviews studies that show how students’ attitudes and aspirations are changing. 27 He points out that changes in priorities, interests and rites of passage mean that engagement in university experience is not a ‘self-evident good’. 28 Christie, in the UK context, writes that middle class students draw upon ‘discourses of entitlement to and self-realisation within higher education,’ 29 but that ‘non-traditional students have limited access to the cultural capital’ that would help them navigate the university system. 30

This change in student attitudes about their study is linked to the contemporary global economic marketplace. 31 Pick and Taylor for example, identify a close link between student aspirations and the national economic agenda. As part of this economic agenda, universities transform graduates into workers for the new economy — steeped in cultural practices that will help create and reinforce economic goals. These practices involve ‘individual autonomy, responsibility, freedom and choice.’ 32 Pick and Taylor, through surveys of Australian students, identify that the fee-paying environment forces students to ‘become more utilitarian’ towards the value of their education. Students expect a higher income to justify the cost of their education. 33

Despite this context, teaching in the Bachelor of Laws in Australia continues to be a fairly traditional and formal mode of content-focussed and doctrinal delivery. 34 This represents the very culture of the law and the law school that has been identified as a barrier to inclusiveness of a more diverse cohort. 35

This context exists also in the JCU Law School, a small school teaching across two regional campuses separated by some 350km. By 2004, with high attrition rates and unacceptably high failure rates during first year, the Law School needed to act to promote retention of its already diverse and ‘non-traditional’ cohort by addressing their learning needs. Therefore in redesigning the first year curriculum, particular attention has been paid to the transition to tertiary study — engaging students in their law study and developing their skills from the outset — as a means of engagement in the culture of academic life. 36

The first year program seeks, amongst other things, to: 37

• enable a transformative, transitional experience for students to develop into ‘self-reflexive, independent, responsible learners and ethical scholars’;


26 Ibid 8.


28 Ibid 8.


30 Ibid.


33 Ibid.


36 For example see Kift, Articulating a Transition Pedagogy to Scaffold and to Enhance the First Year Student Learning Experience in Australian Higher Education Final Report for ALTIC Senior Fellowship Program, above n 10.

• take a broader approach to students’ skill development, including …emotional literacy of students.

This transformative transitional experience for JCU students relies at least partly on their capacity to cope with the social and emotional contexts of study. As Endres points out “transformative education involves the ongoing alteration of the students’ character through a sustained personal relation.” In considering the social and emotional contexts of study, curriculum is designed using a ‘broad view’ of curriculum — one that encompasses ‘the whole process of teaching and learning and all the activities in their various contexts which take place during that process.’ If it is within the ‘academic curriculum that students must find their place, be inspired, excited, engaged and retained’, then it is important to understand the impediments faced in fostering positive learning experiences, and how to help students overcome these.

The first aspect of the curriculum lies in the more concrete elements supporting development of students’ emotional intelligence — through emphasis on emotional literacy or ‘using opportunities in and out of class to help students turn moments of personal crisis into lessons in emotional competence.’ Goleman identifies abilities such as self-motivation, persistence, empathy, hope and mood regulation as elements of emotional intelligence.

III. TRANSITION TO THE LLB AT JCU

In light of students’ ‘life factors’, it can be challenging for them to develop a positive ‘student identity’ with a clear sense of direction and purpose, with confidence in their ability to succeed. Like so many of their peers nationally, generally JCU first year students feel overwhelmed by what is required, feel their school experience did not adequately prepare them for university study, and are largely unaware of the many services available to them.

Christie cites studies that ‘highlight the emotional component of… navigating the financial, social and cultural barriers that non-traditional students must overcome if they are both to gain access to university and to become full members once there.’ For these students — whose background is similar to that of JCU law students — ‘the transition to university is an intensely emotional process…’ and this cannot be divorced from students’ academic success.

Värlander focuses on the important role of emotions in learning:

The more emotionally engaged a learner is, the more likely it is that he or she will be able to learn… Nevertheless, when people perceive a learning situation to be threatening, and experience emotions, eg insecurity and anxiety, they are less likely to learn.

Like Värlander, Beard et al point out that ‘student success is heavily dependent on aspects of social integration which involve the affective dimensions of their engagement with higher education.’ They argue that emotion in higher education is rarely acknowledged and argue for a more human model of the student.

42 Ibid 34.
44 James Cook University, First Year Experience: Project Report 2009 (2009)
45 Christie, above n 29, 125.
In a similar vein, the Law School at JCU has developed strategies to guide, nurture, support and empower students to reach their potential. The aim is to support students’ emotional development as an integral part of their academic development. This falls onto first year academic staff, and particularly the First Year coordinators (‘FY coordinators’) who are largely responsible for pastoral care.

Pastoral care is a student-centered, holistic approach to student welfare that aims to ensure the student develops and engages meaningfully. Adopting a pedagogy of diversity, it is acknowledged that students come with a range of life experiences and contexts, often coupled with a misalignment of expectations and skill sets so pastoral care is one strategy to deal with this misalignment.

Integrating pastoral care into curriculum fosters academic and social connections as well as emotional literacy. This approach aims to provide students with insight into their own process of adjustment, that is personal to them. This fosters a feeling of control over initial social and academic anxieties. This broad approach to curriculum ensures development of skills and attributes to address students’ new circumstances. A university with a solid system of pastoral care based on the principle that the general wellbeing of the student comes first, ‘will have a smaller drop-out rate and provide a positive educational experience.’

In the LLB at JCU, curriculum addresses students’ ‘mismatches with the reality’ in a variety of ways.

A. Students’ Early Formative Experiences on Campus

As James observes, the ‘origins of changing student expectations may lie, paradoxically, in the early formative experiences of students on campus.’ Crossling et al identify that O-week activities have potential to meet the need to ‘induct students into the wider higher education environment.’ As JCU moves towards a ‘third generation FYE [First Year Experience] approach,’ the LLB has led the way through active involvement in O-week, offering a workshop designed to de-mystify the legal writing process and inspire confidence in first year students. Workshop materials are integrated into the first year subject sites providing a seamless introduction into study. Feedback from students over the many years this workshop has been delivered can be summed up in one student’s words ‘I went away feeling excited about starting my course for the first time during O-week!’ Surveys also reveal that attendees of these workshops are more likely to attend writing workshops run by learning advisers during semester, indicating the importance of the workshops in motivating students to learn.

Following the O-week experience, the first lectures discuss student support services and integrate a variety of student support mechanisms into the lecture itself. Bringing student mentors into initial lectures ensures all first year students have the opportunity to become a ‘mentee’. The mentee benefits from engaging with a continuing law student as a role model to help them better adjust to the university environment. Mentors help orientate first year students

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48 JCU Law School has two FY coordinators, one for each campus.
49 Kift, Articulating a Transition Pedagogy to Scaffold and to Enhance the First Year Student Learning Experience in Australian Higher Education Final Report for ALTC Senior Fellowship Program, above n 10.
50 Donard de Cogan, Towards a Blue-Print for Pastoral Care School of Information Systems University of East Anglia, Norwich (<http://www.hull.ac.uk/engprogress/Prog3Papers/Donard.pdf>) at 13 November 2010.
52 Ibid 3.
54 Kift, Articulating a Transition Pedagogy to Scaffold and to Enhance the First Year Student Learning Experience in Australian Higher Education Final Report for ALTC Senior Fellowship Program, above n 10, 1. As evidence of the JCU third generation approach, see James Cook University, First Year Experience Future Directions (2010)
55 See also report in Stephanie Davison, ‘Start at the Very Beginning: Engaging Students in Orientation Week Activities’ (Paper presented at FYHE Conference, Gold Coast (Griffith University), 12–14 July 2006).
56 Crossling, Heagney and Thomas, above n 53, 16.
to university culture, and raise awareness of services and programs. Often through the mentor there is a more informal initial meeting between first year students and academic staff, which can help in breaking down perceived barriers between students and staff.

There are of course students who retreat from face-to-face engagement. In the first three to four weeks of first year, FY coordinators compile a list of students who have not been attending classes. These students are contacted to offer appropriate support.

### B. Ongoing Student Support

After the formative experiences in the LLB, ongoing pastoral support is provided through the Law School Peer Assisted Learning (‘PAL’) program and ongoing social presence of academic staff.

The PAL program offers social and academic support for first year students. Such programs have potential to be an excellent tool for student learning through facilitating the development of students’ skills. They channel the experiences of final year students who provide an opportunity for first year students to self-assess and peer-assess using formative assessment practice. In the PAL environment, the peer-to-peer connection permits students to disclose challenges and misconceptions without fear of reprisal or jeopardizing academic performance. Student engagement in a PAL program offers benefits such as clarification of key concepts, immediate feedback, increased motivation and reduction of social isolation.

Having only run the program for one semester, it is too early to evaluate its impact on student learning. It was however disappointing to see the low uptake of the program. An informal evaluation suggests that students are on campus too infrequently to attend. While it is believed that the program is necessary to assist in social cohesion resulting from students’ absence from campus, those very students may not be interested in attending the program. Consequently it is possible that the program may be reinstated in semester two using online social networking sites as a forum for both synchronous and asynchronous interaction between students and PAL leaders — and of course between the students themselves. These proposed changes are part of the ongoing task of developing an ‘integrated experience’ whereby ‘social interaction adds value to intellectual outcomes’. It is incumbent on the authors as developers of curriculum to ‘[develop] appropriate responses to the new social, economic and technological context of universities’ and of course, students’ experience and expectations.

While PAL is one means of providing social presence, this is done also via email — weekly in first semester, and intermittently in second semester. Emails are friendly, light and positive. Their purpose is to encourage students to engage in student life by recognising the stresses of study and providing solutions to common student concerns. Students are encouraged to develop learning skills by accessing workshops and online resources. Emails also highlight activities related to campus life with invitations to seminars or cultural events. Southey et al identify the importance of such an approach in addressing ‘some of the emotional support issues that students may have.’

Emotional support is also provided through formative assessment. In all first year subjects, students are offered a one-on-one dialogue with academic staff on assessment tasks that are

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57 James Cook University, Student Mentor Handbook <http://www.jcu.edu.au/learningskills/idc/groups/public/documents/guide/jcuprd_034556.pdf> at 13 November 2010; For example see discussion in Craig Zimitat, ‘Improving Quality of Teaching is Part of Improving Retention: a Study of First Year Students in an Australian University’ (Paper presented at the FYHE Conference, Gold Coast (Griffith University), 12–14 July 2006).


59 Ibid 74.

60 Ibid 75.

61 ibid 140.
frequent and 'low-stakes'. As Crossling et al point out, 'formative assessment provides a vehicle for interaction between students and staff, thus helping to develop student familiarity and confidence to approach staff for additional clarification and advice...'. It also allows academics the opportunity to know their students.

IV. The ‘Care Factor’

The discussion so far has focused on quite tangible curricular elements, services and support without mentioning the 'care factor' or the emotional role carried out by teachers.

In one sense, so far the focus has been on a 'public face' of academic work: externally measurable strategies to support student learning. This conceals the private: the emotional interaction between teacher and student. Endres points out that 'the attempt to compartmentalize the public and private aspects of life too completely prevents us from understanding the role of the interpersonal professions, which seem to involve a dynamic interaction between these domains.' Indeed, this is the authors’ experience as FY Coordinators.

As pointed out, students’ learning experience is affected by emotions. Non-traditional students in particular experience an array of emotions in defining themselves as students. FY coordinators observe this in many ways within the context of academic support. As legal academics, clearly the pastoral care role is not that of counsellor. Part of the curriculum strategy is ensuring ready student access to campus counselling and other appropriate support services. This represents an integrated approach to student support. Jacklin and Le Riche distinguish “support” as a mainly reactive response to perceived student problems, [from] “supportive” (and proactive) cultures and contexts... It is this additional aspect of embedded supportive practice that reflects what the authors call the ‘care factor’ of pastoral care.

The authors interpret this ‘care factor’ in terms of ‘realness and genuineness, prizing, acceptance and trust, and empathetic understanding.’ These attitudes cannot be embodied in support services geared towards students as a homogeneous cohort. While there are undoubtedly a number of shared experiences of first year students, 'sufficient subgroup differences emerge toward consideration of support strategies designed to meet the specific needs of various groups of students.' A variety of strategies are therefore required to ensure this diverse array of students value their learning and are then more likely to stay, succeed and graduate.

In the authors’ experience, the supportive aspect of the teacher’s role is integral to success as a teacher. Based on experience with individual students and their needs, it is considered to be an essential part of an integrated approach to transition, as well as more widely. The individuality of the student’s emotional experience is apparent in the LLB at JCU. Students experience a variety of emotions in connection with their study that they freely share...
with the FY coordinators. Consultation addressing a question of pure ‘black-letter’ content can result in student tears as they grapple with their place in the class, their expectations of themselves and their wider life context. Subjects that cover gender, race, sexuality and critical theories generally further complicate the student’s emotional response to their study.

The role of FY Coordinator in the JCU Law School with its emphasis on pastoral care has evolved in response to demands of first year. Consequently there is not a formal duty statement defining this role or a clear workload allocation, nor any formal training for the role. FY coordinators draw on life experience to resolve students’ affective learning issues as they arise. Perhaps the most unexpected part of the role has been the significant support provided in addressing these needs, which is time consuming and often emotionally draining. Endres points out that ‘one of the most difficult aspects of teaching is that it requires teachers to…emotionally engage their students which cannot be done through formal procedures and professional disinterest alone’. 76

Interestingly, these emotional encounters apparently occur most frequently in the offices of the FY coordinators, and much less frequently in those of colleagues — in particular not of male colleagues. 78 Is it possible that the ‘care factor’ constitutes a positioning of the (female) FY coordinators themselves, and by students, as caring?

A. Caring as a Gendered Construct?

Neal et al have analysed women’s self-belief and self-confidence in professional domains including academe. 79 In one case study, they report that a woman academic is ‘positioned as caring by her students who seek her consultation [but] she also positions herself in this role.’ This academic ‘sees student support as part of her performance of a “good” academic.’ 80

Balighole and Goode likewise found in their interviews that women academics who ‘found students at their door… [did not feel] that they could turn these students away’. Both men and women interviewees in their study felt that women more than men took on the emotional aspects of pastoral care. 81 Deem too writes that ‘women may do more of those things which are not easily measured or even noticed, such as extended pastoral care for students, than men.’ 82 Collier reports on the masculine culture of the law school, and the ‘model of academic performativity this [managerialist] process has entailed, one which is a distinctly masculine notion of labour.’ 83

Smith analyses the higher education context (in the UK) to identify a continuum of responses to student support. On the one hand, ‘meaningful, holistic support proceeds from a position that education contains constituent elements of nurturing.’ 84 On the other hand, institutional imperatives within a managerialist or technicist paradigm, approach student support with ‘mechanistic, depersonalised and “off-the-shelf” support products.’ These do not necessarily meet student need. 85 Smith posits that communicative strategies, such as those described above, will be seen as ‘inefficient’ and ‘unproductive’ in a managerialist environment.

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76 Though as part of its evolution towards ‘third generation first year experience’, JCU is developing policy in this regard. See above, James Cook University, First Year Experience: Project Report 2009, n 54.
77 Endres, above n 38, 175.
78 Discussion with male colleagues reveals far fewer interactions with students about emotional or personal matters than with female colleagues.
80 Ibid 53.
81 Bagilhole and Goode, above n 39, 455.
84 Smith, above n 75, 688.
85 Ibid.
There is every possibility that the ‘care factor’ in pastoral care is gendered. To the extent that women take on this role, and that this role is unacknowledged within the management structure of the university, this has implications for women’s career development.\footnote{Bagilhole and Goode, above n 39.} Thornton points out though, that ‘caring men may also be penalised for having devoted excessive energies to feminised activities, such as nurturing students.’\footnote{Margaret Thornton, ‘Discord in the Academy: the Case of the Feminist Scholar’ (1994) 3 \textit{The Australian Feminist Law Journal} 53, 59.}

This is an area that bears further research within the Australian legal education context, particularly in light of the further opening up of higher education and of the particular affective needs of law students as a cohort.\footnote{Kelk et al, above n 9.} At this point however it can only be speculated upon, based on personal experiences, using reflection to provide ‘insight into [our] own professional context’.\footnote{Sue Clegg, ‘Knowing Through Reflective Practice in Higher Education’ (2000) 8 \textit{Educational Action Research} 451, 453.}

Whether or not this caring approach to curriculum is gendered, the nature of this work and its emotional aspects are not explicitly recognised or valued within institutional policies such as workload models or performance management. Student surveys of teaching, focus on motivating students and generating student interest as well as mastery of the subject and achieving learning outcomes. No mention is made of supporting students’ affective learning.\footnote{James Cook University, \textit{Student Feedback Handbook for Staff and Students} (2010) James Cook University <http://www.jcu.edu.au/teaching/idc/groups/public/documents/guide/jcuprd_043585.pdf> at 18 November 2010.}

In lacking recognition, this aspect of teaching is not given a value.

B. Caring as Emotional Labour

The difference between the reality of the emotional aspects of the academic’s work and the institutional framework creates a gap that comes at a personal cost. This can be understood, as Wharton has explained, as ‘emotional labour’.

Wharton defines emotional labour as ‘the process by which workers are expected to manage their feelings in accordance with organizationally defined rules and guidelines.’\footnote{Amy S Wharton, ‘The Sociology of Emotional Labor’ (2009) 35 \textit{Annual Review of Sociology} 147, 148.} She cites Hochschild, who argues that ‘emotions not only are shaped by broad cultural and societal norms, but also are increasingly regulated by employers with an eye to the bottom line.’\footnote{Ibid.} In their study of emotional labour of academics, Constantini and Gibbs identify a tension between the academic, administration and the ‘customer’ (student).\footnote{Panikkos Constantini and Paul Gibbs, ‘Higher Education Teachers and Emotional Labour’ (2004) 18 \textit{International Journal of Educational Management} 243.}

In the authors’ case, having used personal experience to develop the role of FY coordinator, inevitably cultural and societal norms have been drawn upon — as women, and perhaps as mothers. But responses to students’ needs, based on these norms, also probably reflect an understanding of the institutional imperative to retain students. Perhaps also the institution and students position us to care.

This embodies the tension described by Constantini and Gibbs. On the one hand, the institution requires provision of an integrated transition experience for students to meet retention targets. Students require integrated emotional support — indeed, according to Constantini and Gibbs,

the expectation of it, often tacit, fuzzy and implicit, comes from customers (the students), who want more than pleasant platitudes and competent service, demanding instead authentic caring, otherwise they see the falseness of the false. They know of the deceit but want to feel that they are different and enjoy the empathy of the teacher.\footnote{Ibid 246.}

Responding to this need is part of one conceptualisation of a ‘good teacher’. Indeed caregiving can be a rewarding experience. There is no doubt that the JCU Law School is
experiencing a high level of success in student learning through this approach to pastoral care. However as Wharton points out, ‘changes in the structure, practice, and professional norms guiding these fields have the potential to increase or diminish workers’ positive experience of caregiving.’ Much attention has therefore been paid in the literature to the risk of burnout and emotional exhaustion as a consequence of emotional labour.

This lack of recognition, highlighted above, of something apparently integral to meeting institutional goals therefore represents somewhat of a paradox — or a gap between the policy and the reality of academic work.

V. Conclusion

In today’s university climate where ‘a member of staff is expected to be a word-class teacher and a world-class researcher’ something is going to give. Pastoral care incorporating the ‘care factor’ is not presently calculable and will inevitably lack value where it does not neatly fit into a performance box. This will particularly be the case if the hypothesis of the gendered nature of the ‘care factor’ is correct. As Brummell et al point out, ‘the highly individualized capitalist-inspired entrepreneurialism that is at the heart of the new academy has allowed old masculinities to remake themselves and maintain hegemonic male advantage.’

On the other hand, failure to address the social and emotional, as well as the academic needs, of students will result in a failure to achieve institutional performance indicators of retention and completion. Offering a variety of support services is necessary, but not sufficient to meet students’ learning needs. As McNinis pointed out nearly 10 years ago, ‘these academic and support strategies must be seamlessly managed and totally complementary if they are to be effective’. This idea is reinforced by Kift’s transition pedagogy:

A transition pedagogy seeks to attend to each of these aspects of student engagement in a coherent, embedded, and integrated way, utilising the curriculum to mediate as many student-institution interactions as possible to enhance the broader student experience.

So firstly, the importance of the ‘care factor’ needs to be recognised as an integral part of the teaching role. Because of the academic workload and the sheer number of students, many academics will feel unable to devote the precious time to pastoral care that they could. The role of pastoral care, including its emotional labour aspect, needs to be formally defined.

Secondly, the institutional (and governmental) measures of quality and performance need to adapt to recognise the value of pastoral care in meeting the objectives of more open access to higher education. The managerialist discourse of ‘responsiveness’ highlights the inadequacy of such a framework to meet students’ real learning needs, focusing as it does on market imperatives, client satisfaction and competitiveness. Likewise, it fails to recognise the ‘care factor’ as an integral part of the professional academic.

Research shows that ‘only those institutions that invest in “front-end loading” of first year effectively address first year transition issues, including retention, progress and course satisfaction’ and therefore, institutional and governmental performance indicators. Arguably, this requires increased resources to prioritise transitional issues and formally recognise the labour and emotionally intense nature of those activities.

‘The concept of student engagement is based on the constructivist assumption that learning is influenced by how an individual participates in educationally purposeful activities’ and

95 Constantini and Gibbs, above n 93, 154.
96 de Cogan, above n 50.
97 Grummel, Devine and Lynch, above n 12, 192.
98 McNinis, above n 27, 12.
99 Kift, Articulating a Transition Pedagogy to Scaffold and to Enhance the First Year Student Learning Experience in Australian Higher Education Final Report for ALTC Senior Fellowship Program, above n 10,10.
101 James Cook University, First Year Experience: Project Report 2009, above n 44.
102 Coates, above n 11, 26.
academics are entreated to maximise student engagement. In measuring quality teaching using ‘engagement’, the policy framework fails to acknowledge the role of pastoral care and the emotional labour involved in it. This is to the detriment of academic staff and inevitably the student.
I. INTRODUCTION

Today about 70 million people live in countries other than their place of origin. Australia has changed from a nation that was once populated in the majority by Europeans to one whose population includes people from around 200 different countries.

In this context, the Melbourne Declaration on Education Goals for Young Australians has acknowledged that ‘new and exciting opportunities for Australians are emerging. This heightens the need to nurture an appreciation of, and respect for, social, cultural and religious diversity.’

Many universities have made commitments to move towards curriculums with more of an international flavour. In a survey conducted by the International Association of Universities in 2006, 73 per cent of institutions reported giving internationalisation a high priority.

This move by universities towards curriculums with greater international content, designed to develop students’ intercultural understanding, is also placing pressure on law schools to adopt this approach. However, law subjects in Australia have traditionally been taught from a domestic perspective. Richard Johnstone and Sumitra Vignanedra have noted that ‘[c]omparative law and international law are not given much emphasis by many law schools’.

Some universities offer a limited number of comparative law subjects as elective subjects. However, core law subjects generally lack discussion of how Australian laws interrelate with the laws of other countries. To maintain relevance, law subjects need to be internationalised, giving students an insight into how clients may face issues that involve the laws of other countries.

Adding an international dimension to curriculums that previously considered only Australian laws may appear a daunting task. Nevertheless, it is important as future law graduates are increasingly likely to come across clients and colleagues who display not only cultural

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* Graduate School of Business and Law, RMIT University. Many thanks to Rilke Muir, Professor Richard Krever and Kathy Douglas for conversations which helped in refining this paper. The author would also like to thank Ling Feng Mao for his research assistance. Any errors are the author’s.


4 An example of the sort of commitment made by Universities is the RMIT Strategic Plan in which a commitment has been made, ‘[t]o education and research that builds understanding by practical investigation, by designing for the problems it encounters in the world around it … building a ‘global passport’ for students and ensuring that research agendas are global in their conception’: RMIT 2010 Strategic Plan: Designing the Future (2010) RMIT University <http://mams.rmit.edu.au/wkxbw15ps86fz.pdf> at 23 January 2011.


differences, but may also expect a global perspective on legal issues. Alberto Bernabe-Riefkohl has written that ‘[t]he attorneys of the future will have to show sensitivity and understanding of cultural differences, qualities that must be developed early in their education’. Ault and Arnold have also explained how, by introducing a comparative dimension, materials ‘can be used to enrich the classroom discussion of domestic problems’. Thuronyi has discussed how ‘[a] better understanding of modes of thought and prevailing opinions in other countries can lead to a better appreciation of one’s own system’. This work addresses those concerns by providing a practical model for adding an international dimension into a law curriculum subject.

This paper puts forward model changes that can be made to a law curriculum so as to emphasise the consideration of international legal issues by students. This paper also suggests ideas for developing discussion around advising clients from other cultures. Adapting the model would require making some changes to a few of the topics taught in a semester-long subject and would involve adding approximately one week’s worth of new content to the curriculum. Revising what can be summarised or removed from an existing curriculum would allow ample space for the additional material required by the model.

The model involves a simple nine-step approach to changing a law unit curriculum. The discussion of the steps is undertaken with reference to changes that could be made to the way that the Australian taxation law curriculum is generally taught at Universities. This is a relevant curriculum to discuss as Thuronyi has written that ‘[m]ore and more often practitioners find themselves dealing with the tax laws of other countries’, illustrating the importance of this subject being internationalised.

By making changes to a few topics taught in a subject over one semester, materials can be modified to bring more of a global perspective and an awareness of how people are increasingly being affected by other countries’ laws. The law teacher can assess students on the new curriculum by following the model assessment rubric in the appendix to this paper.

This paper posits that the nine steps to internationalising a law curriculum are:

1. choosing another country’s laws to discuss with students;
2. changing the course materials;
3. assessing students on knowledge gained;
4. facilitating a discussion of cultural differences;
5. preparing students to interview a hypothetical client;
6. preparing students to advise a hypothetical client;
7. the assessment activity;
8. students reflecting on the experience gained; and
9. assessment (with a model assessment rubric).

The steps are provided in the order in which teachers would generally modify their materials. Steps 1 and 2 take a law teacher through how to change their curriculum. Step 3 outlines what to prepare students for in terms of assessment. Steps 4–6 outline activities the teacher can facilitate to prepare students for their assessment tasks. Step 7 provides more detail about the assessment activity, step 8 provides details for facilitating a discussion of how students found the assessment activity, and step 9 provides a model assessment rubric that teachers can use to

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11 The model discussed in this paper is based on discussions which took place with a small group of about 10 Juris Doctor students who were taught the modified Australian Taxation Law curriculum in three hour seminars once per week over the semester. The modifications fitted into the first three topics of Australian Taxation Law taught during the semester (Introduction to Tax Law, Residence and Source).
12 Victor Thuronyi, above n 10, 1.
grade their students. The assessment tasks are designed around preparing and assessing students on their advice to a hypothetical client about the laws of another country.

Each step is explained in general terms and then using a specific country to provide an example of how it can be applied. Malaysia was chosen as the example to be applied in this paper as it is one of Australia’s major trading partners and is therefore one of the countries whose laws students may be exposed to in the future. It is envisaged that, when adjusting their curriculum, teachers would choose the most relevant country (or countries) for their own discussion with students, and apply the same considerations discussed in this paper.

II. **Step 1: Choosing Another Country’s Laws to Discuss with Students**

A simple way to introduce an international element to a domestic tax law course is to compare Australia’s laws with those of another country. There are two potential criticisms of this approach. One is that the legal materials from the other country are uprooted and potentially taken out of context. The other is that students will acquire only external knowledge about the other country’s tax system, rather than gaining a deep understanding of it. However, this approach is justified in context, as an in-depth knowledge of the other country’s laws is not required. Catherine Valcke has argued that ‘[t]he introduction of uprooted foreign legal materials is legitimate and can be helpful’. Helpful, not only in illustrating the concept of different approaches in a global framework, but also, through contrast and comparison, students develop a deeper understanding of their own country’s laws.

On selecting which country’s laws to discuss, Matthew C Mirrow has written that ‘[i]f an institution has already established ties to a particular region or country, it seems appropriate that materials from these geographic regions be selected’. Similarly, Afshin A-Khavari has written that ‘[a] law school’s financial and human capital is crucial in developing its internationalisation strategies for its curriculum’. Teachers following this model should have regard to whether their university has exchange programs with other countries, whether the teacher has experience in conducting service teaching in another country, or knowledge and experience of the laws of a particular country gained in other ways. If the teacher has experience with another country’s laws, this would make changes to the curriculum and the subsequent teaching easier. However, there is no great teaching difficulty where a curriculum focuses only on one element of another country’s laws.

III. **Step 2: Changing the Course Materials**

Teachers following this model should select a small part of their course that lends itself to some discussion of comparative law. In most cases, inserting some comparative analysis into the materials for one or two topics is enough to give students an idea of how potential clients might ask about the laws of other countries. The importance of understanding that culture is an element in working with clients can be illustrated to students by using examples like the following: a business client who is considering incorporating the business in another country; a client who wants to know how to apply for a patent in another country; a client who has recently travelled overseas who wants information about the procedure for finding someone guilty of a particular criminal offence; and a client of a family law practice who wants to know about family law in their ex-partner’s country of origin.

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13 The Joint Standing Committee on Foreign Affairs, Defence and Trade has reported that ‘Malaysia is Australia’s third largest partner in ASEAN’: Joint Standing Committee on Foreign Affairs, Defence and Trade Foreign Affairs Sub-Committee, Australia’s Relationship with Malaysia (2007) 1.

14 Catherine Valcke, ‘Global Teaching’ (2004) 54(2) Journal of Legal Education 175. Of course, if a teacher was considering this model for an elective subject they could also explore extending discussion of Australian laws and another country’s laws to a discussion of the different international families of tax law. Thuronyi, above n 10, 23–5.


This hypothetical scenario exercise, using one country and its relevant laws, will make a useful contribution to students’ skills and understanding of the international context of legal issues. A semester-long subject does not allow for detailed examination of another country’s laws. However, it does provide opportunities to look at specific parts of such laws and provide students with an overview of how two countries’ laws can be quite different, and the nature of those differences. Below is a discussion of how teachers following this model could make references to Malaysian tax laws in the context of delivering an Australian taxation law subject.

The first step for a teacher internationalising their curriculum is to identify a topic, or topics, currently being taught that lend themselves to being internationalised. Australian Taxation Law is an introductory tax subject taught to students at RMIT over the duration of one semester. In this subject emphasis is often placed on teaching students about domestic tax laws. However, the laws of other countries are having increasing tax implications for Australian residents (for example, if an Australian works or invests money overseas). Similarly, greater numbers of non-residents of Australia are increasingly becoming liable to pay tax under Australian tax laws. Such situations require a legal practitioner to establish which country a person is a resident of, for tax purposes, and where the source of their income is — these concepts are currently taught in the tax curriculum. Students’ understanding of these tax topics would be enhanced if there was more practical discussion of how these issues would be determined using the laws of an exemplar country. Below are some ideas of how this could be done, using Malaysia as the example country.

To give students an introduction to how a hypothetical client could be affected by an example country’s laws, introductory materials could be modified to include a brief summary of the main features of one aspect of that country’s legal system. For example, in the tax context, students could gain an understanding of how Australian residents could be affected by Malaysian tax laws and how non-resident Malaysians could be affected by Australian tax laws. Introductory materials could be modified to explain that, while in the Australian context there are both statutory laws and common law, in Malaysia the tax law is purely a creature of statute. This would give students a more in-depth understanding of Australian tax laws and also an understanding of how these might be different to the tax laws of other countries.

In the Australian tax law context, materials about the topic of residence could also be modified. Current tax law textbooks explain that the Australian tests for calculating whether someone is a resident, for tax purposes, essentially involve questions of fact and degree, based on qualitative tests developed by the courts. These include looking at how the taxpayer carries out his or her life, and his or her history of movements. The Australian tests are quantitative only in the sense that a person is presumed to be a resident if present in Australia for 183 days or more during an income year. Additionally, that person can prove that his or her usual place of residence is outside Australia, and that he or she does not intend to take up residence in Australia. On the other hand, the Malaysian test for deciding whether a person is a resident in Malaysia is entirely quantitative. The person will be defined as a resident for tax purposes simply if the person spends more than 182 days in Malaysia during an income year.

Double taxation is currently discussed in most Australian tax law courses, but not in any depth. The above discussion of the residence tests can set the scene for discussion to take place around a concrete example, as well as about the issue generally.

In the case of Malaysia, double taxing may happen if the person was a resident under Australian law on the basis of a number of qualitative factors, despite spending sufficient days in Malaysia to qualify as a resident of Malaysia. Students would be better able to conceptualise the idea of double taxation, and how it might be resolved, with such an example. The teacher could show students appropriate sections from the Malaysia–Australia Double Tax Agreement

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18 See, eg, Woellner et al, above n 17, 1489.
20 See, eg, Woellner et al, above n 17, 1,481–2; Coleman et al, above n 17, 46.
(MADTA)\textsuperscript{21}, which is similar to many double tax agreements developed in accordance with the OECD Model Treaty. Article 14(1) of the MADTA states that a resident of one country (say Australia) who renders personal services in the other country (say Malaysia) will be taxable in the other country (Malaysia) on remuneration from the performance of services in the other country (Malaysia). The country of residence (Australia) may also tax the income if it uses the worldwide basis, or the remittance basis. If taxed in both the country of residence (Australia) and the country where the services are performed (Malaysia), a foreign tax credit may be applicable. Under its foreign tax credit system, Australia will grant a credit to an Australian resident for Malaysian tax paid on Malaysian source income, offsetting the Australian tax payable on that income.\textsuperscript{22}

This discussion provides an opportunity for existing tax materials relating to the source of income to also be updated. Existing materials usually explain that Australia uses the worldwide system of taxation. Residents are taxed on all sources of income, wherever that source is. For example, Australian residents have to pay tax in Australia on income that has a Malaysian source.\textsuperscript{23} Students’ understanding that different countries have different systems of charging tax is likely to be greater if the Australian system is compared with a different system. For example, Malaysia uses the derived and remittance system, where residents are taxed only on income derived from Malaysia or remitted into Malaysia. Residents of Malaysia are not assessable by Malaysia on income that has a source in Australia, if it is not remitted to Malaysia.\textsuperscript{24}

Tax textbooks currently discuss Australian laws relating to many types of income; for example, employment and services income, business income and investment income.\textsuperscript{25} It should be sufficient to compare the Australian and foreign law for just one of these sources of income to give students an idea of how another country’s laws interact with Australian law.\textsuperscript{26}

Employment and services income is an appropriate source of income to base a discussion around, as it is most relevant to law students who may wish to travel to work in another country in the future. In the case of Malaysia, under the common law both there and in Australia, the source of remuneration for services rendered is generally regarded as the place where the services are performed. However, the contract of employment becomes relevant for the purposes of establishing where the employment is to be rendered; for example, if the employee is required to perform services both inside and outside Malaysia. If the employee had, for instance, not contracted to render services outside Malaysia, but then did so, their income would be attributed to a Malaysian source, providing that the employment was substantially exercised in Malaysia and that the employee rendered services outside Malaysia which were causal or incidental to the Malaysian services.\textsuperscript{27}

IV. **Step 3: Assessing Students on Knowledge Gained**

The above discussion outlines and provides an example of how curriculum materials can be modified to incorporate an international perspective to the study of law. However, merely inserting materials regarding another country’s legal system into the law curriculum would not in itself give students a proper opportunity to understand the manner in which another country’s laws operate, or the ramifications of those laws. Deeper learning can be gained through a task which is then assessed to establish what students have learned.\textsuperscript{28} A suggested approach is to assess students on how they apply these skills in writing a letter of advice to a hypothetical

\begin{itemize}
  \item \textsuperscript{21} *International Tax Agreements Act 1953* Schedule 16.
  \item \textsuperscript{22} *International Tax Agreements Act 1953* Schedule 16 Article 23(3)(a).
  \item \textsuperscript{23} *Income Tax Assessment Act 1997* (Cth) ss 6–5. The worldwide tax system is explained in Ault and Arnold, above n 9, 6.
  \item \textsuperscript{24} *Income Tax Act 1967* (Malaysia) s 3.
  \item \textsuperscript{25} See, for example, Woellner et al, above n 17, 1493–1501 and Coleman et al, above n 17, 51–4.
  \item \textsuperscript{26} Teachers are unlikely to have the time to discuss the foreign country’s tax laws relating to all sources of income, although perhaps they might like to alternate which source of income to vary the discussion in different semesters.
  \item \textsuperscript{27} *Income Tax Act 1967* (Malaysia) s 13.
  \item \textsuperscript{28} Biggs and Tang discuss deep versus surface learning in John Biggs and Catherine Tang, *Teaching for Quality Learning at University: What the Student Does* (3rd edition, 2007) 22–9.
client. This would involve advising the hypothetical client about overseas laws. In a real-life situation, a client wanting to know about overseas laws may also display cultural differences. Before students interview and advise their hypothetical client, the teacher could facilitate discussion about what might be some cultural differences to consider.

V. STEP 4: FACILITATING A DISCUSSION OF CULTURAL DIFFERENCES

Having a discussion about cultural differences that students might experience will enhance their communication skills. According to Pauwels, ‘[c]ommunication in a society characterised by ethnic, cultural and linguistic diversity is susceptible to difficulties and breakdown’. 29 Students need to be aware that, when they deal with people in a professional context, cultural differences can result in misunderstandings. In an article about the interviewing method employed by lawyers to aboriginal female clients, Diane Eades wrote that ‘[t]he mere fact that we appear to share a language with someone does not mean that we have the same norms for using and interpreting language’. 30 If students are aware of cultural differences they are more likely to be sensitive to their clients, and misunderstandings between clients and their future lawyers are less likely to arise.

In this context, teachers need to consider what cultures students are likely to come into contact with when choosing a topic to discuss with students. For example, the Chinese culture is relevant as China is one of Australia’s significant trading partners. Blay et al have written that ‘China is the next economic giant of the 21st century’. 31

To facilitate a discussion about cultural difference and communication, the teacher could first discuss with students why it is important to have an understanding of different cultures. If an Asian country is chosen as the comparative culture, students could be given a copy of an article by Reisinger and Turner, 32 which highlights that Australia has a large percentage of visitors from the Asian region.

Advantage could be taken of the fact that students in the classroom are from a variety of cultural backgrounds. Students could be encouraged to work in pairs and to ask each other questions such as these:

- What is culture?
- What is your culture?
- What is your culture’s social structure?
- What is the role of family in your culture?
- Have you been to another country? If so, how did you feel?
- What is your experience of other cultures in Australia?
- When was a time when you found another person’s culture very different?
- Why is it important to have an understanding of different cultures?
- What are some of the challenges in dealing with other cultures?
- How can we deal with these?
- How might you be exposed to other cultures in your future working lives?

29 Anne Pauwels, ‘Cross-Cultural Communication in Medical Encounters’ (Working Paper No 4, National Centre for Community Languages in the Professions, Monash University, 1991) 5.
30 Diane Eades, ‘Lawyer–Client Communication: “I Don’t Think the Lawyers Were Communicating with Me”: Misunderstanding Cultural Differences in Communicative Style’ (2003) 52 Emory Law Journal 1126. Some examples are also discussed in this article of some cultural assumptions often made in western society such as that ‘silence in answer to an accusation indicates guilt’: at 1127. Eades then compares these assumptions to some cultural assumptions which she suggests are widely held in Aboriginal societies, such as that ‘people who use silence should be respected for their thoughtfulness and their recognition of the value of time’: at 1127.
31 Blay et al, ‘Teaching Note: Adventures in Pedagogy: The Trials and Tribulations of Teaching Common Law in China’ (2005) 15 Legal Education Review 167. Further, Irene Y M Yeung and Rosalie L Tung have written that ‘[i]n light of the remarkable economic transformation that has taken place in East and Southeast Asia in the past several decades, there is a consensus among government and business leaders that significant business opportunities will abound in this region’: Irene Y M Yeung and Rosalie L Tung, ‘Achieving Business Success in Confucian Societies: The Importance of Guanxi (Connections)’ (1995) 25 Organizational Dynamics 54.
A variety of sources can be used to help the teacher discuss cultural differences between Australia and the chosen country which may be relevant to an Australian lawyer advising a hypothetical client. Students can benefit from a person of the chosen culture discussing their culture with the students (this could be one of the students who is from that culture). Emphasis can also be placed on reliable written sources regarding the culture, such as some of the sources discussed below.

Factors such as ‘integration’ and ‘harmony with others’ have been identified as important to the Chinese culture by commentators such as Connection. Reisinger and Turner describe a culture of people who ‘[a]re socially and psychologically dependent on others. They give support for parents, tradition, duty and obligations.’ Chen and Li describe how ‘[o]ne of the dimensions that differentiates the Chinese and Australian cultures is individualism–collectivism … Australians … are more individualistic … the Chinese … are more collectivist.’

Also, regarding the Chinese culture, Connection has explained that characteristics such as ‘human-heartedness’, ‘kindness’, ‘patience and courtesy’ are also important parts of this culture. Similarly, Reisinger and Turner describe that ‘[t]he Chinese are more situation-oriented and concerned with appropriate behavior.’ They also explain that generally in the Chinese culture conflict and disagreement are to be prevented, and:

[i]t is critical not to offend or harm anyone … ‘Saving one and other’s face’ means being polite, courteous, considerate, understanding, well-mannered, moral and humble. Failure to preserve face means losing social status, reputation, and bringing humiliation on the family.

Reisinger and Turner also describe that:

[a] very important aspect of life in Mandarin-speaking societies is the ability to develop and maintain positive human relationships. Personal relationships are very carefully cultivated. These include social interpersonal relationships, meetings and appointments. Society is supposed to hold together.

This range of differences between Australian and Chinese culture exemplifies why it is important for students studying in Australia to understand that clients might display elements of a culture other than their own and that it is important to be sensitive to these differences. While such a topic can become immersive, only a few brief articles should be given to students about the chosen culture, so as not to overwhelm them with ‘paperwork’ and so that the discussion can fit within the curriculum’s time constraints.

Students could practise what they have discussed with an exercise in which they have to interview and advise a hypothetical client, from the chosen culture. The students could also do this by email or in a role-play advice session where an actor plays the client role.

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34 Reisinger and Turner, above n 32, 177.
36 Connection, above n 33, 150.
37 Reisinger and Turner, above n 34, 177.
38 Ibid 184.
39 Ibid.
40 Within an elective subject, the sort of content discussed in this paper could be delved into in more detail.
VI. Step 5: Preparing Students to Interview a Hypothetical Client

From the literature, discussed above in step 4, a hypothetical client for the students to advise can be constructed. For instance, students might be told that a hypothetical Chinese client would need to check with, or seek instructions from, family members and might come across as reluctant to disagree or say no.41

Before students interview their hypothetical client, they should be prepared for the task. This will give students an opportunity to seek feedback on their understanding before the assessment takes place. Materials given to students about interviewing clients should explain the background to client interviews and how lawyers are given instructions by clients to act for them. Information should include the relevant facts, and the objectives to be achieved by the assessment. The materials should also explain that the lawyer’s task is to ascertain and act upon the factual instructions given. A guide to how notes of interviews should be taken would also be useful to replicate the practice environment where a case file may need to be passed on to another lawyer on the matter.

The Oklahoma Bar Association website42 contains useful information about the initial client interview, including that the client may feel anxious and that it is important for a lawyer to listen and to avoid legal jargon. Students could be encouraged to spend about 10 minutes in class doing pair work. They could practise letting their partner speak (as a client) without interruption. Then they could discuss in the larger class group how they felt undertaking the task.

Teachers following this design could also give students a short handout from the Lawyer’s Practice Manual43 about the importance of making the client feel comfortable in face-to-face interviews and the importance of asking open-ended questions that are less likely to get a yes/no response. In class, students could be given time to practise asking open-ended questions in their pairs.

Something else that may be useful to students is a short one-page article, ‘The First Interview’.44 It is about making the client feel comfortable, listening and questioning, advising and things to do after the interview. Reading this article could help to reinforce what students have learned about interviewing clients. The task of reading and summarising this article could be split up so that each student or group summarises a few main points.45

In support of these in-class activities, Hoeke and Warrington have advocated a move away from the ‘law as rules’ concept of teaching law to argue that learning about the law involves much more than listening to lectures and reading about statutory rules and judicial decisions.46 O’Brien has said that students learn best when applying what they are learning.47

41 However it is also wise to discuss that no two people are the same and that it is difficult to generalise in any cultural discussion. For instance, reference could be made to Ming-Jer Chen, Inside Chinese Business: A Guide for Managers Worldwide (2001) 2–3 in which it is discussed that many Chinese people have migrated from China to Hong Kong, Taiwan, and throughout most southeast Asian countries and many countries of the world. There are 56 ethnic groups in China, 200 dialects in use, eight major cuisines and there were four radically different political systems in the last century.


45 Another task for students, related to interviewing clients, could be one to determine which facts the client talks about are the important ones. In this regard the following book has a useful exercise: Bobette Wolski, Skills, Ethics and Values for Legal Practice (2009) 142–71.


VII. Step 6: Preparing Students to Advise a Hypothetical Client

Once lawyers have interviewed a client, they generally give the client their advice. After facilitating a discussion about interviewing, teachers should go on to talk to students about how to advise a client. While advising a hypothetical client is not unique to this model, it is a good way to facilitate the application of what they have learned. Students will gain deeper knowledge by thinking about how to advise the client that they have interviewed.

To develop ideas and share knowledge, the teacher could divide students into small groups and ask each group to draw a ‘Y-chart’ on a large poster. A Y-chart is a large circle with a Y in the middle creating three sections. The students would fill in each of the three sections with dot points.48 Students could write in one section what they think the aims of a letter of advice are. In the second section they could write who they think the recipients of a letter of advice are. In the third section students could write what might be included in a letter of advice. Students could discuss their thoughts first within their groups, and then present their Y-charts to the class.

The teacher could then discuss with students what some commentators have had to say about writing letters of advice. Students could be encouraged to summarise the main points of the article, Guide to Legal Letter Writing.49 This article discusses the aims of a legal letter and some of its main features. The format of a letter of advice is discussed in a short two-page article called ‘advice letters’.50 Students could be encouraged to work together to summarise one of the eight sections of this article, then present the main points to the class.

The ‘think pair share’ strategy could be used to facilitate the students reading and discussing a section of the Lawyers Practice Manual51 about plain English drafting. Implementing this strategy would involve students reading the section and thinking about it themselves first. Then students could form pairs to discuss why it is important to write clear and effective letters. They could report back to the class about this.52 Feedback from the author’s use of such a strategy in class was that it ‘should be done regularly … Good for learning and getting students involved’, that ‘[i]t stimulates discussion and clarifies points’, and that it was ‘useful. A variety of views from different members’.

Students could be encouraged to read the book chapter ‘Chapter 4: Writing and Drafting’.53 This outlines a number of dos and don’ts, such as ‘don’t use legalese’ and ‘do not use unnecessary words’. Students could be split into two groups. One group could be asked to make a poster summarising the dos, the other group could make one outlining the don’ts. The two groups could then be encouraged to present these posters to the class. There is also an exercise in this chapter where students are encouraged to rewrite a paragraph in short sentences. Students could be encouraged to do this individually in class. The teacher could select a few of the rewritten sentences to share with the class. There is also an example of a ‘bad’ letter.54 Students could be encouraged to suggest how this letter could be improved.

Students could also be given a photocopy of relevant pages of the book Drafting Effective Legal Advice.55 Examples are given in this book of how writing can be simplified. For instance, the chapter on the middle creating three sections. The students would fill in each of the three sections with dot points.48 Students could write in one section what they think the aims of a letter of advice are. In the second section they could write who they think the recipients of a letter of advice are. In the third section students could write what might be included in a letter of advice. Students could discuss their thoughts first within their groups, and then present their Y-charts to the class.

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Students could also be given a photocopy of relevant pages of the book Drafting Effective Legal Advice.55 Examples are given in this book of how writing can be simplified. For instance,

51 Springvale Legal Service, Lawyers Practice Manual (2009) 37. There is also a chapter in the following book about plain English drafting: S Barber, Legal Writing for Paralegals (2nd ed, 1997). Students could be encouraged to read this at home. They could share their ideas in the next class while the teacher writes the students’ ideas on the board.
54 Ibid 62–3.
56 J Doherty, Drafting Effective Legal Advice (2009) 1–16.
using the words ‘cars’ or ‘trucks’ rather than ‘vehicles’. Students could be encouraged to keep this in mind when writing their letter of advice. They could also be shown examples from this book of letters written to a ‘sophisticated client’ and an ‘unsophisticated client’. The provision of these sample letters would aid students in understanding what they are expected to write as part of the assessment.

VIII. Step 7: The Assessment Activity

The following assessment activity has been designed to give students practical experience in applying what they are learning. It is an opportunity for them to gain feedback from the teacher on their skills in providing advice to a hypothetical client. This client could display elements of another culture discussed in the course. He or she may ask for information which requires the students to apply the law of Australia as well as the law of the other country that the students have learned about.

If it is not possible to organise for someone to ‘act’ as the client, students could be asked to communicate with the hypothetical client (the teacher) through email. Teachers could send students an email from the students’ hypothetical secretary informing them of a new client. The email could state that the secretary has received a call from someone wanting advice from the student. There could be some brief details about the client in the email. These might include that the client was born in mainland China (and therefore may display elements of the Chinese culture), but has lived in Australia for a significant period of time (and therefore may be subject to Australian tax laws). The client could be thinking of going to Malaysia to work, and might like some advice on whether he will have to pay tax in both Australia and Malaysia.

Two opportunities to email the client with questions and receive the client’s responses would allow an appropriate opportunity for students to gain more information about their client so as to advise effectively. This might also expose the students to cultural differences. For instance, the Chinese concept of saving face ‘mianzi’, discussed above in step 4, might mean that the client may be reluctant to tell the student too much information. Since family is perceived to be important to the Chinese culture, the client might defer to his family, and tell the student that he or she will have to seek his family’s advice about what the student has had to say. Based on the hypothetical client’s information, the students could then write the client a letter of advice.

If large class size is an issue, the communication from the hypothetical client might need to be standardised. Students could be asked to form groups and write one letter on behalf of their group. There are sound pedagogical arguments supporting such an approach. Hewitt has noted that ‘[r]equiring students to work in groups can allow them to develop skills such as teamwork, cooperation, time management, delegation and people management.’ Further, Keyes and Burns have written that

> [e]ven if students do not explicitly teach each other skills and content, the approaches which they take to learning provide important modeling to other students. … Working with others inevitably requires that one learn to give feedback to and receive feedback from one’s peers.

In this model, working in groups has these benefits as well as underlining the exercise in cultural differences by developing teamwork and exposing students to a range of approaches to the task.

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57 Ibid 7–10.
58 When I asked my students if they were to write a letter of advice as part of an assessment what supporting materials they would like, they suggested templates and examples of a letter of advice.
IX. **Step 8: Students Reflecting on the Experience Gained**

In order to maximise what students learn from the assessment they should be encouraged to reflect on their experience in class discussion.\(^{61}\) Teachers could ask students about their thoughts regarding the cultural differences that they have experienced when dealing with the hypothetical client. Students could also be asked to discuss how issues regarding the cultural differences may potentially be overcome. For example, a discussion could take place about how it is important when dealing with people of different cultures and backgrounds to show respect, avoid clichés, repeat important facts and avoid ambiguous language.

X. **Step 9: A Model Assessment Rubric**

A rubric, or criterion-referenced assessment sheet, has been developed to assist teachers following this design to mark the students’ assessment tasks. It is contained in the Appendix to this paper. The possible marks to be awarded to the student are listed along the top, and several criteria are listed along the side in the manner documented by Oakleaf.\(^{62}\)

Barron and Keller discuss the advantages of using a rubric which can be used to explain to students ‘[t]he criteria against which their work will be judged. More importantly it makes public key criteria that students can use in developing, revising and judging their own work.’\(^{63}\) Oakleaf has written that ‘[b]y making instructor expectations clear, rubrics make rankings, ratings and grades more meaningful’.\(^{64}\) Handley-More has further suggested that rubrics assist students in self-assessing their own work.\(^{65}\) Burton and Cuffe say that if rubrics are given to students before they submit their assessment, then they can be used to encourage students, ‘[t]o become familiar with the assessment details and requirements.’\(^{66}\) This enables teachers to be freed from claims of unfair treatment or of not explaining what was required for an assessment task.

Teachers following this model should, therefore, spend time in class early in the semester discussing the assessment rubric with students, so that they understand what is required of them.

The Australian Learning and Teaching Council, in conjunction with the Council of Australian Law Deans, has recognised the application of topic knowledge and communication theory as an important criteria to use in assessing students.\(^{67}\) The rubric in the Appendix goes one step further and suggests how many marks should be given to each of these two objectives, what components of these objectives should be assessed and what a student needs to do to get any of the grades, from fail to high distinction, for each of these components.

It is suggested that students should be marked out of 15 for their application of topic knowledge and out of 10 for their application of communication theory. When students complete the subject they should be able to demonstrate their understanding of the content of the course. Therefore, with regard to topic knowledge, students should be assessed on whether they have:

- appropriately identified the issues that the hypothetical client is seeking advice on;
- identified the appropriate law to apply; and

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\(^{62}\) This is the traditional way of setting up a rubric as described in Megan Oakleaf, ‘Using Rubrics to Assess Information Literacy: An Examination of Methodology and Interrater Reliability’ (2009) 60(5) Journal of the American Society for Information Science and Technology 969.


\(^{64}\) Oakleaf, above n 62, 969.


• appropriately applied the law to the facts of the client’s situation.

In regard to communication theory, students should be marked on:

• using appropriate ways to communicate with a client displaying cultural differences;
• their written expression; and
• writing an appropriate letter.

XI. CONCLUSION

A greater international perspective needs to be applied in the teaching of law subjects. This is necessary to prepare students for their future careers. Students need to be taught skills in both dealing with clients and colleagues who display cultural differences, and in answering questions regarding international legal issues. In this paper, a model has been presented for doing this. As discussed, one way of adding an international perspective to a law curriculum is to introduce a discussion of another country’s laws. Course materials need to be modified accordingly, so that they provide a comparative perspective. This can also lead to a discussion about the cultural differences that students might experience in dealing with clients.

A framework for assessing students on the knowledge that they have gained has also been offered. Students should be prepared by the teacher to interview and advise a hypothetical client who is from a different culture and who is asking about international legal issues. Students can then be assessed with reference to the model assessment rubric provided.
### APPENDIX I. ASSESSMENT RUBRIC

<table>
<thead>
<tr>
<th>Topic knowledge (out of 15)</th>
<th>High Distinction (80–100%)</th>
<th>Distinction (70–80%)</th>
<th>Credit (60–70%)</th>
<th>Pass (50–60%)</th>
<th>Fail (below 50%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issues identified appropriately</td>
<td>All of the issues were identified appropriately with reference to authority.</td>
<td>Most of the issues were identified appropriately</td>
<td>Some of the issues identified, but perhaps not fully or with reference to authority.</td>
<td>Some attempt to identify issues, which is marginally appropriate.</td>
<td>Appropriate issues not identified.</td>
</tr>
<tr>
<td>Relevant required knowledge identified, referring to appropriate authority for statements.</td>
<td>All knowledge identified and supported by relevant authority.</td>
<td>The majority of relevant knowledge identified, and most statements supported by relevant authority.</td>
<td>Some of the relevant knowledge is identified and supported by authority.</td>
<td>Limited identification of required knowledge. Not well supported with authority.</td>
<td>An inappropriate attempt was made to identify required knowledge.</td>
</tr>
<tr>
<td>Knowledge applied appropriately to the facts</td>
<td>The required knowledge was linked to the facts very appropriately.</td>
<td>A good effort was made to link the required knowledge to appropriate facts. Most of the time this was done appropriately</td>
<td>An adequate attempt was made to link required knowledge to appropriate facts. This was not done as fully as it could have been.</td>
<td>Some attempt was made to apply the required knowledge to the facts but there was not enough detail in the letter. There is a need for more emphasis on stating the law or the facts and linking the two.</td>
<td>An inappropriate effort was made to apply the required knowledge to the facts.</td>
</tr>
<tr>
<td>Application of communication theory (out of 10)</td>
<td>Appropriate methods were used to deal with cultural differences.</td>
<td>An excellent attempt was made to identify and deal with all of the cultural differences faced. This was done appropriately.</td>
<td>A good effort was made to identify and deal with the majority of cultural differences faced. This was done appropriately most of the time.</td>
<td>An attempt was made to identify and deal with some of the cultural differences. However this was not always done in the most appropriate manner.</td>
<td>Some adjustments made to try to deal with the cultural differences faced. However only a small proportion of the cultural differences were addressed.</td>
</tr>
</tbody>
</table>

*continued*
<table>
<thead>
<tr>
<th></th>
<th><strong>High Distinction (80–100%)</strong></th>
<th><strong>Distinction (70–80%)</strong></th>
<th><strong>Credit (60–70%)</strong></th>
<th><strong>Pass (50–60%)</strong></th>
<th><strong>Fail (below 50%)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Clarity of written expression, use of plain English, professional tone, proof-read.</td>
<td>Very well-written and appropriate letter.</td>
<td>The majority of the time the letter was well-written. Most was in plain English, the tone was appropriate, and the letter proof-read.</td>
<td>English expression was acceptable. However there is room for improvement in clarity, simplicity or tone.</td>
<td>English expression was just acceptable. Was sometimes unclear. Sentences not expressed as simply as they could have been. The tone was not always appropriate.</td>
<td>English expression was clearly not appropriate. The sentences were unclear and/or convoluted. The words used were too casual. The paper was not proof-read.</td>
</tr>
<tr>
<td>Letter well formatted, including use of firm letterhead, references, date, name and address, salutation, subject line, summary of instructions, The student provides opportunity for questions from the client and summarises the advice.</td>
<td>An excellent attempt was made to format the letter in a very professional manner.</td>
<td>The letter was mainly formatted in a professional and appropriate manner.</td>
<td>Most of the requirements of a well formatted letter were adhered to. However the letter is still lacking in some respects. For instance, not summarising the advice at the end, or providing an opportunity for questions. It also might not confirm what the next step is.</td>
<td>Some of the requirements of a well formatted letter have been adhered to.</td>
<td>The letter format is inappropriate and unprofessional.</td>
</tr>
</tbody>
</table>
THE HENRY REVIEW AND CHARITABLE PURPOSE.  
WORKABLE SOLUTIONS OR ANOTHER BAND-AID?

ELEN SEYMOUR

I. INTRODUCTION

Charity, so they say, starts at home. But how about tax deductible charity? There has been over the last decade, several reviews of charitable purpose and of Not-For-Profit Organisations (‘NFPs’) generally. The most recent review is Australia’s Future Tax System Report (hereinafter known as the ‘Henry Review’). The Final Report was delivered to the Federal Government in December 2009 but made publically available on 2 May 2010.

The Henry Review identified key issues with respect to the Not-for-Profit (‘NFP’) sector, which includes charities and their activities within the framework of the tax and transfer system. One of the biggest issues facing NFPs is obviously that the current concession based system is complex, both legally and administratively. This is not a new finding — see also the Australian Government’s Productivity Commission’s Report on the same. This article will focus on the idea underpinning much of the NFP sector’s treatment in the Henry Review that the current tax concession based system for NFPs ‘does not fully reflect current community values about the merit and social worth of the activities it subsidises.’ The particular focus will be on charities and entities conducting activities for a charitable purpose.

A. Henry Review

The Henry Review took a ‘root and branch’ approach to tax reform and examined Australian and State government taxes, and interactions with the transfer system in order to make recommendations to the Federal government which would position Australia to deal with the demographic, social, economic and environmental challenges that lie ahead. As part of this Review the role of the NFP sector was examined as a standalone issue but framed within the context of the need to simplify the taxation system as a whole and improve overall efficacy and fairness.

Focusing in on the NFP section, the Henry Review raised the issue of the complexity of tax including Fringe Benefits Tax (‘FBT’) and Goods and Services Tax (‘GST’) concessions currently available for the NFP sector and sought options to improve equity and simplicity in this area. The Henry Review, at the consultation stage posed two specific questions in relation to NFP organisations:

- What is the appropriate tax treatment for NFP organisations, including compliance obligations?
- Given the impact of the tax concessions on NFP organisations regarding competition, compliance costs and equity, would alternative arrangements such as the provision of direct funding be a more efficient way of assisting these organisation to further their philanthropic and community based activities?

* Lecturer in Taxation Law and Financial Services, University of Western Sydney Australia.
1 Productivity Commission, Contribution of the Not-for-Profit Sector Research Report (2010).
Thus, the framework that the Henry Review of NFP’s operated within was consideration of the main tax concessions available to NFP organisations. It did not canvass issues that are the subject of separate inquiries, such as accountability and disclosure issues, the contribution of the NFP sector overall to the economy, and proposals to improve the integrity of prescribed private funds.  

II. What is a Not-for-Profit Organisation?

For the purposes of this article, the ordinary meaning of NFP should be used to understand references made to NFP. That is, a NFP organisation is one that is not operating for the profit or gain of its individual members. The definition applies whether these gains are received directly or indirectly. Any profit made by the organisation goes back into the operation of the organisation to carry out its purposes and is not distributed to any of its members. Within this general category of NFPs there is a sub-category of organisations that engage in activities that are charitable in nature. If the organisation is an institution established and maintained for purposes that are charitable in the technical legal sense then it will be an entity whose income is exempt under Division 50 of the *Income Tax Assessment Act 1997* (Cth) (‘ITAA 1997’). The exemption is not self-executing but is subject to the Commissioner endorsing the entity as having met the exemption requirements.

The High Court decision in *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* (‘*Word Investments*’) considered ‘charitable purpose’ in a technical legal sense. The Court held that the documentation (such as memorandum of association) of a charitable organisation should contain acceptable clauses showing the organisation’s NFP character. The activities of that organisation are required to have sufficient nexus to its proclaimed purposes. Documentation containing clauses that describe business activities run the risk of the purpose of the entity being characterised as commercial and therefore not charitable. Business activity clauses that are directly connected with a charitable purpose such as selling law journals for a fee to support the publication of law journals are clearly permissible. The significance of *Word Investments* was to make explicit that clauses supporting the business activities of the entity will not necessarily change the underlying charitable purpose character of the entity if those profits are used for charitable purposes. If the organisation’s purposes are solely charitable then it can carry on commercial businesses in order to effectuate those purposes. However this raises the question, as Ian Murray asked of how ‘close must the nexus be between the commercial activities and the charitable object?’ *Word Investments* did not provide a specific guidance and if we look to older cases, the question becomes whether the object in the clause is ‘conducive to promoting’ the charitable purpose. The High Court in *Word Investments* cautions us that to isolate the goal of profit as the relevant purpose in the objects of the entity’s documentation is to ‘create a false dichotomy between characterisation of an institution as commercial and characterisation of it as charitable’. Charitable purpose is an area acknowledged to be fraught with difficulties, artificiality and otherwise inconsistency. However the central tenets are generally agreed to have been sourced ‘in spirit and intendment’ from the Statute of Elizabeth, *Charitable Uses Act 1601*

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4 Ibid.
5 ITAA 1997 s 50.5 item 1.1.
6 ITAA 1997 s 50.52(1).
7 (2008) 236 CLR 204 (‘*Word Investments*’).
10 Word Investments Pty Ltd was conducting such activities.
13 *Stratton v Simpson* (1970) 125 CLR 138, 148 (Windeyer J); see also 159–60 (Barwick CJ, Gibbs and Menzies JJ agreeing).
(UK)\textsuperscript{17} which granted exempt income status to charities and the decision of the Privy Council in \textit{Commissioners for Special Purposes of the Income Tax v Pemsel}\textsuperscript{18}. It is these judicial decisions and legislative frameworks in the United Kingdom, Australia and other countries that have followed these basic premises. The Statute of Elizabeth set out the following categories:

- relief of the aged, impotent and poor;
- maintenance of sick and maimed soldiers and mariners;
- schools and scholars in universities;
- repair of bridges, ports, havens, causeways, churches, sea-banks and highways;
- education and preferment of orphans;
- maintenance of prisons;
- marriages of poor maids;
- aid and help of young tradesmen and handicraftsmen;
- aid and help of persons decayed;
- the relief or redemption of prisoners or captives;
- the aid or ease of any poor inhabitants concerning payment of fifteens; and
- setting out of soldiers and other taxes.

The judgment of Lord Macnaghten in \textit{Pemsel}\textsuperscript{19} is often considered the starting point for identifying the four ‘heads’ of charity from which much of our modern legal definitions of charity are derived. The four heads were:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; and
- other purposes beneficial to the community.

However \textit{Pemsel}\textsuperscript{20} was decided in 1891 and as times have changed and community expectations have shifted so too have courts wrangled with the application of these four heads to a variety of circumstances. Although there have been repeated calls from the judiciary,\textsuperscript{21} academics\textsuperscript{22} and review bodies\textsuperscript{23} to legislate a definition or definitions, we are still without a clear legislative definition of what could fall within these four heads. We have come close with a draft bill, the Charities Bill 2003 (Cth). However, it was abandoned — primarily due to the negative response by the NFP community\textsuperscript{24} and the Board of Taxation was similarly negative that the proposed public benefit definition had achieved requisite certainty.\textsuperscript{25} Instead an Act was passed in 2004 to extend definitions (contained in the ITAA 1997) in the Extension of Charitable Purpose Act 2004 (Cth). This Act included the provision of childcare,\textsuperscript{26} and the provision of a rental dwelling under the National Rental Affordability Scheme both as a charitable purpose.\textsuperscript{27} Further it allows for an open and non-discriminatory self-help group,\textsuperscript{28} and a closed or contemplative religious order that regularly undertakes prayerful intervention\textsuperscript{29} at the request of members of the public, to be recognised as institutions that may be for a public benefit.\textsuperscript{30}

\textsuperscript{17} 43 Eliz 1 c 4.
\textsuperscript{18} [1891] AC 531 (‘\textit{Pemsel}’).
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid.
\textsuperscript{22} See Paul Harpur, ‘Charity Law’s Public Benefit Test: Is Legislative Reform in the Public Interest?’ (2003) 3(2) Queensland University of Technology Law and Justice Journal 422–37.
\textsuperscript{25} Peter Costello, ‘Final Response to the Charities Definition Inquiry’ (Press Release, 11 May 2004).
\textsuperscript{26} \textit{Extension to Charitable Purposes Act 2004} (Cth) s 4(1) (‘\textit{Charitable Purposes Act}’).
\textsuperscript{27} \textit{Charitable Purposes Act} s 5(1).
\textsuperscript{28} \textit{Charitable Purposes Act} s 6(1)(a).
\textsuperscript{29} There is authority for the counterargument that intercessory prayer is not for the public benefit, starting from \textit{Gilmour v Coates} [1949] AC 426, thus the need for legislative inclusion.
\textsuperscript{30} \textit{Charitable Purposes Act} s 6(1)(b).
Therefore it is not enough to be simply charitable in purpose, but that purpose must also meet a public benefit test, unless the organisation is engaged in the relief of poverty. As acknowledged by Paul Harpur, the public benefit aspect has not been extensively explored in case law, and indeed has puzzled many a great mind.\textsuperscript{31} It is generally understood that purpose is beneficial to the public if the purpose is aimed at achieving a universal or common good, it must have practical utility and it must be for the benefit of the general community or a sufficient section of it.\textsuperscript{32}

Review of the Taxation Ruling TR 2005/21 illustrates that the Australian Tax Office’s view of the definition of charitable purpose for the purposes of applying the income tax and fringe benefits concessions. The Ruling holds that for a purpose to fall within the technical legal meaning of ‘charitable’ it must be:

- beneficial to the community, or deemed to be for the public benefit by legislation applying for that purpose; and
- within the spirit and intendment of the Statute of Elizabeth, or deemed to be charitable by legislation applying for that purpose.

The benefit of a charitable purpose need not be for the whole community; it is sufficient that it is for an appreciable section of the public.

However, this public benefit requirement does not apply where the charitable purpose is the relief of poverty. Those who benefit from such a charity need not be a section of the public.\textsuperscript{33}

\section*{III. What Does the Tax Law Do?}

There are a number of tax concessions available to NFPs. The main concessions are income tax exempt status GST concessions, FBT exemptions, FBT rebate, and registration on the Deductible Gift Registry (‘DGR’) status. NFP entities may have more than one status so that a charity may have income tax exemption status and it may be on the DGR.

\subsection*{A. Income Tax Exemption}

To access any of these concessions a charitable organisation must first be endorsed; merely stating you are charitable does not grant automatic exemption status. The process to become a tax exempt charitable institution is set out in the ITAA 1997. A charitable entity must therefore be an ‘entity’\textsuperscript{34} covered by the table set out in section 50-5 of that Act. Section 50-52 of the ITAA 1997 provides that an entity is not exempt from income tax unless the entity is endorsed as exempt from income tax under subdivision 50-B. The requirements under section 50-50 are a series of alternatives and exempt status will not be granted unless the entity either meets a physical presence in Australia test, or it is listed on the deductible gifts register in section 30-15 of the ITAA 1997 or it is prescribed by law — that is, prescribed by name in the income tax regulations. The process is undertaken under Division 426 of the Tax Administration Act 1953 (Cth). Once an organisation is endorsed as a charity the income from the entity’s activities are income exempt from tax.

\textsuperscript{31} Harpur, above n 22, 423.
\textsuperscript{32} CDI, above n 23, 8.
\textsuperscript{33} Australian Taxation Office, \textit{Income Tax and Fringe Benefits Tax: Charities}, above n 9, [8]–[10].
\textsuperscript{34} Note that parts of entities cannot be a charitable entity for the purposes of tax-exempt status. The legislation is concerned with ‘an entity’ and an entity is defined in ITAA 1997 s 960.100 as individuals, a body corporate, a body politic, a partnership, any other unincorporated association or body of persons; a trust; a superannuation fund; and an approved deposit fund — clearly not all of these structures will themselves meet the test for being a charity.
B. Fringe Benefits Tax

FBT concessions amounted to around $1 billion in tax expenditures for 2008-09.\(^{35}\) State payroll concessions for NFPs are greater than $800 million per annum.\(^{36}\) In the FBT provisions concerned with providing tax concessions for NFPs there is a capped exemption for benefits provided to an employee of a public benevolent institution,\(^{37}\) or a health promotion charity, or public hospital and public ambulance services,\(^{38}\) or a religious institution.\(^{39}\) Additionally a rebate is provided to certain non-profit employees\(^ {40}\) that reduces the FBT burden to the employer. Both concessions act to tax labour at a reduced effective rate. The concern is that this allows NFPs a competitive advantage in attracting staff in labour markets by enabling them to pay the market wage at a lower cost.\(^ {41}\) Several of the submissions to the Henry Review were concerned with this aspect of tax concessions.\(^ {42}\) The Henry Review included concerns that it creates direct iniquity between employees performing similar work — but receiving different after-tax remuneration.\(^ {43}\) The example given is that of nurses employed in a public hospital compared to those employed in a commercial hospital. The concern is that the FBT concessions are not helping to increase the overall pool of nursing staff and instead contribute to wage inflation across the nursing sector.\(^ {44}\)

1. DGR Status

As at the end of October 2009, there were 52,775 tax concession charities and 26,549 active deductible gift recipients (‘DGRs’).\(^ {45}\) DGRs are entities to which donors can make income tax deductible gifts. They are either prescribed private funds listed by name in the Income Tax Assessment Regulations 1997 (Cth), or other DGRs listed by name in the ITAA 1997. Broadly, DGR status is extended to those organisations whose activities provide a benefit to the public or a significant group within the public. The general DGR categories include public benevolent institutions, public universities, public hospitals, approved research institutes, arts and cultural organisations, environmental organisations, school building funds and overseas aid funds.\(^ {46}\) The government also has the power to enact legislation to create types or categories of deductible gift recipient. For example in 2003 a new type called Harm Prevention Charitable Institution\(^ {47}\) was created in response to the Charities Definition Inquiry (‘CDI’).\(^ {48}\) DGRs can be searched for on the Australian Business Register.\(^ {49}\) A donor will be granted a tax deduction to reduce their assessable income, this is a highly attractive incentive to choose a DGR over another potential

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36 Ibid.
37 If it has been endorsed under *Fringe Benefits Tax Assessment Act 1986* (Cth) s 123C (‘FBTAA’).
38 FBTAA s57A.
39 FBTAA s57.
40 FBTAA s 65J(1) lists 14 categories including trade unions, schools, and other non-profit but not charitable institutions.
43 The difference identified in the Henry Review Final Report was that nurses in public and NFP hospitals had around $2800 per annum in additional after-tax remuneration: Henry Review Final Report, above n 2, 211.
46 ITAA 1997 subdiv 30-B.
47 ITAA 1997 s 30.288.
48 CDI, above n 23.
recipient. For the 2007–08 income year, individuals claimed $2,346 million in deductible gifts, an increase of 24.5% on the previous year.50

2. Prescribed Private Funds and Private Ancillary Funds

Since 2001, individuals, families and businesses have been able to establish their own DGRs, and these were initially known as prescribed private funds (‘PPFs’). PPFs were abolished in 2008 and private ancillary funds were created.51 Private ancillary funds are trusts with DGR status that can receive donations for distribution to other DGRs — but are prohibited from distributing their donations or other profits to other private ancillary funds. As of 31 October 2009 there were 769 private funds receiving $728 million in donations and making $129 million in distributions.52

3. GST Concessions

The GST turnover registration threshold (where registration for GST becomes mandatory) is twice that of other enterprises, and is currently $150,000.53 There is a range of other GST concessions available to NFPs mostly providing exemptions. For example sale of donated second hand goods is GST free, and fundraising events may be input taxed supplies. However the Henry Review reported that, overall the effect of GST concessions for NFPs is significantly moderated by the fact that where NFPs operate in commercial markets their activities are taxable under GST legislation. The Henry Review postulated that this did not adversely affect the principle of competitive neutrality.54 However, it must be noted that the NPF specific exemptions add to the overall complexity of compliance with GST requirements. This is particularly so when one considers the inconsistency whereby some trade receipts of charities are exempt from GST and others are not (in addition to the ordinary exempt categories).55

IV. Issues

The Henry Review put forward the idea that the status quo ‘does not fully reflect current community values about the merit and social worth of the activities it subsidises.’56 Although it is not explicit in defining what ‘community values’ are, the subtext implies that the tax regulatory regime neither meets the needs of the NFP community nor that of the wider community to whom the charities are meant to serve. Evaluation of the proposals for reform put forward in the Henry Review must be considered from this community perspective.

Why then is there this disjuncture between the tax concessions available to NFPs and community expectation? The reasoning of the Henry Review suggests that it is a two-fold issue. The first is the degree of complexity of the system, which acts to inhibit the activities of organisations both through confusion over scope, excessive administrative burden and diversion of monies (donated or derived profits) to compliance. The second is the constraints inherent in the system itself — the difficulty of responding in a timely manner to changing or emerging community expectations and needs. If complexity is removed then the system will become more efficient and there will be a better outcome for the community as a whole. If the system is modernised and becomes flexible then the sector will become more responsive to community needs and changing expectations.

51 Tax Administration Act 1953 (Cth) subdiv 426-D.
53 A New Tax System (Goods and Services Tax) Act 1999 (Cth) s 23.15(2) (‘GST Act’).
A. Complexity

The complexity according to the Henry Review is derived from the fact that there are multiple tax concessions available to NFPs.\(^\text{57}\) This reiterates and draws on the findings of earlier inquiries such as the CDI which noted ‘much of the confusion in the sector is related to what tax or other concessions attach to what type of entities and what the boundaries are between different types of entities’.\(^\text{58}\) It should be noted that each tax concession must be applied for; none of them are automatically granted upon the successful gaining of another concession. For example income tax-exempt status for the purposes of Division 50 of the ITAA 1997 does not grant FBT concessions status. Moreover if the concessions considered are combined with all federal and state concessions (which have not been considered in this article) then at least 40 separate pieces of legislation are involved and they are administered by 19 different agencies.\(^\text{59}\) Each agency and most legislation enacting its own purposes will have slightly different interpretations of what is an eligible entity and eligible charitable purpose. Although the Australian Taxation Office (‘ATO’) appears to have emerged as the de facto regulator for charitable purpose, its decision does not bind any other authority.\(^\text{60}\) Furthermore, apart from New Zealand, no other jurisdiction imposes a separate tax on the provision of benefits to employees; therefore on an international comparative basis Australian charities are overburdened.\(^\text{61}\) This multiplicity of agencies and legislation is particularly burdensome for any entity operating across multiple state jurisdictions. This, complexity rises further if it is operating or engaging in several different types of activity, eg fundraising, donation solicitation, sales of goods or services and peak body representation or lobbying. The sector itself is sometimes uncertain as to whether its activities come within the meanings covered by the legislation (even after endorsement) and frequently resort to (costly) legal advice.\(^\text{62}\)

Another identified cause of complexity is the uneven application of tax concessions. For example a charity may be exempt from income tax and have DGR status but be ineligible for FBT concessions. These concerns were articulated in RSPCA Australia’s submission to the Senate Economics Committee 2008 inquiry into the disclosure regimes for charities and NFP organisations.\(^\text{63}\) The submission indicated that the current arrangements ‘infer that some charitable purposes are more worthy than others’.\(^\text{64}\) The requisite definition threshold for endorsement from exemption from FBT is specified in s 123E(1) of the FBTAA which, in turn, refers to the same endorsement process prescribed by the Taxation Administration Act 1953 (Cth) which is used for endorsement for the income tax exemption. Nonetheless an organisation may not qualify under FBT for the concessions notwithstanding their qualification under income tax. One implication of this unevenness is that organisations may be receiving different status due to their political and or lobbying power rather than on independent merit.\(^\text{65}\)

B. A System Constrained

The system is based on over 400 years of evolving case law and piecemeal legislation. The rationale for tax concessions to charitable NFPs in Australia is not articulated in legislation, nor in the supporting documents. Yet there is an underlying assumption that tax concessions are granted to support charitable NFPs because they serve the community through their activities either directly (for example running a soup kitchen) or indirectly (for example advancement of religion), and their activities provide positive public benefits. That is, the services deliver

\(^{57}\) Ibid 206

\(^{58}\) CDI, above n 23, 34.

\(^{59}\) Henry Review Final Report, above n 2, 207.

\(^{60}\) Productivity Commission, above n 1, 164.


\(^{62}\) Productivity Commission, above n 1, 163.

\(^{63}\) Senate Standing Committee, Commonwealth of Australia, Disclosure Regimes for Charities and Not-for-Profit Organisations (2008).

\(^{64}\) See also Access Economics Report, above n 35, 24.

benefits that are not restricted to the immediate recipient of the benefit (the soup kitchen visitor), but also generate important social, economic and cultural benefits to the wider community. Furthermore, there is support for the idea that the NFP sector is better positioned than governments and the business community to deliver these public benefits through their smaller scale, their connections to various members and classes of society, and their flexibility and capacity to engage private individuals in support of public purposes. Generally there is also public support for this use of public funds. Therefore tax exemptions are designed to allow charitable organisations to devote more of their income to their charitable mission. However it the view of the Henry Review that the complexity of the system and the administration of the system are hindering both the delivery by the sector of those perceived benefits and the benefit in the sector being the one to make those deliveries.

The Henry Review thus appears to adopt the twin focuses of assessing the charitable sector’s efficiency and acceptance of the pluralism-enhancing advantages of having charities provide public goods instead of, or in addition to the government. If it is accepted, as it is in the Henry Review, that the role of charitable organisations in society is to deliver important social, economic and cultural benefits then, given the identified issues of complexity and overregulation, what does the Henry Review offer by way of remedy? The solution must be predicated on the ability of those organisations to deliver the benefits in a flexible manner that adapts to the changing needs of the wider community. The challenge for permitting flexibility is to encourage more of the beneficial activity, and not merely to deliver a financial gain to those who would have undertaken the activity anyway.

V. HENRY REVIEW SOLUTIONS

The Henry Review Final Report recommendations are as follows:

A. Recommendation 41

Consistent with the recommendations of previous inquiries, a national charities commission should be established to monitor, regulate and provide advice to all not-for-profit (NFP) organisations (including private ancillary funds). The charities commission should be tasked with streamlining the NFP tax concessions (including the application process for gift deductibility), and modernising and codifying the definition of a charity.

The introduction of a single regulatory body reflects emerging practices in overseas jurisdictions such as the United Kingdom. The Henry Report reiterates the call for a national charities commission citing the consistency of the recommendation for its introduction from 1995 onwards. The experience in these jurisdictions suggests that the net benefit is positive and well received within the NFP sector and the general public. The strength of the recommendation for a national commission is that it has strong support from the sector itself and from numerous government and non-government inquiries.

70 Fiona Martin, ‘Charities for the Benefit of Employees: Why Trusts for the Benefit of Employees Fail the Public Benefit Test’ (2007) 15(1) e-Journal of Tax Research 59–70, for example, suggests a purpose test that the entity’s activities will add to or advantage the community rather than individuals.
71 It should be noted that recommendations 41–3 are taken verbatim from the Henry Review Final Report, above n 2, 211–12.
73 Henry Final Report, above n 2, 212.
74 See, eg, Productivity Commission, above n 1.
The risks lie not with the creation of a charities commission but whether it is suitably equipped for the task it will be asked and expected to perform. The regulatory body should be given a framework for creating a cohesive and rational policy basis against which developments in taxation law must be formulated. Creating an administrative regulator without this articulated policy basis risks replication of the position the ATO currently occupies. Without the impetus to address the inconsistencies or complexity within the system, this will undermine the usefulness of the role and risk creation of another layer of complexity or imposition of just another regulating body. Additionally it must also be asked as to how another regulatory body will add flexibility to the system beyond lightening the administrative burdens of the sector.

However a centralised body offers the advantage of participants gaining efficiencies in sourcing information and of provision of information in a standardised manner. This would increase our overall body of knowledge in relation to the sector and make implementation of new policies or directions simpler and more cost effective. In addition it creates an opportunity to cut through a particular source of complexity of multiple agencies with multiple definitions. This could be a system analogous to the one created in England and Wales where registration with the Charities Commission creates a legal presumption that the organisation is a charity and must be accepted as a charity by other government bodies including the Inland Revenue.

The current de facto regulator of the ATO is far from ideal as it sees its role as protector of the revenue — maximising tax compliance among NFPs in the key areas of registration, keeping proper records, lodging forms on time, reporting correct information and paying tax on time. In addition, unlike a suitably empowered Commission, the ATO is unable to address the lack of co-ordination between Commonwealth and State exemptions and administration.

However as an alternative to an independent commission, the ATO could be enlarged and a dedicated NFP sector within its structure created and similarly tasked to modernise and codify the definition of a charity. Recognition of the ATO’s exemption status determination could be underpinned by appropriate legislation. The ATO has previously undertaken similar parallel functions such as Child Support collections and if adequately funded could assume many of the commission’s functions. The advantage of this approach is that it will prevent the creation of another bureaucracy with attendant (significant) revenue demands upon the Australian Government. For example, the Charity Commission for England and Wales administers nearly 163,000 charities with annual income of nearly £52 billion and spends around £30 million a year pursuing its objectives.

B. Recommendation 42

Categories of NFP organisations that currently receive income tax or GST concessions should retain these concessions. NFP organisations should be permitted to apply their income tax concessions to their commercial activities.

This recommendation attempts to provide a framework for any changes to the regulatory framework. That is, the Henry Review Final Report should not be read as a recommendation to remove the income tax and GST concessions but to change the implementation and regulation of the concessions. The rationale given is that NFPs deliver benefits to the wider community that either complement or support the government’s activities (such as in health care) or deliver benefits that neither the government nor the private sector are willing or able to. Tax concessions enable NFPs to continue this beneficial activity in a relatively targeted way as they have been an important and longstanding source of financial support.

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82 O’Connell, above n 61, 16.
Giving NFPs the scope to conduct commercial activities freely, it is argued, would potentially reduce costs associated with education, assistance, advice, disputes and litigation on the ATO’s interpretation of a ‘charitable purpose’, and would reflect the principles of the High Court of Australia’s *Word Investments* decision. The underlying idea is to allow charities to become self-sufficient as they would generate income tax exempt income through the provision of goods and services. This would remove some of the demands for increased government funding and therefore also remove concerns that direct government funding would negatively impact on operational flexibility, create greater certainty (rather than a system dependent on budget cycles), and promote social innovation.

The criticism of this commercial openness approach is that NFPs are servicing commercial markets unrelated to their philanthropic activities, including: turf supplies; insurance; music sales; pizza shops; and breakfast and health foods. The fear is that these activities undermine competing taxable entities and therefore, ultimately, undermine the revenue base as consumers purchase from tax exempt entities in preference to taxable entities. Kirby J in dissent in *Word Investments* noted that exempted trading activities afford “an unfair economic advantage”. Murray highlighted in anticipation of the Henry Review Final Report the potential risks of this approach and raised the following as being of concern (in addition to the competitive neutrality concern): the increase in the risk of loss of an entity’s charitable assets if commercial liabilities are not quarantined; the ‘diversion’ of the efforts of the controllers of an entity away from its charitable purpose and towards its commercial activities; and that individuals may view charities as less altruistic if they expand their commercial activities.

The Henry Review did not address many of these and relied upon the preemption of concerns about tax arbitrage by acknowledging that although there may be a degree of erosion of the revenue base the benefits to society as a whole outweigh the disadvantages. This was the view adopted in New Zealand. The Henry Review also adopted the view that an after-profits based income tax exemption does not affect the behavior of the entity setting its prices on a cost recovery basis, and thus competitive neutrality is not undermined by this concession. Nonetheless this must be ultimately seen as a failure of the Henry Review to adequately address the legitimate concerns of these concessions from a public confidence perspective or how increased trading activities might place charity assets at risk.

### C. Recommendation 43

1. **NFP FBT concessions should be reconfigured.**

   a) *The capped concessions should be phased out over ten years. In the transition period, the value of the caps would gradually be reduced. Reportable fringe benefits for affected employees (that is, those benefits that are readily valued and attributed) would be exempt from tax up to the relevant cap, and taxed at the employee’s marginal tax rate above the cap. The market value of these benefits would be taken into account for transfer payment purposes. Non-reportable fringe benefits would be taxable for NFP employers.*

   b) *The FBT concessions should be replaced with direct government funding, to be administered by relevant Commonwealth portfolio agencies or the charities commission. All NFP organisations eligible for tax concessions should be able to apply to the relevant body for funding for specific projects or for assistance with the costs of recruiting specialist staff.*

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87 Murray, above n 12, 326.
The Henry Review outlines that the benefit of this system is that it does much to restore the remuneration system that is both complex and increasingly inequitable. However the Henry Review Final Report noted that the impact of the removal of FBT concessions is less clear in situations where there is no direct for-profit competition (for example, in the provision of health services in remote areas). The removal of FBT concessions in these cases may make it difficult for NFPs to attract appropriately qualified staff, which may result in the downsizing or closure of programs.\textsuperscript{92} The FBT concessions have been identified as causing public confidence issues and raises concerns that taxpayer dollars are subsidising non-charitable items.\textsuperscript{93} Any behaviour perceived as unfair risks an overall reduction in participation by the public including reduction of donations and/or resistance to continued tax advantage of such entities.\textsuperscript{94} The proposal includes a significant phasing in period of 10 years together with interim measures such as taxing at taxpayer's marginal rates the market value\textsuperscript{95} of the benefit above those rates. A concomitant requirement of the disclosure of the transitional benefits is included to increase the transparency of the process and to limit access to other transfer payments by the employees.\textsuperscript{96}

It is of note to compare this to the results of the New Zealand government review of FBT in 2003 which also considered whether the exemption for charities should be retained and heard similar arguments in relation to lack of fairness.\textsuperscript{97} The decision was made in New Zealand to retain the concessions in part due to the fact that many charities are not large enough to have significant numbers of employees obtaining significant benefits under the system.\textsuperscript{98} It is perhaps inconsistent of the Henry Review that the issue of fairness and public perception is addressed in relation to the provision of benefits to employees of charities but is inadequately dealt with in relation to exempting trading activities.

It can be seen that the measures regarding FBT are aimed at the fairness issue — fairness to existing beneficiaries of the system (by having a 10 year transition period) and fairness to the general public and taxpayers dollars. The measures can be seen as attempting to balance the needs of the sector with the public need for greater transparency in the system regarding taxpayer funds. The proposed measures will undoubtedly create short term additional complexity within the remuneration system through the introduction of transitional arrangements together with the possibility of ‘grandfathering’ of current arrangements for beneficiaries under the current system. The risk to the sector is that the changes to the FBT system will be implemented without the recommendation 43(b) proposed replacement with direct government funding, to be administered by relevant Commonwealth portfolio agencies or the Charities Commission. Even if recommendation 43(b) is implemented, the value of the direct funding may erode over time.

\section*{VI. Government Response}

The May 2010 Budget has included only the following:
\begin{itemize}
\item extending deductible gift recipient status to all volunteer fire brigades and other emergency service entities
\item improving the regulatory framework for public ancillary funds
\item updating the list of specifically listed deductible gift recipients.
\end{itemize}

That is, the proposals are merely peripheral and ignore the heart of the Henry Review NFP recommendations.

\begin{itemize}
\item \textsuperscript{92} Henry Review Final Report, above n 2, 210.
\item \textsuperscript{93} Access Economics Report, above n 35, 24.
\item \textsuperscript{94} There are many studies on the relationship between fairness and public goods from experimental economics. See Andrew Reeson and Simon Dunstall, \textit{Behavioral Economics and Complex Decision-Making, Implications for the Australian Tax and Transfer System} (CMIS Report 09/110, CSIRO, 2009) 8.
\item \textsuperscript{95} FBT liability in Australia is triggered by the ‘taxable value’ of a benefit which is not necessarily the market value of the benefit; a good example of this is a motor vehicle which is concessionally treated based on high kilometre usage: FBTAA ss 9, 10.
\item \textsuperscript{96} Henry Review Final Report, above n 2, 211.
\item \textsuperscript{98} O’Connell, above n 61, 36
\end{itemize}
The official government response to the Henry Review Final Report can be found in the Tax Policy Statement ‘Stronger, Fairer, Simpler’. The incumbent government overall has ‘cherry picked’ a few ideas from the Henry Review Final Report and is at the time of writing focused on gaining public support for the ‘resources super profits’ tax on mining companies. Ancillary focus is on cutting the tax rate to companies, simplifying taxes on businesses generally and reconfiguring superannuation and other retirement based savings.

In addition, the Henry Review Final Report was released in an ‘election year’ and as such any major reforms are likely to await re-election. The Federal Opposition’s policies at the time of writing do not include any formal response to the recommendations in the Henry Review Final Report. Thus although there are merits in the proposals at the end of the day there is unlikely to be any significant change to the tax concessions of NFPs.

A. Recent Developments

In addition to the projected Federal election being called there has also been a change in Prime Minister (from Kevin Rudd to Julia Gillard). The tax platform of the Labor party includes changes to superannuation, a renamed ‘superprofits tax’ — now the Mineral Resource Rent Tax and minor changes to the tax acts in respect of deductions. That is, there is nothing in the election platform to date to suggest that this is a focus area for either party. On 13 May 2010 the Senate referred the Tax Laws Amendment (Public Benefit Test) Bill 2010 for inquiry and report by the Senate Economics Legislation Committee. The Report was handed down on 7 September 2010; calling once again, for a national commission to be established; thus maintaining the momentum for reform. The Tax Laws Amendment (Public Benefit Test) Bill 2010 sought to amend the tax laws to require that religious and charitable institutions meet a public benefit test to justify their exemption from taxation. The Committee however determined that reform of the public interest test should form part of a major reform rather than another piecemeal amendment to a complicated area of law.

VII. Conclusion

The Henry Review focuses on a few key reforms — the introduction of a regulatory body, the expansion of commercial activity tax exemption and reconfiguration of FBT exemptions. The risk it runs however is that it is simply another report commissioned by a yet another government, requesting something that has already been identified in numerous reports already commissioned by previous or other governments. In summary, the Henry Review has not provided much in the way of originality to the arguments surrounding the need to reform the charitable sector. In addition it is inclined to the view that simplification of regulation and tax concessions is the cornerstone of delivering community expectation without necessarily substantiating that belief. However the proposed solutions, in their very lack of originality, lend weight to the idea that reform need not be radical and that Australia is lagging behind other Commonwealth countries. There is still much energy and interest in reform from the sector itself thus the issue will not simply ‘go away’ despite current government preoccupation with other activities.

In the end, charity begins not at home, but in the House of Parliament.

100 See, eg, Henry Review Final Report, above n 2, 3, 5.
WHEREVER YOU HANG YOUR HAT MAY BE HOME, BUT IS IT ‘RESIDENTIAL PREMISES’ FOR GST PURPOSES?

ROBIN WOELLNER

I. INTRODUCTION

The concept of ‘residential premises’ is important in relation to Goods and Services Tax (‘GST’) liability because it plays a key role in determining whether property usage and transfers — the latter being a particularly significant element of modern capitalist economies — will be GST-free, input taxed or fully taxable.

Recent cases have raised a number of interesting issues in relation to ‘residential premises’ under the GST legislation. Some of these issues have been resolved satisfactorily by court decisions, others have been ‘resolved’ in rather puzzling ways, while some remain unresolved.

It is useful to begin the discussion of GST treatment of residential premises with an overview of the relevant provisions.

Underpinning the GST treatment of residential premises is the principle that persons selling or leasing real property should be treated in a comparable way to owner-occupiers.

To achieve this outcome, where other requirements are satisfied:

• in general, supplies of residential premises by lease, hiring, licence or sale are input taxed under Subdivisions 40-B and 40-C (which are generally in similar terms); that is, the supply of the items is not taxed, but the supplier cannot claim input tax credits incurred in the supply;

• however, the supply of residential premises is only input taxed to the extent that the premises are to be used predominantly for residential accommodation — regardless of the length of occupation;


3 GSTR 2008/2 deals with the GST treatment of long-term leases with government agencies.

4 For example, there must be consideration; activities in the course or furtherance of an enterprise; and an appropriate link to Australia: see Woellner et al, above n 1, 1769–77.

5 All references to provisions of legislation in this article are to A New Tax System (Goods and Services Tax) Act 1999 (Cth) (‘the GST Act’).

6 GSTR 2003/3, [9].

7 Ibid. The example given is where there is a property consisting of a single title with a retail shop below and a separate residential flat above. See also ATO, GST Ruling GSTR 2000/20 (21 June 2000) [22] (‘GSTR 2000/20’). This will be a mixed supply and the consideration will need to be apportioned: ATO, GST Ruling GSTR 2001/8 (19 December 2001), cited in GSTR 2003/3, [9].
• the supply of new residential premises\(^8\) or commercial residential premises is an exception to the above rules and is not input taxed, but is subject to full GST taxation.\(^9\)

The interplay of these factors creates an interesting but complex picture — particularly as the Courts have consistently indicated that the GST is a practical, business tax; that it is to be interpreted in a way that gives it a real-world effect;\(^10\) and that Division 165 gives the Commissioner wide powers to attack over-zealous tax planning arrangements.\(^11\)

The effect of these GST provisions can be represented diagrammatically by a flowchart, as shown in Figure 1.

The impact of the provisions affecting residential property was outlined by Perram J in *Sunchen Pty Ltd v Federal Commissioner of Taxation*,\(^12\) who referred to the GST Act’s ‘confusing terminology’ before noting that it relieves certain supplies from the GST in two ways.

Firstly, certain supplies are made ‘GST-free’, and no GST is collected by the revenue. While the suppliers are not obliged to collect GST from the consumer, they are still entitled to claim input tax credits on supplies leading to that supply. As Perram J noted:

The practical consequence of the tax not being collected from the consumer and the supplier being entitled to claim an input tax credit is that none of the inputs into the ultimate supply are taxed — GST is not collected from the ultimate consumer and each intermediate supplier obtains input tax credits which neutralise their own liability to GST.

Secondly, certain supplies are ‘input taxed’. In these cases, the supply is not subject to GST, but the supplier cannot claim an input tax credit for supplies made to it which were inputs into the supply to the consumer:

The practical effect of this is to cast the ultimate economic burden of the tax not on the end user but on the immediately preceding supplier.

The practical effect of denying an input tax credit to the supplier [such as the owner of land who sells it, or a landlord who grants a residential lease to a tenant] on supplies which are inputs into the premises is to render those supplies subject to GST in the hands of the supplier. Put another way, the inputs into the supply of the premises are taxed which gives rise, no doubt, to the otherwise rather obscure expression ‘input taxed’.\(^13\)

II. Supply by Lease, Hire or Licence (Subdivision 40-B)

As illustrated in Figure 1 below, under Subdivision 40-B (s 40-35), the supply of premises\(^14\) by a way of lease, hire or licence (including a renewal or extension) is input taxed if the supply is of ‘residential premises’ other than commercial residential premises (or a supply of accommodation in commercial residential premises provided to an individual by the entity owning or controlling those premises).\(^15\)

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\(^8\) Except where the residential premises have been used for residential accommodation before 2 December 1998 (unless new residential premises have been created through substantial renovations or replacement of demolished premises) or residential premises are sold after five or more years of being rented continuously: *GSTR 2003/3*, [13], [14].

\(^9\) Ibid [9], [10].


\(^12\) 2010 AAT 20-161 (‘*Sunchen*’).

\(^13\) Ibid 10,626–67.

\(^14\) Section 40-35 (1A) makes similar provision for input taxation of supply of a berth at a marina.

\(^15\) Section 40-35(1)(b) provides that a supply will also be input taxed if the supply is of commercial accommodation to which Div 87 (long-term accommodation in commercial premises) would apply but for a choice made by the supplier under s 87-25(1) not to apply the Division.
Figure 1: GST Treatment of ‘Residential Premises’

Other GST requirements are met (consideration, link to Australia etc: s 9-1)

‘Real property’ — defined inclusively in s 195-1

That is, ‘residential premises’ as defined in Division 40 (land or building)

Where the supply is of residential premises by lease, hire or licence (not being via a long-term lease) under s 40-35; or by sale or long-term lease under ss 40-65 or 40-70 respectively

Which at time of supply is:

actually (s 195-1(a));

OR

intended to be and is capable of being (s 195-1(b)) …

occupied as a residence or for residential accommodation (s 195-1(a), (b)) …

regardless of the period of actual or intended occupation (s 195-1).

Is INPUT TAXED

But only TO THE EXTENT the premises are to be used predominantly for residential accommodation: ss 40-35(2)(a), 40-65(1), 40-70(1)

EXCEPTIONS which are subject to full GST taxation:

New residential premises: ss 40-65(2)(b), 40-70(2)(b), 40-75(1), (2), (2A), (3)

Commercial residential premises: ss 40-35(1)(a), 40-75(2)(a), 195-1

OR

Lease, etc, of accommodation in commercial residential premises provided to an individual by the entity that owns or controls those premises: s 40-35(1)(a)

Division 87 — but excluded by choice by supplier under s 87-25: s 40-35(1)(b)

If not used for residential accommodation before 2 December 1998: s 40-70(2)(b)
However, under s 40-35(2) (a) and (b), the supply is input taxed only to the extent that the premises are to be used ‘predominantly for residential accommodation (regardless of the term of occupation); and the supply is not of a long-term lease.\(^\text{16}\)

‘Residential premises’ are defined in turn under s 195-1 to mean land or a building that at the time of the relevant supply is either actually occupied or intended to be occupied (and capable of being occupied) as a residence or for residential accommodation.\(^\text{17}\) The duration of the actual/intended occupation is irrelevant.\(^\text{18}\)

The application of these provisions arose in \textit{South Steyne Hotel Pty Ltd v Federal Commissioner of Taxation},\(^\text{19}\) which was run under the ATO test case funding program.

\textbf{A. South Steyne}

The facts in South Steyne were relatively complex, but can be summarised simplistically as involving four transactions related to the transfer of ownership of the Sebel Hotel:

1. the sale by South Steyne Ltd of the ‘management lot’ (the ‘common areas’ of the hotel, such as the reception area) to Mirvac Holdings Ltd (‘MHL’), and a formal agreement between South Steyne and MHL that MHL would manage the 83 units in the Sebel Hotel and the common areas as a ‘serviced apartment business’;

2. the lease of the 83 apartments in the Sebel Hotel to Mirvac Management Ltd (‘MML’);

3. the sale of three of the apartments in the Sebel Hotel to MBI Properties Pty Ltd (‘MBI’) subject to the leases to MML; and

4. the supply of overnight accommodation in the Sebel Hotel by MHL to Ms Young as a member of the public.\(^\text{20}\)

Only transactions 1 and 4 are directly relevant for present purposes, though it is important to outline all of the transactions in order to fully appreciate the arrangements in question. The arrangements could be represented diagrammatically shown below.

The taxpayers sought directions on the issues raised by the four transactions above. On the facts, the Full Federal Court (Finn J, Emmett J; Edmonds J dissenting on some issues) held as follows.

\textit{1. Transaction 1: Leases of Apartments by South Steyne to MML}

The Commissioner argued that these supplies were input taxed as they were ‘residential premises’ (but not ‘commercial residential premises’). The taxpayer argued that the supply was not input taxed, because it was a supply of commercial residential premises.

The Court referred to the provisions of Subdivision 40-B and held on the facts that the lease of the 83 apartments in the Sebel Hotel by South Steyne Ltd to MML was an input taxed supply\(^\text{21}\) because, in terms of ss 40-35(1)(a), (b), the units were occupied for residential accommodation for at least 50 years at the time of supply.

\(^\text{16}\) Under s 195-1, a ‘long-term lease’ means a supply by way of lease, hire or licence (including a renewal or extension) for at least 50 years where, at the time of supply, it was reasonable to expect that it would continue for at least 50 years; and, unless the supplier is an Australian government agency, the terms are substantially the same as those under which the supplier held the premises.

\(^\text{17}\) While the composite term ‘residential premises’ is defined in s 195-1, the term ‘premises’ is not separately defined. However, Arthur Delbridge et al (eds), \textit{Macquarie Dictionary} (5th ed, 2009) defines ‘premise’ (so far as relevant) as ‘a. the property forming the subject of a conveyance. b. a tract of land. c. a house or building with the grounds etc belonging to it.’ The definition may therefore be somewhat tautologous.

\(^\text{18}\) Section 195-1. In the ATO’s view, this means that the premises in question do not need to be a ‘home’ or permanent place of abode: \textit{GSTR 2000/20}, [201]–[22].

\(^\text{19}\) [2009] FCAFC 155; 2009 ATC 20-145; 74 ATR 41 (‘South Steyne’).

\(^\text{20}\) Ms Young was also an employee of the taxpayer and it seems likely that the hiring of the room was set up to create a test situation on the taxation treatment of such arrangements.

\(^\text{21}\) \textit{Gloxinia Investments Ltd as Trustee for Gloxinia Unit Trust v Federal Commissioner of Taxation} [2010] FCAFC 46; 2009 ATC 9,681.
Figure 2. Summary of Transactions in South Steyne 2009 ATC 20-145

1. Sale of management lot
2. Sale of units by South Steyne Ltd to MBI subject to leases
3. Leases of 83 units
4. MHL agreement with MML to run serviced apartments as business
5. Supply of accommodation by MHL to Ms Young

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accommodation purposes and were not commercial residential premises. The line of reasoning by which the Court reached these conclusions was as follows.

Firstly, the apartments were ‘residential premises’ within the meaning of s 195-1 because they were a land or building that was ‘occupied for residential accommodation’.22 In reaching this conclusion, the Court noted that the legislation now expressly states that the term of occupation or intended occupation is to be disregarded in determining the status of the premises.23

Secondly, the Full Court held unanimously that the apartments were not ‘commercial residential premises’.24

For these purposes, ‘commercial residential premises’ is defined — so far as relevant — as including ‘(a) a hotel, motel, inn, hostel or boarding house’, or ‘(f) anything similar to residential premises described in paragraphs (a) to (e)’.25 The question of whether or not the hotel rooms were ‘similar’ to a hotel, motel or the like was therefore central to this aspect of the case.

The terms ‘hotel, motel, inn, hostel or boarding house’ are not defined in the GST Act, and they accordingly bear their ordinary meaning. The ATO takes the view that the meaning of these terms is ‘largely synonymous’.26

In determining whether premises are ‘similar to’ a hotel, motel or the like in s 195-1, the ATO focuses on what it sees as the ‘main characteristics’ of such premises; namely, whether:

- there is an intention to operate the premises commercially;
- there is multiple occupancy;
- the rooms are held out to the public as being available for public use;
- accommodation is the main purpose of the land or building;
- the premises are managed centrally;
- the management of the premises offers the accommodation in its own right;
- the services offered include accommodation; and
- the status of hirers is consistent with that of a hotel guest.27

On the facts, the Court rejected the taxpayer’s argument that, because the 83 units were held subject to the requirement to operate them as a (single) serviced apartment business, the rooms were ‘similar to’ a hotel or motel. The Court instead took the view that each apartment had to be considered separately, and that a hotel or the like consists of more than the rooms and also necessarily includes the ‘common areas’ such as reception areas, dining areas, car parks and so on. In this case, therefore, the ‘supply’ only of a room providing individual accommodation space in a hotel complex, without the supply of the ‘common’ areas (the management lot), was not the supply of commercial residential premises.

As Emmett J observed:

An individual apartment is not similar to a hotel or motel. It does not resemble or have a likeness to a hotel and motel. …

Paragraph (f) of the definition of commercial residential premises, in conjunction with paragraph (a), may cover a serviced apartment complex or other establishment that provides accommodation on a multi-occupancy basis to guests. However, the individual apartments supplied by South Steyne to Management are very different from a hotel or

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22 Whether or not the premises were occupied ‘as a residence’ within the meaning of the definition of ‘residential premises’ in s 195-1. The factors which the ATO takes into account in determining the status of relevant premises are set out in GSTR 2002/20, [26]–[36].

23 South Steyne 2009 ATC 20-145, 10,336 (Emmett J).


25 The definition excludes premises to the extent that they are used to provide accommodation to students in connection with an educational institution that is not a school — this was not relevant to the facts in South Steyne 2009 ATC 20-145.

26 GSTR 2002/20, [75]–[76].

27 GSTR 2002/20, [83]–[133].
motel. The term hotel or motel would not be used, as a matter [sic] of ordinary English, where a single apartment, room or other space is supplied …

It might be appropriate to describe an individual apartment as being similar to a part of a hotel, namely a hotel room. [But it] is not an ordinary use of English to describe a single individual apartment as being similar to a hotel or motel.

2. Transactions 2 and 3: The Sale of Apartments to MBI and Purchase of Apartments by MBI Subject to the Leases to MML

The majority of the Federal Court held that the sale of three apartments to MBI (subject to the leases to MML) was GST-free because it was the supply of a ‘going concern’ under s 38-325.

Though this aspect of the case raised interesting questions of statutory interpretation in relation to going concerns and the real estate margin scheme, these can be left for another time, as they do not relate centrally to the interpretation of ‘residential premises’ under Division 40.

In relation to the purchase of the three apartments by MBI, the Court held that the purchase of the reversionary interest in the three apartments (subject to the leases to MML) was not a new ‘supply’ by MBI to MML merely because it involved the continuation of the leases after the sale of the reversion.

Instead, the situation fell within Division 156, so that the Division 156 attribution rules applied to the supply by South Steyne Ltd.

This conclusion seems correct, but it is not relevant to the current topic and therefore is not discussed further.

3. Transaction 4: The Supply by MHL of Accommodation to Ms Young

The supply by MHL of accommodation in the Sebel Hotel to Ms Young for two overnight stays raised interesting issues. As noted above, so far as relevant here, under s 40-35(1)(a), a supply of accommodation in residential premises by hire, lease or licence is input taxed unless it is a supply of commercial residential premises or of accommodation in commercial residential premises provided to an individual by the entity that owns or controls the commercial residential premises — in which case, it is fully taxable.

On the facts in South Steyne, the Court held that the accommodation was provided to an individual (Ms Young) and was clearly in ‘commercial residential premises’ (the Sebel Hotel).

Accordingly, the issue turned on whether the accommodation was provided by MHL as principal (in which case it would be fully taxable) or as the agent of MML (in which case it would be input taxed).

28 Section 40-35(2)(a) (footnote not in original).
29 South Steyne 2009 ATC 20-145, 10,337 (Emmett J), 10,333 (Finn J agreeing); Edmonds J agreed at 10,345 but noted:
I hesitate to go as far as her Honour [the trial judge] and conclude that the apartments are ‘residential premises’, ‘even without regard to the inclusion of “residential accommodation”’. In my view, whether accommodation is ‘settled’ or ‘established’ involves elements which go beyond mere duration of occupation. Nevertheless, I totally agree with her Honour that the inclusion of ‘residential accommodation’ puts the matter beyond doubt … (citations omitted)
30 See, eg, ATO, GST Ruling GSTR 2005/4 (14 September 2005); GSTR 2005/3, [150]. Edmonds J dissented on this point.
33 Ibid 10,337–8 (Emmett J), 10,333 (Finn J agreeing), 10,342–3 (Edmonds J agreeing).
34 Ms Young was also an employee of a company involved in the arrangements — these stays were presumably arranged in order to test the application of GST to such arrangements.
36 The ‘exceptions’ in s 40-35(2)(a), (b), discussed above, were not relevant on the facts.
The majority held that, although MML was the lessee of the apartment that Ms Young stayed in, it was MHL which had control of the premises for the purposes of s 40-35 and MHL had provided the accommodation in its capacity as the principal — not as agent for MML.

In the majority’s view, although the relationship of MML and MHL under the Serviced Apartment Agreement was ‘unquestionably’ that of principal and agent, the agreement gave MHL exclusive control of the serviced apartment business because:

- under the agreement, MML appointed MHL to manage and operate the serviced apartment business and to enter into contracts in its own name;
- MHL owned the management lot, which was an integral part of the operation of the serviced apartment business;
- MHL controlled the conduct of the restaurant, room service and service of alcohol throughout the complex; and
- MHL’s name was on the tax invoice for the accommodation given to Ms Young.37

In the majority’s view, therefore, the ‘exception’ in s 40-35(1)(a) — above — was satisfied and the supply was fully taxable.38

In dissenting on this point, Edmonds J focussed on the terms of the serviced apartments agreement of 30 November 2007 — including the requirement that all cash from the apartments was to be banked to the credit of MML’s operating account — to conclude that the ‘relationship so established is truly one of principal and agent’.39 In Edmonds J’s view, the supply of accommodation to Ms Young should therefore have been input taxed.40

On balance, while either view is arguable, it is submitted that the view of the majority is to be preferred.

III. AN INTERESTING ISSUE ARISING OUT OF THE WORDING OF SUBDIVISION 40-C AND SECTION 195-1: CAN VACANT LAND BE ‘RESIDENTIAL PREMISES’ FOR GST PURPOSES?

An issue which arises from the case-law is whether vacant land without a building or other improvements can be ‘residential premises’ for GST purposes?

In Vidler v Federal Commissioner of Taxation,41 the taxpayer had sold two blocks of vacant land. The first block, in Gledson Street, was bought by the taxpayer in August 2004 for $1 million and sold in December 2004 for $2.35 million. The Gledson block was zoned residential low density, and was connected to the electricity supply — but not to the gas, water or sewerage, though connections to these services were available at the boundaries of the land.

The second block, in Gladstone Road, zoned mixed residential, was bought for $175 000 in May 2004 and sold in April 2005 for $285 000. This property had access available to electricity, water and sewerage, though these services were not actually connected.

The taxpayer argued that the blocks were input taxed under Subdivision 40-C as sales of residential premises, so that there was no GST imposed on the supply. However, the Commissioner disagreed and treated the sales as fully assessable.

In relation to the sale of residential premises, the provisions under Subdivision 40-C are similar to those applying to a lease, hire or licence, with some variations. Thus, a sale of the property is input taxed to the extent that it is ‘residential premises to be used predominantly for residential accommodation, regardless of the term of occupation’: s 40-65(1).

37 South Steyne 2009 ATC 20-145, 10,333 (Finn J), 10,338–9 (Emmett J).
38 Ibid 10,339.
39 Ibid 20,352 (Edmonds J dissenting); see also 10,353 (Edmonds J disagreeing on the interpretation of cl 4(1)(b) of the agreement under which MML was required to allow Mirvac Hotels to have the benefit of any right of MML under the apartment leases to allow Mirvac Hotels to carry out the relevant duties and responsibilities).
40 Ibid 10,353.
41 2009 AITC 20-149 (at first instance); 2010 AITC 20-186 (Full Federal Court).
However, under s 40-65(2), the sale is not input taxed to the extent that the residential premises are commercial residential premises, or ‘new residential premises’ other than those used for residential accommodation (regardless of the term of occupation) before 2 December 1998.42

‘New residential premises’ are defined in s 40-75(1)(a)–(c) as those which:

(a) have not previously been sold as residential premises (other than commercial residential premises) and have not previously been the subject of a long-term lease; or

(b) have been created through substantial renovations of a building; or

(c) have been built, or contain a building that has been built, to replace demolished premises on the same land.43

Applying the definition of ‘residential premises’ in s 195-1, Stone J at first instance in Vidler held that:

(i) the test in s 195-1(a) was not satisfied, because neither of the vacant blocks was actually ‘occupied’ as residential premises at the relevant time — this was conceded by the taxpayer; and

(ii) the issue therefore was whether either block was ‘premises’44 which were ‘intended … and capable of being occupied as a residence or for residential accommodation’ (s 195-1(b)).45

Stone J observed that the difference between the tests in sub-para (a) and (b) of the definition
does not relate to capacity but only to whether the land (having that capacity) is actually being used (occupied) for the nominated purpose. The fact of actual use in sub-para (a) obviates any need to refer to capacity. The reference in sub-para (b) to being ‘intended to be occupied’ is an additional requirement and does not detract from the necessity for the land to be capable of being occupied.46

Stone J was of the view that the definition refers to actual or intended physical occupation,47 and that in order to be ‘capable’ of being ‘residential’ premises property must provide — at the time of characterisation48 — some ‘element of shelter and basic living facilities such as are provided by a bedroom and bathroom’.49 Stone J stressed that her references to facilities such as a bedroom and bathroom were examples only, and it ‘may be’ that shelter and basic living facilities could exist without either of these,50 although, her Honour did not provide any examples of other elements which might satisfy this requirement.

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42 Section 40-70 makes similar provision for supplies of residential premises by way of long-term lease.
43 However, premises are not ‘new residential premises’ if, for the period of at least five years since the times specified in s 40-75(2)(a)–(c), they have only been used for making supplies which are input taxed as a supply of residential premises under s 40-35(1)(a): see above.
44 Though the term ‘premises’ is not defined in the GST Act: see above n 14.
45 The definition goes on to state that this applies: ‘(regardless of the term of the occupation or intended occupation) and includes a floating home’.
46 Vidler 2009 ATC 20-149, 10,460.
48 Stone J held that the key date for characterisation was when the taxpayer acquired the respective blocks, because s 195-1(b) is ‘focused on the capacity for land to be used at the relevant time, not on the potential for land to be developed to have that capacity’ — for example, the potential for the land to be developed at some future date into residential premises through the erection of a building providing shelter or other facilities (ibid, 10,459-60). The Full Federal Court endorsed this approach: 2010 ATC 20-186, [32]
49 Ibid 10,459. Her Honour commented that her formulation of this requirement had been approved by the Full Federal Court in South Steyne 2009 ATC 20-145, 10,337, 10,460 (the Full Federal Court on appeal in Vidler agreed: [2010] FCEFC 59; 2010 ATC 20-186 (Sundberg, Bennett and Nicholls JJ), [26]-[27].
50 Vidler 2009 ATC 20-149, 10,459; see above n 37.
On appeal, the Full Federal Court agreed with Stone J’s decision but was more definite, commenting that:

… ‘residence’ connotes a dwelling … namely a dwelling, abode or house in which a person may reside … [and] the expression ‘residential accommodation’, added by the post-Marana amendments … connotes ‘lodging, sleeping or overnight accommodation’

… the word ‘occupied’ in the phrase ‘capable of being occupied’ connotes living within or inhabiting a structure...

Stone J had also rejected the taxpayer’s arguments that:

• ‘occupied’ in this context referred to the legal right to possession or occupation, so that (the taxpayer argued) vacant land could be ‘residential premises’ for GST purposes provided it was able to be connected to water and sewerage facilities, and

• the wording of the Explanatory Memorandum to the GST amending Act indicated that residential zoning was sufficient in itself to establish the land as ‘residential accommodation’ for GST purposes.

Stone J held that while residential zoning may be necessary for premises to be residential accommodation under the GST Act, residential zoning is not sufficient on its own to establish that status.

The Full Federal Court on appeal agreed with Stone J’s analysis, commenting in relation to water and sewerage facilities that even if the land were actually connected to these services:

… it would be absurd if the mere existence of a tap in the middle of an acre of vacant land transforms the land into ‘residential premises’ for the purposes of the GST Act.

The Full Court accordingly seemed to be of the view that vacant land on which there was no habitable ‘structure’ could not be ‘residential premises’ for GST purposes.

**IV. THE ATO VIEW: VACANT LAND CAN NEVER BE ‘RESIDENTIAL PREMISES’**

The ATO argued in Vidler that vacant land can never be ‘residential premises’ because it cannot provide essential ‘residential’ elements such as accommodation and sleeping quarters.

However, ‘residential premises’ is defined in s 195-1 to mean ‘land or a building’ that satisfies certain requirements. This might be seen as contemplating that, in appropriate circumstances, either land alone ‘or’ a building may each in themselves constitute residential premises for GST purposes. Certainly, it would have been easy enough for the definition to refer only to a ‘building’ (excluding the reference to ‘land’ altogether) or to refer expressly to ‘land on which there is a building standing’, and thus remove all doubt.

Not surprisingly, therefore, on appeal in Vidler, the taxpayer argued that the statutory definition (and the Explanatory Memorandum to the amending legislation) indicated that vacant land could satisfy the definition of ‘residential premises’ where — as in Vidler — it was or could be connected to water, power and/or sewerage facilities.

In Vidler, Stone J had held that even if the taxpayer was correct in arguing that the word ‘land’ should not be limited to land on which there is a building, ‘it is still necessary … for the land to meet the requirements of the definition, in this case, the criteria in sub-para (b)’ [of being capable of being occupied as a residence or for residential accommodation].

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51 ‘Each of the English cases this [post-Marana] amendment was designed to pick up involved premises in which lodging, sleeping or overnight accommodation took place — a study bedroom at a residential college, a building to accommodate students for short term courses and “living accommodation”: 2010 ATC 20-186, paras 28,30.

52 2010 ATC 20-186, [28] (Full Federal Court – Sundberg Bennett, Nichols JJ).

53 Vidler 2009 ATC 20-149, 10,459.

54 Ibid, paras 30-31.

55 Ibid, [37]

56 2009 ATC 20-149, 10,458.

land did not provide any relevant facilities, in her Honour’s view it did not satisfy the sub-para 195-1 (b) requirement.

On appeal, the Full Federal Court dismissed the taxpayer’s argument summarily, commenting that:

…The definition is not concerned with ‘land’ in the abstract, but with ‘land that is capable of being occupied as a residence or for residential accommodation’. Thus the meaning of ‘land’, which in the abstract or in other contexts will include vacant land, may be modified by its context. For the reasons already given, vacant land is not land that is capable of being occupied as a residence or for residential accommodation... and

... It is ... quite artificial to speak of someone ‘occupying’ vacant land ‘as a residence or for residential accommodation'.

While the Full Court’s approach suggested that it would favour a view that vacant land is inherently not capable of being ‘occupied as a residence or for residential accommodation’, its decision was (as always) limited by the facts it was considering. Thus, while situations where vacant land might be characterised realistically as ‘residential premises’ may not come easily to mind, the Courts in Vidler did not appear to consider a situation where a person had installed a caravan onto a block and used it at the relevant time as a home, erected a tent and lived in it, or slept there regularly in a sleeping bag.

It is significant that, while Stone J at first instance in Vidler expressed the view that she found it difficult to conceive of situations where vacant land could constitute ‘residential premises’, her Honour declined to rule that vacant land could never be residential premises.

It is respectfully submitted that, in light of the definition in s 195-1, Stone J’s approach of leaving the issue open is the preferable one.

V. WHEN CAN IT BE SAID THAT PROPERTY IS ‘TO BE USED’ PREDOMINANTLY FOR ‘RESIDENTIAL OCCUPATION’ UNDER SECTIONS 40-65(1) AND 40-70(1)?

In Sunchen, the taxpayer was a property developer who had purchased a single-level property in September 2006 for $525 000. At the time of purchase, the property had development approval for the construction of a five-storey block of units. However, by the time of the Administrative Appeals Tribunal (‘AAT’) hearing some two years after its acquisition, the taxpayer had not taken any steps to develop it. The property was leased to residential tenants and the taxpayer had not obtained a construction certificate, entered into a building contract, or sought development finance.

The taxpayer claimed input tax credits of $47,727, arguing that at the time of purchase, it had the intention of developing the property for sale in the future and that this intention should be the sole criterion in determining the eligibility for input tax credits. It argued that the court should exclude any consideration of actions (or inaction) after the acquisition of the property.

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58 2010 ATC 20-186, [34], [31] — the Full Court also held that the taxpayer had misinterpreted the Explanatory Memorandum: ibid, [35]-[37]. In NSD 1480/2009, the ATO expressed the view that the Full Court decision in Vidler “confirms the Commissioner’s view, as expressed in GST Ruling 2000/20 [para 25] … that vacant land of itself can never have sufficient physical characteristics to mark it out as being able to be, or intended to be, occupied as a residence or for residential accommodation”. Compare GST Ruling

59 2010 ATC 20-186, [31].

60 2010 ATC 20-186, [31], [34].

61 In Vidler at first instance, 2009 ATC 20-149, Stone J indicated that ‘it is difficult for me to envisage a scenario in which [the characterisation of vacant land as “residential premises”] would be feasible’: at 10,460.

62 A further issue may be whether the occupation of land or a building must be legal — what of the situation where squatters occupy premises?

63 Ibid.

64 2010 ATC 20-161.
In the Federal Court, Perram J held:

1. The key issue in the Sunchen case was whether or not the premises satisfied the definition under s 40-65(1) of ‘residential premises to be used predominantly for residential accommodation’, in which case the premises would be input taxed.

2. The ‘somewhat obscure language’ of s 40-65(1) made the link between the entitlement to an input tax credit and the concept of ‘premises to be used predominantly for residential accommodation’ rather ‘less than obvious’.

3. The concept of ‘residential premises’ is different to most other goods and services, in that the same premises may have the quality of residential accommodation at one time but subsequently lose it (or vice versa). For example, a private home might be sold to a doctor for use as a surgery (or vice versa) and thus change its character.

4. In applying the s 40-65(1) definition, Perram J noted that in his view, the phrase ‘to be used’ in the definition is ‘not a verb in its infinitive form with an unarticulated subject’ but one which ‘uninstructed by authority’ would suggest an objective test of purpose directing attention to the ‘objective circumstances of the premises and the use which can be divined therefrom’.

His Honour doubted the correctness of the decision of White J in Toyama Pty Limited v Landmark Building and Developments Pty Ltd in which White J had held, in relation to predicting the future use of property, that ‘the most important factor in such a prediction is the intention of the future owner or lessee’. Perram J regarded this view as being ‘grammatically unsound’, because the phrase ‘to be used’ connotes the ‘present objectively determined fitness for use not likely future use’.

Perram J also considered the Federal Court decision in Marana where, on differently worded legislation (which used the phase ‘intended to be used as a residence’), the Federal Court applied an objective test.

Perram J then observed that:

There is great force in the notion that the kinds of questions generated by s 40-65 … about residential accommodation should be considered by reference only to the premises themselves and what their apparent purpose and use is. Once one moves away from what the premises are at the time of supply to what they will be, questions emerge which cannot readily be answered by reference to any part of the text of s 40-65. For example, how far into the future is the prediction required? … what happens if there is no information at all about the likely future use of the premises?

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65 Ibid 10,627.
66 Ibid 10,626.
67 Ibid 10,627: the example given by Perram J.
68 Ibid 10,628. Perram J noted that “[t]o say that food is to be eaten is to say nothing about the eater and is purely a description of the purpose which the food has …”
70 Sunchen 2010 ATC 20-161, 10,629.
72 Toyama (2006) 197 FLR 74, 92, quoted in Sunchen 2010 ATC 20-161, 10,627. White J went on to say in the same paragraph that in the case of a lease, the question of how the property is to be used in the future will usually be determined by the terms of the lease. In the case of a sale, the likely future use of the property will probably depend on the purchaser’s intentions, to be assessed having regard to objective circumstances such as the physical condition of the premises, the zoning or any restrictive covenants.
73 Sunchen 2010 ATC 20-161, 10,629.
74 2004 ATC 5063.
… [Moreover] the person who bears the tax liability is the vendor as supplier [and it] is a curious result indeed that leaves the liability of the vendor as a function of the intention of the purchaser.  

Accordingly, Perram J indicated that he disagreed with the subjective intention test applied by White J in Toyama and preferred an objective test, commenting that his preferred approach was ‘consistent with … but not required by’ the decision in Marana.

On the issue of whether he should follow his own preferred approach and apply an objective test of ‘to be used’, or apply the subjective test as applied in Toyama, Perram J noted:

- the well-established principle that he should depart from the test in Toyama (as a decision of a court of equal standing) only if he was of the view that the decision was ‘clearly’ or ‘plainly wrong’; and
- the requirement that a finding that a decision is ‘clearly wrong’ is not lightly to be adopted …’

His Honour indicated that on the facts of Sunchen ‘as with most difficult questions of statutory interpretation it [was] difficult to be dogmatic’ about this conclusion. However, Perram J held, on balance, that while he did not agree with White J’s test, he was ‘by no means’ persuaded that it was clearly wrong. Accordingly, he applied the approach in Toyama and concluded that s 40-65(1) requires ‘a prediction as to future use [in which] intention is a significant element’.

With all respect, Perram J made a convincing case for departing from the test in Toyama and it is perhaps unfortunate that he did not carry through and apply the objective test which he preferred — this might have invited clarification of the issues by the Full Federal Court or High Court.

5. His Honour also held that, in applying the test of purpose in the definition of ‘residential premises’, it is legitimate to look at what the taxpayer had done (or not done) after acquiring the property in order to test whether the taxpayer in fact had the intention claimed. Here, the taxpayer had taken no discernable subsequent action at all towards developing the property, so that it was reasonable to conclude that the premises were ‘intended’ to be used as residential premises.

Applying these principles, Perram J held that the AAT had made no error of law in applying the Toyama test, and there was no basis for disturbing its finding that on the facts. It was likely — as at the date of acquisition — that the premises would continue to be used predominantly for residential accommodation.

As the definition of ‘residential premises’ was satisfied, the premises were input taxed under s 40-65 and no input tax credits were allowable.

75 Sunchen 2010 ATC 20-161, 10,629.
76 Ibid.
77 Ibid 10,628; although his Honour could not resist an obiter grammatical correction of the Federal Court in Marana 2004 ATC 5063.
78 Sunchen 2010 ATC 20-161, 10,629.
80 Sunchen 2010 ATC 20-161, 10,629.
81 Ibid.
82 Ibid 10,630.
VI. A Summary of Propositions Established by the Case-Law in Relation to ‘Residential Premises’ for GST Purposes

Bringing together the effect of the decisions considered above, the following propositions can be identified:

1. Purchase of a reversionary interest in leased property is not a new ‘supply’ merely because it involves the continuation of the leases.83

   In determining whether premises are commercial residential premises because they are ‘similar’ to a hotel or motel, etc, a holistic test is to be applied: the premises must be similar to a hotel, etc, as a whole.84

2. In determining whether a person is acting as a principal or agent for the purposes of s 40-35(1)(a), a realistic approach is to be taken, emphasising substance rather than form.85 However, the strong dissent on this point by Edmonds J in South Steyne indicates that opinions on a given set of facts may vary.

3. In order for particular ‘premises’ (a term which is not defined in the legislation) to be ‘residential premises’ for the purpose of Division 40, the premises must be capable of being occupied as a residence and must provide some element of shelter and basic living facilities at the time the premises were acquired — future potential to satisfy these requirements is not sufficient.86 Bedroom and bathroom facilities are examples of such facilities, but there may be other examples which would satisfy the legislative requirements.87 Zoning of premises as ‘residential’ is not conclusive.88

4. Vacant land will only in rare circumstances — if ever — be capable of being occupied as ‘residential premises’, because in the Federal Court’s view vacant land does not (ordinarily) provide the shelter or basic living facilities required by the concept of ‘residential’ premises.

   However, the question of whether or not vacant land can ever be residential premises, and, if so, the circumstances where it would satisfy these requirements have (technically) not been finally determined,89 though the Full Court’s approach suggested that it would be very difficult to convince those judges that vacant land satisfied the definition of ‘residential premises’, though the Court did not appear to consider the situation where a caravan, for example, was used on the land as a home.

5. In determining whether property is or is intended to be ‘occupied as a residence or for residential accommodation’ within the meaning of s 195-1(a), (b), the issue relates to actual or physical occupation, not the legal right to occupy.90

6. The applicability of the subjective purpose test applied in Toyama91 to determine whether premises are ‘to be used’ as ‘residential premises’ was seriously doubted by Perram J in Sunchen.92 Nevertheless, his Honour did not feel that the Toyama approach was so clearly wrong that he was justified in departing from it to apply the objective test which he preferred. It is respectfully suggested that Perram J made a convincing if unusual case for the view that the Toyama approach was incorrect, and could well have applied the objective test he preferred.

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83 South Steyne 2009 ATC 20-145.
84 Ibid.
85 Ibid.
86 Vidler 2009 ATC 20-149; South Steyne 2009 ATC 20-145.
87 Vidler 2009 ATC 20-149.
88 Ibid.
89 Vidler 2009 ATC 20-149.
90 Ibid.
92 2010 ATC 20-161.
7. In determining how property is ‘to be used’ for s 40-65(1) purposes, it is legitimate to look at what subsequent steps the taxpayer has taken in relation to the property, in order to test whether the intention claimed by the taxpayer in relation to the property did actually exist.

VII. CONCLUSION

As noted at the outset, the provisions dealing with the various aspects of potential GST liability for ‘residential premises’ create a complex and difficult landscape in which the correct answer is not always self-evident.

However, the developing case law in this area is beginning to create a ‘map’ through the wilderness and bringing a little clarity to (some of) the difficult issues thrown up by the provisions — for example, establishing that that the purchase of a reversionary interest in leased property is not a new ‘supply’.

Nevertheless, some issues have been clouded by the decisions (for example, the correct test of ‘intended usage’ in s 40-65), while many issues remain unresolved, including:

• the boundaries of the concepts of ‘new’ and ‘commercial’ residential premises;
• when a supply of accommodation in commercial residential premises will be provided ‘by the entity that … controls’ those premises; and
• technically at least — whether vacant land can ever be ‘used as a residence or for residential accommodation’, though the Full Court in Vidler .seemed very sceptical.

Hopefully, these and other conundrums will be clarified by future decisions. In the meantime, academics and practitioners will continue to examine the entrails of court decisions in order in the attempt to discern a coherent and principled approach to the interpretation of Division 40 and related provisions.

Hopefully, the analysis in this article will provide some assistance in this task.