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ARTICLES

CONTROLLED OPERATIONS, CONTROLLED ACTIVITIES AND ENTRAPMENT

*Eric Colvin**

This article explores the boundaries between, on the one hand, controlled operations and activities under Chapter 5 of the Police Powers and Responsibilities Act 2000 (Qld) and, on the other hand, entrapment of a kind liable to lead to the exclusion of evidence. 'Entrapment' involves improper facilitation or inducement of an offence for the purpose of obtaining evidence for its prosecution. Chapter 5 was designed primarily to authorise participation in otherwise unlawful activities during covert investigations, and thereby to avoid evidence being excluded on the ground that the offence committed to obtain evidence was disproportionate to the offence to be prosecuted. It is, however, still possible for evidence to be excluded because an improper mode of facilitation or inducement was used or because the target of the investigation was selected in an improper way. The article examines the scope for either of these other forms of entrapment to occur following the enactment of Chapter 5.

Chapter 5 of the Police *Powers and Responsibilities Act 2000* (Qld) (hereafter, the 'PPRA') is entitled 'Controlled Operations and Controlled Activities'. It establishes a scheme for authorising law enforcement officers and, in some instances, their agents to engage in what would otherwise be unlawful conduct during investigations of serious offences. It also permits officers engaged in controlled operations or activities to go beyond what has been authorised where this becomes reasonably necessary for certain prescribed purposes. The scheme is directed to covert investigations, during which operatives participate in offences for the purpose of obtaining evidence against other participants. The scheme extends to officers of the Crime and Misconduct Commission (hereafter, the CMC) as well as to police officers. The term 'controlled' refers to operations and activities which are authorised under the Act.[1] 'Controlled operations' can extend over a period of time and involve various activities whereas 'controlled activities' involve just single meetings.[2]

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1 See the definitions in Schedule 4 to the PPRA.

2 The terms 'operation' and 'activity' are not specifically defined in the PPRA. Sections 190-191, dealing with the authorisation of controlled activities, refer only to single meetings. Section 173(5)(f), dealing with the authorisation of controlled operations, refers to 'general classes of otherwise unlawful activities'.

Some other Australian jurisdictions have similar legislation.[3] These legislative schemes were introduced in response to the 1995 decision of the High Court of Australia in *Ridgeway v The Queen*.[4] The effect of the *Ridgeway* decision was that all evidence of the commission of an offence is liable to be excluded if that offence was the product of entrapment by law enforcement officers or agents.[5] Exclusion is not mandatory but may occur through the exercise of the 'policy' discretion, that is, the judicial discretion to exclude unlawfully or improperly obtained evidence on grounds of public policy. In *Ridgeway* itself, officers had arranged for narcotics to be unlawfully imported for the purpose of prosecuting a suspected trafficker for subsequent possession of those narcotics. The High Court held that the seriousness of the offence committed by the officers justified the exclusion of all evidence of the offence of possession. In response to this decision, several jurisdictions enacted schemes to authorise participation in otherwise unlawful activity for investigative purposes and thereby to remove one possible argument for excluding evidence obtained in this way. Section 194 of the PPRA expressly provides:

> It is declared that evidence gathered because of a controlled operation or controlled activity is not inadmissible only because it was obtained by a person while engaging in an unlawful act if the unlawful act was authorised under this chapter.

The purpose of this article is to explore the boundaries between, on the one hand, controlled operations and activities and, on the other hand, entrapment of a kind liable to lead to the exclusion of evidence. Chapter 5 of the PPRA lays down stringent conditions for controlled operations and activities. The conduct of a covert operative may be improper despite being part of a controlled operation or activity if the authorisation breached the conditions of the Act. Furthermore, the conduct of a covert operative may be unlawful if it exceeded the terms of the authorisation in a way unrecognised by the Act. Quite apart from the terms of the Act, evidence is still liable to be excluded if it was obtained in an improper way. The concept of entrapment is analysed in the next part of the article, before the structure of Chapter 5 of the PPRA is examined.

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3 See *Crimes Act 1914* (Cth) ss 15G-15X; *Criminal Law (Undercover Operations) Act 1995* (SA); *Law Enforcement (Controlled Operations) Act 1997* (NSW).

4 (1995) 184 CLR 19.

5 See especially the judgments of Mason CJ, Deane and Dawson JJ and of Brennan J. Toohey J agreed with the exclusion of the evidence in that case but disagreed that it could be described as a matter of entrapment. Gaudron J and McHugh J viewed entrapment as a ground for a stay of proceedings rather than the exclusion of evidence.

Entrapment defined

'Entrapment' is usually used as a pejorative term, referring to actions which are improper. There are some acceptable ways in which offences may be facilitated or induced in order to gain evidence for their prosecution. For example, a covert operative may offer to purchase a product or service from someone suspected of breaching the terms of a licence or may offer a bribe to an official suspected of corruption. Depending on the circumstances, such investigative practices may involve what would technically be unlawful participation in the resulting offences under general principles of secondary liability. Yet, few people would criticise such investigative practices if there were a reasonable suspicion of criminal activity, if there were no other viable way of obtaining evidence for a prosecution, and if the operative was to do no more than provide an opportunity for the offence to occur under controlled circumstances. Where, however, evidence is sought by *improperly* facilitating or inducing the commission of offences, the term 'entrapment' may be used to describe what has happened.

The boundary between permissible and impermissible conduct in covert investigations can be conceived in either behavioural or normative terms. The traditional conception of entrapment has been 'behavioural', in the sense that what the operative does to facilitate or induce the offence to be prosecuted is taken to determine whether entrapment has occurred. Thus, it has often been said that entrapment requires conduct which goes beyond facilitating or providing an opportunity for an offence and instead amounts to instigating it or causing it to occur.[6] Commonly-given examples of more-active forms of inducement include pressuring someone to commit an offence by persistent importuning or by making threats. In some versions of this kind of test, the question asked is whether the offence would otherwise have been committed or whether the conduct of the operative was objectively likely to have induced commission of an offence that would not otherwise have been committed.[7]

The traditional, behavioural approach has diminished in favour for two reasons. The first concerns the exigencies of investigating some offences, including drugs offences.[8] Merely facilitating or providing opportunities may not be sufficient to generate the commission of these offences under controlled circumstances. Greater activity such as a display of enthusiasm or even persistent importuning may be expected before an approach to commit an offence is taken seriously and accepted as genuine. An operative may therefore need to engage in more active

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6 See, eg, *Amato v The Queen* [1982] 2 SCR 418, 446, adopted in *Ridgeway v The Queen* (1995) 184 CLR 19, Toohey J at [14].

7 See, eg, *R v Mack* [1988] 2 SCR 903, [120]; *Ridgeway v The Queen* (1995) 184 CLR 19, McHugh J at [18], [31].

8 See *R v Loosely* [2001] UKHL 53, [69], [102]. See also *Ridgeway v The Queen* (1995) 184 CLR 19, McHugh J at [32].

forms of inducement if there is to be any real chance of success. The second reason is that it is difficult to describe some cases, condemned as 'entrapment' by the courts, as involving the more-active forms of inducement. It is often said that entrapment can extend to providing an opportunity to commit an offence to a person who is not reasonably suspected of being ready to engage in that form of crime.[9] This practice can amount to random 'virtue-testing' and it might be objectionable even if there is no special inducement or pressure. In addition, the High Court of Australia in *Ridgeway* applied the label of entrapment to a case where objection was taken, neither to the manner of facilitation or inducement nor to the grounds for selecting the target for a covert operation, but rather to the relationship between the offence prosecuted and offence committed in order to obtain evidence for the prosecution. The accused in *Ridgeway* did not need to be given any special inducement or subjected to any special pressure because he was planning to deal in imported drugs before he came to official attention. Moreover, he was targeted for a covert operation because there were grounds to reasonably suspect him of preparing to engage in drugs offences. Nevertheless, the evidence of his offence was excluded. The crucial factor in the exclusion was that law enforcement officers had committed the legally primary offence, importing narcotics, in order to obtain evidence of a secondary offence, possession of those narcotics.[10]

The alternative, 'normative' conception of entrapment takes as its starting point the impropriety of the operative's conduct rather than its impact on the person under investigation. Instigating an offence or causing its commission is not the only form of misconduct which can occur in a covert operation. 'Entrapment' occurs whenever law enforcement officers, in facilitating or otherwise inducing offences for the purpose of prosecuting them, violate the law or otherwise depart from accepted standards for criminal investigation. This was how entrapment was conceived in the recent decision of the House of Lords in *R v Loosely*, where it was stressed that a multiplicity of factors needs to be taken into account.[11] Lord Hoffmann said: 'An examination of the authorities demonstrates, in my opinion, that one cannot isolate any single factor or devise any formula that will always produce the correct answer.'[12] Similarly, Gaudron J in *Ridgeway* said: "Entrapment' is not a term of art; nor is it a term with any precise meaning. It has been used to cover a variety of situations in which law enforcement agents resort to undercover activity.'[13]

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9 See, eg, *R v Mack* [1988] 2 SCR 903, [119]; *R v Loosely* [2001] UKHL 53, [56]-[65].

10 See Mason CJ, Deane and Dawson JJ at [34]-[36]; Brennan J at [15]-[16]. Toohey J at [29]-[30] also agreed that the evidence should be excluded for reasons similar to those of the majority but disagreed that the case could properly be described as one of entrapment.

11 [2001] UKHL 53, [25]-[29] (Lord Nicholls), [48]-[71](Lord Hoffman), [100]-[102] (Lord Hutton).

12 Ibid [48].

13 (1995) 184 CLR 19, [19].

There are three types of case to which the label 'entrapment' has been commonly applied in recent years.[14]

First, there are cases where an operative contributes in an improper way to the commission of the offence to be prosecuted. This is the type of case which gave rise to the traditional, behavioural conception of entrapment. In most such cases, the conduct of an operative goes beyond merely facilitating or providing an opportunity for criminal activity that could have occurred anyway and engages in more-active forms of inducement which either generate or objectively risk generating an offence that would not otherwise have occurred.[15] The conduct of an operative might, however, be improper even though it goes no further than facilitation or the provision of an opportunity. For example, it might involve the exploitation of either a relationship with the person who is entrapped or a particular vulnerability of that person.[16] In *Loosely*, it was suggested that, while it might be acceptable for a covert operative to provide an 'unexceptional' or 'ordinary' opportunity to commit an offence, anything more could amount to entrapment.[17] Similarly, McHugh J in *Ridgeway* observed that, to avoid the label of entrapment, the manner in which an offence was induced would have to be 'consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity'.[18]

Secondly, there are cases where the selection of a target for investigation is improper, even though no more is done than to facilitate or provide an opportunity for an offence. In the decision of the Supreme Court of Canada in *R v Mack*, the example was given of planting a wallet in a park in the hope of being able to catch someone stealing it.[19] Lamer CJ said that it is entrapment to provide 'an opportunity to persons to commit an offence without reasonable suspicion or acting *mala fides*'.[20] There are two main bases for reasonable suspicion that the person targeted would be prepared to commit the offence in any event. There may be information about the specific person targeted. Alternatively, there may be information about criminal activity in a particular location where the person is present.[21] Without a reasonable suspicion on some such foundation, law enforcement officers are engaged in random 'virtue-testing' rather than in offering

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14 These categories may not be exhaustive. In *R v Loosely* [2001] UKHL 53, [60], Lord Hoffman suggested that there may be entrapment where there is no proper supervision of undercover operatives who induce the commission of offences.

15 See, eg, *R v Mack* [1988] 2 SCR 903, [119]-[120]; *Ridgeway v The Queen* (1995) 184 CLR 19, Gaudron J at [19], [36], McHugh J at [18], [31].

16 See, eg, *R v Mack* [1988] 2 SCR 903, [126]; *R v Loosely* [2001] UKHL 53, [28].

17 *R v Loosely* [2001] UKHL 53, [23], [102].

18 (1995) 184 CLR 19, [32].

19 [1988] 2 SCR 903, [115].

20 Ibid [119]. See also *R v Loosely* [2001] UKHL 53, [24], [56]-[65].

21 See, eg, *R v Barnes* [1991] 1 SCR 449. See also *R v Loosely* [2001] UKHL 53, [65].

controlled opportunities for offenders to commit their offences. Moreover, even if the condition for reasonable suspicion is satisfied, it may still be improper to select a target for ulterior reasons, perhaps ideological or personal, unconnected with a *bona fide* investigation of criminal activity.[22]

In a third category of entrapment, the impropriety involves disproportionate unlawfulness between an offence committed in order to obtain evidence and the offence for which evidence is sought. The commission of an offence for investigative purposes cannot be justifiable if that offence is worse than the offence for which evidence is sought. This was the kind of impropriety faced by the High Court of Australia in *Ridgeway*,[23] where narcotics were unlawfully imported for the purpose of obtaining evidence of their subsequent possession. The target of the operation was actively seeking to import narcotics before the law enforcement officers intervened. Nevertheless, the case was labeled as 'entrapment' by a majority of the High Court.[24] Gaudron J sought to bring the case within the category of entrapment by improper mode of inducement, on the ground that the particular offence of possession (that is, an offence occurring at a particular time and place and concerning a particular quantity of narcotics) would not have been committed without law enforcement officers supplying the narcotics.[25] The officers therefore technically procured the offence of possession. Yet, it would be misleading to say that their actions induced or risked inducing the commission of an offence that would not otherwise have been committed. Indeed, several judges observed that admitting the evidence would not have been unfair to the accused.[26] The notion of an offence that would not otherwise have been committed is best understood as meaning an offence *of a kind* that would not otherwise have been committed. For that reason, it seems preferable to treat cases like *Ridgeway* as constituting a separate category of entrapment.

Impropriety and unlawfulness are separate but related issues. The mere provision of an opportunity to commit an offence does not constitute unlawful participation in that offence. Yet, under some special circumstances, it can be improper. Unlawfulness is therefore not a necessary condition for entrapment. Furthermore, there has traditionally been some tolerance of unlawful participation in offences for investigative purposes. Unlawfulness is therefore not a sufficient condition for entrapment. Entrapment does, however, usually involve conduct which is unlawful as well as improper. Moreover, the unlawfulness of

22 See *R v Mack* [1988] 2 SCR 903, [114].

23 *Ridgeway v The Queen* (1995) 184 CLR 19.

24 Toohey J at [15] held that there was no entrapment because the law enforcement officers had not instigated the offence. He nevertheless held that there was an abuse of process. This was also how a 'reverse sting' operation was characterised in *R v Campbell and Shirose* [1999] 1 SCR 565, [22], where it was said that there was no plausible case for entrapment.

25 (1995) 184 CLR 19, [42].

26 Ibid Mason CJ, Deane and Dawson JJ at [33]; Brennan J at [14]; Toohey J at [29].

some conduct by law enforcement officials or agents may provide a reason for regarding it as improper. Arguments that unlawful participation should not be tolerated may be particularly strong now that the PPRA provides for otherwise unlawful conduct to be authorised.

The provisions of the PPRA dealing with controlled operations and activities were designed to deal primarily with the third type of entrapment. Evidence obtained through an authorised operation or activity cannot now be excluded on the ground that a disproportionate offence was committed. There still remains, however, the possibility of exclusion on some other ground of impropriety. The PPRA has not eliminated the other grounds. Moreover, by establishing a scheme for otherwise unlawful activity to be authorised, the PPRA has shaped the law on what constitutes improper facilitation or inducement and improper selection of a target for investigation.

The next part of this article will examine the conditions for activities to become lawful under the Act. Subsequent parts will examine the remaining potential for entrapment to occur in Queensland.

Controlled operations and activities

Under Chapter 5 of the PPRA, two types of activity are exempted from criminal liability. First, there are activities falling within the specific terms of an authorisation for a controlled operation or activity.[27] With respect to controlled operations, s 179 of the PPRA declares that it is lawful for a covert operative to engage in the otherwise unlawful activity described in the approval of the operation. In addition, s 193(4) affirms that there is no criminal liability for acts or omissions which are in accordance with 'an approval given for a controlled operation' or 'an authority given for a controlled activity; and an entity's policy about controlled activities'. Secondly, s 193(5) exempts an operative who is a police or CMC officer from liability for certain other activities which, during the course of a controlled operation or activity, become reasonably necessary either to take advantage of an opportunity to gather evidence of additional criminal activity or to protect the safety of any person or the identity of an operative. Effectively, such additional activities are treated as impliedly authorised. The exemption does not, however, extend to causing serious harm to persons or property or to encouraging or inducing criminal activity of a kind that otherwise could not reasonably be expected to occur. [28] Nor does it extend to operatives who are not police or CMC officers.

The PPRA regulates these activities in several ways: (1) by prescribing the purposes for which controlled operations and activities may be undertaken and for

27 PPRA s 193(4).
28 PPRA s 193(6).

which an operative may engage in otherwise unlawful activities; (2) by prescribing who may engage in such activities; (3) by prescribing how authorisation is to be given; (4) by prescribing what may be authorised and what else may be done. The regulatory scheme is generally tighter for controlled operations than for controlled activities. This is because, whereas a controlled activity merely involves a single meeting, a controlled operation may well involve more active conduct and the commission of what would otherwise be a series of offences.

Section 164 of the PPRA provides that the regulatory scheme does not apply in two instances: (1) 'the investigation of minor matters or investigative activities that, by their nature, can not be planned but involve the participation of police officers in activities that may be unlawful'. This is an obscure provision. The reference to unplannable activities in the second part suggests that, if they were viewed as acceptable before the enactment of Chapter 5, they will continue to be acceptable even though unauthorised. The exclusion is, however, confined to activities which are unplannable 'by their nature'. What is covered by this expression is unclear. It might be intended to cover cases where there is an unanticipated opportunity to investigate an offence and no time to get authorisation. In such cases, however, the investigative activities would be unplannable because of their context rather than their nature. Similarly, the significance of excluding 'the investigation of minor matters' is unclear. On its face, it suggests that it is never acceptable to engage in unlawful activity when investigating minor offences. This seems sensible. It would be odd, however, to juxtapose such a prohibition with an endorsement of the acceptability of some unplannable unlawful activity. The structure of the provision would make more sense if the reference to 'minor matters' were to mean that authorisation need not be obtained for engaging in unlawful activity during their investigation. It is, however, difficult to see why unauthorised action should be permitted in this context. The need for authorisation arises from the character of the investigative activity rather than from the character of the offence to be investigated. The character of an offence may be relevant in deciding whether an activity should be authorised, but it is major not minor offences which are more likely to justify an authorisation.

The purpose of a controlled activity must be to obtain evidence of the commission of an offence and the activity must be reasonably necessary for this purpose.[29] For a controlled operation, the purpose must be to gather evidence of serious criminal activity or official misconduct and the operation must represent 'an effective use of public resources'.[30] More precisely, the purpose of a controlled operation must be to investigate an offence falling into one of three categories:[31] 'serious indictable

29 PPRA s 190.
30 PPRA s 177(3)(b)-(c).
31 PPRA ss 163, 165, 177(3)(b).

offences',[32] 'misconduct offences',[33] or 'organised crime'. [34] These categories cover most serious offences against persons or property, serious drugs offences, official misconduct, and offences related to prostitution or SP bookmaking (which have historically been connected with police corruption). The same restrictions on categories of offences apply in the event that an operative goes beyond the scope of an authorised operation or activity in order to investigate additional criminal activity.[35] In addition, as was noted earlier, an operative can go beyond what was authorised not only for investigative purposes but also in order to protect the safety of any person or the identity of an operative.

The scheme for authorising controlled activities permits only the use of police or CMC officers as covert operatives.[36] In contrast, the scheme for controlled operations permits the use of other persons. It must, however, be 'wholly impractical in the circumstances' for a police or CMC officer to perform the role of the covert operative.[37] In addition, an operative who is not a police or CMC officer is exempt from liability only when acting within the terms of the authorisation; such a person cannot take advantage of the protection for additional activities conferred by s 193(5). There are also, as will be described below, special requirements for the drafting of an authorisation for someone who is not a police or CMC officer.[38] Whoever is to be the operative, that person must have received 'appropriate training for the purpose'. [39]

Separate procedures are prescribed for authorising activities and operations. The procedure for activities is relatively simple. Authorisation for them can be given by police officers of at least the rank of inspector or by the chairperson or an assistant commissioner of the CMC, in accordance with any policy of the relevant

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32 'Serious indictable offence' is defined in Schedule 4 of the PPRA as an offence involving any of: '(a) serious risk to, or actual loss of, a person's life; (b) serious risk of, or actual, serious injury to a person; (c) serious damage to property in circumstances endangering the safety of any person; (d) serious fraud; (e) serious loss of revenue to the State; (f) official corruption; (g) serious theft; (h) money laundering; (i) conduct relating to prostitution or SP bookmaking; (j) child abuse, including child pornography; (k) an offence against the *Drugs Misuse Act 1986* punishable by at least 20 years imprisonment'.

33 'Misconduct offence' is defined in Schedule 4 of the PPRA as an offence of official misconduct under the *Crime and Misconduct Act 2001* or the *Police Service Administration Act 1990*.

34 The category appears to cover no ground that is not already covered by 'serious indictable offence'. 'Organised crime' is defined in Schedule 4 of the PPRA as 'an ongoing criminal enterprise to commit serious indictable offences in a systematic way involving a number of people and substantial planning and organisation'.

35 See text to n 27.

36 PPRA ss 190-191.

37 PPRA s 177(3)(d).

38 See text to n 45.

39 PPRA s 177(3)(c).

agency.[40] For operations, there is a more elaborate scheme involving a two-tiered structure of control. Authorisation can be given by an 'approving officer'. For the police service, this means the commissioner, a deputy commissioner or an assistant commissioner responsible for crime operations; for the CMC, it means the chairperson or an assistant commissioner.[41] Unless there are urgent circumstances, however, approval can ordinarily only be given on the recommendation of a 'controlled operations committee' chaired by a retired Supreme Court judge.[42] Where there are urgent circumstances, an approving officer can act without a recommendation but must afterwards refer the application for approval to the committee for non-binding advice.[43] An application for the approval of a controlled operation must be written and must include enough information for it to be properly considered.[44] The particulars must include a description of the criminal activity to be investigated, the name of each covert operative, and a description of the otherwise unlawful activity in which the operative will engage: for an operative who is a police or CMC officer, this description can refer to 'general classes' of activities but, for other operatives, the description must be 'precise'.[45] An approval must also be written and must include the same information as well as a statement of the period for which the approval has effect.[46] The approval may subsequently be varied with respect to the time period, the particulars of a covert operative and the criminal activity to be investigated, but not with respect to description of the activity in which an operative will be engaged.[47] If approval is wanted for additional activities, a new application must be made.

For present purposes the most important prescriptions pertain to what may be authorised and what else may lawfully be done. There are two sets of prohibitions. One relates to the commission of harm to persons or property. A controlled operation must not be approved if it is 'probable' that it will cause injury or death to a person or serious damage to or loss of property.[48] Similarly, an operative going beyond the terms of an authorisation must not actually cause

40 PPRA ss 190-191.

41 PPRA s 173(2). Where, however, the CMC is investigating a police officer, only the chairperson may approve the operation: PPRA s 173(3).

42 PPRA ss 172(1), 174(1), 177(1), (3). The chairperson of the CMC can act following informal consultation and agreement rather than a formal recommendation: PPRA s 175(2).

43 PPRA s 176. See also PPRA s 175(3), permitting the chairperson of the CMC to seek the informal advice of certain members of the committee rather than the committee as a whole.

44 PPRA s 173(4).

45 PPRA s 173(5).

46 PPRA s 178(1). There is, however, a procedure for concealing the actual identity of a covert operative: see PPRA ss 178(2), 186-189.

47 PPRA ss 180-185.

48 PPRA s 177(2)(a)-(c).

such harm.[49] The other relates to the undesirability of manufacturing offences. A controlled operation must not be approved if it is 'probable' that, because of the way it is to be conducted, 'someone could be encouraged or induced by a covert operative to engage in criminal activity of a kind the person could not reasonably be expected to have engaged in if not encouraged or induced by the covert operative to engage in it'.[50] Similarly, an operative going beyond the terms of an authorisation is not exempted from liability for conduct that actually results in someone being encouraged or induced to engage in criminal activity of a kind that otherwise could not reasonably have been expected.[51] The prohibitions respecting conduct exceeding what has been authorised apply to controlled activities as well as controlled operations. Curiously, they are not expressly made applicable to approvals for controlled activities. The view might have been taken that they are implicit in the restriction of a controlled activity to a 'single meeting'.[52] Yet, a single meeting could conceivably be conducted in a way which risks encouraging or inducing an offence of a kind that would otherwise not have occurred.

The PPRA does not explicitly address the position of an operative who acts under an improperly granted authorisation. In principle, the operative should be able to rely on an authorisation that is not defective on its face.[53] The prescriptions governing authorisations would then be directory rather than mandatory, in the sense that failure to comply with them should not affect the validity of an authorisation. Yet, even if this interpretation is correct, the issue of the authorisation would still be improper. Furthermore, it could be viewed as improper for an operative to engage in otherwise unlawful activity under an improperly granted authorisation. An argument to this effect would be particularly strong if the prohibitions on authorising certain types of operation have been breached. Thus, even if the conduct of an operative has been authorised, it may still amount to entrapment if it was probable at the time of the authorisation that that conduct could encourage or induce criminal activity that could not otherwise have been reasonably expected.

The prohibitions on what may be authorised in a controlled operation are framed in terms of objective risks attaching to the way the operation is to be conducted. Thus, if the way of conducting an operation will probably cause injury or death to a person or serious damage to or loss of property, the operation must not be approved. If approval is given despite these risks being present, the operation is

49 PPRA s 193(6)(a)-(c).
50 PPRA s 177(2)(d).
51 PPRA s 193(6)(d).
52 PPRA ss 190-191.
53 A difficulty for this interpretation is presented by the wording of the exemption from criminal liability for controlled activities, since one of the stated conditions for the exemption is that the authorisation complies with the entity's policy about controlled activities. An operative might be unaware of a relevant policy. The denial of an exemption in this instance might be viewed as an anomaly caused by legislative error.

improper even though none of the risks materialise. Moreover, if the way of conducting an operation makes it probable that someone could be encouraged or induced to commit a kind of offence that otherwise could not reasonably be expected to occur, it is immaterial that the target happens to be predisposed to commit such an offence. The target's predisposition is not part of 'the way the proposed operation is to be conducted'.[54] The position differs, however, where an operative exceeds the terms of an authorisation for investigative or protective purposes. The operative's conduct is unlawful if it actually causes injury or death to a person or serious damage to or loss of property but not if it merely risks these outcomes. Moreover, although an operative must not encourage or induce the commission of an offence that otherwise could not reasonably have been expected to occur, a reasonable expectation could presumably be based on knowledge of the target's predisposition to commit such an offence. It is unclear why the focus switches in this context from the objective risks to the actual outcomes of an operative's conduct. Perhaps recognition is given to the difficulties an operative can face in the field, needing to make quick decisions without the opportunities for calm reflection that would be available to an approving officer or a controlled operations committee.

It is 'probable' rather than 'possible' risks which must not be run when controlled operations are authorised. Although the meaning of the term 'probable' has been disputed, Australian law does not generally make a sharp distinction between probabilities and possibilities. In the leading case of *Boughey v The Queen*, it was said that 'likely' and 'probable' are synonyms, the ordinary meaning of which is 'to convey the notion of a substantial – a 'real and not remote' – chance regardless of whether it is less or more than 50 percent'.[55] Nevertheless, the choice of 'probable' rather than 'possible' does indicate that the risk must be a substantial one.

It might, however, be misleading to talk of substantial risks in the context of s 177(2)(d) of the PPRA. That provision says that an operation must not be approved if 'it is probable that … someone could be encouraged or induced …'. The risk here must only be that someone *could*, not *would*, be encouraged or induced to commit an offence that could not otherwise reasonably be expected to occur. There is little if any difference between the propositions that (1) it is probable that some event could occur and (2) it is possible that it would occur. Interpreted as a whole, therefore, s 177(2)(d) may prohibit authorising any

54 PPRA s 177(2). The approach adopted in other Australian jurisdictions has been to focus on the risk that the particular person who is the target of a controlled operation might be encouraged or induced to commit an offence that otherwise would not have been committed. See *Crimes Act 1914 (*Cth) s 15M; *Criminal Law (Undercover Operations) Act 1995* (SA) s 3(d); *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 7(1). On this alternative approach, evidence of the target's criminal predisposition would be relevant.

55 (1986) 161 CLR 10, 21, Mason, Wilson and Dawson JJ. See, however, the different views of Gibbs CJ at 14 and Brennan J at 43-45.

operation carrying a significant risk of encouraging or inducing someone to commit an offence that would not otherwise be expected to occur, regardless of whether the risk is 'substantial'. Nevertheless, if 'probable' is to have any meaning in this context, it presumably excludes a category of remote risks.

The remaining parts of this article will examine in more depth what can still constitute entrapment in Queensland.

Improper facilitation or inducement

The paradigm of entrapment is probably the case where law enforcement officers or agents act towards a person in a way which goes beyond facilitating or providing an opportunity for an offence and amounts to inducing the commission of an offence that otherwise would not have been committed. Following the enactment of Chapter 5 of the PPRA, however, there are three, somewhat distinct, categories of entrapment through improper mode of facilitation or inducement in Queensland.

The first category comprises cases where law enforcement personnel facilitate or induce an offence in a way that is unlawful. There are now two sets of conditions for unlawfulness. First, the conduct of the law enforcement personnel must constitute an offence under the general criminal law. Secondly, the conduct of the law enforcement personnel must fall outside the protective umbrella of Chapter 5 of the PPRA.

The conduct of the law enforcement personnel must fall within the scope of an offence before the protective umbrella of the PPRA is needed to make it lawful. Usually, an operative will be a secondary party to the offence to be prosecuted, having aided, counselled or procured it contrary to s 7 of the Criminal Code.[56] Alternatively, in some bilateral transactions such as selling drugs or sexual services, it may be that the conduct of the operative would amount to aiding, counselling or procuring except that there is no liability because of the doctrine of implied legislative exclusion. That is the doctrine that, where the terms of an offence apply to only one party to a bilateral transaction, secondary liability for the other party is impliedly excluded. The scope of the doctrine is uncertain and it may only apply to offences designed for the protection of the other party.[57] Even if it is given broader scope, some other offence will usually be committed.

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56 It is conceivable that the liability of an operative as a secondary party may be extended to additional offences by virtue of ss 8-9 of the Criminal Code. It is also conceivable that the operative may have committed an offence as a principal, for the purpose of having the target prosecuted for that offence as a secondary party.

57 On the more restrictive view, the doctrine still apples to an offence such as incest. See, eg, *R v Starr* [QWN] 23 (SC). It probably does not, however, apply to offences related to the selling of drugs or sexual services. See, eg, the competing views on the

Traditionally, the view has been taken that participating in an offence for investigative purposes does not always amount to entrapment. There has been a measure of tolerance for lower levels of secondary participation. For example, in *R v Swift*,[58] the Queensland Court of Appeal upheld the conviction of a corrupt police officer who had agreed to accept a bribe offered by an undercover operative.[59] There has even been some judicial support for the acceptability of a degree of persistent importuning of drugs dealers.[60] The argument has been that a display of persistence is expected of prospective purchasers and that dealers will often refuse to sell in its absence. This acceptance of lower levels of secondary participation on the part of covert operatives might perhaps be defensible in the absence of mechanisms for conducting controlled operations and activities lawfully. That rationale, however, is no longer available in Queensland now that Chapter 5 of the PPRA provides a scheme for the authorisation of otherwise unlawful activity. Given the existence of that scheme, unauthorised participation in offences for investigative purposes should generally be viewed as entrapment.[61]

The scope of secondary participation in offences is broad. 'Aiding' an offence obviously includes providing material assistance for its commission. It also extends to providing psychological encouragement or support during the commission of an offence.[62] Psychological support usually involves some active communication but mere presence can be sufficient if it indicates readiness to help should the need arise.[63] 'Counselling' means encouraging its commission beforehand. 'Procuring' is an obscure concept but is probably best equated with causing an offence to be committed by someone else. There is some overlap between the concepts of counselling and procuring. For example, a person who pesters another person to commit an offence would usually be said to counsel rather than to procure it. Counselling is, however, one way in which an offence can be caused. On the other hand, in cases where the label 'procuring' is used, there will often be some element of counselling. Usually, however, a procurer also

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application of the doctrine to prostitution offences in *Scott v Killiam* (1985) 40 SASR 37 (FC). See also, eg, the contrasting views of English and Canadian courts on whether the doctrine applies to selling drugs: *Sayce v Coupe* [1953] 1 QB 1 (Div Ct); *R v Dyer* (1972) 5 CCC (2d) 376 (NSCA; *R v Meston* (1975) 28 CCC (2d) 497 (Ont CA).

58 (1999) 105 A Crim R 277.

59 There was some argument in the case over whether the undercover operative had acted unlawfully. The Court of Appeal, however, upheld the conviction on the assumption that the offer was unlawful.

60 See above n 8.

61 Section 164 of the PPRA apparently excuses proceeding without authorisation in some circumstances. The scope of that provision, however, is unclear. See text following n 28.

62 See, eg, Beck (1989) 43 A Crim R 135 (Qld CCA).

63 See, eg, ibid.

contributes to the causation of an offence in some other way, such as through offering a material inducement for its commission.

An unauthorised operation or activity could conceivably trigger an offence and yet be lawful because no more was done than to facilitate it or provide an opportunity for it to occur. There was no material assistance for the offence or active encouragement of it and there was no procurement of it because the contribution to its occurrence was insufficient for causal responsibility.[64] For example, suppose that an undercover operative attended a nightclub where the selling of prohibited drugs was suspected and that the operative adopted an appearance unlikely to arouse the concern of a dealer. A dealer then approached the operative and offered to sell drugs. Even leaving aside the possible application of the doctrine of implied legislative exclusion, the presence and appearance of the operative would not be sufficient for secondary participation in the dealer's offence. There would admittedly be a causal contribution to the occurrence of the drugs offence. Nevertheless, it would be effectively a matter of chance that the approach was made to the operative rather than someone else. Suppose also that for the purpose of tempting thieves, goods were put in a location where they could be easily stolen and this location was then kept under observation, as happened in the English case of *Williams and O'Hare v DPP*.[65] This might not amount to procuring the stealing as long as other, similar, opportunities for stealing were open to the thieves. Again, it could be argued that the causal contribution was minimal because, given the other opportunities for stealing, it was effectively a matter of chance that an offence occurred in the location under observation rather than somewhere else. On the other hand, there would presumably be procuring if suspects were offered an exceptional opportunity of a kind they would not ordinarily encounter.

Yet, the threshold for secondary participation in an offence is not high and will be crossed in many undercover operations and activities. It will almost certainly be crossed in a case where an operative uses threats, unusually attractive inducements or persistent importuning to get the target to commit the offence.

To be unlawful, the conduct of law enforcement personnel must also fall outside the protective umbrella of Chapter 5 of the PPRA. It may escape the protective umbrella either because there was no authorisation for the activity or because, if there was an authorisation, the conduct of the operative impermissibly exceeded its scope, breaching both its terms and the extended authorisation conferred under s 193(5-(6) of the PPRA.[66] Section 193(6) prohibits additional action if it results in someone being encouraged or induced to engage in criminal activity of a kind that

64 On the concept of causal responsibility, see especially *Royall v The Queen* (1991) 172 CLR 378, 441-442, McHugh J.

65 (1994) 98 Cr App R 209.

66 See text to above n 28.

otherwise could not reasonably be expected to have occurred. The best way of establishing that would be to show both that there was no evidence of the target previously committing that kind of offence and that the conduct of the operative was likely to induce its commission by a person lacking predisposition to engage in the activity. In an extreme case, the manner of inducement alone might suffice, even though the target had previously engaged in the activity. An example might be the facts of the leading Canadian case of *R v Mack*.[67] The target in that case was subjected to persistent approaches over several months to supply drugs to a police informer. He eventually succumbed after the informer adopted a 'threatening manner'. The Supreme Court of Canada held that there was entrapment despite the police having held a reasonable suspicion that the target was involved in criminal conduct.[68]

The second category of entrapment by improper manner of facilitation or inducement comprises cases where an operative has been improperly authorised to engage in what would otherwise be criminal activity. The conduct is lawful because there is an authorisation under Chapter 5 of the PPRA. However, the conduct of the operative is improper because the authorisation should not have been issued. The prescriptions for authorising controlled operations were discussed in the preceding part of this article. To summarise: these prescriptions cover the purposes for which an authorisation may be issued, the persons who may be granted an authorisation, the procedures to be used in issuing an authorisation, and the kinds of activity which can be authorised. Most importantly, a controlled operation must not be authorised (a) if there is an objective risk of it probably causing injury or death to a person or serious damage to or loss of property or (b) if the way of conducting it makes it objectively probable that someone could be encouraged or induced to commit a kind of offence that otherwise could not reasonably be expected to occur. It was suggested earlier that the latter prescription prohibits the authorisation of an operation to be conducted in a way that carries a significant risk of encouraging or inducing someone to commit an offence that otherwise would not be expected to occur.[69] Another way of posing the issue would be to ask whether there is a significant risk of an ordinary person succumbing to the encouragement or inducement. That should rule out authorising operations in which the target will be threatened or offered an inducement so attractive that it might appeal to the greed of the ordinary person. An example might be provided by the facts of *Attorney General's Reference Number 3 of 2000*, a case decided by the House of Lords together with *R v Loosely*.[70] In the *Attorney General's Reference*, the initial approach by the police involved an offer to supply the target with smuggled cigarettes. There was evidence that the target's subsequent agreement to a request to supply heroin was

67 [1988] 2 SCR 903.
68 Ibid, [156]-[159].
69 Text to above n 55.
70 [2001] UKHL 53.

induced by the prospect of a profitable trade in cigarettes. The House of Lords held that there was entrapment in the *Attorney General's Reference* because the inducement was exceptional for the drugs trade. [71] An operation like this might also be improper in Queensland because of the risk of the inducement tempting an ordinary person. On the other hand, an ordinary person might be expected to resist a financial inducement like that in *R v Swift*,[72] where $3000 was offered for information about police investigations of dealings in drugs. An ordinary person can also presumably be expected to show some resilience in the face of straightforward importuning and even pestering.

The third category of entrapment by improper manner of facilitation or inducement comprises cases where an operative improperly exploits a personal relationship or a particular vulnerability of the target.[73] In such cases, there is a special risk of the operative bringing about the commission of an offence that would not otherwise have occurred. An attempt to generate criminal activity might succeed even though it would ordinarily be ineffective.

Of course, cases of entrapment by exploitation are often likely also to fall within one of the other categories of entrapment. Exploitative conduct will often involve counselling or procuring the offence, so that it will be unlawful unless it has been authorised under Chapter 5 of the PPRA. It was earlier argued that unlawful participation in offences in order to prosecute them now generally amounts to entrapment. If this is correct, most cases of entrapment by exploitation will probably also involve entrapment by unlawful conduct. If, on the other hand, some lower-levels of secondary participation continue to be regarded as acceptable, exploitation could become a significant factor. It could be the additional ingredient which makes an operative's conduct improper. For example, suppose it were to be regarded as generally acceptable for undercover operatives to make unauthorised requests for the supply of drugs. It might nevertheless be improper for an operative to direct such a request to a partner in an intimate relationship, playing on susceptibilities arising from the relationship. It is perhaps unlikely that this kind of exploitation would ever be authorised under Chapter 5 of the PPRA. If it happened, however, it could be argued that the conditions of the Act were breached because of the risk of ensnaring someone who would otherwise not have committed an offence of supplying.

There might also be improper exploitation in a case where the conduct of the operative would not ordinarily be unlawful. Suppose that an undercover operative establishes an intimate relationship with a person suspected of being involved in drugs offences. The operative then vaguely expresses a desire for drugs and frustration at difficulty in obtaining them, hoping that this may generate an offer

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71 Ibid, [81], [116].
72 (1999) 105 A Crim R 277 (Qld CA). See text to above n 58.
73 See text to above n 16.

to supply them. The other person obliges out of compassion. Since the operative did not ask for drugs, it is questionable whether the operative counselled or procured an offence of supplying. The operative perhaps just provided an opportunity for the offence to be committed. The view might nevertheless be taken that the operative improperly exploited the relationship. Similarly, suppose that an operative investigating drugs offences strikes up a casual acquaintanceship with a young, mentally handicapped associate of some suspects. In the presence of the youth, the operative talks vaguely about wanting drugs but does not advance any specific request. The youth foolishly does what the operative has been hoping for and offers to supply drugs. The view might be taken that the operative improperly exploited vulnerabilities connected with immaturity and mental handicap.

Improper target selection

Entrapment can occur not only when the mode of facilitating or inducing an offence is improper but also when a target for investigation is selected in an improper way. It would be wrong to facilitate or induce the commission of an offence if the target is not reasonably suspected of already being prepared to commit that kind of offence.[74] This could be entrapment even though it merely involves facilitating an offence or providing an opportunity for it to occur. Consider the example of planting a wallet in a park in the hope of being able to catch someone stealing it, which was discussed in *R v Mack*.[75] It is questionable whether this would amount to procuring unless some exceptional temptation was offered.[76] Nevertheless, it might be condemned as an exercise in 'random virtue-testing'. Admittedly, randomly tempting people will catch some persons who are predisposed to engage in the criminal activity. Unfortunately, many people have occasional 'weak' moments when the element of greed in human nature overcomes normal inhibitions on dishonest behaviour. Randomly tempting people therefore always carries some risk of inducing criminal activity by persons who would otherwise have stayed within the bounds of the law. There is no good reason why this risk should be run. Moreover, tempting some persons but not others could be unfair unless they are selected on the basis of reasonable suspicion.

In cases where random virtue-testing involves what would ordinarily be unlawful conduct, authorisation under Chapter 5 of the PPRA is required. It is questionable whether the PPRA scheme contains specific safeguards against improper target selection. The issue is how to interpret the prohibition in s 177(2)(d) on authorising an operation where it is probable that someone could be encouraged or induced to engage in criminal activity of a kind that otherwise could not

74 It might also be viewed as entrapment if, although there are grounds for reasonable suspicion, action is taken for ulterior and improper reasons. See text to above n 20.

75 [1988] 2 SCR 903, [115]. See text to above n 19.

76 See text to above n 65.

reasonably be expected to occur. It was suggested earlier that the provision is directed to modes of encouragement or inducement carrying a risk which might be aptly described as 'significant'.[77] Unless the temptation is particularly great, the risks associated with random virtue-testing may not be sufficiently large to be excluded by s 177(2)(d). And, if great temptation is offered, the operation should be barred because the mode of encouragement or inducement is improper, independently of any impropriety in the selection of the target. In any event, selecting a target without reasonable suspicion is improper. Even if the PPRA scheme does not prohibit the practice, it also does nothing to legitimise it. The practice is improper even if there is only a relatively low risk of tempting someone who could not otherwise reasonably have been expected to commit an offence. Moreover, a court could hold a controlled operation or activity to constitute entrapment on this ground.

There is an instance in which the improper selection of a target may be the factor making an operative's conduct unlawful. Section 193(6)(d) of the PPRA restricts the exemption from liability for an operative who goes beyond the terms of an authorisation to take advantage of an opportunity to gather evidence in relation to additional offences. An operative remains liable for conduct resulting in someone being encouraged or induced 'to engage in criminal activity of a kind the person could not reasonably be expected to have engaged in if not encouraged or induced by the covert operative to engage in it'. That result would usually occur because the manner of inducement was too aggressive, perhaps involving threats or financial inducements too attractive for the ordinary person. If there was an approach which the ordinary person could reasonably be expected to withstand, such as a degree of importuning, s 193(6)(d) would ordinarily protect the operative. Suppose, however, that the inducement was directed at someone for whom there was no evidence of predisposition to commit the offence. If the target happened to respond by committing the offence, the operative could also be liable for the offence under general principles respecting secondary participation. Since the target lacked predisposition, there could not have been a reasonable expectation that offence would be committed without the importuning. The PPRA would therefore afford no protection to the operative.

Suspicion has been described in this way:

> A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence'.[78]

77 On the interpretation of this provision, see text to above n 55.

78 *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303, Kitto J.

The quantity and quality of information needed for reasonable suspicion can be debatable. One issue is what use can be made of 'tip-offs' and other information received from third parties. In principle, it would seem that reasonable suspicion can be grounded upon information of this kind. The House of Lords has said in another context that reasonable suspicion can be based on hearsay information.[79] Much may depend, however, on what is said by the informant. In *R v Loosely*,[80] the House of Lords approved an operation where there was a reasonably strong case for suspicion. There, attention had first focused on a public house where drug dealing was suspected. A person in the public house then provided an undercover operative with the name and telephone number of the appellant and suggested telephoning him if drugs were desired.[81] A weaker case would be *Teixeira de Castro v Portugal*.[82] In that case, undercover police officers initially targeted someone (the first intermediary) who was suspected of trafficking in drugs. That person claimed to be unable to supply any drugs but mentioned the name of the applicant as a possible supplier. Despite making this identification, the first intermediary did not know how to contact the applicant and had to obtain his address from a second intermediary. The intermediaries and the undercover police officers then approached the applicant and persuaded him to obtain heroin for them. The European Court of Human Rights held that, despite the information received from the intermediaries, the police had no good reason to suspect the applicant was a drugs trafficker. The information had amounted to no more than a mention of his name as some one who 'might be able' to find some heroin.[83] In addition, he had no prior record and he was unknown to the police.[84] Moreover, he did not have any drugs in his home and had to obtain them for the police from yet another party. The court did not indicate what its conclusion would have been if the information gathered in the initial stages of the operation had tended to confirm rather than dispel the suspicion. Nor did it indicate whether it would have taken a different view if the initial information had come from a particularly reliable source.

It was earlier noted that there are two main bases for reasonable suspicion that someone would be prepared to commit an offence.[85] There could be information either about the specific person targeted or about activity in a particular location where the person is present. In the latter case, of course, the suspicion might only attach to persons with a particular characteristic, such as a particular age or gender. In some instances, suspicion might even fall upon persons with particular

79 *O'Hara v Chief Constable of the RUC* [1997] AC 286, 293, 298.
80 [2001] UKHL 53.
81 Ibid [84].
82 (1998) 28 EHRR 1.
83 Ibid [10].
84 Ibid [38].
85 Text to above n 21.

characteristics regardless of their location. It would then, however, be very difficult to defend the suspicion as being 'reasonable'.

With respect to suspicion of a specific person, a major issue is how much use can be made of information about the history of the person. Exclusive reliance on historical matters is unlikely to be acceptable. The Supreme Court of Canada has said, in the context of a case on entrapment, that 'the mere existence of a prior record is not usually sufficient to ground a 'reasonable suspicion".[86] An Australian court might be expected to adopt a similar position as a matter of general principle. In addition, the dictionary in Schedule 4 to the PPRA states: "reasonably suspects' means suspects on grounds that are reasonable in the circumstances'. If this provision is to add anything, the reference to 'circumstances' should be taken to focus attention on current activities rather than the past character of a person. Nevertheless, historical information can presumably be taken into account when information about current activities is interpreted. Suppose, for example, that a tip-off is received that someone is dealing in drugs. If that person has a prior record of drug-dealing, that will strengthen the argument for a reasonable suspicion of engagement in the activity now.

With respect to suspicion of persons in a particular location, one issue is how the boundaries of locations are to be determined. In *R v Barnes*,[87] the Supreme Court of Canada indicated that law enforcement officers should have some flexibility in planning the location of undercover operations. In that case a drugs operation targeted an area of approximately six city blocks. Drug-dealing was scattered throughout the area but was particularly common at certain locations within it. It was held to be legitimate for an undercover police officer to approach a dealer in the larger area but away from the most commonly used locations. The court noted that traffickers tend to modify their techniques in response to police investigations.[88] The court also suggested, however, that an operation could become illegitimate if its boundaries went beyond the concentration of criminal activity.[89]

Another issue is how frequently offences must occur in a location before they can be targeted. In the English case of *Williams and O'Hare v DPP*,[90] police put a partly opened van containing visible cigarette cartons (actually dummies) under observation to see who might take the cartons. This was held to be justifiable investigative practice by the Divisional Court. The area in which the van was put

86 *R v Mack* [1988] 2 SCR 903, [118].
87 [1991] 1 SCR 449.
88 Ibid [18].
89 Ibid [20].
90 (1994) 98 Cr App R 209.

had 'high motor vehicle crime'.[91] The judgment, however, did not discuss the significance of this or of crime rates generally. The degree of suspicion attaching to any individual within a location will typically be less than when suspicion is based on information about a specific person. This may be acceptable. Nevertheless, if people are to be targeted on the basis of presence in a location, the rate of offences in that location should be high enough to justify the particular operation. Account should therefore also be taken of the nature of the operation and the nature of the offence under investigation. For example, the more exceptional is the inducement to be used, the higher may be the threshold rate for targeting a location. In *R v Loosely*, it was said: 'The greater the degree of intrusiveness, the closer will the court scrutinise the reason for using it.'[92] This is because of the increased risk of ensnaring an 'unwary innocent' who is not predisposed to commit the offence. On this approach, the acceptability of an operation like that in *Williams and O'Hare* would depend, not only on the magnitude of the rate of vehicle crime, but also on how exceptional was the opportunity offered for stealing. It would be easier to justify the operation by reference to the rate of vehicle crime if the opportunity offered was similar to what would ordinarily be available in the location. Conversely, the more serious is the offence under investigation, the lower may be the threshold rate for targeting a location. The risk of ensnaring an 'unwary innocent' becomes more acceptable when very serious offences are at stake and capturing an offender becomes a matter of urgent need.

Conclusions

Entrapment occurs when the commission of an offence is improperly facilitated or induced so that it will occur under circumstances where evidence can be obtained for its prosecution. Evidence obtained by entrapment is liable to be excluded under the 'policy' discretion. Prior to the enactment of Chapter 5 of the PPRA, and similar schemes in other jurisdictions, law enforcement officers and agents had no special authority to participate in offences for investigative purposes. They relied on the tolerance of the courts. Chapter 5 was designed to narrow the scope for covert operations and activities to be labelled 'entrapment'. In particular, it was designed to deal with the problem which arose in *Ridgeway*, where it was held to be entrapment for law enforcement officers to commit an offence disproportionate to the offence to be prosecuted. Chapter 5 of the PPRA effectively eliminates that problem by establishing a scheme for authorising officers and, in some instances, their agents to commit what would otherwise be offences in the course of investigating serious crime.

Nevertheless, entrapment can still occur because a law enforcement officer or agent contributed to the commission of an offence in an improper way. It is

91 Ibid 211.
92 [2001] UKHL 53, Lord Nicholls at [24].

generally acceptable for an operative to facilitate or provide an opportunity for the commission of an offence as long as what is done is not sufficient to make the operative a secondary party to the offence. Traditionally, tolerance has also been extended to law enforcement officers and agents engaging in lower-levels of secondary participation in some offences for investigative purposes. However, following the establishment of the scheme for authorising such conduct in Chapter 5 of the PPRA, unauthorised secondary participation should now generally be regarded as entrapment. Chapter 5 has therefore expanded the scope for secondary participation to amount to entrapment. In addition, even if it has been authorised, encouraging or inducing the commission of an offence will be improper if the authorisation breached the conditions of the PPRA. In particular, authorisation must not be given for an operation to be conducted in a way which carries a significant risk of encouraging or inducing someone to commit an offence that otherwise would not be expected to occur. It has been argued that an operation using methods with this objective risk will be improper even though the particular target happens to be predisposed to commit the offence. Even if authorisation is not required, because the operative does no more than facilitate an offence or provide an opportunity for it to occur, the conduct of the operative may still be improper and therefore amount to entrapment if it involves exploitation of a personal relationship or a particular vulnerability of the target. Exploitation would also be a factor to be taken into account in the event that some tolerance were to continue to be given to unauthorised use of lower-levels of secondary participation. The operative's conduct might still be improper if it involved exploitation.

In addition, entrapment can still occur because the target of a covert operation or activity was selected in an improper way. A covert operation or activity should be directed by reasonable suspicion that an offence will be committed in any event. Random temptation carries an unacceptable risk of manufacturing crime and can also involve unfairness. Entrapment through improper selection can occur even though nothing more is done than to facilitate or provide an opportunity for an offence, so that the conduct of the law enforcement operative is lawful regardless of the PPRA. Although the general principles in these respects are clear, the concept of reasonable suspicion needs further elaboration by the courts. Outstanding issues include the extent to which suspicion of a person can be based on that person's past record and the conditions under which suspicion can attach to persons on the basis of their presence in a location associated with criminal activity.

Of course, it does not necessarily follow from a determination of entrapment that evidence of the offence will be excluded. In *Ridgeway*, it was said that this sanction for entrapment should ordinarily only be used 'where the illegality or impropriety of the police conduct is grave and either so calculated or so entrenched that it is clear that considerations of public policy relating to the administration of

criminal justice require exclusion of the evidence'.[93] Nothing in the PPRA changes the criteria governing the discretion to exclude evidence obtained by entrapment.

93 (1995) 184 CLR 19, 39. It was also said that evidence should be excluded in cases where law enforcement officers committed the principal offence. This was the scenario which Chapter 5 of the PPRA was designed to avoid.

PLEAD GUILTY EARLY AND CONVINCINGLY TO AVOID DISAPPOINTMENT

*David Field**

The recent decision of the High Court in Cameron v The Queen[1] *provides a timely opportunity to re-examine the precise rationales behind the policy observed in all Australian criminal courts (whether exercising State or Commonwealth jurisdiction) of 'discounting' an otherwise appropriate sentence in return for a plea of guilty.*

It also raises important issues regarding the appropriateness of 'utilitarianism' as one of those rationales, the relevance, as a sentencing factor, of the timing of a guilty plea, and the desirability of the sentencing court placing on the record what level of discount has been granted, and on what basis.

Controversially, it raises the prospect of future High Court rulings to the effect that a discount for pleading guilty is discriminatory of those who exercise their right to plead not guilty, thereby obliging the Crown to prove its allegations against them.

Finally, it reminds us yet again of the fragility of the current regime for providing indigent accused with adequate legal representation.

The facts of *Cameron*

The facts of the case were significant in several respects. The Appellant (C) was arrested at Perth Airport in April 1999 in possession of over 5000 tablets which were initially believed by the authorities to be 'Ecstasy'. Although these tablets were found in his travel bag, C originally denied all knowledge of them.

He was charged with what in essence was possession of a prohibited drug with intent to sell or supply same, under s 6(1)(a) of the *Misuse of Drugs Act 1981 (WA),*[2] and was remanded in custody, from where he made eight appearances in

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1 (2002) 76 ALJR 382.

2 This was the result of the operation of various provisions of *the Commonwealth Places (Application of Laws) Act 1970* (Cth) which rendered the state laws applicable to his offence, and invested the WA courts with federal jurisdiction in the matter.

the Perth Magistrates Court between the date of his arrest and 17 November 1999, when his matter was scheduled for a preliminary hearing. Four of these 'appearances' were by way of video link from prison.

C maintained his not guilty plea (and indeed maintained his claim of ignorance of the very existence of the drugs in his travel bag) until 10 November 1999, when his solicitor wrote to the DPP and confirmed that C would be entering a plea of guilty to the charge. However, she also pointed out that the relevant analyst's certificate (dated 28 June 1999) showed that the tablets in question were not 'Ecstasy', but 'Speed', and requested that the charge be re-drafted.

This occurred on 17 November, the day originally set for the preliminary hearing. C entered a plea of guilty there and then, and was further remanded in custody for sentence in the District Court on 12 January 2000.

On the day of sentence, C pleaded guilty on arraignment, and his counsel submitted that he should be sentenced on the basis that his plea had been entered 'at the earliest possible opportunity', and that he should be given the same credit on sentence as if his plea had been a 'fast-track' one.[3]

Although Crown Counsel did not oppose this submission, C received only a 10% 'discount' in sentence (from 10 years to 9 years) in return for his guilty plea. His appeal to the WA Court of Criminal Appeal was argued on the sole ground that this discount was too low by comparison with what might be termed the 'going rate' of between 20% and 30% discount in 'fast track' cases.[4] The Crown opposed the appeal on the ground that while the plea had been an 'early' one, it had not been made at 'the earliest point' at which it could have been made.

In dismissing the appeal, the Court of Criminal Appeal were of the unanimous opinion that the plea had been entered too late to attract a discount any higher than 10% because

> …it would still have been open to the applicant at a much earlier stage to indicate that he did have a prohibited drug but it was methylamphetamine

3 The 'fast-track' system which operates in Western Australia under ss 100 and 101 of the *Justices Act 1902* (WA) allows an accused to plead guilty in the Local Court to an indictable offence which cannot be dealt with summarily, following the provision to him by the prosecution of a minimum amount of evidential material. He is then committed to the higher court for sentence, which may then be 'discounted' by as much as 30% in return for that plea. While it is a procedure claimed as being unique to Western Australia, its effect is not unlike the ex-officio indictment procedure followed at the request of the defence in appropriate indictable matters in Queensland; see *Criminal Code Act 1899* (Qld), s 561.

4 See *Verschuren v The Queen* (1996) 17 WAR 467, 473-5, which confirms this 'range', and in which the 'fast-track' procedure is further explained.

> and not ecstasy . . . . . it did not save the administration of justice to have the number of remands that there were and to have time set aside for the preliminary hearing.[5]

The majority in the High Court,[6] and Kirby J in a separate judgment,[7] were of the opinion that the Order of the Court of Criminal Appeal should be set aside, and that the matter should be remitted to that Court 'for further hearing and determination'. Only McHugh J[8] remained of the opinion that the Court of Criminal Appeal had not erred.

However, the judgments of all their Honours raise (once again) some issues of general but fundamental importance to all sentencing courts being asked to give a discount in sentence to an accused who pleads guilty.

The timeliness of the plea

On the preliminary issue of whether or not C's plea of guilty had been sufficiently timely in the circumstances, the majority began with the observation:[9]

> The question whether it was possible for a person to plead at an earlier time is not one that is answered simply by looking at the charge sheet … the question is when it would first have been reasonable for a plea to be entered … leaving aside remorse and acceptance of responsibility, the operative consideration is willingness to facilitate the course of justice. And a significant consideration on that issue is whether the plea was entered at the first reasonable opportunity.

On the specific issue of whether or not C's plea of guilty *had been* 'reasonable' in terms of its timing, the majority had no difficulty in concluding:[10]

> …[I]t was not reasonable to expect the appellant to plead to an offence which wrongly particularised the substance to which the charge related … The Court of Criminal Appeal was in error in holding that the appellant could have pleaded guilty before the charge was amended to correctly specify the substance which he had in his possession. Moreover, it was in error in stating that there

5 Per Pidgeon J, quoted in Cameron, 384.
6 Gaudron, Gummow and Callinan JJ, ibid, 386.
7 Ibid 400.
8 Ibid 391.
9 Ibid 385-386, quoting with approval the observation of Ipp J in *Atholwood* (1999) 109 A Crim R 465, 468, that 'During the period that the prosecution maintains counts that are ultimately abandoned, there is a strong incentive for a person who recognises his guilt on other counts … to persist in a not guilty plea to all counts'. See also *R v Houghton* [2002] QCA 159, at [15].
10 Ibid 386.
11 Ibid 396-397.

> had been 'no saving in the Magistrates Court', for the appellant's plea of guilty rendered a preliminary hearing unnecessary.

In his separate judgment, Kirby J[11] also quoted *Atholwood* with approval, and agreed with the judgment of the majority, saying:

> The test is not the time when theoretically or physically a prisoner might have pleaded. The test is when it was reasonable, in all the circumstances and as a matter of practicality, to have expected a plea of guilty to be announced … Until the prosecutor sorted out the accurate identity of the particulars of the charge it was presenting against the appellant, it was unreasonable for the prosecutor, or the court, to expect the applicant to plead guilty.

Only McHugh J[12] took the narrower (and perhaps more cynical) view adopted by the Court below, to the effect that until his plea of guilty, C denied knowing that he was carrying drugs at all, and that it was not 'likely that the particulars of the drug were responsible for his original plea and his change of plea'.

Given that the legislative provisions of all the States and territories except South Australia and Tasmania[13] authorise a court, when reducing a sentence in acknowledgment of a guilty plea, to take account of precisely *when* in the history of the matter it was first intimated, this re-affirmation that the essential test is the *reasonableness* of the timing of that intimation (rather than simply its position in the bare chronology of the matter) is reassuring.

Lengthy delays in bringing matters to the point at which an accused, on proper legal advice, intimates a plea of guilty are by no means exclusively the result of a refusal on the part of an accused to 'face reality'. Under-funding in the areas of operational policing, police prosecutions, state and federal prosecution offices and Legal Aid all combine, on many occasions, to seriously frustrate the efforts of the parties to negotiate an indictment into its 'final form'.

What might be termed 'system-driven' initiatives[14] to speed up this process can have only a limited effect when the root cause of the delay is under-resourcing on both sides. These constraints *must* be factored into the equation when assessing

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12 Ibid 390-391. His Honour was impressed by the consideration that '…nothing before the sentencing judge indicated that his delay in pleading guilty was induced by the particulars of the prohibited drug'. Referring to the letter which C's solicitor finally sent to the DPP, intimating the guilty plea for the first time, His Honour observed that 'The contents of this letter indicate that the identity of the prohibited drug was not a factor which influenced the appellant's plea'.

13 For a full list of these provisions, see below n 44. The Commonwealth has no equivalent legislative provisions.

14 Such as 'fast-tracking', defence-initiated ex-officio indictments and case management by judges.

when it would have been 'reasonable' for an accused to acknowledge that the charges in their final form are a true reflection of his actual criminality.

In searching for the rationale behind the principle that the timing of a guilty plea is a relevant factor in 'discounting' a sentence, it is hard to ignore the obvious one born of 'economic rationalism', namely the saving of time (and therefore resources) within the criminal justice system as a whole.

The argument for the existence of such a rationale is further strengthened by the very existence of a 'range' of discounts which appear to apply according to when, in the history of a matter, the plea was first intimated. As has already been noted (see above n 3), that range is set between 20% and 30% in WA, while an 'early' plea of guilty can attract a 25% discount in South Australia.[15]

The Chief Justice of Queensland,[16] while refusing to set a 'usual' discount period for pleas of guilty because of the number of variables involved, has however, recently indicated that 'Another aspect of course is the timeliness of the plea'.

In *R v Thomson; R v Houlton,*[17] the NSW Court of Appeal set out, at the request of its State DPP and others, to 'promulgate a guideline judgment with respect to the discount for a plea of guilty in relation to State offences'. After reviewing the position under all state, territory and Commonwealth jurisdictions, and by reference to the provisions of s 22(1) of its own *Crimes (Sentencing Procedure) Act 1999*, the Court[18] issued the following guideline:

> Sentencing judges are encouraged to quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so. This effect can encompass any or all of the matters to which the plea may be relevant – contrition, witness vulnerability and utilitarian value – but particular encouragement is given to the quantification of the last mentioned matter … The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10-25 per cent discount on sentence. The primary consideration determining where in the range a particular case should fall, is the timing of the plea … In some cases a plea will not lead to any discount.

15 See, eg *R v Nixen* [1993] 66 A Crim R 83 at 90.

16 *R v Mulholland* [2001] QCA 480. However, in *R v Houghton* [2002] QCA 159, at Para 31, Fryberg J indicated that 'Normally the sentence will be reduced by 10 per cent to 30 per cent for such a plea'. A survey across jurisdictions conducted in 1995 by the Australian Institute of Judicial Administration (Mack and Anleu, *Pleading Guilty: Issues and Practices* (1995)) showed the range to be potentially as wide as 25% to 50% (op cit, 164).

17 (2000) 115 A Crim R 104.

18 Ibid 138.

It also quoted from the1990 Second Reading debate in the New South Wales State Parliament of the Bill which became the fore-runner of s 22(1), in the course of which the then State Attorney-General[19] observed:

> Even where the Crown case is strong and a guilty plea may be thought to be inevitable, it will usually be appropriate to reduce the sentence to take account of the plea of guilty because the State has been saved the expense of a trial, witnesses have been spared the necessity of attending court and giving evidence, and police have been able to better carry out their duty of protecting the community.

In the course of formulating its guideline, the Court in *Thomson*[20] confirmed:

> The reference in s 22(1)(b) to an obligation to take into account 'when the offender pleaded guilty' is to be construed as indicating that the earlier a plea is made or indicated, the greater the claim that an offender has to the exercise in his or her favour of the discretion to which the Act refers.

Finally, it came down emphatically in favour of economic rationalism as the main basis for rewarding an early plea of guilty, in its conclusion[21] observing:

> The benefits to the criminal justice system as a whole, which flow from a plea of guilty, particularly an early plea of guilty, are not related to the circumstances of the offence or to the conduct of the offender … Rather, they are collateral benefits for the efficiency and effectiveness of the criminal justice system as a whole, which require acknowledgment of some character by way of an incentive, so that the benefits will in fact be derived by the system.

Each of their Honours in *Cameron*[22] took time to consider – as a relevant factor - whether or not C's guilty plea *had* resulted in resource-saving within the WA criminal justice system. This renders all the more confusing what the majority of the Court then went on to say about the potentially discriminatory nature of such a rationale.

The alleged discriminatory effect of a discount for a guilty plea

In acknowledging that a plea of guilty is a matter which a sentencing judge can properly take into account in mitigation of sentence, the majority in *Cameron* revisited their own previous statement of the general rule in *Siganto v The Queen,*[23] where it was said:

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19 Later Dow J; see New South Wales Legislative Assembly, Parliamentary Debates (Hansard) 4 April 1990, 1690.
20 Ibid 107.
21 Ibid 131.
22 op cit, at 386 (majority), 391 (McHugh J) and 397 (Kirby J) respectively.
23 (1998) 194 CLR 656, 663-664.

> A plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case.

They immediately added:[24]

> It should at once be noted that remorse is not necessarily the only subjective matter revealed by a plea of guilty. The plea may also indicate acceptance of responsibility and a willingness to facilitate the course of justice.

Then came the following somewhat surprising retreat from the observation which the same judges in majority had made only four years previously in *Siganto* regarding the validity of resource-saving within the criminal justice system as a ground for a reduction in sentence in recognition of a guilty plea:

> It is difficult to see that a person who has exercised his or her right to trial is not being discriminated against by reason of his or her exercising that right if, in otherwise comparable circumstances, another's plea of guilty results in a reduction of the sentence that would otherwise have been imposed on the pragmatic and objective ground that the plea has saved the community the expense of a trial. However, the same is not true if the plea is seen, subjectively, as the willingness of the offender to facilitate the course of justice.[25]

Nor was *Siganto* by any means the only previous authority on this point being called into question. As McHugh J pointed out[26] in the course of a minority judgment which conceded that this was perhaps not the sort of case in which to create waves for state jurisdictions:

> …[I]n recent years, under the pressure of delayed hearings and ever increasing court lists, Australian courts have indicated that they will regard a plea of guilty as a mitigating factor even when no remorse or contrition is present. They have taken the pragmatic view that giving sentence 'discounts' to those who plead guilty at the earliest available opportunity encourages pleas of

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24 Ibid 384.

25 Ibid.

26 Ibid 388, quoting, among others, *R v Shannon* (1979) SASR 442 at 448, 451; *Winchester* (1992) 58 A Crim R 345, 350, and *Atholwood* (1999) 109 A Crim R 465, 467, in which the WA Court of Criminal Appeal held that 'A bare plea of guilty (that is, a plea that is not accompanied by genuine remorse), even when made at the last moment, is a mitigating factor as it avoids the expense of a defended trial, inconvenience to witnesses and delay to other cases in the list. This is so even when the case of the prosecution is strong …'

27 Ibid 390, considered again below.

> guilty, reduces the expense of the criminal justice system, reduces court delays, avoids inconvenience to witnesses and prevents the misuse of legal aid funds by the guilty.

Given that, in his opinion,[27] it was a matter for the states whether or not to discount sentences in return for guilty pleas, he felt himself entitled, on the facts of the case, to conclude:[28]

> In these circumstances, the sentencing judge was entitled to hold that the public interest in avoiding the expense and inconvenience of a District Court trial warranted a discount of no more than 10%.

It was left to Kirby J to most forcefully re-affirm the pragmatism with which the modern sentencing process is routinely approached. At pp 394-395, he observed:[29]

> The main features of the public interest, relevant to the discount for a plea of guilty, are 'purely utilitarian'[30]. They include the fact that a plea of guilty saves the community the cost and inconvenience of the trial of the prisoner which must otherwise be undertaken. It also involves a saving in costs that must otherwise be expended upon the provision of judicial and court facilities; prosecutorial operations; the supply of legal aid to accused persons; witness fees; and the fees paid, and inconvenience caused, to any jurors summoned to perform jury service. Even a plea at a late stage, indeed even one offered on the day of trial or during a trial, may, to some extent, involve savings of these kinds … it is in the public interest to facilitate pleas of guilty by those who are guilty and to conserve the trial process substantially to cases where there is a real contest about guilt. Doing this helps ease the congestion in the courts that delays the hearing of such trials as must be held.

It was, however, clearly in the minds of the majority that saving the community the cost of a trial is not, of itself, sufficient to warrant a discounted sentence, because to do so would be discriminatory of those who plead not guilty. However, according to the majority, it *is* sufficient if, 'subjectively', the person pleading guilty is seen as expressing 'a willingness to facilitate the course of justice'.

It may immediately be questioned whether or not this is a distinction with a difference. Is it possible for an accused person to tender an early plea of guilty and *not* be said to be 'facilitating the course of justice'? Are there additional factors which will identify the plea as one which facilitates the course of justice, as opposed to merely saving the time, and therefore the resources, of the criminal justice system?

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28 Ibid 391.

29 Relying on all the authorities listed in Note 26 above, plus *R v Perry* [1969] QWN 17, *R v Gray* [1977] VR 225, *Verschuren v The Queen* at 473 and *R v Thomson and Houlton*, at 112, 113.

30 Quoting *Winchester*, at 350.

Does it not facilitate the course of justice when, in the words of Kirby J 'Doing this helps ease the congestion in the courts'?[31] If, as the old saying goes, 'Justice delayed is justice denied', then surely assisting in the reduction of a court backlog must be characterised as 'facilitating the course of justice'.[32]

If it becomes the general rule that cost-saving alone is not enough to earn a discount in sentence, then future courts will face the difficulty of distinguishing between those guilty pleas which somehow facilitate the course of justice from those which merely save money.

Nor will this be the only difficulty arising from the majority opinion that sentence discounting for guilty pleas is potentially discriminatory if the only motive for it is one of economic rationalism.

The next obvious ones are (a) the distinction between discounting for a guilty plea and penalising a not guilty plea, and (b) the fact that a guilty plea is not, in any event, an automatic guarantee of a reduced sentence

Distinguishing between a discount for a plea of guilty and a penalty for going to trial

In *Siganto v The Queen,*[33] the Appellant (S) had been convicted after trial of a particularly unpleasant rape. The trial (in a Northern Territory court) had necessitated the complainant testifying, an experience which she had understandably found very distressing. During the history of the matter, S had twice failed to appear for listed committal proceedings. In sentencing him to nine years imprisonment, with a non-parole period of 6 years 4 months, the trial judge made the following sentencing remarks:[34]

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31 See note 29

32 See also *R v Thomson and Houlton*, above, in which the observation was made that 'The leniency is afforded in order to encourage early pleas of guilty so that the criminal list is more expeditiously disposed of and so that other cases, in which there is a genuine issue to be determined, will be brought on for hearing without delay'. In *R v Shannon* (1979) 21 SASR 442 at 452, King CJ referred to '… a willingness to co-operate in the administration of justice by saving the expense and inconvenience of a trial, or the necessity of witnesses giving evidence, or … some other consideration which is in the public interest'.

33 See note 23. The extent to which *Siganto* is authority for the validity of a discount for a guilty plea on purely economic grounds may now of course require to be reconsidered in the light of *Cameron*.

34 Quoted in *Siganto*, 663.

35 Ibid 665.

> You pleaded not guilty, having always denied the charge, and have shown no remorse whatsoever. The jury took but a short time to find you guilty, an inevitable finding on the evidence. The jury were satisfied that you lied on oath in denying the crime, and that you lied to police during the record of interview … Your victim … was greatly distressed by your crime. Her distress was evident to police officers who attended … [her] distress was aggravated by having to give evidence against you, both at the committal and at trial.

The majority ruling of the High Court (Gleeson, Gummow, Hayne and CallinanJJ, with Gaudron J concurring in this aspect of the judgment, but dissenting on unrelated grounds) was that the subsequent appeal against sentence should be allowed because

> … it is difficult to avoid the conclusion that [the sentencing judge] treated the distress of the victim at having to give evidence in the criminal proceedings as a matter of aggravation.[35]

The correct approach was stated[36] to be as follows:

> A person charged with a criminal offence is entitled to plead guilty, and defend himself or herself, without thereby attracting the risk of the imposition of a penalty more serious that would otherwise have been imposed … It is proper for a sentencing judge to observe, in a particular case, that circumstances which might otherwise attract leniency are absent. A trial judge's reference to the absence from the case of a matter of mitigation does not mean that the judge is indicating the presence of a circumstance of aggravation.

Among the reasons given by their Honours[37] for the necessity of such a rule were that

> … even an innocent person may be deterred from seeking to defend himself or herself if it were the case that rejection of the defence case by a jury may result in an increased sentence. Similar considerations apply to the argument presently under consideration. A sentencing judge is punishing an offender for the crime, not for the conduct of the defence case … The very denial of guilt by a person charged may be distressing to a victim, especially if, as not infrequently occurs, it is accompanied by a version of events which is offensive. Distinguishing between a plea of not guilty and the manner of conduct of the defence case is difficult, both in terms of principle and in a practical sense.

However, they also acknowledged[38] that

> To some, it may appear a matter of semantics to distinguish between denying the existence of circumstances of mitigation and asserting the existence of

36 Ibid 663.
37 Ibid 666.
38 Ibid 667.

> circumstances of aggravation; and judicial statements intended as the former may sometimes be misunderstood as intending the latter. However, the distinction can be important.

In re-affirming this aspect of their previous ruling in *Siganto*, the majority in *Cameron* also acknowledged:[39]

> The distinction between allowing a reduction for a plea of guilty and not penalising a person for not pleading guilty is not without its subtleties, but it is, nonetheless, a real distinction, albeit one the rationale for which may need some refinement in expression if the distinction is to be seen as non-discriminatory.

McHugh J, in his dissenting judgment, was less diplomatic, observing:[40]

> The subtlety of this scholastic argument has not escaped criticism from those who see legal issues in terms of substance rather than form.

It was left to Kirby J to formulate a general rule which in his opinion adequately reflected the important distinction being made between an absolute ban on the imposition of a *higher* sentence following a plea of not guilty and the possibility of a *reduced* sentence following a plea of guilty tendered for what be termed 'the right reasons'. He observed:[41]

> The true foundation for the discount for a plea of guilty is not a reward for remorse or its anticipated consequences but acceptance that it is in the public interest to provide the discount.

The 'public interest' which he thereby identified is the one he went on to describe[42] as having as its 'main features' the 'purely utilitarian' benefits, consisting largely of cost-saving within the criminal justice system.

For Kirby J, if for no-one else, this cost-saving is the main basis for the distinction between a 'no discount' plea of not guilty and a 'discount' for a guilty plea. The person who pleads guilty may be said to be furthering the 'public interest', for which read 'the public purse'.

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39 Ibid 384.

40 Ibid 389, quoting, similar observations in *R v Shannon* (1979) 21 SASR 442, 458-459, per Cox J, and the complaint by Pincus J in 'Court Involvement in Pre-trial Procedures' (1987) 61 *Australian Law Journal* 471, 477, that '… people are being punished for insisting on a trial, at least in the sense that they may receive a longer sentence if they plead not guilty than they would if they pleaded guilty'.

41 Ibid 393.

42 See above n 29.

43 See above n 25.

The unanswered question (considered above) is whether or not this may also be said to constitute 'a willingness to facilitate the course of justice',[43] which is what the majority of the Court clearly require an accused to demonstrate before he qualifies for a discount.

No guarantee of a discount for a guilty plea

When assessing the extent to which an accused person may be said to be prejudiced in terms of his/her ultimate sentence by the decision to plead not guilty and take the charges against him to trial, it must be acknowledged that not all pleas of guilty can be *guaranteed* to result in a reduced sentence, however much such a policy may be the 'norm'.

While all state and territory legislative schemes[44] apart from Tasmania, and their Commonwealth counterpart,[45] make provision for the sentence imposed on an accused to take into account the fact that he has elected to plead guilty, in none of these jurisdictions is a reduced sentence a *mandatory* outcome of a guilty plea.

As Kirby J noted in *Cameron:*[46]

> In a prisoner who has been caught red-handed, the plea of guilty may indicate regret at being caught and charged, rather than regret for involvement in the crime.

In addition, there are some grounds for believing that in appropriate cases, an accused person may gain nothing from pleading guilty, if the other factors which feed into 'the complex task of imposing criminal punishment'[47] are sufficiently strong against him.

In *Thomson and Houlton,*[48] it will be recalled, the NSW Court of Appeal, in formulating a guideline for sentencing discounts in its own state, acknowledged[49] that, 'In some cases a plea of guilty will not lead to any discount'.

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44 *Sentencing Act 1995*(WA), s 8(2); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 22(1); *Sentencing Act 1991* (Vic), s 5(2)(e); *Sentencing Act* (NT), s 5(2)(j); *Penalties and Sentences Act 1992* (Qld), s 13(1); *Criminal Law (Sentencing) Act 1998* (SA), s 10(g); *Crimes Act 1900* (ACT), s 29A(1)(u).

45 *Crimes Act 1914* (Cth), s 16A(2)(g)

46 at 394

47 Per Kirby J, ibid 393

48 See above n 17.

49 Ibid 138.

50 New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 4 April 1990, 1689. See also de Jersey CJ in *R v Ruhland* [1999] QCA 430, [6], Phillips JA in *R v Hilton* [2001] VSCA 134, [14], Cox CJ in *Hyland v R* (1994) Tas CCA 98/1994, [11] and *Murphy v R* [2000] TASSC 169, [2].

In the NSW parliamentary debate on the forerunner to S.22(1) of that state's *Crimes (Sentencing Procedure)Act 1999* (part of which has already been quoted; see note 19 above), the then Attorney-General observed:[50]

> There are some cases in which it would be inappropriate to reduce a sentence because of a plea of guilty. It is impossible to predict what sort of cases these will be, but one example is where the offence is so serious that it is appropriate for the maximum sentence to be imposed despite a plea of guilty.

The very reason for the request for the guideline issued for NSW in *Thomson and Houlton* was said[51] to have been

> …that there was significant doubt amongst practitioners that a substantial discount was in fact given by all sentencing judges and that there was particular scepticism as to whether an early plea was being appropriately recognised.

The Court in that case, while declining to place any great reliance on statistics from its own District and Local Courts which suggested that there was no regular identifiable discount for the fact of a guilty plea, did draw, from the Weatherburn and Baker survey (see note 51, supra) the conclusion that there was some indication ' … there is no benefit from an *early* plea'[52] (the Court's emphasis).

Other postulated valid grounds for a discount

In raising the possibility that it is discriminatory of those who exercise their right to trial for a court to give a sentencing discount for a plea of guilty on the sole ground that the accused has saved the community the cost of a trial, the majority in *Cameron* were prepared to accept that such a process is *not* discriminatory when the plea of guilty arises from other motivations. These were identified in the following passage from the majority judgment:

> Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.[53]

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51 Ibid 109, an observation apparently supported by a research study undertaken by the NSW Bureau of Crime Statistics and Research under the short title of Weatherburn and Baker, Managing Trial Court Delay (2000).

52 Ibid 112.

53 See *Cameron* at 385.

As has already been argued, there may well be no distinction in reality between 'facilitating the course of justice' and 'saving the community the expense of a contested hearing'. Nor, with the greatest respect, do either of the other quoted justifications for a discounted sentence fare any better when they are considered against the reality of contemporary criminal practice.

Remorse

In *Siganto,*[54] the majority of the Court (two of whom were later to form part of the majority in *Cameron*) expressed the traditional view that a plea of guilty '… is usually evidence of some remorse on the part of the offender', and in *Cameron* they went on to impliedly confirm their opinion in *Siganto* that a plea of guilty born of remorse was deserving of a reduction in sentence.

The reality is that for a number of years now, courts throughout Australia have come to entertain serious doubts regarding the genuineness of many professed expressions of remorse, and have certainly ceased regarding a plea of guilty as automatic proof of such.

In *R v Shannon,*[55] King CJ in the South Australian Court of Appeal took great care to distinguish between, on the one hand 'genuine remorse, repentance or contrition' and, on the other hand 'a recognition of the inevitable', or a plea '… entered as the means of inducing the prosecution not to proceed with a more serious charge', both of which he regarded as 'not of itself a matter of mitigation".

In *Heferen,*[56] Anderson J in the WA Court of Criminal Appeal observed that 'Where the prosecution case is strong and a conviction is inevitable, a plea of guilty is not generally regarded as a significant indication of remorse'. In *R v Porter and McQuire (No 2),*[57] McMurdo P, of the Queensland Court of Appeal, observed that 'The criminal justice system recognises that a plea of guilty is a mitigating factor even when not accompanied by remorse'.

In *R v Jones,*[58] Davies JA in the same Court offered this more cynical observation:

54 at 663-664, per Gummow, Hayne and Callinan JJ, with Gleeson CJ.
55 at 452-453.
56 (1999) 106 A Crim R 89, at 93. A year previously, in *Heryadi and Ors v The Queen* (1998) 98 A Crim R 578, at 584, Ipp J said of a drug courier 'The applicant's plea of guilty, however, has little mitigatory effect. He was, after all, caught red-handed'.
57 (2000) 110 A Crim R 348, 363, quoting *Corrigan* [1994] 2 Qd R 415, 416, 419, and *Penalties and Sentences Act 1992* (Qld) s 13.
58 [2000] QCA 84.
59 at 131.

> I would doubt whether at least in this State a guilty plea is usually evidence of remorse. More likely in most cases, it is evidence of an expectation on the part of an offender usually as a result of legal advice that a guilty plea will probably result in a reduced sentence … I doubt whether the guilty plea was evidence of remorse at all. The case was as I have already indicated an overwhelming one against the applicant and he must have realised that.

A similar sentiment would appear to prevail at the highest level in New South Wales. In *R v Thomson; R v Houlton,*[59] Spigelman CJ, in delivering the judgment of that state's Court of Criminal Appeal, noted:

> A plea may be entered as an acceptance of the inevitable or in order to obtain such advantage as may be afforded in the circumstances. In such a case a plea does not indicate genuine remorse or contrition . . . . . Much greater weight may be accorded to the conduct and statements of an accused over a period of time, which confirm a position of genuine and deeply felt contrition. When such contrition is taken into account by a sentencing judge, then the diminution of sentence is given for contrition, not for the plea of guilty . . . . . it is not desirable to sepeaate out the factor of a plea as an indication of remorse from other manifestations of remorse.

Similar expressions of doubt regarding the reliability of a plea of guilty as an indicator of true remorse may be found in the Court of Appeal reports of Victoria,[60] Northern Territory[61] and Tasmania.[62]

These all demonstrate clearly that while remorse may well be one of the ingredients of a plea of guilty, and may indeed in some cases be its primary motivation, a plea of guilty is by no means an automatic barometer of remorse, and remorse may indeed exist independently of a plea of guilty being entered.

It is no doubt for this reason that some Australian legislatures have chosen to separate remorse from the mere *fact* of a plea of guilty, and have afforded them separate status in the list of factors which a sentencing judge is required to consider when selecting an appropriate penalty.[63] In fact, every legislative

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60 *R v Gillick* [2000] VSCA at [12] and [13].

61 *R v Jabaltjari* (1989) 64 NTR 1.

62 *Murphy v R*, at [2].

63 See *Penalties and Sentences Act 1992* (Qld), ss 9(4)(i) and 13; *Crimes Act 1900* (ACT) S.429A (i)(u) and (v); *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 21(A) and 22; *Sentencing Act 1991* (VIC), ss 5(2)(e) and 5(2C); *Crimes Act 1914* (Cth), s 16(A)(2)(f), (g).

64 [1995] QCA 374. See also *The Queen v Jabaltjari*, per Asche CJ, Para 61, who observed of an accused that 'If his defence involves a complete denial of the offence for which he is charged, and if nevertheless it is established beyond reasonable doubt that

provision which makes reference to 'remorse' or 'contrition' keeps it separate from the provision which deals with a mere entry of a plea of guilty, which is clearly regarded as a distinct and discrete factor to be added to the equation. Nowhere in the sentencing provisions of any Australian state or territory is a plea of guilty directly equated with a demonstration of remorse.

It is also at least arguable that an accused who pleads not guilty – thereby requiring his alleged victim to testify both at committal and trial – disqualifies himself from any discounted sentence based on remorse. While it is not yet being suggested that anyone taking this path should receive a higher sentence, it is certainly unlikely that he could expect what might be termed a 'remorse-based' discount.

In *R v Solway,*[64] for example, Pincus JA in the Queensland Court of Appeal observed:

> The orthodox theory is that Solway is not to be given extra punishment for his apparent lack of remorse and for having put the victim through the traumatic experience of being publicly questioned about all these matters at committal and trial; but he is not entitled to any substantial leniency which the cases show can often be justified in such cases, where there is an admission of guilt … What may be said to mark this case out from others in which, in comparable circumstances, non-custodial sentences have been imposed is principally the denial of the offences and lack of remorse.

It is difficult to construe these remarks in any other way than as indicating that demonstrating lack of remorse by going to trial will result in a higher sentence than pleading guilty and sparing the victim the trauma of trial. Obviously, one would not look for remorse from someone who regards himself as innocent of the alleged offences, but is he then to be penalised for *not* showing remorse if the jury subsequently finds him guilty?

If that is to be the policy, then with the greatest of respect this is just as discriminatory of someone who elects to plead not guilty as imposing a higher sentence on an accused simply because he thereby incurs the public cost of a trial. Indeed, a strong case could be made out for being *more* severe on someone who has put the victim through the ordeal of a trial than one who has simply 'wasted' public money.

The cynicism with which expressions of remorse have come to be regarded in recent years also highlights the practical difficulty of distinguishing between genuine remorse and what might be termed the tactically appropriate public expression of it. Without some test for identifying 'objective remorse' (one example

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> he committed it, the obvious comment would normally be that he has shown no remorse or self-realisation and he should get no consideration for those factors'.

of which might be sparing the victim the trauma of trial), it may well become the case that discounts are in reality given for what amount to no more than cost-saving exercises in which counsel for the defendant has the presence of mind to include the word 'remorse' in his sentencing submissions.

Given these difficulties, it is hardly surprising that, McHugh J noted in *Cameron,*[65]

> …[I]n recent years, under the pressure of delayed hearings and ever increasing court lists, Australian courts have indicated that they will regard a plea of guilty as a mitigating factor even when no remorse or contrition is present

The essential distinction between what might be termed 'genuine' and 'tactical' remorse was further highlighted by Kirby J in this observation:[66]

> The discount for a plea of guilty to the charge brought against the accused is to be distinguished from a discount for a spontaneous and immediate expression of remorse conducive to reform and or immediate cooperation with investigating police. The latter has always been treated as deserving of such recognition in the sentencing of an accused . . . . . However, judges have lately expressed doubt as to the extent to which pleas of guilty really proceed from such motives. In a prisoner who has been caught red-handed, the plea of guilty may indicate regret at being caught and charged, rather than regret for involvement in the crime.[67]

With respect, this is surely the correct way to view the current role of remorse in the overall sentencing equation. It is an *additional* factor which may attract a *further* discount – it is not the pre-requisite for a discount in the first place. This pre-requisite is to be found in the 'other features of the public interest' referred to by His Honour, which he went on to describe as 'purely utilitarian'.

In conclusion, he noted:[68]

> …[T]here are other considerations of the public interest that warrant a discount. Remorse, when present, is icing on the cake.

Acceptance of responsibility

In practice, it is likely to be extremely difficult to distinguish between a guilty plea born of an 'acceptance of responsibility' by the accused, and one which is not. Is it possible, in reality, for a person to plead guilty without at least by implication

65 at 388-389, quoting *Winchester*, at 350.
66 at 393-394.
67 In such a case, of course, however, the plea may thereby cease to be 'utilitarian'.
68 Ibid 397.

accepting that he was responsible for the criminal actions of which he stands accused? Posed in reverse, would someone (or at least, someone properly advised legally) plead guilty to offences for which he did not regard himself as being responsible?

Acceptance of responsibility is clearly not the same thing as remorse, although on many occasions the two may accompany each other. One may accept responsibility with a dull resignation without at the same time experiencing an ounce of contrition; by the same process, one may feel the greatest remorse for what ultimately happened to the victim without accepting criminal responsibility for it, particularly after taking dispassionate legal advice.

This distinction is implicit in all the cases referred to above in which the courts have come to dissociate the presence of remorse from the plea of guilty. Even though that plea may be merely the product of a desire for a lower sentence, it must surely be accompanied (in all but the most exceptional cases) by an acceptance of criminal responsibility.

If all that is required for a discount is an 'acceptance of responsibility' (which even the majority in *Cameron* distinguished from an expression of remorse[69]), then it may well be the case that the concerns expressed by the majority regarding unwarranted discounts in sentencing being discriminatory of those who plead not guilty will turn out to be groundless, since the vast majority of those entering guilty pleas may be said to be accepting their responsibility, a ground identified by the majority themselves as meriting such a discount.

A division between State and Commonwealth?

The strongest implied criticism of the state and territory court policy of discounting sentences in exchange for guilty pleas came from McHugh J, who at the same time was at pains to dissociate the federal courts from such a practice. At p 390, he issued the following ringing re-affirmation of those principles of equity which he maintained should underlie the sentencing process:

> It is … one thing for courts, exercising State jurisdiction, to give a discount for a bare plea of guilty even though it results in persons who plead guilty receiving shorter sentences than persons in similar circumstances who plead not guilty. But it is another matter whether, consistently with the exercise of the judicial power of the Commonwealth, courts exercising federal jurisdiction can give 'discounts' in such cases. If there is one principle that lies at the heart of the judicial power of the Commonwealth, it is that courts, exercising federal jurisdiction, cannot act in a way that is relevantly discriminatory. To deny that proposition is to deny that equal justice under the law is one of the central concerns of the judicial power of the Commonwealth. And it is at least arguable

69 See above n 24.

> that it is relevantly discriminatory to treat convicted persons differently when the only difference in their circumstances is that one group has been convicted on pleas of guilty and the other group has been convicted after pleas of not guilty.

In support of this proposition, McHugh J quoted the majority ruling in *Wong v The Queen,*[70] to the effect that

> Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect.

He then converted that broad principle into the following practical application:[71]

> Where the facts and circumstances of crimes and the subjective factors of those who commit them are the same, arguably equal justice requires that there be an identity of, and not different, outcomes in the punishment that they receive. That the State and others may be advantaged by a plea of guilty is arguably not a relevant difference in cases where the plea of guilty throws no light on the contrition, remorse or future behaviour of the defendant.

This, it is submitted, cuts to the very heart of the debate, and highlights the core issue over which opinion seems to divide in the final analysis. Should a person be sentenced *solely* on the basis of factors arising within the case itself, plus the personal circumstances of that accused (one of which *may* be a genuine expression of remorse, which in turn *may* have led to the guilty plea), or should a discount in sentence be allowed on the *extrinsic* ground that the accused has pleaded guilty (without remorse), and thereby saved the public purse the cost of a trial, in circumstances in which it *cannot* be said that he has accepted his responsibility, and it *cannot* be said that he has evinced a willingness to facilitate the course of justice?

For the reasons advanced above, it is arguable that such a specific specimen of a plea of guilty will in practice be rare. However, it will present itself from time to time, and will divide opinion between the states and territories on the one hand, and the Commonwealth on the other.

Factors such as remorse, acceptance of responsibility etc. identified by the majority in *Cameron* as deserving of a discount are presumably to be regarded in the Commonwealth jurisdiction as among the 'relevantly' differentiating factors referred to in *Wong*, leaving the purely pragmatic ground of cost-saving out on its own as not deserving of a distinction between two cases which are otherwise indistinguishable. For the states and territories, on the other hand, economic

70 (2001) 76 ALJR 79 at 92. McHugh J's emphasis.
71 at 390.

rationalism will almost certainly rule the day, even in the limited number of cases in which the defendant cannot even be said to have displayed a 'willingness to assist the course of justice'.

Quite apart from the fact that we may have to wait a long time for an appropriate sentencing appeal in which the only mitigating factor which can be argued on behalf of an accused is that 'he saved the cost of a trial' (such is the ingenuity of defence counsel in placing their clients in whatever category of virtue is relevant under the sentencing regime which obtains at any given time), it may well take a considerable time for the correct combination of factors to manifest themselves at a federal level for this issue to be advanced further.

In acknowledging that his remarks in relation to discrimination against those who opt for trial was *obiter* of the essential issues before the Court in *Cameron*, McHugh J was obliged to concede:[72]

> …[I]n Western Australia a person who pleads guilty as soon as practicable is entitled to have the otherwise appropriate sentence substantially discounted. Determining whether the discount principle applies in federal jurisdiction must therefore be left for another day. Given the advantages that the prosecution authorities see in the discount system, a challenge to the applicability of that system in federal jurisdiction will probably have to come from a person who has been sentenced after being convicted on a plea of not guilty. If such a person has been denied the discount received by those pleading guilty, the sentence may be arguably discriminatory in a relevant sense.

In short, the storm-clouds may be gathering, but the first drops of rain have yet to fall. When and if they do, it is difficult to visualise the states and territories voluntarily abandoning a policy which in the end-result has proved so economically beneficial to the criminal justice system. Nor is it easy to imagine their respective electorates being willing to finance the alternative.

Should the rules eventually change in respect of Commonwealth matters only, then in those state and territory courts exercising Commonwealth jurisdiction alongside its state and territory equivalent, there may in time erupt a very real argument involving alleged discrimination – against offenders going to trial under local criminal law (who allegedly 'lose out' by pleading not guilty), as compared with their counterparts under the Commonwealth regime, who may in future receive the same sentence regardless of whether or not they plead guilty.

The most appropriate last word on this issue is probably that of Kirby J, who, referring to the policy of discounting sentences in return for guilty pleas, observed:[73]

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72 Ibid. See also Kirby J at 399.
73 Ibid 399-400.

> …[T]he principle is uniformly accepted. In practice, the amount of the discount and the rules applied in arriving at it, do not appear to vary greatly. This is not the occasion to explore this question further.

The need for transparency in discounting

A further issue raised by Kirby J is, however, in more urgent need of response, since it is in practice a frequent source of appeals against sentence. It concerns the 'transparency' with which discounts for guilty pleas are granted.

By this is meant a practice under which, at the end of the sentencing process, the accused is advised of the sentence he *would have* received had it not been for the mitigating factors which were taken into account, at the same time that he is advised of the sentence which he *is* to receive. Such a process has at least two advantages.

The first is that the person being sentenced can clearly grasp what 'discount' he has received, and in respect of what mitigating factors. The second is that a body of 'discount comparatives' may be added to the growing libraries of sentencing precedents, Australia-wide. These in turn are extremely valuable in ensuring 'parity of sentence' between cases in which the factors upon which the sentence falls to be determined are similar.

To these, Kirby J added[74] a third, and closely related, justification for transparency in discounting, observing:

> …[I]f the prisoner and the prisoner's legal advisers do not know the measure of the discount, it cannot be expected that pleas of guilty will be encouraged in appropriate cases, although this is in the public interest … Knowing that such a discount will be made represents one purpose of such discounts. Unless it is known it may not be possible for an appellate court to compare the sentence imposed with other sentences for like offences or to check disputed questions of parity.

This is particularly true at High Court level, in view of the different 'discount levels' which seem to apply in different states and territories (see above n 16).

Given the obvious advantages of transparent discounting (which Kirby J also refers to as the 'two-stage approach' – see below), it is surprising to find that it is by no means generally practised, or even acknowledged, across the jurisdictions, the majority of which prefer to employ a process generally known as the 'instinctive synthesis of factors' (see below), leading to a single declared sentence.

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74 Ibid 395.

One of the dangers of such a practice was highlighted by Kirby J, by reference to the very circumstances which led to the appeal in *Cameron* itself, in the following passage from his judgment:

> …[I]t is appropriate to observe that, effectively, this appeal would not have been possible (and a miscarriage of justice might have been irreparably masked) had the sentencing judge contented himself with stating generally that he had taken the plea of guilty into account and simply announced his 'instinctive synthesis' represented by the sentence … The appeal would have been without redress[75]

This in itself, of course, is a further reason for the encouragement of 'transparent' or 'two-stage' sentencing, namely that it identifies grounds for appeal against sentence which might otherwise remain only as a suspicion that the process has somehow miscarried.

His Honour left no-one in any doubt regarding his views on the matter. At p.395 he declared:

> I remain of the opinion that where a 'discount' for a particular consideration relevant to sentencing is appropriate, it is desirable that the fact and measure of the discount should be expressly identified. Unless this happens, there will be a danger that the lack of transparency, effectively concealed by judicial 'instinct' will render it impossible to know whether proper sentencing principles have been applied.

Of all the state and territory jurisdictions, one aspect of Queensland's sentencing procedure comes the closest to imposing a statutorily-mandated 'two-stage' sentencing process. Under the *Penalties and Sentences Act 1992 (Qld)*, s 13A(7), a judge reducing a sentence on the ground that the defendant has undertaken to co-operate with law enforcement agencies must announce, in open court, the actual sentence being imposed, then close the court and announce (a) that the sentence has been reduced under the subsection (and such a reduction appears to be mandatory), and (b) the sentence which would otherwise have been imposed.

A similar provision is to be found in the *Crimes Act* (Cth), s 21E, for federal offences.

However, s 13(4) of the Queensland Act, while requiring a sentencing judge to 'take into account' a guilty plea, requires only that a judge who does *not* reduce a sentence in return for a guilty plea state that fact in open court, and the reasons for it. When a sentence *is* being so reduced, subsection (3) requires simply that the judge state in open court that the guilty plea was taken into account when passing

75 Ibid 396.

sentence. This is a long way from the 'transparent' two-tier process advocated by Kirby J, which would require the extent of the discount to be quantified.

Similarly, s 16A(2)(g) of the Commonwealth Act requires only that a judge sentencing for a federal offence 'have regard' to a plea of guilty, and does not even require the judge to state in open court his/her reason for not discounting a sentence in return for a guilty plea.

The *Sentencing Act 1995 (WA)*, s 8(4), requires that if a court reduces a sentence because of a 'mitigating factor' (including a plea of guilty), then it must state that fact in open court. There is no requirement to quantify the discount, but in subsection (5) there *is* such a requirement in those cases in which the discount is being given in return for the offender assisting law enforcement authorities.

The provisions of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*, s 23, provide for a *discretionary* discount in cases in which the offender has undertaken to assist law enforcement authorities, but contains no provision equivalent to that under s 13A(7) of the Queensland Act, requiring a statement in open court of the quantum of the discount.

Section 22 of the same Act (like s 13 of its Queensland counterpart) contains a provision [in subsection (1)] which requires a sentencing court to 'take into account' a plea of guilty. While it would seem that the sentencing judge is not required to state formally in open court that he has done so (and even less does he appear to be required to quantify any discount), subsection (2) does require him to record his reasons for *not* reducing a sentence in return for a plea of guilty.

In Victoria, the provisions of the *Sentencing Act 1991 (VIC),* s 5(2AB) are to the limited effect that if a court imposes a less severe sentence than it would otherwise have done following an undertaking to assist law enforcement officers, then the court must announce that it is doing so. Once again, there appears to be no requirement to quantify the discount.

There are no equivalent, or otherwise relevant, provisions to be found in the sentencing legislation of South Australia, Tasmania, the Northern Territory, or the ACT.

It is clear from this brief survey that hitherto, the only context in which it has been deemed sufficiently important for a sentencing court to quantify the discount it is giving in return for some mitigating factor is that in which the offender has agreed to co-operate with law-enforcement authorities. In no jurisdiction anywhere in Australia has this been considered appropriate when the reason for the discount is a plea of guilty, and it is presumably this policy which Kirby J was seeking to reverse in *Cameron*.

He had previously espoused this proposal in *AB v The Queen*[76] and *Wong v The Queen,*[77] and on both occasions had found himself in a minority, with the majority court in *Wong* (Gaudron, Gummow and Hayne JJ)[78] preferring the alternative methodology of weighing up all the factors to be taken into account when passing a particular sentence, and from them arriving at an 'instinctive synethis' of factors.

Almost defensively, they went on to explain:[79]

> This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion (narcotics importation contrary to Commonwealth provisions) balances many different and conflicting features.

They quoted, in support of their position, the review carried out by Spigelman CJ in the New South Wales case of *R v Thomson*[80] which revealed that the preponderance of appeal court authority at state and territory level[81] was against the 'two stage' approach to sentencing. As indicated above, with the limited exceptions outlined above, the legislation of the states reveals the same disinclination to encourage sentencing judges to begin with an 'objective' sentence and then discount it by a given proportion, according to the mitigating factors which can be identified.

In *AB v The Queen,*[82] McHugh and Hayne JJ had also opposed the suggestion that sentencing be performed on a 'two tiered' basis. McHugh J there said:

> …[I]t is in conflict with the discretionary nature of the sentencing process. Discretionary judgments require the weighing of elements, not the formulation of adjustable rules or benchmarks.

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76 (1999) 198 CLR 111, 148-149, in which the issue was the failure of the sentencing judge, when passing sentence on a serial child sex offender, to publicly acknowledge the granting of a discount in sentence in return for the offender waiving a privilege relating to his extradition from the USA, as the result of which it was possible for a further 39 offences to be disposed of on sentence.

77 (2001) 76 ALJR 79, 99-100, in which he observed that 'Greater transparency and honesty are the hallmarks of modern public administration and the administration of justice. In sentencing, we should not turn our backs on these advances'.

78 Ibid 93.

79 Ibid 93.

80 (2000) 49 NSWLR 383, 396-411. See also above n 17.

81 Specifically, in NSW, Victoria, Queensland, Tasmania, South Australia and Western Australia.

82 at 121-122 and 156 respectively.

83 (1998) 164 CLR 465, 476-477.

He also considered that it was in conflict with the broad statement of principle in *Veen v The* Queen,[83] to the effect that the various 'purposes' of criminal punishment ' … overlap, and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case'

Hayne J had observed in *AB:*

> No calculus will reveal some mathematical relationship between the appellant's remorse, the harm he has inflicted on his victims and society's denunciation of what he did to them … Remorse, harm, denunciation, retribution and deterrence – in the end, all these and more must be expressed by a sentencing judge in units of time. That is a discretionary judgment. It is not a task that is to be performed by calculation.

With the greatest of respect to his Honour, how else is it to be done? And of even more importance, how are defence lawyers to advise their clients fully on the consequences of pleading guilty at an early stage in the proceedings, as opposed to taking their chances in the lottery of jury trial, without some quantitative yardstick with which to express the likely benefits of an early plea in terms which the client can understand?

It is a fundamental requirement of all law that it be both accessible and intelligible to those who are bound by it. If the sentencing process is allowed to take on the appearance of the alchemist's potion, compiled from exotic ingredients combined by means of a formula known only to adepts, then few will respect it, and even fewer will be convinced that the sentences handed down by the courts are appropriate.

The appeal in *Cameron* arose from a perception on the part of the appellant and his legal team that he had been, in the vernacular, 'short-changed' in respect of his guilty plea. That perception arose by reference to 'the going rate' for pleading guilty by way of the 'fast-track' system which is available in Western Australia. It had been promoted by the government of that state in order to encourage 'utilitarian' pleas of guilty. Without a prior expectation that his guilty plea would result in a discounted sentence, the appellant might well not have chosen to plead guilty. Had the judge not indicated the level of discount which he was applying, the appeal (which in the event was successful) could not have been contemplated.

Kirby J does not suggest that the entire sentencing process be converted into a mathematical formula, simply that judges indicate, when passing sentence, what degree of discount (if any) has been allowed in respect of the 'mix' of mitigating factors which presented themselves. Without such a process, sentencing

84 at 395.

precedents (so important in ensuring 'parity' of sentence between cases) will become meaningless.

It is probably the case that such a proposition would be supported even by those members of the Court who favour the 'instinctive synthesis' approach, and that the real issue is whether or not sentencing judges should give more detailed reasons for their choice of sentence. Kirby J acknowledged this much in the following passage of his judgment in *Cameron*:

> The difference that has emerged in this Court on this question may be one of semantics rather than of substance. However that may be, in my view it is desirable, and certainly permissible, by the common law, for a judge to identify the measure of the discount which he or she has allowed for a plea of guilty. If that means that a 'two-stage approach' is involved, including identification of the primary and then the discounted sentence, I regard it as inherent in the provision of an identifiable discount for such a plea. No such discount can be reduced to a set formula. Elements of intuition and judgment remain to be given weight in arriving at the aggregate sentence finally imposed.[84]

At the end of the day, if issues such as those raised in the instant case are to be fully ventilated by reference to current practice, it is imperative that the bases upon which sentences have been arrived at are at least fully identified, if not quantified.

Adequate appellate legal representation: the limitations of *Dietrich*

One final issue arising from the *Cameron* case, to which the attention of the Court was drawn by Kirby J, concerns the right of an appellant to legal representation on appeal. Noting that the special leave application against the original decision of the Western Australia Court of Criminal Appeal had been made by the applicant in person,[85] and that the state authorities had made arrangements to bring him to court for that purpose, his Honour voiced the following concern:[86]

> There is a risk that, but for his appearance and oral argument, the error of the Court of Criminal Appeal that is now exposed might not have been detected. The limitations on the resources of Legal Aid in Western Australia, as elsewhere, make it inevitable that cases occur where legal representation before this Court is not provided. This Court cannot forfeit its judicial responsibilities to the decisions of legal aid bodies constrained by resource allocations of the Executive Government … The appellant's success in this appeal does not demonstrate that improved arrangements are unnecessary. On the contrary, it demonstrates the opposite. In my opinion, this Court should not

85 Although he was provided by Legal Aid with counsel for the hearing of the appeal itself, once leave had been granted.

86 Ibid 400.

> be content with the present unequal arrangements for prisoner applications. Equal justice before the law is not a principle confined to trials.

In calling for a broadening of the principle which underlay the decision in *Dietrich v The* Queen,[87] his Honour complained:[88]

> Appellate courts, including this Court, are sometimes forced to rely on their own resources or voluntary assistance occasionally provided by legal professional bodies. Yet if Dietrich rests, as I think it does, on a broader, and possibly a constitutional, foundation, whether generally or at least in cases within federal jurisdiction, improved arrangements for the presentation of applications by indigent prisoners in custody may be required.

It is difficult not to sympathise with the suggestion that at appeal level, and certainly before the High Court, all applicants should be legally represented, and that those without the means to pay for such representation, and who are in custody, should have it provided free of charge. However, with the greatest respect to His Honour, such a worthy aim both ignores the reality of life 'at the coal face', and elevates the *Dietrich* principle higher than it was ever intended to go.

Dietrich itself involved a successful appeal against conviction in the Melbourne County Court on three of four original indictment counts alleging serious Commonwealth narcotics charges. The appeal was on the sole ground of miscarriage of justice arising from the fact that the trial judge declined to either stay the indictment or adjourn the trial in order that D might obtain adequate representation by counsel. The subsequent trial lasted 40 days, during the whole of which D was required to represent himself.

It is of some significance that although he was eventually found not guilty of one of the original four charges (in circumstances which cast some doubt on the reliability of the guilty findings in respect of the other three), the Victorian Legal Aid Commission had taken the initial view that D was only entitled to Legal Aid representation for a guilty plea. This only further serves to promote pleas of guilty over pleas of not guilty, and is arguably even more discriminatory than 'discounting' sentences in return for guilty pleas. It certainly sits uncomfortably with the majority approach in *Cameron*.

The precise ratio of *Dietrich* emerges from the following extract from the joint judgment of Mason CJ and McHugh J:[89]

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87 (1992) 177 CLR 292, which, as pointed out by His Honour at p 400, '…does not, in its terms, apply to appeals or applications for leave or special leave to appeal to this Court'.

88 Ibid.

89 at 311, Deane, Toohey and Gaudron JJ. Agreeing in broad principle with this aspect of the joint judgment.

> … Australian law does not recognise that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial. Such a finding is, however, inextricably linked to the facts of the case and the background of the accused.

In short, the 'foundation' of *Dietrich* extends no further than the possibility, in appropriate cases, of staying *trial* proceedings while an accused obtains counsel, who may or may not be supplied at public expense. It is drawing an extremely long bow to seek to extend this authority to one which requires the provision of counsel free of charge to all accused in custody who may feel that they have grounds for appeal. Almost by definition, such persons will be 'indigent', at least by the time that they have been sentenced.

Nor was the principle which emerged in *Dietrich* extended in any meaningful way by its application by the New South Wales Court of Criminal Appeal (of which Kirby J was at that time the President) in Milat,[90] in which the unanimous judgment of the Court, in rejecting an appeal by Ivan Milat against what was in effect the level of remuneration being offered to his legal team by the New South Wales Legal Aid Commission, contained the following passage

> The principle in *Dietrich* concerns persons being, or about to be, tried for serious criminal offences … It does not concern an accused person's supposed right to competent counsel; the existence of such a right was denied by the decision in Dietrich.[91]

In practice, only the most senior and experienced counsel appear at any appellate level, and the High Court is the almost exclusive preserve of the QC and SC strata of the profession. It is not easy to envisage the Legal Aid Commissions of the various states committing vast resources to additional appeal funding at this level. Nor would there seem to be any immediate case authority to support such a policy.[92]

The ultimate irony may be that the possibility of future additional funding for such a worthwhile purpose may (given finite budgets) rely heavily on a corresponding improvement in the trial/plea ratio of matters which the various Commissions are required to fund at first instance. Put another way, the greater

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90 (1995) 37 NSWLR 370.

91 Ibid 375.

92 Although Kirby J in Cameron suggested a possible 'constitutional foundation' for it under the broad canopy of the decision in *Leeth v The Commonwealth* (1992) 174 CLR 455, 483-489 and 502-503. See, in particular, 400.

the number of guilty pleas, the greater the potential source of re-allocated funds for appellate representation.

That in turn may well require an increase, rather than a decrease, in the number of 'purely utilitarian' pleas of guilty, whose only apparent merit is that they save public resources for other purposes. One of these 'other purposes' might well be improved appellate representation.

The first responses to Cameron

At the time of writing (September 2002), there have been at least two appeals at state Court of criminal Appeal level (in South Australia and New South Wales) in which the respective Courts have been afforded an opportunity to respond to *Cameron*. They have both proved to be unimpressed, and economic rationalism in sentencing remains alive and well.

The first of these two cases chronologically was *R v Place*[93], an appeal against a 'head sentence' of eleven and a half years for six armed robberies and four bail breaches, discounted from an original head sentence of 22 years (itself reduced from 32 years under the 'totality' principle), by means of what the South Australian Court of Criminal Appeal[94] described as a 'two-stage approach' in which the appellant had been given a 40 per cent reduction in sentence to reflect his early confession, his guilty plea, his contrition and his saving of 'significant police and court time'.

The grounds of appeal were (a) the allegedly 'excessive' sentence, and (b) the alleged 'errors of principle' involved in employing the two-stage approach. With regard to the second ground, the Court[95] said that its task was:

> . . . . to determine whether it is an error for a sentencing judge to identify a specific reduction for a plea of guilty and whether this Court has been in error in encouraging sentencing courts to do so'

At the same time as re-assessing South Australian sentencing discount policy in the light of *Cameron*, the Court supplied a unanimous response to the earlier High Court ruling in *Wong*[96], which as indicated *supra* had principally been concerned with the legitimacy of a process by which the NSW Court of Criminal Appeal had issued a 'guideline' judgment indicating appropriate penalties for a whole range of drug trafficking offences, but which had also dealt with the competing claims of

93 [2002] SASC 101, heard on 12.2.02, with the judgment delivered on 26.3.02, some six weeks after the delivery of the judgment in Cameron.
94 Ibid [2].
95 Ibid [6].
96 Considered above – see text to note 77.

'two-tier' and 'instinctive synthesis' sentencing processes, and had issued a majority opinion in favour of the latter.

Noting that the South Australian Court of Criminal Appeal had never issued guideline judgments such as those criticised in *Wong*, and had no intention of doing so, the Court proceeded to the issue of 'two-tier' sentencing, and concluded that the process observed in South Australia did not fall within the category of a 'mathematical approach', which was the aspect of it which had incurred the criticism in *Wong*.

They went on to observe [97] that nothing said by the majority Court in either *Wong* or *AB v The Queen*[98]

> …dealt specifically with the practice in South Australia of nominating a specific reduction for a plea of guilty, as part of a process in which all relevant factors are considered, but the effect of one factor on the sentence is quantified.

Instead, even the Federal Court[99], in addition to interstate Courts of Criminal Appeal including that in NSW, had approved the policy adopted and consistently followed in South Australia as the result of the landmark judgment of its then Chief Justice, King CJ, in *R v Shannon*[100], in which he identified in advance those factors to which sentencing judges in South Australia were entitled to give weight in mitigation of sentence following a plea of guilty.

Noting that whereas initially, sentencing judges applying the *Shannon* principles, while confirming that they had given weight to a guilty plea in passing sentence, did not actually quantify the precise discount given, the Court added that in a series of cases beginning in 1991[101] it had embarked on a policy of encouraging judges to quantify the discount. They further noted:[102]

> As a consequence of the encouragement, for a number of years the vast majority of sentencing judges and magistrates have consistently identified the extent of the reduction given for a plea of guilty and co-operation with authorities.

97 Ibid [38].
98 Considered above – see text to note 76.
99 In, eg *R v Schumacher* (1981) 3 A Crim R 441 at 448.
100 See, in particular, note 32.
101 Of which *R v Harris and Simmonds* (1992) 59 SASR 300 is a particularly clear example.
102 Ibid [46].

After reviewing the interstate case-law on whether or not a sentencing judge should quantify the level of discount for a plea of guilty[103], the Court confirmed that this would continue to be the practice in South Australia. In a further reference to certain observations made in *Cameron* and *Wong*, they added:[104]

> In observations with which we respectfully agree, Kirby J[in *Cameron*] repeated his views about the need for transparency and for identification of the extent of a reduction for a plea of guilty … There is no suggestion in the joint judgment or the judgment of McHugh J that the practice or the approach of the sentencing judge [in *Cameron*] was wrong in principle or undesirable … In our opinion this Court is not constrained by authority to hold that the existing practice in this State is wrong … The fears expressed by McHugh J in *AB* and in the joint judgment in *Wong* have not come to fruition in the 10 years that the practice has existed in this State … the public policy objectives are not achieved unless the specific reduction is identified … The initial scepticism that accompanied the general recognition that a plea of guilty entitled an offender to a degree of mitigation has disappeared … It would be very difficult to explain to offenders and the community why the court has departed from its present practice. An explanation for the departure based on describing the sentencing process as an instinctive synthesis would be greeted with scepticism

Finally, on the issue of the 'utilitarian' ground for discounting sentences in return for a plea of guilty, the Court observed:[105]

> The remarks of Kirby J concerning the public interest served by facilitating pleas of guilty echo the theme of the judgment of King CJ in *Shannon* . . . .The issue of the rationale was not the subject of submissions. We tend to favour the views expressed by Kirby J and King CJ that, in the absence of subjective criteria such as contrition, a sufficient rationale is found in the public interest based on 'purely utilitarian' considerations. The considerations to which Kirby J and King CJ referred are compelling.

Barely a month later, the NSW Court of Criminal Appeal, in the case of *R v Sharma,*[106] had an opportunity to assess the implications of both *Cameron* and *Wong*, in the light of the South Australian response in *Place*. The NSW response was even more defiant than its South Australian counterpart.

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103 and laying particular emphasis on the similar review by Spigelman CJ in Thomson which led to His Honour's conclusion that 'The preponderant, but not unanimous view, in the Australian authorities is that it is always permissible and sometimes desirable for a trial judge to quantify the discount accorded for a plea of guilty'.

104 Ibid [79] – [82].

105 Ibid [70] and [78], pointing out in [77] that the various judgments on this point in Cameron were obiter anyway.

106 [2002] NSWCCA 142.

The case itself was a Crown appeal against the leniency of an 18 month sentence imposed in a District Court on a 19 year old who pleaded guilty to one count of robbery in company, and undertook to supply evidence against a co-offender, without which that person would probably have escaped prosecution.

The sentencing judge approached his task in the classic 'two-tier' manner, with the following sentencing remarks[107]

> The appropriate starting point, it seems to me, for calculating the appropriate sentence in this case . . . . . is four years in prison. There has been a plea of guilty, it is an early plea, and he is to have the benefit of that. The contrition which he shows by the plea, and which he has exhibited by giving evidence in the witness box, and from the utilitarian component of avoiding the necessity for a trial, these things combined cause me to allow a discount of some twenty-five per cent on sentence.

The resulting 3 year head sentence was then halved to take into account S's co-operation with the investigating authorities. The Court of Criminal Appeal noted[108] its task as being that of considering '. . . . . whether a sentencing judge is permitted, when taking into account a plea of guilty, to quantify a discount to be given for the plea and, in any event, to give weight to the utilitarian value of the plea'.

There are of course two separate issues involved in that consideration. So far as concerned what the sentencing judge had referred to as 'the utilitarian component', the Court confirmed[109] that since its own 5-judge decision in *Thomson*[110], it had become the norm to discount sentences 'in the range of ten to twenty-five per cent for that component alone', and that[111] 'This Court should not reconsider a recent decision of a five judge bench unless it is required to do so by the doctrine of precedent. It is not so required'.

The justification for this remained that originally enunciated by Spigelman in *Thomson:*[112]

> The instinctive synthesis approach is the correct general approach to sentencing. This does not, however, necessarily mean that there is no element which can be taken out and treated separately, although such elements ought to be few in number and narrowly confined. As long as they are such, their separate treatment will not compromise the intuitive or instinctive character of the sentencing process considered as a whole.

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107 Reproduced, ibid [17].
108 Ibid [20].
109 Ibid [21].
110 Above n 17.
111 Ibid [27].
112 at [57] thereof. The Court in the instant case was also led by Spigelman CJ.

So far as concerned the rationale behind discounting purely for the utilitarian value of a guilty plea, the Court, while noting that the majority judgment in *Cameron* was binding on it, expressed its concern[113] thus:

> If the reasoning in *Cameron* is applicable in this State, then the foundation of the judgment in *Thomson* is swept away. For purposes of the instant case, his Honour will have erred in taking into consideration a utilitarian component in the objective sense, without focusing his attention exclusively on the subjective aspect. The discount range of ten to twenty-five per cent established by *Thomson* was based on the utilitarian value of the plea understood in an objective sense. There is no reason to accept that a discount of this order of magnitude would be appropriate as a separate element, if the courts' consideration were confined to the subjective factor of preparedness to facilitate the administration of justice.

However, the Court went on to conclude that all courts in NSW continued, notwithstanding *Cameron*, to be bound by the provisions of S.22 of the *Crimes (Sentencing Procedure) Act 1999,*[114] which states that a sentencing judge must take into account both the fact of a plea of guilty, and when it was made, and must give reasons if not discounting a sentence as a result. None of these provisions has any reference to 'the subjective intention of the person pleading guilty'.[115] The Court added:

> The mandatory language of s22 must be followed whether or not by doing so the Court can be seen to 'discriminate', in the sense that word was used in the joint judgment in *Cameron*, against those who put the crown to proof. The Court must take the plea into account even if there is no subjective intention to facilitate the administration of justice. However, viewed objectively, there will always be actual, as distinct from intended, facilitation of the administration of justice by reason of 'the fact' of the plea. The use of the word 'must' and the relevance to 'the fact' of the plea, strongly suggest that the Parliament was not concerned only with subjective elements. The actual facilitation of the administration of justice was to be regarded as relevant by sentencing judges.

In case anyone remained in any doubt as to the ongoing commitment of the Court to discounting on purely utilitarian grounds, Spigelman CJ continued:[117]

> On the proper construction of s22 of the New South Wales Act, courts in this State are . . . . permitted to take into account the objective utilitarian value of the plea . . . . I do not understand the joint judgment in *Cameron* to have called into question the ability of a State Parliament to adopt a form of

113 Ibid [36] and [37].
114 Above n 17.
115 Ibid [51].
117 Ibid [62], [67] and [68].

> differentiation which may be, or at least may appear to be, discriminatory in the sense that word was used in the joint judgment. Insofar as that is the consequence of accepting that s22 . . . . empowers the Courts of this State to give significant weight to the objective utilitarian value of a plea of guilty, then that consequence must be accepted is that is what the New South Wales Parliament has done. In my opinion, that is the case . . . . . the reasoning in the joint judgment in *Cameron* does not apply in this State. *Thomson* should still be followed.

It was argued earlier in this article that State governments are unlikely, without a struggle, to relinquish the financial and other 'purely utilitarian' benefits which flow into their criminal justice systems as a result of early pleas of guilty. These first responses from South Australia and New South Wales give some early indication of the support they are likely to receive from their own courts.

THE NATURE AND IMPORTANCE OF MECHANISMS FOR ADDRESSING POWER DIFFERENCES IN STATUTORY MEDIATION

Claire Baylis and Robyn Carroll***

Introduction

Power is a dynamic that every mediation practitioner and academic will have confronted at some stage. Much has been written on the nature and types of power, and the implications of power differences for participants, the mediator and the process itself. How mediators should attempt to deal with power differences and the impact of mediator interventions on both neutrality and the parties' perceptions of the legitimacy of the process are fundamental issues of on-going concern. This article focuses attention on the increasing number of statutes in Australia and New Zealand that provide for the resolution of disputes by mediation and conciliation, and the ways that statutory processes address power differences between the parties.[1] While the statutory examples are drawn from these jurisdictions, the power issues and statutory mechanisms will be pertinent in other jurisdictions.

We have surveyed Australian and New Zealand statutes for provisions that deliberately or incidentally address power differences between the parties. Many of the provisions are described as 'statutory mechanisms' because they are a device or instrument by which the power dynamic is in some way altered.[2] It is our aim to encourage a more principled approach to the questions of whether these mechanisms are provided for by legislation at all and whether they would be better provided for in other ways. By reviewing the mechanisms, we also seek to raise awareness of the beneficial use that might be made of them in other statutory contexts to protect the parties and the integrity of the process.

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1 When we refer to legislation we are including all forms of subsidiary legislation.

2 It is conceded that in some sense, every statutory provision is capable of affecting the power dynamic, especially provisions conferring substantive legal rights. We are seeking to identify provisions that impact on the process itself, rather than the parties' claims against each other.

This article reviews the concept of power in mediation, its effects on the legitimacy of the mediation process and the many ways that it has been suggested that mediators and the design of the process can address power differences. Typically, these methods have been identified by researchers and practitioners and are recommended by commentators in the context of voluntary mediation. We also outline the growing use of codes of practice and standards and their impact on this area. The focus then shifts to statutory mediation. We explain why the impact of power differences is so significant when a statute provides for mediation and address the issue of whether legislation should incorporate mechanisms to address power differences. We then discuss the statutory mechanisms that we have identified. Finally, we suggest a more principled approach to the question of what mechanisms should be incorporated into legislation.

The primary focus is on mediation and conciliation rather than other forms of dispute resolution. In most instances, the term 'mediation' is used here to include 'conciliation' unless it is suggested otherwise by the context.[3] We use the term 'statutory mediation' broadly to mean mediation that is subject to some form of statutory regulation.[4] This can range from simply providing that mediation may be used to resolve disputes arising under the statute to more comprehensive procedural models.[5] We are not confining our attention to statutes where mediation is compulsory, although, arguably, in these cases the need to address power differences is most compelling. Although in many cases where mediation is

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3 In Australia and New Zealand, mediation and conciliation are generally considered to refer to distinct processes. In Australia, the National Alternative Dispute Resolution Advisory Council (NADRAC) definitions provide that the key distinguishing feature between mediation and conciliation is that in mediation the neutral third party fulfills a facilitative, but not an advisory role, whereas in conciliation the neutral third party may play an advisory role as well as a facilitative role. See NADRAC, *Alternative Dispute Resolution Definitions* (Canberra, 1997) currently under review by NADRAC, see 'ADR Terminology: A Discussion Paper' (Canberra, 2002). In other jurisdictions the distinction is not as finely drawn and mediation is often defined in sufficiently broad terms to include conciliation, eg the US *Uniform Mediation Act* which provides that "Mediation' means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute'. s2(1). The important distinction for the purpose of the analysis in this article is between mediation and conciliation where the third party neutral does not have a determinative role and those processes where the neutral third party does.

4 For an overview of types of mediation legislation see R. Carroll, 'Trends in Mediation Legislation: "All for One and One for All' or 'One at All" (2002) 30 *University of Western Australia Law Review* 167.

5 In this way we distinguish private mediation, even though the subject matter of the mediation may be statutory in nature. We are not directly examining statutes that provide for court based mediation, although many of the comments made concerning statutory mediation may apply with some or equal force to mediation in the courts.

provided for by statute the process is not compulsory, in practical terms parties are compelled to use the process because of the lack of realistic alternatives.

In our view the aim of any mediator intervention or mechanism to address power differences is to ensure that agreements made result from a process in which both parties have been able to participate equitably, so as to be able to influence the outcome in terms of their own needs. We will not be continuing the debate in this article about *whether* mediators *should* seek to address power issues in mediation. Our concern is *how* issues of power imbalance can and should be addressed in statutory mediation, as we accept that mediators do and should have some impact on the power dynamic between the parties.

Power issues in mediation

The nature of power in dispute resolution

Power is defined as 'the capacity to influence the behaviour of others, the emotions, or the course of events'.[6] Mayer suggests that '[f]or the purpose of understanding the dynamics of conflict, power may be defined as the ability to get one's needs met and to further one's goals.'[7] This type of power can be understood only in context.[8] In mediation, the concern is with the parties' ability to meet their needs and further their interests during the process and in any agreements reached as a result of the mediation.

At the broadest level of analysis, power can be categorised as either structural power or personal power.

> Structural power is lodged in the situation, the objective resources people bring to a conflict, the legal and political realities within which the conflict occurs, the formal authority they have, and the real choices that exist. Personal power has to do with individual characteristics, such as determination, knowledge, wits, courage and communication skills.[9]

The majority of statutory mechanisms that we will be analysing affect the structural power dynamic. Personal power, however, is also capable of influence by statute.[10] Within these two broad categories, there are many types of power, and each of these can be used by the parties and the mediator during mediation.[11]

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6 *The Concise Oxford Dictionary* (10th ed, 2000).
7 B Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (2000) 50.
8 Ibid.
9 Ibid 54.
10 The status and identity of the mediator being a prime example.
11 In his earlier and highly influential work on power, Mayer identified 10 types of power: 'The Dynamics of Power in Mediation and Negotiation' (1987) 6 *Mediation*

The power dynamics in mediation are not confined to the relations between the parties to a dispute. Another critical type of power is the power of the mediator over the process and in relation to the parties. Mediator power can be understood as 'the ability … to affect the perceptions, attitudes and behaviour of others'.[12] There are a range of views on the ability and the extent of the mediator's responsibility to address power imbalances between the parties.[13] It is argued that for mediators to be effective in any case where one party seeks to use power to determine the outcome '…they must know how to manage the means of influence and power that the parties exercise and how to exert pressure themselves'.[14] As Boulle notes,[15] this is a major policy issue, and although there may be good reasons for seeking to redress a power imbalance between the parties,[16] there are also dangers in doing so.[17] As we will see below, the expectation that a mediator operating in a statutory context will exert power and influence over the parties, and the parameters within which they do so, will be influenced by the express provisions of the legislation under which the mediator is operating.

The following propositions about power are drawn from the extensive literature on this subject and provide a basis for analysing statutory mediation.

(a) There are many types of power.

These include:

- Resources power, which includes financial power, skills, information power, education, position[18] and familiarity with the process;

Quarterly 75, 78. More recently Mayer has extended the list to 13 types of power, see above n 7, 55-60.

12 L Boulle, *Mediation-Skills and Techniques: Butterworths Skills Series* (2001) 181.

13 For example, Wall argues that a mediator's primary task is to manage the power relationship of the disputants and in unequal relationships the mediator may attempt to balance power. J Wall, 'Mediation: an Analysis Review and Proposed Research' (1981) 25 *Journal of Conflict Resolution*, 157, 164. For discussion see C Moore*, The Mediation Process; Practical Strategies for Resolving Conflict* (2nd ed, 1996) 333-337. Mayer, on the other hand, argues that that the idea that power can be balanced is misleading, see above n 7, 51 and below, n 35 and n 36.

14 Moore, ibid 327. For discussion of the sources of power mediators and other intervenors have in disputes, and a framework for understanding the roles that interested and powerful intervenors play in disputes see M Watkins and K Winters, 'Intervenors with Interests and Powers' (1997) *Negotiation Journal*, 119.

15 Boulle, above n 12, 225.

16 For example, NADRAC, *Issues of Justice and Fairness in Alternative Dispute Resolution Discussion Paper* (1997) 28-29; GR Clarke and IT Davies, 'Mediation – When is it not an Appropriate Dispute Resolution Process?' (1992) *Australian Dispute Resolution Journal* 70, 70-71.

17 Boulle, above n 12, 226-227.

18 G Tillett, *Resolving Conflict: a Practical Approach* (2nd ed, 1999).

- Strategic power, for example, when the apparently more powerful party has more to lose by not reaching an agreement, or the apparently weaker party has strong public support;
- Emotional or psychological power, intelligence, social status, personal power over an individual;
- Cultural power, through being of the dominant race or ethnicity, sexual orientation or by being able-bodied;
- Physical power, the ability to intimidate the other party and influence their decision-making on grounds of fear of violence or due to previous physical or emotional abuse; and
- Gender power,[19] which may involve an aggregation of resources and emotional or psychological power.

(b) Power is not a characteristic of an organisation or person but is an attribute of a relationship. A party's power is directly related to the power of an opponent.[20] Therefore power is very contextual and situational. A person may have power in one situation and less in another. Even a person who is very powerful in *some* situations will not be powerful in *all* situations. [21]

(c) There is always some power disparity in the resolution of disputes.[22] Power relations can be symmetrical or assymmetrical. Although symmetrical power relations are optimal for effective bargaining, this symmetry is not the norm between disputing parties.[23]

(d) Power is not capable of measurement.[24] As a result, an imbalance of power is not something that can be 'balanced' by a mediator simply giving more power to one party.

(e) Power is dynamic. During the course of a negotiation the existence of many different types of power will mean that there will be shifts in the balance of power.

(f) Power is not easily located and preconceptions about where it lies need to be avoided.[25] There are dangers in making assumptions and generalising about

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19 See for example, R Alexander, 'Family Mediation under the Microscope' (1999) *Australian Dispute Resolution Journal* 18; and K Mack, 'Alternative Dispute Resolution and Access to Justice for Women' (1995) 17(1) *Adelaide Law Review* 123.

20 Moore, above n 13, 333.

21 Tillet, above n 18, draws the broad distinction between positional and situational power.

22 Boulle, above n 12, 224.

23 Moore, above n 13, 336-337.

24 NADRAC, *Issues of Fairness and Justice in ADR*, above n 16, 29. See also Mayer, above n 7, 51.

25 R Charlton and M Dewdney, *The Mediator's Handbook* (1995) 239.

the location of power. The complex and dynamic nature of power means that assumptions about power based on stereotypes will often be misleading.

(g) A person may have power but choose not to use it.[26] There may be strategic reasons why a person who has power chooses not to exercise it in some situations. For example, a large business with economic power may have the power to put a small supplier out of business simply by litigating a dispute and imposing legal costs which the supplier cannot meet. The large business may decide, for various reasons, not to litigate but to use a less expensive method of dispute resolution.

(h) A person may have power but be unable to use it.[27] There may be reasons why, despite having certain types of power, a person is unable to use it in a particular dispute to negotiate effectively. For example a person with resources power may be unable to use it because the conflict is affecting them emotionally or because of other events in their life.

(i) The power relations between the parties may be a cause of concern at different points in time in the process. The first point in time is when a dispute is being assessed for suitability for mediation. A significant power difference is often regarded as a contra-indicator to the suitability of a consensus-based process[28]. Secondly, the issue may arise when a mediation takes place and the question becomes one of identifying the proper role of the mediator in relation to the power relations between the parties, and what level of power the mediator should exercise.[29] Thirdly, the exercise of power by one of the parties or by the mediator during the mediation may also be a concern if a mediated agreement is reviewed after the mediation and the reviewing body is required to decide whether any agreement made at the mediation should be set aside on grounds of duress or unfairness.[30]

Mayer states that one of the many misleading images of power is that power can be balanced. He argues that while it is meaningful to look at differences in power (whether someone has power to make something happen), at sources of power and at vulnerabilities to other people's power, the notion that power can be balanced so as to produce some equality of power fails to account for the dynamics of power and the interactional context within which it must be understood.[31] It is more

26 NADRAC, *Issues of Fairness and Justice in ADR,* above n 16, 29.
27 Ibid.
28 For example, see Clarke and Davies, above n 16.
29 For a discussion of power issues and how they are dealt with in a conciliation model, see D Bryson, "And the Leopard Shall Lie Down With The Kid': A Conciliation Model for Workplace Disputes' (1997) 8 *Australian Dispute Resolution Journal* 245.
30 The grounds of review and for setting aside a mediation agreement will depend on what legal rules, including statutory provisions, apply to the mediation.
31 Mayer, above n 7, 51.

useful, argues Mayer, to think that people need '…an adequate basis of power to participate effectively in conflict.'[32]

This view of power is significant to an understanding of the role of the mediator and the purpose of statutory mechanisms. It is also consistent with the notion that mediation must be consensual for it to be legitimate as it ensures that the parties have enough power that others '…must at least consider their concerns and enough power to resist any solution that fundamentally violates their interests'. [33]

Power and the legitimacy of mediation

Power is a concern in mediation and other facilitative forms of dispute resolution because in these processes there is no third party decision-maker. This means that to reach an outcome the parties must negotiate with each other.[34] There is a general view that the fairness of the outcome will be affected by the ability of each of the parties to negotiate effectively on their own behalf.[35] Where there is a significant power difference, the concern is that one party may dominate the process and the resulting outcome to the extent that the agreement reflects largely only that party's needs and interests.[36] In these circumstances:

> The stronger party is likely to be less motivated to compromise and more likely to use tactics of coercion and intransigence. The less powerful party may react with either passive concession making or reactive defiance, neither of which provides a sound basis for arriving at a durable settlement.[37]

On an individual and practical level there is a real danger that in situations of significant power differences the agreements reached will be unfairly advantageous to one party,[38] or that no agreement will be reached.

The issue of how power is used in mediation, however, also has broader repercussions. Ultimately it may affect the legitimacy of the mediation process itself in these types of disputes. For the mediation process to be legitimate, it must

32 Ibid 52.
33 Ibid. The meaning of 'consensual' is discussed in the text below.
34 NADRAC, above n 16, 28.
35 See, for example, J Maute, 'Mediator Accountability: Responding to the Fairness Concerns' [1990] *Journal of Dispute Resolution* 347.
36 NADRAC, above n 16, 28. The Discussion Paper refers to the danger that one party will dominate the outcome, rather than the process. In the writers' view, domination of the process is also a concern.
37 K Kressel, *The Process of Divorce: How Professionals and Couples Negotiate Settlements* (1985) 52.
38 See for example, 'Access to Justice Advisory Committee Access to Justice: An Action Plan' (1994) 298-299 where it is recognised that women may obtain unfair results in the family mediation context due to power imbalances.

be able to deal fairly with disputes involving significant power differences. Where this is not possible, it may be that mediation is inappropriate. This fundamental concern with legitimacy, the integrity of the process itself, and the tension between neutrality or impartiality and empowerment has been recognised for some time. For example, in 1987, Mayer wrote:

> The ethical dilemma that faces mediators working in a number of different areas is how to maintain the integrity of the mediation process, which is based on the assumption of mediator neutrality, without letting the process be used to violate important interests of the community or of interested but unrepresented parties. The problem becomes even more complicated when the mediator has a great deal of clout. The maintenance of impartiality under these circumstances is not an academic question, but one that is basic to the credibility of the process.[39]

Astor has, more recently, argued that mediation derives its legitimacy from two core concepts, neutrality and consensuality. Consensuality involves the parties' ability to both choose the mediation process[40] and '…to arrive at an agreement to which both (or all) consent… .'[41] She states:

> Clearly the reality of consensuality is crucially affected by the reality of the consents made by the parties. It is also affected by the ways in which all of the participants in mediation, including the mediator, use power. Consequently the issue of power relations in mediation is of central importance. [42]

Consensuality can only exist if both parties are making real and free choices based on effective participation in a mediation.[43] In circumstances involving significant power differences the mediator must attempt to ensure that the participation of all parties is both genuine and active, and that any agreement formed is not based on coercion or pressure.

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39 Mayer (1987) above n 11, 83.

40 Astor does acknowledge though that there may be circumstances where mediation may be mandated but that in that case the process itself should then proceed consensually. H Astor, 'Rethinking Neutrality: A Theory to Inform Practice- Part I' (2000) 11 *Australian Dispute Resolution Journal* 73, 81.

41 Ibid 73.

42 Ibid 73-74.

43 Similarly, Galligan argues that the guiding principle in making informal agreements in administrative contexts (that is using negotiation and mediation) is that the agreement be real and that it be voluntarily entered into. The factors he identifies as contributing to a real and voluntary agreement are knowledge of the options, open willingness to enter negotiations and a genuine decision to accept a compromise. DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996) 383.

Neutrality, Astor's other key legitimating principle, is also inextricably linked to the issue of power relations. Neutrality is often taken to include fairness and even-handedness by the mediator, although these characteristics are sometimes categorised separately as impartiality, in which case neutrality is '…used more to describe a mediator's sense of disinterest in the outcome of the dispute.'[44] The on-going difficulty, in both the theory and practice of mediation, is that there can be a contradiction between even-handedness and fairness: if the parties are treated in the same way, then power differentials are not addressed, leading to a lack of fairness in process and outcome. Astor suggests that what is needed is a re-definition of neutrality:

> It must take into account the particular qualities of mediation, and the sources of legitimacy of mediation. It must take into account the fact that mediation takes place in private and does not necessarily apply the law, and must therefore take particular care to protect from exploitation those who are vulnerable… it is necessary to abandon the 'grand theory' of neutrality in which neutrality is conceived of as a great – though essentially undefined – goal. Further, we should move away from a focus on neutrality as an attribute of the mediator… Instead, we should focus on maximising party control as the legitimating principle of mediation. [45]

If neutrality is focused on '…what the mediator is doing to ensure that, to the maximum extent possible, the parties control the content and the outcome of the dispute',[46] then ensuring that both parties can act free from pressure or coercion is imperative. If neutrality is understood in this way, addressing power differences becomes an even higher priority.

Strategies to address power differences in mediation

Process design and mediator interventions and strategies

Numerous commentators have written about ways to address the disparity of power between the parties.[47] The purpose of this section is to provide a brief overview of the ways in which power issues may be addressed in mediation. It is

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44 R Field, 'Neutrality And Power: Myths And Reality' (2000) 3(1) *ADR Bulletin* 16, 16. NADRAC also accepts this distinction but includes impartiality as part of the responsibility of the mediator in remaining neutral. See NADRAC, *A Framework for ADR Standards*, April 2001, 114 fn1.

45 Astor, above n 40, 81.

46 Ibid 73.

47 A Davis and R Salem, 'Dealing with Power Imbalance in the Mediation of Interpersonal Disputes' [1984] 6 *Mediation Quarterly* 17; Mayer (1987) above n 14; D Neumann, 'How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce' [1992] 9 *Mediation Quarterly* 227; Clarke and Davies, above n 16, 73-76; Boulle, above n 12, 226; B Wolski, 'Mediator Settlement Stategies: Winning Friends and Influencing People' (2001) 12 *Australian Dispute Resolution Journal* 248.

sometimes stated that power differences can be addressed by the mediation process itself, and by specific mediator strategies and interventions.[48] While efforts to separate these are problematic because the way the mediator applies the process is a itself a strategy, it can be helpful to look at it this way.

(a) Features of *the process* that enable power imbalance to be addressed include:

- An intake or screening process provides the mediator with some information about the parties' relationship and may allow the mediator to anticipate power issues. This also provides an opportunity for the mediator to refuse to mediate.
- In voluntary mediation, the parties' agreement to participate in the process.
- The process is structured to give each party an opportunity to speak;
- By agreeing to 'ground rules', parties give each other an opportunity to speak without interruption and without abuse or criticism from each other.[49]
- The presence of a neutral third party, usually on neutral ground, provides support to the parties.
- Confidentiality, especially between the mediator and each party, provides an opportunity for parties to 'express emotions and their true interests'.[50]
- Creating steps in the process when parties are to exchange documents and other information can assist them to prepare for the mediation.
- Parties are encouraged to treat each other as equals, and the mediator can model this in the way that he or she relates to the parties.[51]
- Separate sessions provide an opportunity to check how the parties are coping with the process.
- Shuttle mediation can be used where the parties are not prepared to be, or best not put, in a room together.
- The number of meetings that are held can be increased and can be held over an extended period of time so that the parties do not feel rushed into making decisions, and
- Whether a voluntary or mandatory process, the parties cannot have a decision imposed on them by the mediator.

(b) There are many strategies and interventions available to mediators, and the list below is not intended to be comprehensive.[52] These include:

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48 For example, Neumann, ibid; Clarke and Davis, above n 16, 73 refer to 'safeguards and techniques', 'some of which are inherent in the mediation process itself and others which can be specifically employed by a skilled mediator, to address the issue of power imbalance between disputants in the mediation process.'

49 Clarke and Davis, above n 16, 74.

50 Ibid.

51 Ibid.

52 Moore identifies 12 forms of influence to 'incline the parties towards agreement' that can be used when the parties have unequal power. Above n 13, 327. See also D Eliades, 'Power in Mediation - Some Reflections' (1999) 2 *ADR Bulletin* 4.

- During the intake session or a preliminary conference, and at any time during the mediation session, explaining the process and indicating what information the parties may need to assist their decision making.
- Ensuring that the physical setting of the mediation is conducive to effective negotiation.
- Reflecting on whether the process is 'fair' after using a series of questions to focus attention on the parties' ability to negotiate.[53]
- Enforcing the mediation ground rules to reinforce the role of the mediator as being as objective and neutral as is possible.
- Encouraging parties to seek legal advice before and during the mediation.
- Improving communication between the parties through use of specific forms of questions; and reframing, paraphrasing and summarising what the parties have said.
- Using private sessions:
- to provide opportunity for a party to disclose and discuss information they are not prepared to disclose or discuss in joint session;
- to test out whether the party has sufficient knowledge or information to negotiate effectively;
- to reality check options that have been raised;
- to discuss whether there are cultural issues that are impacting on the negotiation process;[54] and
- to rehearse techniques that the party can use in joint session.
- Using a support person, or friend for the parties;
- Using an interpreter where the parties cannot communicate with each other and the mediator in the same language;
- Encouraging and advising parties on how to seek assistance to collate information or material needed for the mediation;
- Where one party has been violent against the other, amongst other things, at least:
- requiring strict adherence to the terms of contact agreed to between the parties; and
- maintaining contact with the parties between meetings;
- Calling adjournments;
- Encouraging the parties to agree to a cooling off period *before* signing an agreement;[55]

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53 K Severens, *Mediation Manual* (IINCM, 1998) (adapted by) T Sourdin, in 'Conciliation Processes', LEADR – The Third Millennium Conference - 28 July 2000, 7.

54 Eliades, above n 52.

55 Cooling-off periods during mediations are sometimes used by third parties in situations where there are '…highly emotional confrontations in which one or more of the parties has become intensely angry…' Conflict Resolution Consortium, University of Colorado, 'Cooling-Off Periods' International Online Program on Intractable Conflict, <http://www.colorado.edu/conflict/peace/treatment/cooloff.htm>.

- Encouraging parties to include a 'cooling off' clause in their agreement, (that is allowing a party to rescind the agreement during a short period *after* the agreement is made);
- Reality checking all the likely consequences of a proposed course of action, including the long term consequences of using their power unfairly during the mediation, creating doubts in the minds of the parties over 'the facts, the law, the evidence and their likelihood of their being successful in litigation';[56]
- Terminating the mediation where the process is operating unfairly against one party or where the agreement reached between the parties is so unfair that it would be a miscarriage of justice;[57] and
- Threatening to terminate or terminating the mediation.

The ability of a mediator to employ these many and varied strategies and interventions will depend on their knowledge, skills and ethics as a practitioner.[58] It will also depend on any parameters placed on the mediator's powers. In private mediation any parameters placed on the mediator's or the parties' power would need to be agreed upon by the parties. In mediation within a statutory context the various interventions may be allowed, required or disallowed by the legislation.

Mediators working in a statutory context will often have a wide discretion as to how they exercise their powers and the extent to which they exert pressure on the parties. Increasingly though, the discretion of private and statutory mediators is likely to become subject to regulation as, in the interests of developing quality practices, voluntary codes and procedures shape the expectations of mediator standards of practice.

Non-statutory codes and practice standards

Many industries and organisations have established codes and procedures for handling complaints and grievances that aim for early intervention in a non-adversarial manner.[59] In these situations there is often recognition of the potential for power to be used unfairly and this is addressed in the procedures adopted.[60]

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56 Boulle, above n 12, 227.

57 Maute, above n 35, 348.

58 NADRAC has used these three aspects of a mediator's qualification as a basis for categorising the standards applicable to ADR practitioners, NADRAC*, A Framework for ADR Standards*, 100. The components listed for each category provide a useful checklist of practitioner standards that can be adapted to suit a wide range of areas of dispute resolution.

59 For an overview of developments in dispute resolution in the Australian business sector see T Sourdin, 'The Future of Dispute Resolution in Business - New Rules' in *The Arbitrator* (2000) 23.

60 Criticisms about elements of conduct in the Australian franchising sector were identified in Finding a Balance, the May 1997 report of the Inquiry Into Fair Trading of the House of Representatives Standing Committee on Industry, Science and

For example, within business organisations, complaint procedures are likely to have been adopted for employees complaining of discrimination or unfair treatment in the workplace. Similarly, many industries have developed schemes to handle consumer complaints. [61]

Compulsory codes have been developed in some areas of industry to manage dispute resolution.[62] Other initiatives in Australia have been the development of benchmarks for avoiding and resolving disputes[63] and the formulation of standards for use in the prevention, handling and resolution of disputes.[64] More recently the Australian NADRAC recommended the adoption of Codes of Practice by all alternative dispute resolution service providers and associations.[65] The Codes of Practice would specify the standards of knowledge, skills and ethics that practitioners require in specific areas of practice. The following areas, pertinent to the role of the mediator in addressing power issues in mediation, were identified by NADRAC for consideration. In terms of knowledge, a mediator should know 'how to ensure fairness in procedure'.[66] In terms of skills relating to assessing a dispute for mediation, a mediator may need to be able to assess power differentials between parties, including the timely and effective exclusion of mediation where appropriate, and evaluate

> factors such as apprehension of violence, security issues, age of the parties, issues affecting a party from a non-English speaking background, the need to seek advice, the legal or factual complexity of the matter, the precedent value

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Technology. The Franchising Code of Conduct was one element of the Commonwealth Government's New Deal: Fair Deal package, announced in September 1997, in response to concerns identified during the inquiry.

61 For examples see Sourdin, above n 53, 25 and T Sourdin, *Alternative Dispute Resolution* (2002) 120-124.

62 For Australian examples, see the Oil Industry Code of Practice administration Committee Oil Code: Voluntary Code of Practice and Administration of Agreements in the Petroleum Industry (1989); Commonwealth of Australia Department of Workplace relations and Small Business Franchising Code of Conduct (1998).

63 ACCC, *Benchmarks for Dispute Avoidance and Resolution – A guide* (1997).

64 Standards Australia, AS 4608–1999, October 1999. These developments mark 'a shift away from a focus on resolution processes towards communication management': Sourdin, above n 53, 28. Sourdin suggests the benefits of using mandatory and non-mandatory frameworks need to be questioned, and that it is unclear what impact the Standards will have on business practices. She suggests the main role of the Australian Standard may be to inform courts and tribunals, in addition to the business community, about norms of operation and expected responses as well as informing the sector about negotiation practices. She also questions the educative function of the Standard so far as it applies to ADR processes, noting that there is already clear evidence that the business sector is using ADR processes in preference to litigation (see page 28).

65 NADRAC, *A Framework for ADR Standards*, 71.

66 Ibid 103.

> of a formal resolution of an issue and the need for public sanctioning of particular conduct.[67]

Other skill areas relate to managing the process, and managing the interaction between the parties. Areas relating to ethics involve ensuring effective participation by parties, eliciting information and ensuring appropriate outcomes.

Thus, there are clear signs of moves towards better documented dispute resolution processes and mediator standards. In many areas these standards apply in the absence of statutory provisions.[68] In areas where the mediation process is provided for by statute, it may well be the case that standards and codes of conduct can usefully deal with matters that need not be in legislation.

Power issues in statutory mediation

The need to address power in statutory mediation

We have provided an overview of the nature of power dynamics in mediation and examined why addressing significant power differences between the parties is necessary to maintain the legitimacy of the process. We have also outlined the many ways in which mediators and organisations have responded to concerns about power differentials in mediation. As we have shown there is a complex web of skills, ethical standards, and practical strategies and interventions for addressing power differences between the parties. Without in any way seeking to detract from the importance of these strategies and interventions, we turn now to consider what additional mechanisms do and should exist in statutory mediation - in particular where the process is compulsory.

It is clear that successive governments in New Zealand and Australia (at both State and Federal levels) are increasingly legislating for mediation as a dispute resolution process in a wide variety of areas.[69] Often mediation will be established in conjunction with other new or existing dispute resolution processes. There are various motivations for parliaments to enact mediation or conciliation models and these are often interlinked. Cost-effeciency is often a prime motivator,[70] but so too

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67 Ibid 105.

68 For examples of ADR standards and Guidelines in Australia see NADRAC, *The Development of Standards for ADR Discussion Paper* (Canberra 2000) Appendix 1.

69 For example C Baylis, 'Statutory Mediators and Conciliators: Towards a Principled Approach' Forthcoming June Issue (2002) 20(1) *New Zealand Universities Law Review*; T Altobelli, 'Mediation in the Nineties: The Promise of the Future' (2000) 4 *Macarthur Law Review* 103, 106. The same trend is evident in other jurisdictions, for example in the US, see S Press, 'International Trends in Dispute Resolution – a US Perspective' (2000) 3 *ADR Bulletin* 21.

70 For example, in New Zealand, the Hon Margaret Wilson (Minister of Labour) commented that 'The whole purpose of the new institution, namely relating to

can be the belief that mediation offers a more appropriate form of dispute resolution in the circumstances.[71]

This legislative trend has given rise to a number of concerns. It has been argued that statutory models of mediation set up a second class system of justice,[72] that mandatory mediation is antithetical to the consensual nature of the process[73] and that the institutionalisation and legalisation of mediation destroys the informal and flexible nature of the process.[74] The latter concern is exacerbated by legislation that formalises the process and increases mediator powers. While we recognise that these are important issues that must be acknowledged and addressed, our analysis proceeds on the basis that now that there is a body of legislation that incorporates mediation, there is a corresponding need to analyse the ways that statutory provisions can and do influence the power relations in the mediation.

In the analysis of power undertaken earlier in this article, it was acknowledged that there can be dangers in making assumptions about the power relations that exist in a mediation. This may lead some to argue that it is inappropriate to attempt to address power differences by statutory mechanisms in any situation. Our response is to point to the fact that it is not uncommon and often highly appropriate for the law to create legal rules or design processes that acknowledge the harm that can occur when one person is likely to be, but will not always be, vulnerable to pressure and may possess insufficient power to protect their interests. The law acknowledges that such relationships exist and attempts to provide protection for vulnerable parties.[75] Similarly, in many areas where mediation is provided for by statute, the law recognises the potential for

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mediation … is quite simply to enable the parties an efficient, prompt and cheap method to be able to resolve their disputes as quickly as possible.' Hansard NZPD 9 Aug 2000, 4480. See also Martin Gallagher MP's comments on Health and Disability Commissioner Act: Hansard NZPD 16 June 1994, 1813.

71 See, for example, the comments by Hon JK McLay (New Zealand Minister of Justice) on the Family Proceedings Bill: Hansard NZPD 19 Nov 1980, 5104; and Martin Gallagher MP's comments on the Health and Disability Commissioner Act: Hansard NZPD 5 Dec 1995, 10378.

72 See for example, R Abel, *The Politics of Informal Justice: Volume One: The American Experience* (1982).

73 See, for example, the submissions from the Arbitrators' and Mediators' Institute of New Zealand (at 2), the Law Commission (at 7), the Legal Services Board (at 4), and the NZ Law Society at 4 and 8), in Submissions to Courts Consultative Committee on Court Referral to Alternative Dispute Resolution June 1997.

74 M Thornton noted over a decade ago, '…informality is being subtly transformed by creeping legalism'. 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52 *Modern Law Review* 733, 754.

75 Consumer credit laws are a clear example. Section 51AC of the *Trade Practices Act 1974* (Cth) stipulates in great detail what types on conduct are capable of constituting unconscionable conduct.

significant power differences and attempts to provide mechanisms to protect the party presumed to be at a disadvantage. There are a number of areas where the nature of the relationship between the parties, or the circumstances leading to the dispute, suggest an inherent power inequality. This inequality may then be intensified or ameliorated depending on the types of power that each party possesses. In some areas inequality is presumed to exist to some degree, such as in farm debt cases, employer-employee relationships,[76] discrimination and sexual harassment cases,[77] and health disputes.[78] In other areas some form of inherent power inequality is not presumed to exist but will be considered likely in specific circumstances. For example, in family disputes where one party has been violent towards the other.

Although examples of mechanisms will be drawn from a range of statutes it is disputes where the legislation presumes a degree of inequality of power between the parties with which we are largely concerned in this article. In these circumstances, we argue that it is appropriate for legislation to operate on a presumption that a party lacks power, or that the differential in power is high, and in some circumstances statutory mechanisms are necessary if the legitimacy of the process is to be maintained. At the same time, the fact that mediation is provided for by legislation, sometimes as a mandatory step in the overall dispute resolution process, is significant to the parties, the integrity of the process of mediation and the dispute resolution role of the state itself. The role of the law in addressing the power differences thus becomes an issue of paramount importance. There are two main reasons why this is so.

First, increasingly (and to some alarmingly), the statutory models are compelling parties to use mediation as a first step in the dispute resolution process. Even under statutory models where the process is not mandated but is the usual

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76 For example, P Churchman and P Roth comment that '[t]he *Employment Relations Act* acknowledges the inherent inequality of bargaining power…. one party (almost invariably the employer party) possesses overwhelming bargaining power….': '*Employment Relations Act 2000*' (NZ Law Society Seminar, Oct 2000) 5. See also R Guthrie, 'Power Issues in Compensation Claims' (2001) 12 *Australian Dispute Resolution Journal* 225 where the author examines the effects of the implementation, in 1993, of informal dispute resolution processes in the Western Australian workers compensation system under the *Workers Compensation and Rehabilitation Act 1981* (WA) and argues that pre-existing power imbalances have been aggravated by these procedural changes, in particular by the exclusion of legal practitioners from the dispute resolution process.

77 For example see J Morgan, 'Sexual Harassment and the Public/Private Dichotomy: Equality Morality and Manners' in M Thornton *Public and Private: Feminist Legal Debates* (1995) 89-110; C Baylis, 'The Appropriateness of Mediation for Sexual Harassment Complaints' (1997) 27 *Victoria University Wellington Law Review* 585, 595-601.

78 See for example comments by Bill English (MP and Parliamentary Under Secretary for Minister of Health): Hansard NZPD 16 June 1994, 1808.

procedure, parties may feel they have little choice but to use the process. This perception may be reinforced by the legislation. For example, under the Residential Tenancies Act 1986 (NZ) if a party refuses to mediate 'without reasonable excuse' in a case which in the opinion of the Tribunal 'ought reasonably' to have settled at mediation, the Tribunal can award costs against that party.[79] In these ways consensuality, a central tenet of mediation, is reduced in that the parties do not have control over the choice of process. This makes the genuine consensuality of the outcome all the more necessary.[80] Mandatory mediation also has the potential to affect the integrity of the process itself. Many commentators and practitioners believe voluntariness is essential to the process.[81] Further, the element of compulsion may also have potential implications for the integrity of the state's role in dispute resolution. A basic precept of the justice system in New Zealand and Australia since colonisation has been that 'recourse to the courts is a fundamental right of all citizens'.[82] Making mediation mandatory in some areas fetters this right.[83]

The second reason why the role of law in addressing power differences in statutory mediation is important is because the process is state sanctioned. Ultimately, the fair and just administration of justice is central to the legitimacy of the government itself. Western style governments have attempted to ensure that disputes are resolved in a fair and just way through the primary state-sanctioned dispute resolution mechanism, the Courts. The adversarial system contains a range of mechanisms that attempt to enhance the equality of the parties. For example, parties speaking through professional, trained lawyers according to strict rules of evidence before an impartial judge increase the ability of both

79 *Residential Tenancies Act 1986* (NZ) ss 87(2) and 102(2)(c).

80 As Galligan points out, unless agreement is genuinely consensual, '…negotiation and mediation become a means of coercion and injustice… Such informal processes may be less consensual than they appear, with parties having no real choice whether to participate or to accept a particular outcome. (footnote omitted) And if, in addition, the parties are in positions of inequality, the pressures on the weaker party to settle for compromise will be compounded', above n 43, 276.

81 See R Ingleby, 'Court Sponsored Mediation: The Case Against Mandatory Participation' (1993) 56 *Modern Law Review* 441; and T Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 106 *Yale Law Journal* 1545. For an examination of the concepts of 'voluntariness' and 'consensuality' as they relate to mediation see B Wolski, 'Voluntariness and Consensuality: Defining Characteristics of Mediation?' (1997) 15 *Australian Bar Review* 213.

82 Law Commission of New Zealand Submission in Submissions to Courts Consultative Committee on Court Referral to Alternative Dispute Resolution, June 1997, 8.

83 Ibid 3. NADRAC, in A Framework for ADR Standards, considered that extra attention is required where mediation is mandatory and recommended 'That bodies which mandate or compel the use of ADR give special attention to the need for mechanisms and procedures to ensure the ongoing quality of mandated ADR': Recommendation 10 (at 78).

parties to put their case.[84] Similarly, a system of rules of natural justice attempts to ensure that the effect of power differentials is minimised in administrative decision-making bodies. Thus, as informal, consensus-based forms of dispute resolution like mediation and conciliation are being incorporated into legal processes, it is necessary for the process to be able to deal fairly with parties in disputes involving significant power differentials to ensure, as far as possible, the administration of justice; albeit informal justice. Procedural protections are necessary to ensure that agreements reached through a process based on compromise are voluntary and informed.[85]

This analysis suggests that where statutes establish models of mediation, particularly mandatory mediation, interventions or mechanisms should be available to ensure that the parties can participate meaningfully in the process and outcome. So far, however, the question of how this should occur is left open. Central to this question, in areas where the law presumes that there are significant differences in power, is whether the legislation should incorporate mechanisms to mitigate the effects of such a power differential or whether it should be left to the statutory body responsible for administration of the particular statute to formulate policies or guidelines, or even to the individual mediators acting in each case. Before addressing this question some statutory examples will be outlined.

Existing statutory mechanisms

Whilst it is evident that there are statutory mechanisms that have the aim or the effect of addressing significant power differences between the parties in existing models of statutory mediation, there are some difficulties in conducting a meaningful review of these mechanisms. First, the legislation covers a wide

84 See discussion in R Delgado, C Dunn, P Brown, H Lee and D Hubbert, 'Fairness & Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' [1985] *Wisconsin Law Review* 1359, 1367-1375. We acknowledge the extensive critiques of the adversarial process as being mono-cultural and patriarchal, but our point here is that in setting up alternatives the state has a responsibility to attempt to achieve fair and just processes.

85 Galligan, above n 43, 280. See also Law Commission of New Zealand's submission in Submissions to Courts Consultative Committee on Court Referral to Alternative Dispute Resolution June 1997:3. Welsh, who reports that research into court-ordered mediation shows that 'when disputants bring their disputes to the courthouse, they expect something more than bargaining assistance. They expect and value procedures that feel fair' and that 'the failure to consider issues of procedural justice in court-connected mediation has the potential to threaten the legitimacy and the authority of the judiciary and to reduce disputants' compliance with the agreements they have reached.' NA Welsh 'Making Deals in Court-Connected Mediation: What's Justice got to go with it?' (2001) 70 *Washington University Law Review* 787, 816. A similar finding might also be expected of statutory mediation.

variety of areas and, consequently, the comparison of power issues may become strained. Second, some features of a particular statute may have the effect of addressing power differences even though this may not have been the primary reason for their incorporation. An example of this is where the statutory models include statements of principle, for instance, under the Australian *Family Law Act 1974* (Cth), any agreement made between couples who have children is to be in 'the best interests of the child'.[86] Whilst this principle establishes the parameters of possible settlements, it may also impact on the power dynamic between the parties, particularly if the mediator uses it as a reality check when concerned about a potentially unfair agreement. Our focus, though, is on mechanisms that address power issues more directly.

Notwithstanding these difficulties, we suggest, albeit tentatively, that these mechanisms can be placed into four broad categories. These are, first, mechanisms that impose the mediation process on the parties; second, mechanisms relating to the appropriateness of commencing mediation and continuing mediation; third, those relating to the manner in which the mediation is conducted; and finally, mechanisms relating to the outcome of the mediation.

Mechanisms imposing the process

Compelling the process

It is usually clear from the legislative provisions whether mediation is voluntary or mandatory.[87] Compelling mediation is a means by which the power dynamics are altered. For example, by compelling the process a party may be precluded from using their resources power to dictate the process to be used or to impose pressure on the other party to settle by threatening protracted and expensive litigation. Usually each party is compelled to use mediation by the legislation. However, the *Farm Debt Mediation Act 1994* (NSW) provides an unusual model, based on a presumed power imbalance, where the compulsion to mediate is placed only on the creditor, while the farmer can opt not to mediate.[88]

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86 Section 63B of the *Family Law Act 1975* (Cth) provides that '[t]he parents of a child are encouraged (a) to agree about matters concerning the child rather than seeking an order from a court; and (b) in reaching their agreement, to regard the best interests of the child as the paramount consideration.'

87 Although sometimes a model may appear to be voluntary, it actually may have an element of compulsion, such as the New Zealand Residential Tenancies Act. Examples of mandatory models include, the *Federal Court of Australia Act 1976* (Cth) s53A(1A), the *Children Young Persons and their Families Act 1989* (NZ) s 175, *the Family Proceedings Act 1980* (NZ) s 17, the *Anti-discrimination Act 1991* (Qld) ss 158-160, the *Workplace Relations Act 1997* (Qld) s 219, the *Freedom of Information Act 1992* (WA) s 83 and the *Worker's Compensation and Rehabilitation Act 1981* (WA) s 84Q.

88 Sections 8-11. Although if the farmer does opt to mediate he or she must do so in good faith: s 11(2)(a).

Compulsion both confirms the mediator's power to manage the process and fetters the rights of one or both parties to resolve their dispute in court without first mediating. The extent to which the mediator's power is enhanced by a statute will depend on the coercive powers conferred on the mediator. For example, some statutes allow the imposition of costs on parties who refuse to participate while others make it an offence not to attend without reasonable excuse.[89] Where there are power inequalities between the parties, compulsion can be problematic[90] and may need to be tempered with other legislative mechanisms, particularly an intake process, to ensure that the agreement is balanced and reflects the needs of both parties.[91]

Modifying the process or providing for a different process

The type of process specified in the Act can of itself have an impact on power differences. It is not always possible to draw a bright line between mediation and conciliation. If we apply the NADRAC definitions of mediation and conciliation,[92] it is clear that the legislative framework within which the process is situated will have a greater impact in conciliation, where, at least in theory,[93] the Act will expressly or implicitly confer some power on the conciliator to influence the outcomes of the process.[94] In this situation, a conciliator may be in a stronger position to address a significant power difference between the parties by providing advice on the substantive outcome and the relevant law.

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89 For example, costs can be imposed under section 102(2)(c) of the *Residential Tenancies Act 1986* (NZ); while s 83 of the *Freedom of Information Act 1992* (WA) makes it an offence with a potential penalty of a fine or six months imprisonment.

90 Ironically, there may be a danger that a court may view the prescription of mediation as leaving the parties to the consequences of any inherent inequality of bargaining power. See *Commonwealth Bank of Australia v McConnell* (Unreported NSW SC, 24 July 1997, BC 9705442) where Rolfe J responded to the mortgagee's assertion that at the time of executing the Heads of Agreement in the mediation there existed material inequality in bargaining power between them and the Bank by saying 'The Bank is entitled to respond that it was forced by the Act to mediate… In so far as a lack of equal bargaining power comes about that is not the fault of the Bank, but of the legislature, which has created the circumstances in which the mediation is to take place.' (at 38).

91 The intake process as a mechanism will be discussed further below. See also C Baylis 'Reviewing Statutory Models of Mediation/Conciliation: Three Conclusions' (1999) 30(1) *Victoria University Wellington Law Review* 279, 287-290.

92 NADRAC, above n 3.

93 See Baylis above n 77, for discussion of confusion of roles of mediators and conciliators.

94 For discussion, see D Bryson, "Insider Mediators' and the ADR Practice of Spitting on the Spear' (2001) 12 *Australian Dispute Resolution Journal* 89. See also RH Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950.

Mechanisms to determine the appropriateness of commencing and continuing the process

Intake process

There is a significant body of literature that suggests that mediation is not appropriate for all types of disputes involving power imbalances, particularly in cases where there is a history or danger of violence between the parties or to third parties.[95] One way to deal with this issue is for the legislative models to incorporate an intake or screening process, both to protect one party from the danger of physical harm from the other, and also to ensure that disputes are not mediated in situations where one party would not be able to negotiate effectively on their own behalf due to the prior actions of the other party.[96] An intake process both enhances the power of the mediator or other official exercising statutory powers by giving that person the discretion to refuse mediation and, at the same time, fetters the parties' rights to use mediation. Usually the discretion would be exercised where either or both parties do not wish to use the process, but it is possible that an agency or mediator could decide mediation was unsuitable even though both parties agreed to it.[97]

The Australian *Access to Justice* Report identified a screening process as a necessary limitation on institutionalised mediation that required a national minimum standard to ensure justice in this area.[98] Similarly, the Western Australian Law Reform Commission, in suggesting increased use of ADR in the civil justice system, recognised the need for an intake process to determine the suitability of a dispute for ADR and included as one relevant factor, 'the potential for, or degree of, power imbalance between the parties, if any.'[99] However, the degree to which statutory models incorporate or make reference to such a mechanism varies significantly. An intake process is particularly important in legislative models that compel mediation.[100]

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95 For example, see H Astor, 'Violence and Family Mediation: Policy' (1994) 8 *Australian Journal of Family Law* 3; K Rowe 'The Limits Of The Neighbourhood Justice Centre: Why Domestic Violence Cases Should Not Be Mediated' (1985) 34 *Emory Law Journal* 855; and M Irvine, 'Mediation: Is it Appropriate for Sexual Harassment Grievances?' (1993) 9 *Ohio State Journal of Dispute Resolution* 27, 28.

96 For a general discussion on factors affecting the appropriateness of mediation see Clarke and Davies above n 16.

97 For example, in a situation where one party had been violent to the other.

98 Access to Justice Advisory Committee, *Access to Justice: An Action Plan*, above n 38, 295.

99 Western Australian Law Reform Commission (WALRC), *Review of the Criminal and Civil Justice System in Western Australia* Final Report, Project 92 (1999) Recommendation 48, 86.

100 Even supporters of compulsory mediation often suggest that where this occurs there needs to be an intake process. For example, see M Vincent, 'Mandatory Mediation of

Some models incorporate a detailed intake procedure[101]. For example, under the *Family Law Act 1975* (Cth), both the *Regulations*, which apply to community and private mediators under the Act,[102] and the *Family Law Rules 1984* which apply to Court mediators,[103] contain similar provisions that establish a screening process. Both require that before mediation occurs, disputes must be assessed to determine their suitability for mediation. The factors to be taken into account include the potential risk of child abuse, family violence, the emotional and psychological state of the parties, as well as the degree of equality of the bargaining power between the parties. In terms of the latter, the *Family Law Regulations* give two possible examples, which are 'whether a party is economically or linguistically disadvantaged'.[104]

Obviously one of the difficulties of a screening mechanism is that the power differences will not always initially be apparent as, for example, parties may be unwilling to discuss violence that has occurred or has been threatened. One response to this difficulty, is to provide, as in the *Family Law Regulations*, specific information that must be given to the parties before mediation is commenced, including the information 'that mediation may not be appropriate for all disputes, particularly if a dispute involves violence that renders one party unable to negotiate freely because of another's threats'.[105] This has the potential to encourage a person who has been subjected to violence to opt out of mediation or at least bring the issue of violence to the attention of the mediator.[106]

Many legislative models have less explicit intake processes. A common mechanism is for the legislation to empower an official to refer a dispute to mediation or for the official to mediate where they believe it appropriate to so do.[107] Another example is seen in the *Health Services (Conciliation and Review) Act 1995* (WA),

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Custody Disputes: Criticism, Legislation, and Support' (1995) 20 *Vermont Law Review* 255, 288. See also CC Hutchinson, 'The Case for Mandatory Mediation: Practitioner's Note' (1996) 42 *Loyola Law Review* 85, 90.

101 Another example is the *Residential Tenancies Act 1986* (NZ) which states that when an application is filed, the tenancy officer refers it to a Tenancy Mediator unless in terms of any regulations made under the Act, the application is of a class that is to be referred directly to the Tribunal....': s 87(1).

102 Family Law Regulations 1984 Reg 62.

103 Family Law Rules 1984 Order 25A Rule 5.

104 Family Law Regulations 1984 Reg 62(2)(c).

105 Family Law Regulations 1984 Reg 63(1)(d).

106 It is interesting to note that an assessment of suitability of mediation where there is a history of violence between the parties does not take place in all cases involving family disputes. In some States, family disputes over property are heard in the Supreme Court or equivalent, where provisions equivalent to the Family Law Regulations or Rules do not necessarily exist.

107 For example, section 61 of the *Health and Disability Commissioner Act 1994* (NZ).

which sets out the process to be followed if, in the Director's opinion, the complaint 'is not suitable for conciliation…'[108] but does not address what factors would make it unsuitable. An obvious difficulty with this model is that cases may not be filtered out on a consistent basis if guidelines are not established, as it may depend on the level of experience and training in power imbalance issues that the official happens to have and their views of the appropriateness of mediation in different circumstances.

Finally, many legislative models are silent as to an intake process while others mandate that all disputes must be mediated. A particularly problematic example of the latter was the *Human Rights Act 1993* (NZ) which compelled the Commission to conciliate once the investigating officer formed an opinion that a complaint had substance.[109] This removed the power of the Commission to decide that a case was inappropriate for conciliation. However, since the enactment of the *Human Rights Amendment Act 2001* (NZ) the Commission can only compel attendance at a dispute resolution meeting in cases which are referred back to it from the Human Rights Review Tribunal or the Director of Human Rights.[110] The initial use is voluntary. Thus mediation may be used at three points in time under the Act. However, there is only an intake process at the last point in time, in that the Tribunal must refer the complaint back to the Commission for dispute resolution services (or further services) unless it is satisfied that this will not contribute constructively to resolving the complaint or will not be in the public interest or will undermine the urgency of the proceedings.[111]

The fact that there is no statutory intake process for the first two referrals to mediation was raised in submissions on the *Human Rights Amendment Bill* that resulted in the 2001 Act. The Select Committee agreed that there were difficulties raised by the use of consensus-based processes in situations of significant power differences between the parties. It believed, however, that a formal intake procedure would be 'overly prescriptive' and that it was 'more acceptable to allow the Commission the flexibility to determine the best way to proceed in any given situation.'[112] This tension between flexibility and prescription is central to the use of legislative mechanisms as will be discussed below. With this legislation, however, it is difficult to understand why an intake process would be included for

108 Section 31. Another similar example is the *Community Justice Centres Act 1983* (NZ) s 24(1), which states that 'The Director may decline to consent to the acceptance of any dispute for mediation under this Act at a Centre.'

109 Section 81 of the *Human Rights Act 1993* (NZ).

110 Section 84(4) of the *Human Rights Act 1993* (NZ).

111 Section 92D of the *Human Rights Act 1993* (NZ). Similar provisions exist in the *Employment Relations Act 2000* (NZ) in relation to the Employment Relations Authority (s159(1)) and the Employment Court (s188).

112 Justice and Electoral Select Committee Report on the Human Rights Amendment Bill (Wellington, 2 November 2001) 15-16; see also C Baylis, 'The Human Rights Complaints Process' [2000] *New Zealand Law Journal* Nov 2001, 410.

one use of mediation but not the others, even though the Select Committee 'expected [the same factors] to be borne in mind by the Commission when providing assistance to a complainant in the first instance'.[113]

Termination

Another important mechanism for preventing the abuse of power in mediation is the ability of the parties and the mediator to terminate the mediation. How realistic it is for the parties to choose to terminate the mediation will be determined to some extent by whether the process is compulsory under the statute. Although the courts have made it clear that only participation in the process, not reaching an agreement, is compulsory,[114] the parties, and indeed the mediator, may perceive themselves to be constrained from terminating the mediation. The exercise of the right to terminate may need to be weighed up against any statutory obligation to mediate in good faith that exists in any particular statutory context.[115]

Whilst relatively few legislative provisions expressly provide for termination, an example is found in Regulation 64 of the *Family Law Regulations* (Cth), which states that the mediator must terminate if 'requested to do so by a party' or 'if the mediator is no longer satisfied that mediation is appropriate'.[116] Presumably the screening factors set out in the regulations to determine whether mediation is appropriate in the first place, which include the equality of the bargaining power between the parties, are also relevant in determining whether mediation has become inappropriate.[117] In terminating mediation where there are concerns about abuse of power, however, it is necessary to use strategies that attempt to ensure the safety of all concerned.[118] This type of termination provision should ensure that the question of whether the mediation is working in a legitimate consensual

113 Justice and Electoral Select Committee Report on the Human Rights Amendment Bill (Wellington, 2 November 2001) 15.

114 For example, *Hooper Bailie Associated Ltd v Natcom Group Pty Ltd* (1992) 28 NSWLR 194; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236.

115 For example, the *Employment Relations Act 2000* (NZ); and the *Farm Debt Mediation Act 1994* (NSW) s 11(2)(a).

116 Other provisions confer a discretion to terminate. For example, section 24(2) of the *Community Justice Centres Act 1983* (NSW), provides that '…a mediation session may be terminated at any time by the mediator or by the Director.'

117 See Regulation 62.

118 It is particularly important that the mediator attempts to ensure that the perpetrator of the abuse does not blame the other party for the termination of the mediation. For example, see A Barsky, 'Issues in Termination of Mediation Due to Abuse' (1995) 13(1) *Mediation Quarterly* 19 which discusses P Charbonneau, Report from the Toronto Forum on Woman Abuse and Mediation (Belfast, Maine: Fund for Dispute Resolution, Academy of Family Mediators, Ontario Association for Family Mediation, Family Mediation Canada, Ontario Anti-Racism Secretariat, Guelph-Wellington Women in Crisis, and Women's Law Association, 1993).

way is kept to the forefront of the mediator's mind. Such a provision may have an educative function, but it may also be useful for the mediator to have the express *duty* to terminate, especially in situations where one or both parties may appear to wish to continue, but due to the abuse of one party the mediator does not believe this will achieve a fair outcome.

Mechanisms that affect the manner in which the mediation is conducted

The role or status of the mediator

Even where mediation rather than conciliation is used, some statutes enhance the mediator's role in some way. For example, the *Residential Tenancies Act 1986* (NZ) states that mediators shall 'make suggestions and recommendations and do all such things as they think right and proper for inducing the parties to come to a fair and amicable settlement.'[119]

The identity of the mediator may also enhance their power. Under some statutes a judge or decision-maker acts as mediator and then may hear a subsequent proceeding if the case does not settle.[120] The knowledge that this may occur may act as a check on a stronger party's tactics. However, these models are also problematic.[121] The difficulties that arise from having the same person act as mediator and subsequently as judge have been recognised by some courts, and are avoided by ensuring that different court officers participate in the different processes.[122] The identity of a mediator as a person appointed under a statute may also operate to enhance their status in the eyes of the parties, which could have an impact on the power relations in the mediation.

Timing of the process

The time at which the mediation occurs in the overall dispute resolution process can affect the power relations between the parties. Perhaps the clearest example of legislation where this was an issue was the process under the *Human Rights Act 1993* (NZ) before its amendment by the *Human Rights Amendment Act 2001*.[123] Previously, one of the main uses of conciliation under the Act was

119 Section 76(5)(b). Similarly, s 23 of the *Residential Tenancies Act 1987* (WA) allows the magistrate to '…interview the parties in private…' (with or without any representative present): s 23(1)(a); and 'endeavour to bring about a settlement of the proceedings on terms that are fair to all parties': s 23(1)(b).

120 For example, *Family Proceedings Act 1980* (NZ) s16.

121 See Baylis, above n 69 for discussion of these issues.

122 See Australian and New Zealand Council of Chief Justices, Position Paper and Declaration of Principle on Court-Annexed Mediation (Canberra, March 1999).

123 This Act deals with complaints of discrimination, sexual harassment and racial harassment and disharmony. The Amendment Act removed the Commission's investigative role, although it retains an information gathering function.

compulsory conciliation after the Complaints Division had conducted an investigation and reached an opinion that the complaint had substance. In other words, the process took place against the backdrop that the Commission had already formed an opinion that a complaint was genuine and a breach of the Act had occurred. The focus of the conciliation then was based around a remedy and future conduct. That aspect of the process had a significant impact on the power balance between the parties because if conciliation was taking place, it would always be the presumptively weaker party who was supported by the Commission's opinion. A limitation of this as a mechanism to address power difference is that because it involved only an 'opinion' of the Commission, it may not have had enough weight to prevent the respondent from challenging the facts and attempting to broaden the conciliation focus back to the alleged breach.

A related mechanism appears in the *Federal Magistrates Act 1999* (Cth) which allows a party to a primary dispute resolution process (which includes mediation and conciliation) to apply to the Court for determination of a question of law. The application must be consented to by the person conducting the mediation or conciliation who must state that the determination is 'likely to assist the parties in reaching an agreement.'[124] Whilst the primary purpose of this mechanism may not have been to alter the power dynamic between the parties, there is potential for it to have this effect.

Legal representation

The issue whether parties should be legally represented in a mediation has attracted a range of views. On the one hand, it is not uncommon to hear mediators complain that some lawyers are unwilling to or incapable of acting in a way that is conducive to the mediation process. On the other hand, in areas where there are serious differences in the parties' power, the argument is made for legal representation to ensure real and effective participation from both parties and a genuinely consensual agreement.[125] For example, in the context of conciliation of discrimination complaints, Thornton states:

> The problem of imbalance of power between the disputants is a critical issue in mediation and it can only be hoped that the legislature's desire to simplify, expedite and decrease the cost of resolving disputes does not blind the legislature to the very positive role that the legal profession plays in ensuring that negotiation, even facilitated negotiation, takes place on a 'level playing field.' [126]

This argument is particularly strong in cases of statutory mediation where parties may be foregoing potential legal entitlements.

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124 Section 27.
125 For example, in the context of worker's compensation claims see Guthrie, above n 83.
126 Ibid.

Some statutes are silent on the question of legal representation,[127] but others make express reference to it.[128] The express provisions take a range of forms. First, an Act may specify that one set of interests must be legally represented. For example, the *Children Young Persons and their Families Act 1989* (NZ) states that any lawyers of the child must be present.[129] This type of provision enhances the rights of the child and recognises the child's inability to exercise power on his or her own behalf. The second approach is that an Act may confirm the parties' right to legal representation by allowing representation if they so choose. For example, the *Family Proceedings Act 1980* (NZ) allows any lawyer representing the parties to be present at the request of the parties.[130]

Finally, an Act may enhance the power of the mediator or another official to allow or refuse legal representation during mediation;[131] this obviously has a significant effect on the rights of the parties. For example, the *Children Young Persons and their Families Act 1989 (NZ)* allows legal representation unless the mediator proscribes it.[132] Sometimes the legislation sets out the grounds for the exercise of the discretion, at other times it does not.[133] An example of the former is the *Disability Services Act 1993* (WA), which gives the Commissioner the discretion to allow representation only 'if the Commissioner is satisfied that the process will not work effectively otherwise.'[134] Similarly, under the *Commercial Arbitration Act 1986* (WA), which covers mediations or conciliations conducted by an arbitrator,[135] the arbitrator must grant leave for representation if satisfied that this would reduce costs, shorten proceedings or 'that the applicant would, if leave were not granted, be unfairly disadvantaged.'[136]

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127 For example, the *Retail Leases Act 1994* (NSW), the *Human Rights Act 1993* (NZ), the *Medical Practitioners Act 1995* (NZ). Alternatively some statutes allow advocates to be present, for example *Disability Services Act 1993* (WA) section 39(3).

128 Thornton, above n 74, 754 notes that '[r]enunciation of the role of lawyers has been one of the most notable characteristics of conciliation.'

129 Sections 170 and 175.

130 Section 14(3). Other examples are the *Health and Disability Commissioner Act 1994* (NZ) s61(3); and the *Farm Debt Mediation Act 1994* (NSW) s17(4).

131 Section 163 the *Anti-Discrimination Act 1991* (Qld).

132 Section 172(2)(d). Note: In this case a Family Court Judge is the mediator.

133 For Example, *Equal Opportunity Act 1984* (WA) s 92.

134 Section 39(3).

135 Section 27.

136 Section 20 (3)(b). Similarly, section 25 of the *Community Justice Centres Act 1983* (NSW) provides more generally, that a party to a mediation session is not entitled to be represented by an agent unless it appears to the Director of the Centre that it would facilitate the mediation, that the agent has sufficient knowledge of the matter in dispute to represent the party effectively and the Director approves.

Interpreters

Where an Act specifically confirms the parties' right to an interpreter it provides a safeguard against unfairness for a party who may be disadvantaged by their inability to communicate well in English. For example, the *Anti-Discrimination Act 1991* (Qld) explicitly states that '[a] person has a right to use a professional or voluntary interpreter at a conciliation conference.'[137]

Requiring documents and other information to be shared

An important mechanism for dealing with power imbalance that may be caused by a lack of information needed for effective negotiation, is to provide a procedure by which parties share information and documents.[138] Power may be given to a mediator to *require* parties to give information and produce documents[139] or to make a similar *request* of the parties.[140] Conferring formal power on a mediator to influence the conduct of the mediation may be seen, of course, as increasing the formality of the process and in some way detrimental to the mediation process. This was the view of the Select Committee considering the Bill which became the *Human Rights Amendment Act 2001*(NZ):

> Adding a power to compel information would re-introduce a formal and adjudicatory element to the initial dispute resolution process, which would conflict with the general policy direction of the bill in this area.[141]

However, this type of power can be an important mechanism to reduce potential disadvantage to one or both parties in a statutory process.

Imposition of costs and requirements of good faith

Some statutes enhance the mediator's powers to affect the abuse of power by a party by allowing the mediator to report to a body on the conduct of the parties during the mediation. The body may then use this report in determining costs.[142] For example, the New Zealand *Human Rights Amendment Act 2001* introduced a provision allowing the Tribunal, in determining whether to make an award of

137 Section 162 of the *Anti-Discrimination Act 1991* (Qld). See also section 84T of the *Workers' Compensation and Rehabilitation Act 1981* (WA).

138 There may be overriding policy reasons why a mechanism like this is specifically precluded. For example, the *Freedom of Information Act 1992* (WA) specifically precludes a conciliator from ordering that a document be produced: s 71(4).

139 For example, *Residential Tenancies Act 1987* (WA) s 19; and *Workers' Compensation and Rehabilitation Act 1981* (WA) s 84Q.

140 For example, *Agricultural Practices (Disputes) Act 1995* (WA), Schedule 1 cl 7.

141 Justice and Electoral Committee, Report on the Human Rights Amendment Bill (Wellington, 2 November 2001) 17.

142 See for example, the *Residential Tenancies Act 1986* (NZ) sections 88(4) and 102(2).

costs, to consider the extent to which parties 'participated in good faith in the process of information gathering…' and 'acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.'[143] Failure to mediate in good faith can have other implications for one or both of the parties. One example of a mechanism that may have a similar effect to the reporting mechanism is found in the *Farm Debt Mediation Act 1994* (NSW), which provides that certain orders can only be made where it is found that a party has attempted to mediate in good faith.[144] Similarly, under section 164 of the *Employment Relations Act 2000 (NZ),* the Employment Relations Authority can only make certain orders if a party has acted in good faith.[145] To a large extent it will be the threatened use of these mechanisms that affect the parties' conduct in a mediation and enhance the mediator's ability to inhibit abusive behaviour.

Exceptions to confidentiality

Another statutory mechanism that may protect a party is where exceptions to confidentiality provisions are created to allow the reporting of the unacceptable use of power. For example, the *New Zealand Residential Tenancies Act 1986* (NZ), while establishing a general duty of confidentiality for Tenancy Mediators, allows mediators to disclose any statement or information if they have reasonable grounds to believe it is necessary to prevent or minimise the danger of injury to any person or damage to any property.[146] Similarly, the *Family Law Regulations 1984* (Cth) provide that a private mediator may disclose communications if he or she:

> reasonably considers that it is necessary for him or her to do so to protect a child, or to prevent or lessen serious and imminent threat to a person or property, or to report the commission of an offence or prevent the likely commission of an offence of violence or damage to property.[147]

The *Family Law Regulations* exception is wider in scope than the *Residential Tenancies Act* in that it allows the mediator to report an offence that has already been committed. Where an offence is threatened during a mediation, whether against the other party or another person who is connected to them, not only does

143 Section 92L(2).

144 S 11(1) requires the Authority established by the Act to issue a certificate that the Act does not apply to the farm mortgage where the farmer has, inter alia, failed to take part in mediation in good faith, ss 11(2)(a). In this event the creditor will be free to commence proceedings in respect of the farm debt.

145 Section 164.

146 Section 90. In addition, there is an exception to the principle that statements made in mediations are subject to privilege (section 89) where the statement would otherwise be admissible in criminal proceedings (section 89(4)). See also section 88(d) *Human Rights Act 1993* (NZ).

147 Regulation 67.

this place their safety at risk, but it is likely to have a dramatic effect on the negotiating power between the parties. Enhancing the mediator's power to respond to such threats may in itself reduce the likelihood of the abusive party making such threats.

Professional mentor

Some legislation provides a mechanism aimed at ensuring that a statutory mediator has access to a process expert. For example, the *Health Rights Commission Act 1991* (Qld) establishes a model of conciliation that can be used for health service complaints under the Act.[148] It provides that all conciliators 'to the extent practicable' are to have professional mentors.[149] These are 'persons with knowledge or experience in the field of dispute resolution' who are to advise the conciliator on the performance of their functions. The provision includes an exemption for the conciliator from confidentiality in this regard and also imposes a duty of non-disclosure on the professional mentor. This mechanism would allow the conciliator to discuss a case at any stage of the conciliation. If it seemed likely that a particular case would involve a significant power imbalance the conciliator could discuss this before the conciliation started. Further, he or she could also discuss difficulties that arose in this regard during the conciliation and debrief after it. While this mechanism may have an important educative function, generally it would seem more appropriate for mentoring processes to be provided for in subsidiary legislation or practice standards and guidelines.

Mechanisms relating to the outcome of mediation

Solicitor approval

Some statutes include lawyer approval clauses if one or both parties did not have legal advice during the mediation process. This provides a check to ensure that one party is not unduly disadvantaged by the agreement. It also recognises that the mediator is not in a position to advise the parties on the terms of their agreement. For example, the *NZ Family Proceedings Act 1980* (NZ) states that, if a party does not have legal representation at a mediation conference, a consent order cannot be made 'unless that party states expressly that that party does not wish the conference to be adjourned to provide an opportunity for legal advice to be taken.'[150]

148 See also the *Health Complaints Act 1995* (Tas) Part 5.
149 *Health Rights Commission Act 1991* (Qld) s87.
150 Section 15(2).

Cooling off periods

The cooling off mechanism is used in contract law and has been codified in some jurisdictions in areas where there is a 'presumptive' power imbalance.[151] A statute may prescribe a cooling off period after an agreement is reached at mediation. During the cooling off period the agreement is not enforceable and the presumed 'weaker' party, for whose benefit the mechanism operates, may opt to rescind the agreement. An example of this mechanism is provided by the *Farm Debt Mediation Act 1994* (NSW) which requires that where any written agreement is entered into between a farmer and creditor as a result of a mediation there must be a cooling off period of at least 14 days. During this time it is possible for the farmer, but not the creditor, to rescind the agreement.[152]

In part this mechanism reflects the notion that a presumed 'weaker' party may have been pushed into an agreement in the heat of a mediation by the 'stronger' party and later realise they have been disadvantaged. It may also reflect that the 'weaker' party, unlike the 'stronger' party, is likely to be inexperienced in the process and therefore they are less likely to be able to negotiate as effectively. In the farm debt mediation context, for example, it gives a farmer the chance to talk to family members, others with an interest in the farm, and lawyers (if they were not present at the mediation) about the agreement. The ability of one party to opt out of a mediated agreement will undoubtedly have some impact on the mediation itself, as each of the parties know that there is time for the party with that option to reconsider the terms of settlement.[153]

Developing a principled approach to the incorporation of statutory mechanisms to address power differences in mediation

From the review of statutory provisions above, it is clear that whether mechanisms for addressing power differences exist, and what those mechanisms

151 For example Australian federal legislation incorporates cooling-off periods for financial supplement contracts under the *Social Securities Act 1991* and the *Student Assistance Act 1973*, for life insurance and consumer credit insurance under the *Insurance Contracts Act 1984,* and for employees under the *Retirement Saving Accounts Act 1997*. In New Zealand the Credit Contracts Act 1981 and the *Door to Door Sales Act 1967* both incorporate the concept of a cooling off period.

152 *Farm Debt Mediation Act 1994* (NSW) s11B. If this occurs, either party can claim compensation or adjustment where the other party has received a benefit under the agreement (but a claim cannot be made only on the basis of the rescission itself).

153 One commentator advocates for the adoption in court-connected mediation of a three-day, non-waivable cooling-off period before mediated settlement agreements become enforceable, in a bid to preserve party determination in the face of evaluative mediation techniques commonly used in this context: see N Welsh 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalisation?' (2001) 6 *Harvard Negotiation Law Review* 1, 6-7.

are, varies considerably between statutes and statutory models of mediation. There is also considerable variation between statutes that incorporate the same type of mechanism. This is illustrated by the various provisions that relate to legal representation. In some statutes there is a high level of detail in either the Act or the Regulations relating to the model of mediation to be used, and a range of mechanisms that address significant power differences. From the discussion above it will be clear that the Australian *Family Law Act* and the New Zealand *Residential Tenancies Act* fall into this category. In contrast, New Zealand's *Employment Relations Act 2000* establishes a permissive regime explicitly leaving the procedure to be adopted to the discretion of the mediator and states that the nature, content or manner of the mediation services cannot be challenged.[154] At times, mediation is provided for in scant detail and consequently does not incorporate any or many mechanisms. An example of this is the New Zealand *Medical Practitioners Act 1995* which does little more than state that a Complaints Assessment Committee can attempt conciliation.[155]

The approach taken will depend, in part, on the specific context in which the statute is operating. We have seen that statutes which provide for mediation in areas of law where there is some presumed inequality of power between the parties will often incorporate some form of statutory mechanisms for addressing power differences. There may be other factors that explain the use of a particular mechanism. For example, the requirement for solicitor approval under the *Family Proceedings Act 1980* (NZ) reflects the significance of the outcomes in matters such as custody. Sometimes the variation is more a factor of the level of prescription adopted by the legislature at the time, for example whether where a discretion is granted, the grounds are set out for its exercise. Where the state wishes to exercise more control over outcomes (often in areas where there is a greater likelihood that disputes will involve an inequality of bargaining power), conciliation will usually be favoured over mediation. Accordingly, many statutes covering anti-discrimination and health complaints provide for conciliation,[156] although there are exceptions to this.[157]

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154 Sections 147, 149(3)(b) and 152. This was recognised as being potentially problematic during the Parliamentary debates on the Bill: See the Hon John Luxton, Hansard NZPD, 9 August 2000, 4480.

155 See section 94. See also *Freedom of Information Act 1992* (WA) and the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA).

156 For example, the *Health Rights Commission Act 1991* (Qld), the *Anti-discrimination Act 1991* (Qld), the *Equal Opportunity in Public Employment Act 1992* (Qld), the *Medical Practitioners Act 1995* (NZ), *Health Services (Conciliation and Review) Act 1995* (WA), the *Racial Discrimination Act 1975* (Cth) and the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

157 For example, the *Health and Disability Commissioner Act* (NZ). Recently, the *Human Rights Act 1993* (NZ) has been amended to change the process used from explicitly being conciliation to being '…services designed to facilitate resolution of the complaint,

Many of the mechanisms incorporated in the legislation operate by enhancing and confirming the powers of the mediator or by fettering one or both parties' rights. Earlier we drew on Astor's work relating to neutrality and her suggestion that mediators should work to maximise party control. Many of these mechanisms may at first glance appear to be in direct opposition to this principle, however this is too simplistic a view. Where there is a real inequality of power between the parties, it may be necessary to reduce one party's power, for example by precluding legal representation; or to bolster the other party's power, for example, by allowing an advocate or interpreter or having a cooling off period. The Western Australian Law Reform Commission recognised the need to address power issues in mediation stating 'when there is a significant power imbalance between the parties, it may be that less control in the hands of the parties will afford a greater potential for fairness in the outcome.'[158] Similarly, mechanisms that increase the power of the mediator, for example by requiring conciliation rather than mediation, or by compelling mediation in a situation where one party may use litigation to their advantage, can have a positive impact on power imbalance. Alternatively, the mechanisms can operate by precluding or limiting the use of mediation, for example, through intake procedures or termination provisions, in situations where there does not appear to be the possibility of real control of the process and outcome by both parties.

The statutory examples outlined above illustrate that there is a range of approaches to the issue of power differences in mediation. Our aim has been to draw attention to the range of mechanisms used in legislation and to suggest that some may usefully be adopted in other statutory contexts. In our view a principled approach would involve more explicit recognition of likely power differentials in process design and closer attention to the potential impact of statutory mechanisms on the integrity of the process.

There is a range of opinion as to the appropriate degree of regulation in the legislation as compared to the agency or mediator self-regulation. In Australia and to some extent in New Zealand, these opinions have led to overt debate about the adoption of mediator standards. There has been little explicit recognition, however, of the issue of the appropriate level of regulation for mechanisms addressing power differences in a statutory context. There are advantages and disadvantages to legislating for these mechanisms, and ultimately there is a need for a balanced and principled approach to the issue. On the one hand, incorporating mechanisms into statutes is likely to lead to a more consistent approach to their use than if they are left for individual mediators to use as they deem appropriate. Consistency of process is all the more important where the

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including information, expert problem solving support, mediation and other assistance.' s 76(2)(c).

158 WALRC, above n 99, paragraph 11.11.

process is part of the state machinery of dispute resolution, because of the principle of the rule of law. The use of mechanisms such as cooling off periods or excluding legal representation should be applied on a more principled basis than merely the knowledge and belief of individual mediators.

On the other hand, weighed against the consistency argument are the arguments of diversity and flexibility. Each dispute is unique, as are the power relations that exist between the parties. Thus there is the argument that each individual mediator should have the flexibility to deal with the dispute before them as befits it, without being fettered by the legislation into a 'one-process for all' approach. There is a danger that too much regulation in legislation results in the process being co-opted and overly legalistic. In some cases, issues may better be addressed through non-statutory provisions; for example the detail of an intake procedure. It may also be appropriate in some cases, to provide for certain mechanisms to apply simply by agreement between the parties and the mediator; for example the right to terminate a mediation.

A compromise between consistency on the one hand, and diversity and flexibility on the other, is for legislation to be used to empower the mediator in terms of a range of possible mechanisms to address power without necessarily compelling their use in all cases. It is not our aim to prescribe whether particular mechanisms should be set out in the enabling Act or in some form of subsidiary legislation. The latter has the obvious advantage of allowing for review and amendment of mechanisms as necessary without recourse to the cumbersome parliamentary process. In our view, there are certain mechanisms that should be provided for in some form of legislation, namely those mechanisms which determine the parties' legal rights, or empower the mediator to determine their rights, or give one party rights but not the other. At a minimum we suggest that some form of legislation is needed where there is an interference with a party's right to legal representation, where a cooling off period is provided, and where sanctions can be imposed on a party for their conduct during mediation.

By making procedural powers and choices more transparent, and by giving mechanisms statutory force where appropriate, the public and parties are more likely to perceive the statutory process as fair. If statutory mediators are seen to regulate the process other than by agreement of both parties (as would be the case in private mediation), for example by creating a cooling off period, mediators and the statutory body to whom they are accountable may no longer be seen as being impartial. If the legislature provides for such mechanisms, this should reduce the degree to which parties might view the mediator as lacking neutrality or impartiality and in this way preserve the legitimacy of the process.

Conclusion

Increasingly disputes arising under statute are being directed to mediation. There is also a trend to compel parties to attend and participate in mediation. In many of these disputes the law regards the parties as being in positions of unequal power. While power is a complex dynamic in any mediation and the concept of 'balancing' power is fraught with difficulty, many aspects of process design, and strategies and interventions employed by mediators aim to ensure that parties are able to negotiate effectively in their own interests to reach fair outcomes. In this article we have shown that in many statutory models of mediation there are mechanisms that have the purpose or the effect, or both, of addressing differences in power. We argue that compelling reasons to address issues of power in mediation in this way are to preserve the integrity of the process itself and to maintain the legitimacy of the state's role in dispute resolution. We suggest that some of these mechanisms might be appropriate for consideration in other statutory contexts and that a more principled approach to their inclusion in legislation be adopted. This is not to suggest that statutory mechanisms should in any way detract from the value and importance of practice-based interventions or from non-statutory mechanisms, such as professional guidelines and codes of practice. In our view, the integrity of statutory mediation will be better maintained if there is greater awareness of the power issues at play in any statutory context and the question of what process mechanisms should be given statutory force is addressed.

CRYSTAL PALACES: COPYRIGHT LAW AND PUBLIC ARCHITECTURE

By Matthew Rimmer[*]

This paper investigates copyright law and public architecture in the context of cultural institutions of Australia. Part 1 examines the case of the Sydney Opera House to illustrate the past position of architects in respect of copyright law. It goes onto consider the framework laid down by the Copyright Amendment (Moral Rights) Act 2000 (Cth) to resolve copyright disputes over moral rights and architecture. Part 2 considers the argument over the proposed renovations to the National Gallery of Australia between Dr Brian Kennedy and the original architect Colin Madigan. Part 3 finally deals with the allegations that Ashton Raggatt McDougall, the architects of the National Museum of Australia, plagiarised the designs of Daniel Libeskind for the Jewish Berlin Museum.

It is a puzzle that architecture should endure a marginal place under copyright law, even though it enjoys a rich and established cultural tradition.

Historically, architecture has long been considered a form of art, ever since ancient times, when it was viewed as the product of divine inspiration.[1] However, buildings did not immediately gain as much copyright protection because of their functional and utilitarian nature. Architectural works only came to be included within the list of literary and artistic works protected at the international level after the revision of the *Berne Convention* in 1908.[2] The *Copyright Act* 1911 (UK) offered protection to 'architectural works of art' insofar as the work related to the 'artistic character of design' and not the 'processes or methods of construction'. The *Copyright Act* 1968 (Cth) provided protection for buildings and models of buildings - whether or not the architecture was of artistic quality.[3] Furthermore, there was

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1 A Hauser, *The Social History of Art, Volume One* (1951); and D Watkin, *A History Of Western Architecture* (3rd ed, 2000).

2 S Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (1987), 253-257.

3 S 10 (1) of the *Copyright Act 1968* (Cth).

separate protection of the architect's plans, designs, and drawings.[4] The *Architectural Works Copyright Protection Act* 1990 (US) was implemented to protect architectural works in compliance with the Berne Convention.[5] Prior to this legislation, copyright protection was afforded only to architectural drawings and specifications.

Such concerns with the status of architecture have been revisited in recent policy discussions. The Copyright Law Review Committee Simplification report assumes that architecture should be treated just the same as other creations - such as literary, dramatic, musical and artistic works.[6] It maintains that architects should enjoy the same array of economic and moral rights as other creators. By contrast, the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) insists that architecture deserves special treatment because of its functional and utilitarian character. Thus the moral rights of architects are limited to consultation in respect of changes to buildings. However, the Copyright *Amendment (Moral Rights) Act* 2000 (Cth) does not diminish the copyright protection that may subsist in drawings. So paradoxically, architects enjoy full moral rights in respect of architectural plans - but not buildings. The legislation displays an ambivalence whether architecture should be treated the same as other artistic works, or singled out for special attention. The old debate about whether architecture should be classified as art continues to haunt the current discussions.

The *Copyright Act* 1968 (Cth) does not draw an explicit distinction between 'private' and 'public' architecture in the framework of the legislation. However, the courts make an implicit separation between the two categories in judicial decisions. There have been a series of cases in Australia dealing with copyright law and private architecture - mainly in relation to floor plans for project homes and kit homes.[7] Such matters involve quite prosaic deliberations about copyright infringement. More striking have been a number of controversies in Australia concerning copyright law and publicly funded architecture - such as galleries, museums, and other cultural institutions. Barbara Hoffman comments upon the general character of such disputes:

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4 S 21 (3) of the *Copyright Act 1968* (Cth).

5 M Mathis, 'Function, Nonfunction, and Monumental Works of Architecture: An Interpretive Lens in Copyright Law' (2001) 22 (2) *Cardozo Law Review* 595; and R Newsam, 'Architecture and Copyright - Separating the Poetic from the Prosaic' (1997) 71 (4) *Tulane Law Review* 1073-1131.

6 Copyright Law Review Committee, *Simplification of The Copyright Act 1968: Part 2. Rights and Subject Matter* (1999).

7 There have been a series of cases in Australia dealing with copyright law and private architecture - mainly in relation to floor plans for project homes and kit homes: *Darwin Fibreglass Pty Ltd v Kruhse Enterprises Pty Ltd* (1998) 41 IPR 649; *Led Builders Pty Ltd v Eagle Homes Pty Ltd* (1999) 44 IPR 24; *Eagle Homes Pty Ltd v Austec Homes Pty Ltd* (1999) 44 IPR 535; and *JS Hill & Associates Ltd and others v Dawn and others* (2000) 50 IPR 425.

> At issue in all of these disputes is the conflict between the rights of the artist who creates the work, the rights and responsibilities of the government authority who commissions and/ or funds the work, and the rights of the public for whose benefit it is presumably created. What limitations, if any, are imposed on government as an owner of property when that property is art? Does artistic freedom limit government property rights, or are such rights of artistic expression properly limited in the public context? [8]

Such controversies involve a consideration of the use of public space and the relationship between the architect, the government, and the public. They also invite debate about the role of copyright law, the protection of cultural heritage, the renewal of architectural relics, and urban planning. Such matters of symbolism are not necessarily apparent in the cases dealing with architectural plans of private residences.

There have been a number of international cases involving disputes over public architecture. In the United Kingdom, there has been disquiet about renovations to heritage buildings. The heir to the British throne and the sometime architectural critic Prince Charles said of a 1984 proposal for an extension to the National Gallery, London: 'A monstrous carbuncle on the face of a much-loved and elegant friend'. Daniel Libeskind's Spiral Gallery for the Victoria and Albert Museum has also attracted controversy. The architecture historian David Watkin likens the building to a 'pile of falling cardboard boxes'.[9] In Europe, too, there has been concern about cultural institutions. There has been a debate over the completion of Antoni Gaudi's La Sagrada Familia church in Barcelona.[10] Defenders of the project say that one should think of it as a medieval cathedral, begun by some hands and finished by others. Critics complain that the constant revisions are a progressive distortion of the work. The Pompidou cultural centre in Paris attracted six failed lawsuits to halt the project, and a decade of press criticism.[11] In the United States, there has also been criticism of dysfunctional architecture. Notably, the Guggenheim Museum in New York, which was designed by Frank Lloyd Wright, has been damned as nothing more than 'scientific kitsch'.[12] Such controversies show that the questions raised by this study of copyright law and public architecture are universal in their resonance.

This paper investigates copyright law and public architecture in the context of cultural institutions of Australia. It considers such issues as the tension between

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8 B Hoffman, 'Law for Art's Sake', in W Mitchell (ed), *Art and The Public Sphere* (1992) 121.

9 J Glancey, 'All The Angles', *The Guardian* (London), 18 June 2001.

10 R Hughes, *Barcelona* (1992), 538-539.

11 G Jahn, 'Letter To The Editor from the National President of the Royal Australian Institute of Architects', *The Sydney Morning Herald*, 3 May 2001.

12 D Watkin, *A History Of Western Architecture* (3rd ed., 2000), 648.

form and function, the nature of collaboration, and the difference between influence and appropriation. Part 1 examines the case of the Sydney Opera House to illustrate the past position of architects in respect of copyright law. It goes on to consider the framework laid down by the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) to resolve copyright disputes over moral rights and architecture. Part 2 considers the argument over the proposed renovations to the National Gallery of Australia between Dr Brian Kennedy and the original architect Colin Madigan. It examines the role played by the Royal Australian Institute of Architects (RAIA). Part 3 finally deals with the allegations that Ashton Raggatt McDougall, the architects of the National Museum of Australia, plagiarised the designs of Daniel Libeskind for the Jewish Berlin Museum. Of course this sample of cultural institutions is not comprehensive. Similar discussions have attended the renovations to the Museum of Contemporary Art in Sydney,[13] the Federation Square project in Melbourne,[14] and the National Gallery of Victoria.[15]

Red Sails In The Sunset: The Sydney Opera House

Ironically enough, some of the first forums about the introduction of a system of moral rights were held in the Sydney Opera House.[16]

The Sydney Opera House was a classic case of moral rights violations. The Danish architect Jorn Utzon won an international competition to design a performing arts complex. Construction of the building began in 1959 and proceeded in slow stages over the next fourteen years. The project was subject to many delays and cost over-runs and Utzon was often blamed for these. The New South Wales state Government withheld fee payments to Jorn Utzon and refused to agree to his design ideas and proposed construction methods.

The architect presented a list of nine demands to the Minister Sir Davis Hughes.[17] Hughes rejected terms 3, 4, and 5, which would have given Utzon final approval of all details, overall control of the surroundings of the site, though not necessarily of the work itself, and an instruction directing consultants that the architect was in charge and the client agreed not to by-pass him by communicating directly with them and the contractor. These were standard conditions which applied to all architects and their clients. Minister Hughes rejected the RAIA's standard conditions of engagement, in particular 4 (j), not to deviate from the original

13 E Farrelly, 'Behold! A Crystal Palace Never To Be Built', *The Sydney Morning Herald* (Sydney), 2 May 2001; and J Crosling, 'Museum Of Contemporary Art' (2001) 76 *Architectural Review* 92-97.

14 <http://www.federationsquare.com.au/>.

15 <http://www.ngv.vic.gov.au/redevelopment/index.html>.

16 Australia Council, Australia Council National Symposium on Moral Rights: Report of Proceedings, 29-30 November 1979.

17 P Drew, *The Masterpiece. Jorn Utzon: A Secret Life* (1999), 352.

design, and (m), that the employment of firms of consultants should be at the architect's discretion. Hughes also demurred at Utzon's request for the Technical Advisory Panel to exercise final authority on all programme and technical matters through the Executive Committee. As a result, the architect was forced to resign in February 1966 as Stage II was nearing completion.

A team of Australian architects - Peter Hall, Lionel Todd, David Littlemore - took charge of the project. They came up with a number of revisions to the original design - such as eliminating the opera facilities in the Major Hall, and making it a single-purpose concert hall. The author Philip Drew laments the changes:

> The outcome was a travesty of the original plan. After years of criticising Utzon for not satisfying the conditions of the competition brief, Hughes now completely abandoned a major requirement of the building programme. Hughes faced an unwelcome prospect, for Peter Hall advised him that the acoustical requirements could not be met by a multi-use hall. In a stroke, Hughes robbed the roof design of any validity. His Opera House is a perversion. Having been conceived with the intention of broadening, not narrowing, the scope of musical performances which could be offered to audiences, it now betrayed Eugene Goossen's original vision. To make matters worse, it was unnecessary.[18]

Jorn Utzon had no legal recourse to prevent such alterations to his original design. There was no system of moral rights in place in Australia, as in Continental Europe. The artistic concerns of the architect could not challenge the interests the owner of the building.

This situation might have been different under a comprehensive scheme of moral rights. Jorn Utzon would have been able to complain that such alterations to the design of the building were in contempt of his moral rights to preserve the integrity of the artistic work. The State Government of New South Wales would have been forced to consult about the proposed revisions to the building. There could have been doubt and uncertainty about whether the building constituted an 'artistic work' given that it had not yet been fully completed and finished. However, Jorn Utzon would nonetheless retain separate copyright protection in respect of the architectural plans and drawings. He could have maintained that the reproduction and alteration of the plans amounted to an infringement of the integrity of the artistic work.

Moral Rights

In the wake of such controversies, professional organisations - such as the RAIA - lobbied for the protection of the moral rights of artists. After much procrastination, the Federal Government agreed upon the need to introduce a

18 Ibid 387.

system of moral rights. However, there was much industry complaint. Whereas the film industry engaged in a very public battle over the moral rights scheme,[19] the building industry restrained themselves to behind-the-scenes lobbying. Since the release of a Discussion Paper, the Federal Government vacillated in respect of the moral rights of architects.[20] It started out with the presumption that architects should enjoy a moral right of integrity - subject to a test of reasonableness. This position was reflected in the *Copyright Amendment Bill* 1997 (Cth). The Federal Government withdrew the moral right of integrity in respect of buildings after protest from the Property Council of Australia. This decision was encoded in the *Copyright Amendment (Moral Rights) Bill* 1999 (Cth). The Federal Government finally reached a compromise that architects should have a right of consultation in respect of any changes that are made to their building. This consensus was enshrined in the *Copyright Amendment (Moral Rights) Act* 2000 (Cth). However, the Federal Government did not make any changes in respect of moral rights that might subsist in architectural plans and drawings.

Copyright Amendment Bill 1997 (Cth)

In the *Copyright Amendment Bill* 1997 (Cth), the Federal Government provided that certain treatment of artistic work was not to constitute an infringement of the author's right of integrity of authorship. Hence s 195AS (1) provided that the destruction of a moveable artistic work, or a change in a structure containing an artistic work, did not constitute an infringement of the right of integrity if the author was given a reasonable opportunity to remove the work first.

The Federal Government obviously had in mind the United States case regarding the public sculpture, the *Tilted Arc*.[21] In 1979, Richard Serra was commissioned to create a site-specific sculpture on the Federal Plaza in lower Manhattan. Ten years later, it was removed to storage after a panel of experts failed to find a suitable site for relocation. Richard Serra alleged that the decision to remove his sculpture infringed his rights under the free speech clause of the First Amendment, the Due Process clause of the Fifth Amendment, federal trademark and copyright laws, and state moral rights law. At first instance, Justice Pollack rejected all of the arguments of Richard Serra. The New York law on moral rights did not apply to the Tilted Arc case because of its location on federal property. On appeal, the three-judge panel of the Second Circuit affirmed the granting of a summary judgment and held that Richard Serra's First Amendment rights were

19 M Cooper, 'Moral Rights And The Australian Film And Television Industries' (1997) 15 (4) *Copyright Reporter* 166.

20 Attorney-General's Department, *Proposed Moral Rights Legislation for Copyright Creators: Discussion Paper* (1994).

21 *Richard Serra v United States General Services Administration* (1988) 847 F 2d 1045; and R Serra, 'The Tilted Arc Controversy' (2001) 19 *Cardozo Arts and Entertainment Law Journal* 39.

not infringed. The case was impetus for Congress to pass the *Visual Artists Rights Act* 1990 (US) which extends to visual artists certain rights governing the display and resale of their work.

However, the Federal Government made no stipulation under the *Copyright Amendment Bill* 1997 (Cth) that the destruction or modification of a building itself would not constitute an infringement of the author's right of integrity of authorship. It therefore presumed that architects should enjoy the same moral rights as other creators - such as writers, artists, and so on.

Thus, under this model, architects would enjoy the moral rights of attribution and integrity. This would be subject to a test of reasonableness - which would take into account factors such as the nature of the work, the context of work, industry practice, and the employment context. Furthermore, architects would be able to waive their moral rights or give consent to particular acts or omissions - a matter of some concern to the RAIA.[22]

Copyright Amendment (Moral Rights) Bill 1999 (Cth)

The Property Council of Australia lobbied the Federal Government to ensure that architects could not exercise moral rights in respect of their buildings.[23] They argued that this was a common sense alternative. The president of the RAIA, Ed Haysen, charted the background to the debate on Radio National:

> The original legislation - which went to the second reading stage - had a clause in it which required owners of buildings to consult with architects and get their consent before buildings were demolished or altered. There was a reasonableness clause in that legislation - so that architects could not withhold that consent unreasonably. The Property Council got very alarmed by that clause. They lobbied Senator McGauran to have all references to buildings and architecture removed from that legislation…. The Property Council felt that this was going to tie up the owners of buildings, and architects would act unreasonably to refuse changes being made to the buildings. But there was this reasonableness clause in it.[24]

This legislation was modelled on s 80 (5) of the British act of parliament, *Copyright, Designs and Patents* Act 1988 (UK), which provided that the moral right of integrity does not apply to a work of architecture in the form of a building.

In the second reading speech of the *Copyright Amendment (Moral Rights) Bill* 1999 (Cth), Daryl Williams observes:

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22 Royal Australian Institute of Architects, 'Press Release' (10 June 1998).

23 Property Council of Australia, 'Press Release: Bill Protects Owners Rights' (14 December 1999).

24 M Cathcart, 'Moral Rights In Architecture', *Radio National, ABC* (12 April 2001).

> This bill clarifies one of those exceptions—that alteration to or demolition of a building will not infringe the right of integrity in the architect's design or in any work, such as a mural, that forms part of the building. This was always the government's policy intention, but there was some concern expressed that the drafting of the original legislation was ambiguous. Of course, where a building is altered without consulting the architect, the owner might have to remove any public sign—such as a wall plaque—giving the false impression that the architect designed the building as altered, if the architect so desires.[25]

However, this seems like a post-facto rationalisation of the intentions of the original bill.

RAIA claimed that the *Copyright Amendment (Moral Rights) Bill* 1999 (Cth), before the House, specifically excluded the moral rights of integrity for architects and enabled clients to put considerable economic pressure on architects to sign away their right to attribution.[26] Michael Peck was particularly concerned about s 195 AT, which stipulated that certain treatment of works - including the modification and demolition of a building - would not constitute an infringement of the author's right of integrity. He complained that the clause unjustly discriminates against architects and subverts the intent of moral rights legislation. Furthermore he believed that the introduction of 'comprehensive consent' in the Bill will also have the practical effect in the marketplace of making the legislation ineffective in respect of architects' moral rights.

Copyright Amendment (Moral Rights) Act 2000 (Cth)

After much procrastination, the Federal Government finally introduced the *Copyright Amendment (Moral Rights) Act* 2000 (Cth). It provided for a moral right of attribution - the right to be identified as the author of a work. It also allowed for a moral right of integrity - the right to protect a work against derogatory treatment.

The Federal Government recognised the compromise that had been reached between the RAIA and the Property Council over the moral rights of architects. Ed Haysen explained:

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25 Hansard. 'Copyright Amendment (Moral Rights) Bill 1999 (Cth)', *House of Representatives* (8 December 1999).

26 Royal Australian Institute of Architects, 'Submission to Hon Peter McGauran MP' (3 December 1999); Royal Australian Institute of Architects, 'Architects Claim Moral Rights Legislation Flawed', Press Release (9 March 2000); and Royal Australian Institute of Architects, 'Morally Unsound Legislation', Press Release (11 May 2000).

> We found out by accident that these provisions had been taken out. So we lobbied very heavily Senator McGauran. A compromise was reached out of those negotiations. It was watered down a bit. Basically, it says that when an artistic work or a building is going to be changed, or altered or demolished, the building's architect has to be given reasonable notice if the building is going to be changed. If the author asks, he or she is allowed access to the building to make a photographic record of it.[27]

So, essentially, architects have a right to consultation and negotiation under the legislation. However, they do not have the power to prevent the destruction or a modification of a building, so long as there has been adequate consultation.

S 195AT provides that certain treatment of works does not constitute an infringement of the author's right of integrity of authorship. A convoluted set of provisions seeks to express the compromise that had been reached between the Federal Government, the Property Council of Australia, and the Royal Institute of Architects.

S 195AT (2A) provides that the owner of a building who changes, relocates, demolishes or destroys a building will not infringe a moral right of integrity of the author in respect of a building, so long as a certain set of procedures is satisfied. First, the owner must serve the author with a written notice stating the owner's intention to carry out the change, relocation, demolition or destruction. Second, the notice must provide the author with access to the building for the purpose of making a record of the artistic work. Third, the owner must also consult with the author in good faith about the change, relocation, demolition or destruction. Fourth, the owner must give the author a reasonable opportunity within a further 3 weeks to have such access. Finally, the author may require the removal from the building of the author's identification as the author of the artistic work - if there are changes.

S 195AT (3) provides that the owner of building will not infringe a moral right of integrity in such circumstances if they cannot discover the identity and location of the author or a person representing the author. S 195AT (3A) specifies what efforts the owner of a building must first make before relying upon this section.

S 195 AT (1) deals with the destruction of a moveable art work. S 195 AT (2) considers a change, relocation, demolition or destruction of a building in which an artistic work is affixed. S 195AT (4A) and (4B) deal with the removal or relocation of a moveable art work. S 195AT (5) provides that 'anything done in good faith to restore or preserve a work is not, by that act alone, an infringement of the author's right of integrity of authorship in respect of a work'.

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27 M Cathcart, 'Moral Rights In Architecture', *Radio National, ABC* (12 April 2001).

Such provisions serve to undermine the project of the Copyright Law Review Committee to simplify the *Copyright Act* 1968 (Cth) in both formal and substantive ways.[28] First, the legislation is long-winded and convoluted. It hardly seems to fulfil the need to explain copyright law in terms of Plain English. Second, the legislation discriminates between the moral rights accorded to authors and other creators, and the limited moral rights provided for architects. Such substantive differences go against the push to treat creators in a similar fashion - whatever artistic field they happen to be in. There is a tension here between the simplification project of the Copyright Law Review Committee, which holds that all artistic media should be treated alike, and the long tradition of special pleading by particular industries affected by copyright law.

The architectural critic Elizabeth Farrelly questions whether the compromise produced meaningful amendments: 'The act, as amended last year, requires architects to be consulted 'in good faith' before their buildings are substantially altered. This is so vague as to be profitless for all except the legal fraternity and, if given teeth by the courts, may yet to be an own-goal for the profession by providing a real disincentive to employ an architect, or buy her product, in the first place'.[29]

Blue Murder In The Art Cathedral: The National Gallery of Australia

In 2001, the National Gallery of Australia announced a multi-million dollar refurbishment in which the southern, left-hand corner of the Canberra Gallery would be enclosed in a large glass box.

Tonkin Zulaikha Greer, Managing Architects, have released their designs for the enhancement of the National Gallery of Australia. It involved three main areas. First, the main part of the work is a new 'front door' for the building, providing public facilities appropriate to a national institution. A new sustainable forecourt water garden, with major new sculpture opportunities, will lead visitors from the car park or the street direct to the new ground-level entrance. Peter Tonkin declares:

> The project will allow the NGA to face Canberra's cultural 'main street' - King Edward Terrace, instead of turning its back to the public. The new 'front door' takes the form of a tall, naturally-lit great hall, linking all of the main levels of this complex building, uniting and rationalising the required access and

28 Copyright Law Review Committee, *Simplification Of The Copyright Act 1968: Part 2. Rights And Subject Matter* (1999).

29 E Farrelly, 'The Art World's Great Custody Case', *The Sydney Morning Herald*, 4 July 2001, 16.

> service functions for the building as a whole. A unique, low energy solution will control air temperature and daylight in the external glass walls.[30]

Second, the designs provide for new facilities for all of the main functions of the Gallery, including new gallery space, public education facilities and art storage and unpacking. Third, the project seeks to address shortcomings in the building's disabled access, fire safety and air conditioning, while improving all of the operations of the Gallery. Selected public spaces in the original building will be restored as a fundamental part of the proposal.

The need for a new entrance is well documented. The original design intent was that the building will be entered either via a raised walkway connecting to the High Court to the west, and in turn to the never built National Place. Otherwise, there was a grand stair leading down towards the lake. Instead the majority of visitors enter the building from the so-called temporary carpark to the south, past the loading dock and up on a narrow ramp.

The building's architect, Madigan, was furious: he says that he has not been consulted about this radical addition- and that changes show 'unreasonable contempt' for his building. Sydney architectural critic Elizabeth Farrelly conceives of the current dispute in respect of the National Gallery of Australia in terms of a custody battle in family law:

> The current National Gallery debate is little more or less than a classic custody tussle. Architecture is always mixed progeny, with at least two - client and architect - and probably more assisting not only at birth but at conception. Grrrruesome. Even thereafter, architects occasionally get all anal, hanging around to select every little thing down to carpet, cupboard handles, furniture, paintings.
> Normally, though, and quite rightly, the architect moves on once the birth pictures are taken, leaving the infant edifice in full care and control of the client, loving or otherwise.
> But later, much later? The question exercising many a professional mind is this: what rights, if any, should the original architect have when, years or even decades later, the now mature building needs amendment. Whose building is it anyway?[31]

The dispute over the National Gallery of Australia has provided the first real test of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) laid down by Parliament.

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30 <http://www.nga.gov.au>.

31 E Farrelly, 'The Art World's Great Custody Case', *The Sydney Morning Herald*, 4 July 2001, 16.

Consultation

The original architect Madigan was displeased that he was not consulted about the plans for the renovation of the National Gallery. He only found out about the proposed changes to the building accidentally. A United States landscape design company sent its plans to the original landscape architect, unaware that he had died. His daughter passed them on to a surprised Madigan. The architect was upset at the lack of consultation:

> It is a public building funded by taxpayers. Why should we allow an itinerant custodian who is here for a limited term of office and the gallery council keep this thing embargoed? Nobody is allowed to see it as it is. They say that it is still not ready to be shown. It was only by accident that I was shown the proposals. Thank goodness, I was able to bring it into public debate.[32]

Eventually Madigan was allowed to see the plans in early June. But even then the National Gallery of Australia instructed him to destroy the copy. Such secrecy may have been necessary to secure government funding - but it lead to widespread mistrust among architects and controversy in the media.

There was criticism of the lack of consultation with the architect Madigan. There was an interesting exchange between Senator Schacht and Dr Kennedy in the Senate Estimates Committee:

> Senator Schacht: Because of the moral rights legislation, obviously Mr Madigan has some rights legally to preserve the integrity of his artistic work.
>
> Dr Kennedy: No, Senator. The moral rights legislation is quite specific in what it says and the obligations that it makes upon the gallery. There is a key issue here: some architects believe that the moral rights legislation should have gone further than it does; that it should have a provision that the change or amendment of a building should not take place without the approval of the original architect; and that the level of consultation is in the second dictionary meaning, as opposed to the first, of informing, and the second of seeking approval. This is contentious; it is not the law at the current moment. What is important and essential in an artistic institution is that discussions in such matters would be in good faith and would be regarded as genuine and meaningful.[33]

Senator Schacht highlighted how the trustees of the Sydney Opera House had consulted with Jorn Utzon and his son about future renovations of the building.[34]

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32 M Cathcart, 'Moral Rights In Architecture', *Radio National, ABC* (12 April 2001).

33 Hansard, 'Senate Committee for the Environment, Communication, Information Technology and the Arts' (6 June 2001) 206.

34 Sydney Opera House, 'Press Release: Utzon Appointment 'Reunites The Man And His Masterpiece' - Trust Chairman' (11 August 1999).

He suggested to Dr Kennedy that it would be wise management practice to follow this example: 'I suspect that may be an example from which the management of the gallery could see that this can be effectively done without an unseemly artistic brawl occurring that does nobody any good'.[35] However, Dr Kennedy resented the comparisons: 'In the particular case of Mr Utzon, he left in some disagreement, whereas Mr Madigan has been highly praised for his building from the profession and by the community'.[36]

Following requests by the RAIA, the National Gallery of Australia agreed to put current design proposals for additions to the gallery on hold, to enable a process of private and public consultation to occur.[37]

The Gallery agreed to participate in a consultation meeting with the original architect Madigan and the new architects, Tonkin Zulaikha Greer. A meeting was held at the RAIA state headquarters in Sydney chaired by the RAIA National President, Graham Jahn. A second meeting also took place involving the Gallery's Director Dr Brian Kennedy and the National Capital Authority Director General Annabelle Pegrum. Graham Jahn said: 'The RAIA is pleased that the NGA and the new architects have taken up its strong recommendation to embark on a more open and consultative process'.[38] The National Capital Authority refused to forward the project design to the Minister for Regional Services, Territories and Local Government, Senator Ian Macdonald until the Gallery has completed its obligations under the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) through consultation with the original architect. In addition, the Gallery reversed its previous decision not to make the new design proposals public prior to their approval by Parliament.

Authorship and Integrity

The Sydney Morning Herald suggested that the director of the National Gallery might be in breach of the moral rights legislation. Lauren Martin comments: 'Dr Brian Kennedy, the Irish director of the National Gallery of Australia, likes to refer to art galleries as cathedrals and himself as the secular archbishop. Now he may become the first person accused in Australian courts of committing a moral sin against an artist'.[39] Madigan obtained preliminary legal advice that there was a case for using the new moral rights legislation to fight plans to alter his award-

35 Hansard, 'Senate Committee for the Environment, Communication, Information Technology and the Arts' (6 June 2001) 206.
36 Ibid.
37 Royal Australian Institute of Architects. 'Press Release: National Gallery Designs On Hold' (19 June 2001).
38 Ibid.
39 L Martin, 'Blue Murder in the Art Cathedral as Angry Architect Takes on the Archbishop', *The Sydney Morning Herald*, 2 June 2001, 1 and 6.

winning building. However, such a suggestion seems rather mischievous given the limited moral rights available to an architect.

The architect behind the National Gallery was ambivalent about the question of authorship in relation to architecture. On the one hand, Madigan was at pains to refute the idea that he was the sole author of the National Gallery. He emphasized that the architecture was the product of a collaborative team of architects, designers, and artists:

> I mean that one of the things that I have to say is that they keep saying, 'It's my building'. It is entirely wrong. That building was produced over a fifteen year period. We had a great team of wonderful architects in our office. We had a great time of engineers, mechanical engineers, and builders. We had wonderful committees and counsels vetting every moment of design. It has the imprint of many, many minds… All these people have put an imprint into the essence of that building's character. Why should that be defaced?[40]

On the other hand, Madigan was quite possessive about his creation. He noted: 'Well, if they keep on saying that it is my building, then I am going to take it back'.[41] It is worth noting that the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) only makes special provision for collaborative arrangements in respect of film. Otherwise the normal principles of joint authorship would apply. The presumption would be that the principal architect would be considered to be the author of the work.

Madigan professed himself comfortable with change in principle, and has lectured on 'design as a creative evolutionary process'. But this particular proposal he likened to the destruction of the Afghani Buddhas. Madigan emphasized that the National Gallery of Australia was a work of art. He believed that the cultural heritage of the building would be violated by the proposal:

> When the gallery was finished, the curator of Australian art, Daniel Thomas, and the director James Mollison, declared it to be a work of art. They said that it should be included on the inventory of art in their collection. They were the ones who nominated it as a work of art. And as such it deserves a great deal of respect and courtesy for any additions that are made to it. I take issue with the introduction that you put to the audience - with new architects calling it a 'brutalist' style of architecture. If it is, then I think it should be part of our heritage.[42]

Madigan conceded that galleries would require additions as they grew in stature, and developed in history. However, he maintained that those additions should be done in a respectful and dignified way.

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40 M Cathcart, 'Moral Rights In Architecture', *Radio National, ABC* (12 April 2001).
41 Ibid.
42 Ibid.

The RAIA took up the cause of Madigan. This was part of a wider agenda. The RAIA sought to use the high profile controversy over the National Gallery to highlight the inadequacies of the current moral rights system. They emphasized that the legislation discriminated against architects. They also questioned whether the current consent provisions are open to abuse. The RAIA also campaigned for design competitions to recognise the moral rights of architects. In particular, they complained that the Department for Immigration and Multicultural Affairs failed to include the moral rights of architects in tenders for designs of detention centres.[43] RAIA pushed for stronger rights for architects. Ideally, they would like a strong legal regime that protects the cultural heritage of buildings.

A group of Australia's leading architects signed a statement of principles which calls for work on the entry to stop while a comprehensive plan of management is prepared for the gallery-High Court precinct.[44] Among the signatories were John Andrews, Robin Gibson, Daryl Jackson, Richard Leplastrier, Neville Quarry, Peter McIntyre and Madigan, all winners of architecture's highest award, the Gold Medal. Other signatories include James Grose, Richard Goodwin, Ken Maher, Rod Simpson, and Ken Wolley. The signatories declared that both the gallery and court were conceived of as an entity and should be protected in the Register of the National Estate as a heritage precinct.

However, Tonkin defended the renovations proposed to the National Gallery of Australia against the accusations of Madigan and his supporters. He argued that the firm had, with care and creativity, proposed a new life for the National Gallery, honouring its original genius and responding to the demands of a new century:

> Tonkin Zulaikha Greer won the selection stage on the basis of our sensitive treatment of the existing building, a demonstrated understanding of its failures and our design's respect for Madigan's highly personal architecture. The firm's track record of successful reworking of heritage buildings for contemporary cultural use underlies our approach to the NGA project. Changed values from 1969 to 2001 mean that our conclusion about what is now appropriate for the building differs significantly from his. Unlike a painting, no work of architecture can be considered fixed in time, divorced from its function.[45]

43 (Perhaps this shows a skewed sense of priorities - thinking that the moral rights of architects are more important than, say, the human rights of refugees).

44 G O'Brien, 'Exhibit A', *The Sydney Morning Herald*, 7 April 2001.

45 <http://www.nga.gov.au>.

Tonkin observed that over the past 21 years insensitive changes had been made to the interior of the building.[46] Among these were doors cut through walls, skylights being blocked off and mezzanines installed in double storey galleries. Tonkin said: 'Beautiful bush-hammered concrete walls were covered up with plasterboard and key architectural features were compromised'.[47] Thus it is possible that the architectural firm could seek protection under s 195AT (5). This legislation provides that 'anything done in good faith to restore or preserve a work is not, by that act alone, an infringement of the author's right of integrity of authorship in respect of the work'. However, it is uncertain whether this provision would cover the extension itself.

The architect Andrew Nimmo challenged the notion that the cultural institution was a work of art above and beyond functional considerations:

> Tonkin Zulaikha Greer are not art vandals and the National Gallery of Australia is not an artwork. It is a building that must function and perform. It requires major modifications and this is acknowledged by all the informed players in this current drama, including Madigan.[48]

The architectural critic Elizabeth Farrelly agreed that there was a strong case that the changes to the National Gallery were reasonable in the circumstances: 'Answer, a gallery needs a front door - considerably more than a fish needs a bike'.[49] Philip Cox concurred the proposed new entry was a benign piece of architecture.[50] However, all had reservations about the glass box in the south-west corner of the building, because it would not be reversible. It would become a permanent feature of the building regardless of whether it is seen to have been a success in fifty years time or not.

Madigan and his supporters seemed to believe that moral rights could preserve the cultural heritage of a building in its youth. However, there is an important disjuncture between the regimes. As Elizabeth Farrelly comments:

> With the architect still alive and posterity yet in the wings, this is not really a heritage question, although the protagonists - including Madigan - do at times paint it that way. It's more about copyright, now known as intellectual

46 R Bolton, '"Utzon Solution' May Put Wind In NGA Sails', *The Australian Financial Review* (Sydney), 23-24 June 2001, 5.

47 Ibid.

48 A Nimmo, 'Controversy: Plans For The National Gallery of Australia' (2001) 90 (5) *Architecture Australia* 26-29.

49 E Farrelly, 'The Art World's Great Custody Case', *The Sydney Morning Herald*, 4 July 2001, 16.

50 P Cox, 'Finding A Mix For Art and Design', *The Canberra Times*, 6 July 2001, 11.

> property, or even moral rights, as the latest Copyright Amendment Act is parenthetically tagged and colloquially known.[51]

There are differences between moral rights and cultural heritage laws. Copyright lasts for the life of the author plus fifty years - whereas heritage laws intervene later in the life of the building. Moral rights are concerned with the reputation of the author, but cultural heritage laws are interested in questions of conservation and preservation.[52]

Revisions

The National Gallery of Australia has been forced to abandon its controversial plans to glass in its front door. [53]

After challenges from supporters of the building's designer, Madigan, the gallery's director, Dr Brian Kennedy, made 'fundamental' changes to the $43 million renovation. The gallery is now planning to put a new entrance near its loading area.[54] Dr Kennedy said Tonkin's new entrance would 'adjoin or abut or integrate with the existing building' on the southern side at the loading bay area, depending on the ultimate solution. It will be 'effectively under another building'. Instead of the original proposal for a multi-storey glass atrium entrance on the south-west corner, the entrance, on the south side of the gallery, will be framed by a series of parallel zinc walls, with glass infills. To allow for the new entrance, facing the southern car park, the gallery's James O Fairfax Theatre will have to be demolished and rebuilt when, as expected, work begins at the beginning of 2003. The partner Brian Zulaikha said that the new entrance would be 'comfortable and appropriate to the form of the building'.[55] The architect of the 1982 building, Col Madigan, said that he knew nothing of the new entrance design. 'I thought it was abandoned'.[56]

The outcome achieved under the process of consultation and negotiation is quite surprising, given the limitations to the moral rights of the architect under the legislation. The president of the RAIA, Mr Graham Jahn, called the precedent setting outcome 'surprising…amazing…and absolutely successful'. Madigan was

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51 E Farrelly, 'The Art World's Great Custody Case', *The Sydney Morning Herald*, 4 July 2001, 16.

52 M Stitt, 'Plastic Trees And Plastic Houses: The Formulation Of Environmental Law And Policy To Address Imitation Of Cultural Heritage' (1994) 11 (2) *Environmental And Planning Law Journal* 155.

53 L Martin, 'Gallery's Glass Design In Shards', *The Sydney Morning Herald*, 30 August 2001.

54 V Lawson, 'Surprise As Gallery Approves Entrance Plans', *The Sydney Morning Herald*, 31 December 2001.

55 Ibid.

56 Ibid.

able to augment his limited right of negotiation with other forms of power. He was successful at publicising the dispute by bringing in the Royal Institute of Architects, and a petition of fellow architects. Madigan also enlisted the support of a politician in the form of Chris Schacht. This brought about scrutiny of the proposals for a work of public architecture in Parliament. Madigan was also able to bring public pressure to bear upon Dr Brian Kennedy through the strategic use of the mass media.

Is this settlement a vindication of the moral rights scheme? Dr Kennedy said the NGA was 'at the forefront of what [moral rights] might mean, as a public building and one that is the focus of considerable attention'.[57] The Federal Government would see the case a validation of its legislation. It imagined that most cases would be resolved by alternative dispute resolution. Only the exceptional few instances would need adjudication. It is a shame that the dispute did not reach the courts. It would have been a sweet irony for the High Court to rule upon the artistic integrity of the architect who designed their building - as well as the National Gallery of Australia.

A Tangled Vision: The National Museum of Australia

The proposed renovations to the National Gallery of Australia were perhaps the product of institutional envy and jealousy. They were an attempt to compete for attention with the spectacular new National Museum of Australia across the lake.

Museum architects Ashton Raggatt McDougall, in association with Robert Peck von Hartel Trethowan and landscape architects Room 4.1.3, submitted and developed an innovative and colourful design for the new museum on Acton peninsula using cultural references from many sources. They were inspired by Walter Burley Griffin's land and water axes for Canberra and incorporated their own 'Uluru line', leading notionally to the centre of the continent.

They conceived of the main building as a three-dimensional knot shaping the extravagant bulges of wall and roof. The bold curved shapes of the huge windows in the main hall are strongly reminiscent of the roofline of the Sydney Opera House. The elegant zigzag shape that houses the museum's Gallery of First Australians imitates the outline of a part of Daniel Libeskind's Jewish Museum, which opened in Berlin in 1999.

The Jewish Museum is a remarkable work of architecture - with its forbidding black zinc exterior, internal voids and dead ends, and underground links to the Berlin Museum. The architect, Daniel Libeskind, describes the design of the building:

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57 L Martin, 'Gallery's Glass Design In Shards', *The Sydney Morning Herald*, 30 August 2001.

> To put it simply, the museum is a zigzag with a structural rib, which is the Void of the Jewish Museum running across it. And this Void is something which every participant in the museum will experience as his or her own absent presence. That's basically a summary of how the building works. It's not a collage or a collision or a simple dialectic, but a new type of organization which is organized around a center which is not, around what is not visible. And what is not visible is the richness of the Jewish heritage in Berlin, which is today reduced to archival and archaeological material, since physically it has disappeared.[58]

There are a number of influences and references contained within this building. First, Libeskind referred to the emblem of the Yellow Star of David in the zig-zag design of the building. Second, the architect - who was trained as a musician - responded to the music of Arnold Schonberg. The strange shape of the building is designed to echo and distort sounds. Third, Libeskind was interested in the names of those people who were deported from Berlin during the Holocaust. Fourth, the architect was inspired by Walter Benjamin's *One Way Street*. This aspect is incorporated into the continuous sequence of sixty sections along the zig-zag of the building.

There have been allegations that the National Museum of Australia is a copy of the Berlin Museum. The controversy raises interesting questions about the operation of the economic and moral rights of architects in relation to copyright law. This case study develops and extends the analysis of moral rights, which has been undertaken in the paper. Whereas the battle over the National Gallery of Australia concerns the physical alteration of the building, the dispute over the National Museum of Australia deals with changing and transforming the context of a work. It involves a situation where the context of the Berlin Museum was altered from what the architect intended or found artistically acceptable. Furthermore, the controversy over the National Museum concerns the legitimacy of creating a new work using the fragments of earlier art works and images. It is related to the debate concerning the restrictions that the moral rights regime places upon appropriation art.[59] The contrast between the National Gallery of Australia and the National Museum of Australia is instructive and enlightening. It reveals that, although architects have limited moral rights in respect of the physical alteration of the building, they have extensive moral rights in relation to the contextual use of architectural designs. Arguably, this will mean that architects will have a greater scope for legal action against their peers - than their paymasters.

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58 D Libeskind, *Radix-Matrix: Architecture And Writings* (1997), 34.

59 E Wang, '(Re)productive Rights: Copyright And The Postmodern Artist' (1990) 14 *Columbia - VLA Journal Of Law And The Arts* 261.

Economic Rights

The dispute raises fundamental questions about copyright infringement of economic rights, and the possible defences to such claims. It also acts as an important reminder that the moral rights regime will not act in isolation. The dispute highlights that it is possible for parties to bring simultaneous actions for breach of economic rights and moral rights. It will be left to the courts to facilitate the co-existence of these regimes.

The Bulletin first raised the allegations that the National Museum of Australia plagiarised the Jewish Museum on the 13 June 2000. The journalist Anne Susskind revealed the story in the breathless tones of a scoop:

> It's an open secret in architectural circles, but hasn't gone much beyond that: the 'footprint' of the Gallery of Aboriginal Australians, designed to represent the history of Aboriginal Australians, designed to represent the history of Aboriginal people and one of the most important parts of the National Museum of Australia, traces that of the new Jewish museum in Berlin, designed to represent the history of the Jews in Berlin.[60]

In response, Daniel Libeskind told *The Bulletin*: 'We've looked at the web site and at some plans. It is extremely difficult to make a judgment based on these, but it seems there is a very shocking similarity, and we will investigate it further'.[61]

The story was picked up by the media in Germany. Interestingly, the usually dignified Frankfurter *Allgemeine Zeitung* chose to headline its story: 'Stroke of inspiration from the Antipodes; We'll copy you; Architectural kleptomania; How the Jewish Museum in Berlin became the National Museum of Australia in Canberra'. Libeskind told the newspaper: 'At first, I thought it was a joke. Not a proportion, not an angle of the Jewish Museum has been changed'.[62] Daniel Libeskind repeated his claims on the Bayerischer Rundfunk radio station in Germany that Howard Raggatt has copied his design for the Jewish Museum in Berlin, a controversial landmark building.[63] He said that his structure, in central Berlin, with sloping floors and other innovations designed to be metaphors for the disorientation Jews have suffered throughout history, had been copied exactly in the National Museum. The allegation focused on the Gallery of First Australians, a centre for Aboriginal Australia. There were questions about whether it was appropriate to attempt to compare the genocide of Jews with the experiences of Australian Aborigines.

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60 A Susskind, 'Footprints In The Quicksand', *The Bulletin*, 13 June 2000, 108.
61 Ibid.
62 P Heinrichs, 'Museum a Copy, Claims Architect', *The Age* (Melbourne), 8 April 2001.
63 Ibid.

In response, Howard Raggart rejected the allegations of plagiarism, which had been aired in the press. He told Arts Today on Radio National:

> I think that the press is having a lot of fun with those allegations. More seriously, it is unfortunate that the debate has been couched in this terminology. Plagiarism involves unacknowledged work - the purpose of passing that work off as your own. This is what we have not tried to do. I guess that our scheme is a purposeful translation of Daniel Libeskind's building in quite dramatic terms, which would be unrecognisable by the unscholarly viewer. Nevertheless, we have taken the icon of the zigzag - not because we are particularly inspired by the building, or even interested in it, in a way. It is a highly recognisable iconic form.[64]

Howard Raggatt was concerned that Daniel Libeskind is reported to have said that he thought that it was architectural plagiarism. There was a need to resolve the inter-personal ethics of the situation. Howard Raggatt hoped to contact Daniel Libeskind and resolve the dispute through mediation. He noted: 'It is a very awkward thing to have a conversation via the media'.[65]

However, it might be difficult to establish that there is a substantial similarity between the National Museum and the Berlin Jewish Museum. Even the journalist Anne Susskind admits that there are big differences from the Libeskind-designed building.[66] First, the wall surfaces will be different - they are exposed black pre-cast concrete as opposed to the shiny zinc cladding of the Berlin building. Second, they are not vertical like those of the Berlin building, but skewed, sloping in different directions. Thirdly, the roof was not flat like the Berlin building. Fourthly, the Canberra façade is even more aggressive, more severe and hermetic, with less relief in terms of windows (the windows are looking into a courtyard garden, the Garden of Australian Dreams). This makes it even more bunker-like - possibly due to budgetary constraints, but perhaps reinforcing a political statement the architects are making. Finally, a visitor approaching the museum might also not perceive the Libeskind zig-zag, because a section has been built in, obscuring it somewhat. But in some of the architects' aerial images of the gallery, the pattern is unmistakable.

Furthermore, it is interesting that journalists should pick up the references to the Libeskind building, and ignore the many other quotations embedded in the work. In a book on the building, Anne Susskind comments: 'No one, really, should be surprised that the National Museum of Australia has several allusions to other buildings'.[67] First, the central organising concept of the scheme is the idea of a

64 M Cathcart, 'National Museum of Australia: Plagiarism?', *Arts Today, Radio National, ABC*, (30 April 2001).
65 Ibid.
66 A Susskind, 'Footprints In The Quicksand', *The Bulletin*, 13 June 2000, 108.
67 A Susskind, *Building History: The National Museum of Australia* (2001), 19.

'tangled vision', engaging the axes of Burley Griffin's city plan. It evokes such disparate inspirations as Bea Maddock's 'Philosophy Tape', Jackson Pollock's 'Blue Poles', boolean string, a knot, ariadne's thread, and the Aboriginal Dream-Time story of the Rainbow serpent making the land. The building implies that the story of Australia is not one story, but many stories tangled together. Furthermore, the National Museum of Australia refers to a Burley-Griffin designed cloister at Newman College in Melbourne. It quotes the Sydney Opera House - both the parts designed by Jorn Utzon, and sections designed by the other architects. It suggests the shell curves of Felix Candela. The Hall is evocative of Eero Saarinen's terminals at the J F Kennedy Airport in New York. The arc is like a piece of work by Richard Serra. The Garden of Australian Dreams evokes a range of different cartographies. And the walls also use selected fragments of the word Eternity - evoking the story of a man who for thirty years chalked this single word on the pavements of Sydney.

So it would be wrong to take the reference to the work of Daniel Libeskind out of context. It is but one of a multitude of quotations embedded in the building. As Charles Jencks notes that no one reference is clear: 'it suggests all of these things without naming them, and this ambiguity gives the building great power'.[68] It is striking that questions about copyright should be raised in relation to the work of Daniel Libeskind, but not in respect of say the buildings of Jorn Utzon or Eero Saarinen. However, Charles Jencks also justifies the building in terms of transformative use: 'Transformation liberates architects from slavish imitation while allowing them to combine prototypes'.[69] So perhaps a case could be made that the copying is protected by the defence of fair dealing - for the purposes of criticism and review.

It is striking that the RAIA was silent over the controversy over the National Museum of Australia, given that it was so vocal and active in the dispute over the National Gallery of Australia. There were a number of extenuating factors which militated against such an involvement. The conflict over the Museum pitted an Australian architect against an international architect - whereas the battle over the Gallery was a clear-cut conflict between an architect and the owner of a building. Furthermore, the Museum raised complex questions of inspiration and appropriation in relation to a post-modern building.[70] By contrast, the Gallery involved matters of heritage and renovation in regard to a modern building. Such circumstances could have dissuaded the RAIA from playing a direct role in the conflict.

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68 C Jencks, 'The Meaning of Australia' (2001) 837 Domus 96.

69 Ibid.

70 LJ Wood, 'Copyright Law And Postmodern Artistic Practice: Paradox And Difference' (1996) 1 *Media And Arts Law Review* 72.

Moral Rights

The dispute also highlights the limitations of the moral rights regime in dealing with collective and collaborative art. As Patricia Loughlan notes:

> Moral rights does not have within its ideology any idea which recognises or accommodates the collective, continuing nature of all creativity, either the inevitable fact that 'the very act of authorship in any medium is more akin to translation and recombination than it is to creating, or the fact that whole networks of people, including the cognoscenti of the 'art worlds', are in fact required to work together to produce and disseminate art.[71]

It is a quirk that architects will enjoy full moral rights in respect of copying of their designs - but limited protection in respect of physical alterations to their buildings.

The noted architecture critic Charles Jencks poses the fraught question of attribution: 'Is it right, or reasonable, in a pluralistic democracy to quote other architecture and, if so, should the quotes be overt, understated or cryptic?'[72] Charles Jencks claims that the building cites - rather than copies - the Jewish Museum:

> One of the problems of Modern architecture is that its pretensions to originality often obscured covert plagiarism. Here quotation marks are out in the open, thus disarming charges of theft. For instance the zigzag motif is lifted explicitly from Daniel Libeskind's Jewish Museum in Berlin and it has several justifications. The most obvious is the parallel between two different genocides, but there is also the way the shape gives a figural direction to the Gallery of the First Australians (as it is also known) and connotes the angst of the lightning bolt. There is a world of difference as any scholar or lawyer knows between honest and open citation and covert copying. Everywhere the architects Ashton, Raggatt and McDougall are citing authorities they find relevant, or functional, or amusing, or instructive.[73]

The Canberra museum seeks to appeal to a wide range of audiences through incorporating explicit references to the major subcultures of Australia. The justification for making some quotes explicit is to ensure that various people feel that they are getting a small slice of the national pie; or at least recognition.

The Bulletin suggested that there were serious copyright and ethical and moral issues at stake. An architect who preferred to remain anonymous questioned

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71 P Loughlan, 'Moral Rights (A View From The Town Square)' (2000) 5 (1) *Media And Arts Law Review* 1 at 8.

72 C Jencks, 'The Meaning of Australia' (2001) 837 *Domus* 96.

73 Ibid, 112.

whether sufficient respect was shown for the integrity of the Jewish Berlin Museum:

> It's a little like theme-park architecture. By removing the uniqueness of a symbol, you downgrade it to some degree. I couldn't do something like that, that replicates something. You take a magazine, do some scanning or whatever; you can do it, you can distort images, steal original images, you can mirror it do whatever you want.
>
> Anyone who follows works of architecture internationally would pick it up. Where do you draw the line and what are the ethics? Can one equate a symbol of the Holocaust with genocide in Australia? How deep does the ownership of that symbol in Berlin, where the Holocaust was conceived or generated, go? The project should be open to such scrutiny.
>
> Most architecture is concerned with beauty - this has a wider ambition. It is not politically neutral. I personally like that subversive aspect of it. What I don't support is how he generated it. [ARM] have elevated this theory of replica to high art. They say it is generated by certain cultural connections. But it's like kleptomania in architecture.[74]

There is a dissonance between the interior and the exterior of the building. There has long been a concern about museums appropriating cultural property from Indigenous people. Dawn Casey has spoken out against this practice herself.[75] Furthermore there are exhibits within the museum which discuss the history of artistic appropriation of Indigenous designs. In such a context, it might be considered inappropriate for a copy of the Berlin Museum to be used to represent the Gallery of First Australians.

However, Professor Michael Keniger, a member of the Acton Peninsula Project Design Integrity Panel, denied any political intent: 'The map, the plan, the footprint, is very specific, so I think those who are aware of Libeskind's design will be aware of the parallels being drawn. That is as far as it goes. It's an inference drawn by others, rather than a specific political statement. They have woven into the collage this symbol and it sites there'.[76] A Canberra architect Andrew Metcalfe was supportive of the design: 'In terms of postmodern culture, it's probably permissible'.[77] Another architect said it could be seen as a 'homage' to the Libeskind building.

The director of the National Museum, Dawn Casey, sought to defend the architecture of the National Museum from criticisms that it was a case of

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74 A Susskind, 'Footprints In The Quicksand', *The Bulletin*, 13 June 2000, 108.
75 D Casey, 'Indigenous Ownership of Digital Material: Is Organised Crime Getting Out Of Hand', *Incite: ALIA Magazine*, June 2001.
76 A Susskind, 'Footprints In The Quicksand', *The Bulletin*, 13 June 2000, 108.
77 Ibid.

appropriation.[78] First, she attempted to deflect attention away from the debate about the exterior of the Museum to the interior of the Gallery of First Australians:

> Why are we talking about the building's envelope when so many rich stories lie within? We are especially proud of the imaginative and significant exploration of Aboriginal and Torres Strait Islander cultures and histories that it contains.[79]

Second, Dawn Casey provided a defence of the artistic practices of the architects of the National Museum of Australia. She argued that the building was the product of artistic criticism and review, rather than cultural cringe: 'Ashton Raggatt McDougall's architecture has, in fact, critiqued that process of architectural quotation for many years'.[80] Finally, Dawn Casey takes the populist line that the building has been validated by the response of the public: 'People love it and are coming to see it in enormous numbers, 100,000 in less than a month. They seem to agree with us about the building's cheeky Australianness, originality and sense of place'.[81] Such arguments could be evidence that the conduct of the architects was reasonable in all of the circumstances.

It is worth considering whether the National Museum of Australia can be said to have authorised any infringement of moral rights by the architecture firm. S 195AO of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) notes that a person can authorise the infringement of the right of attribution. S 195AQ (2) stresses that a 'person infringes an author's right of integrity of authorship in respect of a work if the person subjects the work, or authorises the work to be subjected to, derogatory treatment'. The museum's director and council had approval of the building designs at all stages and liked what they saw. The director of the National Museum of Australia, Dawn Casey, denied any prior knowledge of the quotation of the Libeskind building:

> We were not aware of the reference to the Libeskind plan (which is a Jewish history museum, incidentally, not a Holocaust museum) among the numerous cultural references inherent in the design. We endorsed the plans as a whole for their imaginative and creative solution to the task at hand. Hindsight is a fine thing and, had we known, we may well have asked for that particular reference not to be included, simply because of its potential to distract attention from our exclusively Australian story.[82]

78 D Casey, 'Vision For Museum Not Based In Mimicry', *The Australian* (Sydney), 23 April 2001.
79 Ibid.
80 Ibid.
81 Ibid.
82 Ibid.

It is difficult to divine what circumstances of authorisation are envisaged by the legislation. If a person commissioned an architect to copy another building in a derogatory fashion, perhaps they would fall foul of these provisions.

The conflict over the National Museum of Australia highlights a fundamental clash between the individualistic focus of the moral rights regime, and the collective nature of architecture and other cultural forms. As Patricia Loughlan observes:

> The legal concept of moral rights reflects acceptance of a theory of art which is author and artefact-centred and which embodies romantic, individualistic and canonical conceptions of artistic creativity. Alternative visions of art as discourse and as reflective of communitarian values and collective practices do not fit easily within a moral rights conceptual or legislative framework. Those arts practices (like appropriation, montage and parody) which most directly challenge ideas of authorial control and private ownership of artistic images and products are in fact also those most directly and negatively affected by moral rights regimes.[83]

It would be a shame if the moral rights regime might be used to censor playful and eclectic works of art, such as the architecture of Ashton Raggatt McDougall. There is a need for the courts and the legislature to show greater latitude in respect of artistic practices and cultural forms, which involve pastiche, montage, and parody.

Conclusion

There is a profound anxiety as to whether architecture should be treated the same as the other arts, or treated in a special fashion. The director of the National Gallery, Dr Brian Kennedy, posed the question: 'Will architects insist on being like the other arts or will they be greater than the other arts, as they've always been? It's a great art form but it requires you to let go'.[84] As Peter Greenaway observed in his film *The Belly Of An Architect*:

> You can hide paintings, you can avoid literature, you can - if you're ingenious - avoid listening to music, but you cannot avoid architecture. Architecture is the least perishable of the arts and the most public. Architects (perhaps like film-makers) are supposed to be accountable to art, to finance, to the specialist critic, to the man in the street and perhaps to posterity.

83 P Loughlan, 'Moral Rights (A View From The Town Square)' (2000) 5 (1) *Media And Arts Law Review* 1 at 8.

84 L Martin, 'Blue Murder in the Art Cathedral as Angry Architect Takes on the Archbishop', *The Sydney Morning Herald*, 2 June 2001, 6.

There is certainly a case to be made that architecture is different from other forms of art in terms of its longevity and its public profile. However, such differences are not compelling enough to force architects to relinquish their economic and moral rights.

It is unfair that architects should be denied the full complement of moral rights given that public architecture has long held a secure place in high art. It is unjust for the profession to be accountable to all - but have no one answerable to them. They should not have to endure such public responsibilities without any privileges in return. A strong case can be made that architects deserve to be treated as other creators. The test of reasonableness, industry standards, and consent provisions, should be sufficient to resolve any disputes over moral rights. Architects should not have to wistfully rely upon a limited right of negotiation. The legislation needs to mediate between the artistic concerns of architects, the property investment of the proprietors of buildings, and the public interest in the urban environment.

There are signs that the debate over copyright law and architecture will shift from cultural institutions like galleries and museums to private homes and residences, which are designed by architects. Geraldine O'Brien observes that 'inner-city house architects are increasingly concerned about what they see as ruinous changes to their original works'.[85] There is a push to extend moral rights protection from iconic buildings to significant heritage or award-winning houses. The national president of the RAIA, Graham Jahn, emphasized that the law made no distinction between the one-off architectural gem and a run-of-the-mill project home: 'It's a new law and the way it applies is not fully resolved'.[86] Such claims could lead to hysteria among property owners that private residences will be unable to be renovated and reconstructed for fear of infringing the moral rights legislation.

85 G O'Brien, 'Architect's Anger Over Blankety Wall', *The Sydney Morning Herald*, 13 December 2001, 1.

86 Ibid.

DEVELOPMENTS IN CROSS-BORDER INSOLVENCY PRACTICE IN THE UNITED KINGDOM

*Paul J Omar**

Introduction

The law relating to both personal and corporate insolvency is currently contained in the *Insolvency Act 1986*.[1] The treatment of both areas of insolvency in one statute has not always been the case. Personal insolvency, or bankruptcy, has had statutory recognition since early times. Although not the earliest of measures, one of the first extensive laws was the Statute of Bankrupts 1542, enacted in the reign of Henry VIII. The law relating to corporate bodies was introduced by the *Joint Stock Companies Act 1844* although corporate insolvency itself only makes a proper appearance in the inclusion of the institution of winding up in the *Joint Stock Companies Act 1848*. Since this time, both personal and corporate insolvency have been the subject of many consolidations and re-enactments. The 1986 enactment, resulting from the Cork Report,[2] appointed to look into the reform of insolvency law, brought together the subjects in one statute and at the same time effected a radical reconstruction of the law relating to both personal and corporate insolvency, which included the introduction of the concept of rescue through the use of procedures titled 'corporate voluntary arrangements' and 'administration'. There have been few occasions for reforms over the years, although two statutes were passed effecting minor changes in 1994.[3] Further reforms have since been effected, including to aspects of the law relating to the impact of insolvency on small and medium enterprises as well as the law relating to the disqualification of directors that were the subject of an Act adopted by Parliament in 2000.[4] More recent proposals, published as part of an *Enterprise Act in 2002*,[5] have pointed towards restricting the use of the institution of administrative receivership, an

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1 Readers will not need reminding that the United Kingdom is divided into a number of separate jurisdictions, each with its own history and legal tradition. This article will deal with the law as applied in England and Wales, although, where appropriate, reference will be made to Scots and Northern Irish laws or caselaw.

2 Report of the Review Committee into Insolvency Law and Practice 1982 (Cmnd 8558). The committee was chaired by Mr (later Sir) Kenneth Cork and is referred to by his name.

3 *The Insolvency (Amendment) Act 1994* and *Insolvency (Amendment) (No 2) Act 1994.*

4 *The Insolvency Act 2000.*

5 This Act received Royal Assent on 7 November 2002.

institution also imported into the 1986 consolidation based on the private law procedure of receivership. The import of these proposals is major, effectively because they change the focus of insolvency towards the use of collective proceedings in the form of administration and other rescue measures away from private debt recovery measures.

Jurisdiction Principles in Company Law

An examination of the jurisdiction rules in company law is necessary because, generally, a company is required to have assigned to it a connection with a particular country in order for rights and obligations to which it is subjected to be capable of determination by the appropriate law. Traditionally, the tests used to enable the allocation of a jurisdiction include presence, often used to determine whether a company is present for the purposes of litigation, residence, of major significance in determining whether a company is subject to tax, domicil, often governing questions of status of the incorporated body, and nationality, referring most often to the location of incorporation. The tests are confusing and often overlap in their definition. This is because of the difficulty involved in adapting for the purpose of legal persons the principles ordinarily applicable to natural persons.[6] The process of determining the appropriate law is further refined through the identification of other factors establishing a connection. These include whether business is being carried out within the jurisdiction, whether there is a registered office, branch or other presence, whether management or control is exercised from the jurisdiction and whether assets or obligations are present.

As a rule, the law in England and Wales adheres to the 'state of incorporation' doctrine, according to which the applicable law is that of the jurisdiction where the company was incorporated. In England and Wales, the domicil and nationality tests both rely on the state of incorporation doctrine. The domicil test is commonly used as the jurisdictional basis in civil and commercial treaties and, for that reason, acquires a particular importance, although the precise definition may depend on the wording of the text that defines the extent of the jurisdiction.[7] Only where residence is at issue is there a difference. Here, place of incorporation is only one of the evidentiary factors to be considered when ascertaining where control of the company, defined as the seat and directing power of the affairs of the company, resides and thus where the company itself is to be regarded as resident.[8] This difference is justified in the case law by the need to subject the activities of the company to taxation where the exercise of management properly occurs and

6 See North and Fawcett, *Cheshire and North's Private International Law* (13th ed, 1999) 171.

7 Ibid 175.

8 The rule in *Cesena Sulphur Co v Nicholson* (1876) 1 Ex D 428. This test bears similarities to the real seat (siège reel/Sitztheorie) rule often found in civil law systems.

the real business of the company is carried out.[9] The advantage in company law of the state of incorporation rule is that the choice of incorporation determines the applicable law and is thus susceptible to prior selection by promoters of the company, including its would-be directors and shareholders. A free choice would normally allow for incorporation in a favourable legal jurisdiction, from where the company may seek to carry on business elsewhere.[10]

Jurisdiction principles in insolvency

Deriving from the principles outlined above, it is a general principle of law that the law of the state of incorporation of the company governs its status from creation to dissolution.[11] This is irrespective of the fact that the company may well operate principally or exclusively in another jurisdiction. It is also a general principle that the dissolution of a company by the law of its place of incorporation will be recognised by the courts in England and Wales.[12] This principle would of necessity require recognition of a foreign liquidation order that has been granted in the home jurisdiction, or domicile, of the company and includes recognition of the authority of a liquidator appointed by virtue of any order.[13] In addition, orders pronounced by courts in other jurisdictions may also be recognised, provided that the basis on which jurisdiction has been taken approximates to grounds normally accepted by the local court. The consequences in insolvency are that the courts, when confronted with a foreign company conducting business within their jurisdiction, must face a choice between the application of the foreign law of the state of incorporation and domestic law to the facts of its dissolution.

Arguably, policy is one of the determining factors in this analysis. For that reason, the recognition of foreign orders has long been subject to certain common law exceptions based on whether foreign proceedings are final in nature, whether they comply with perceived notions of natural justice, whether jurisdiction has been exercised validly and whether recognition would offend public order rules.[14] One of the more problematic areas has been the position of foreign revenue claims in insolvency owing to judicial views that to allow collection of such claims would offend public policy.[15] The traditional common law doctrine is that a foreign order,

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9 The rule in *De Beers Consolidated Mines Limited v Howe* [1906] AC 455.

10 See *Centros Ltd v Erhvervs- og Selskabsstyrelsen* (C-212/97) [1999] I ECR 1459; [1999] 2 CMLR 551 for a situation bringing the incorporation and real seat rules into conflict.

11 See North and Fawcett, above n 6, 897 (in 12th edition, material omitted from 13th edition).

12 *Lazard Bros & Co v Midland Bank* Ltd [1933] AC 283.

13 *Macaulay v Guaranty Trust Company of New York* (1927) 40 TLR 99. See also Marks, The Rights and Reliefs for Foreign Liquidators in England (1995/96) 1 *RALQ* 37.

14 Wood, *Principles of International Insolvency* (1995) 250 (para 5-13).

15 *Government of India v Taylor* [1955] AC 491. See Miller, 'Bankruptcy and Foreign Revenue Claims' (1991) *JBL* 144. For an interesting view contra, see Dawson, 'An Extraterritorial Dichotomy?' [2000] 2 *Insolv L* 81, 83-85.

although creating an obligation that is actionable within the legal jurisdiction, cannot be enforced without the institution of fresh legal proceedings. This is said to be on grounds that courts recognise the limitation of their own power, if making an order in similar circumstances, to affect assets of a company abroad without the express consent of the foreign court to initiate and assist proceedings. Recognition is thus not tantamount to enforcement of the foreign order within the jurisdiction. Nevertheless, although a foreign liquidation order is not directly enforceable, it can be assisted by the recognition of the appointment of the foreign liquidator and allowing him capacity to act in certain instances.[16]

The recognition of the subjection of a foreign company to a foreign law does not necessarily mean the domestic courts will not assume some jurisdiction over the issues in contention. This may be effected through rules requiring foreign companies conducting business within the country to comply with such rules as enable the courts to have jurisdiction when these companies engage in transactions.[17] Difficulties arise where the company is by its nature hybrid and appertains to more than one jurisdiction, as where a company formed under Belgian law was ordered nevertheless to be wound up on the application of one of the English shareholders.[18] What is clear is that the courts have had to take account of the existence of companies operating within the country that have subsequently become insolvent. There is a long tradition in England and Wales of courts extending aid for the collection of assets located in the jurisdiction of the courts that belong to foreign debtors.[19] The precept of assistance, first located within the law of bankruptcy, derives from the doctrine relating to the law of personalty or movable property, by which personal assets were deemed to have no locality but were subject to the law governing the person of the owner.[20] There were difficulties, however, in relation to persons who had not committed acts of bankruptcy within the jurisdiction.[21] Furthermore, the situation of real property was one where the courts often declined to assume jurisdiction, holding that the proper law was that of the location.[22] Nevertheless, the opening of proceedings

16 See North and Fawcett, above n 6, 407.

17 See the definition of an 'oversea company' in s 744, *Companies Act* that requires that a company incorporated outside the United Kingdom have a place of business within the United Kingdom for the purposes of Part XXIII of that Act.

18 *Re Dendre Valley Railway and Canal Company* (1850) 19 LJ Ch 474.

19 *Solomons v Ross* (1764) 1 Hy Bl 131 n; 126 ER 79. See Nadelmann, '*Solomons v Ross* and International Bankruptcy Law' (1947) 9 *Mod LR* 154. For an extensive survey of this development, see Blom-Cooper, 'Bankruptcy in English Private International Law' (in 3 parts) (1954) 3 *ICLQ* 604, (1955) 4 *ICLQ* 1, (1955) 4 *ICLQ* 170. See also Lipstein, 'Jurisdiction in Bankruptcy' (1949) 12 *MLR* 454; Graveson, *Conflict of Laws* (1974) 543-567.

20 *Sill v Worswick* (1781) 1 H Bl 665 per Lord Loughborough at 690.

21 See Topham, 'A Defect in Our Law of International Bankruptcy' (1903) 14 *LQR* 295.

22 *British South Africa Company v Companhia de Mocambique* [1893] AC 602; *Re Trepca Mines* [1960] 3 All ER 304.

involving foreign debtors began to be a regular feature in the case law, although, despite the doctrine mentioned above requiring courts to recognise orders dissolving the company in its home jurisdiction, the courts were not inclined to give effect to foreign judgments in all cases.[23]

The ancillary assistance doctrine

The development of the ancillary nature of assistance emerges in the case law at an early stage. According to this doctrine, the nature of proceedings taking place within the jurisdiction of the court is described as ancillary to main proceedings being undertaken in the home jurisdiction of the company. The case law developed in response to the growing problem of insolvencies of institutions with operations in England and Wales and the then Dominions. In *Re Matheson*,[24] which concerned a winding up petition presented by a creditor against a company already in liquidation in New Zealand, the proposition was stated thus by Mr Justice Kay:

> The mere existence of a winding up order made by a foreign court does not take away the rights of a court of this country to make a winding up order here, though it would no doubt exercise an influence upon this court…[25]

The affirmation of this jurisdiction was prompted by the need to secure assets in England to protect the rights of creditors and third parties present within the jurisdiction. The judge in fact continues to state that care would be taken to ensure there would be no conflict between the courts and that costs would be kept down while the interests of all creditors would be looked after. In *Re Commercial Bank of South Australia*,[26] on the suspension of a bank incorporated in South Australia followed by a winding up order, the creditors were held entitled to a winding up order in England, the nature of which was described by the judge as being ancillary to the winding up in Australia.[27] The extension of this jurisdiction often involves determining the precise application of provisions of company legislation to foreign companies. In *Re Mercantile Bank of Australia*,[28] the power to appoint a receiver[29] and to require security to be given by a liquidator[30] was held applicable to a company incorporated in Victoria but conducting business in

23 *Tharsis Ltd v La Société des Métaux* (1889) 58 LJ QB 435; *Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.
24 *Re Matheson Brothers Ltd* (1884) 27 Ch D 225.
25 Ibid 230.
26 *Re Commercial Bank of South Australia* (1886) 33 Ch D 174.
27 Ibid 178. See the converse situation in *North Australian Territory Co v Goldsborough Mort & Co* (1890) 61 LT 716.
28 *Re Mercantile Bank of Australia* [1892] 2 Ch 204.
29 Section 4, *Companies (Winding up) Act 1890*. See also s 135, *Insolvency Act 1986*.
30 Rule 67, Companies (Winding up) Rules 1890. See Rule 4.28, Insolvency Rules 1986 (SI 1986/1925).

London. In this same case, an ancillary order was stated as being a desirable outcome although the granting of the order was to be postponed until the outcome of shareholder negotiations in Australia was known.

The fact that issues of jurisdiction may arise in many different contexts can be illustrated by the case of *Re English, Scottish and Australian Chartered Bank*,[31] in which a company incorporated in England, whose principal business was in Australia, was due to be wound up in England. The relationship of various classes of creditors standing to gain or lose by the winding up process influenced the decision of the English court, where from the facts it was clear that the scheme of reconstruction that was proposed needed the assent of a meeting of the creditors and shareholders. Proxies were obtained from Australian creditors for a meeting in London, at which the resolutions were carried with the support of these proxies. The resolutions were subsequently sanctioned by order of court. British creditors appealed stating that, but for inclusion of the Australian proxies, the scheme would not have met with the approval of British creditors. It was held that there was nothing unreasonable or unfair in the scheme as between the treatment of the different classes of creditors and that the scheme should go ahead. In this case, Mr Justice Vaughan Williams pronounced that:

> One knows that where there is a liquidation the general principle is: ascertain what is the domicile ... let the court of the country of domicile act as the principal court ... and let the other courts act as ancillary ... to the principal liquidation.[32]

A court may be keen to ensure that the priorities between proceedings occurring in different jurisdictions are firmly set to ensure that any disparity in rights available to creditors acting before different courts do not affect the overall settlement of the liquidation. A court may grant the enforcement of rights acquired in priority to the beginning of insolvency proceedings where it appears equitable to do so, as where a garnishee order obtained by judgment creditor was held to have priority over sequestration of judgment debtor's assets.[33] There has long been a discretion available to common law courts to stay the continuance of process in order to allow claims to be tried more properly in another jurisdiction.[34]

In light of the *Re English, Scottish and Australian Chartered Bank* observation with regard to equality between creditors, it has been held that a great disparity in the treatment of creditors would prompt the court to restrain one class of creditors from exercising rights available in another jurisdiction. This was evident in the case of *Re Vocalion (Foreign) Ltd*,[35] where a company registered in England

31 *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385.
32 Ibid 394.
33 *Galbraith v Grimshaw* [1910] AC 508.
34 *Re Queensland Mercantile Agency* (1888) 58 LT 878.
35 *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196.

was also registered in Victoria as a foreign company. The Bank of New South Wales claimed a sum owing for commission on banking work as well as for sums lent to the company and, in a separate action, for specific performance by the company and its registered agent in Victoria, of an undertaking by the agent to give security for the company to the bank, both of which actions were before the courts of Victoria. On the liquidation of the company in England, the Official Receiver sought an order restraining the Bank of New South Wales from proceeding with its action in Victoria. It was held in that case that a court may in the exercise of its equitable jurisdiction restrain a party from proceeding with an action on liability incurred abroad brought in a foreign court.

Nevertheless, there is also a point to be made about the appropriateness of the foreign forum to hear cases, especially where there is a more substantial connection with that forum. Emerging from the same judgment in the above case is the recognition that, where a company is domiciled abroad by registration as a foreign company, substantial justice is more likely to be attained by allowing the foreign proceedings to continue. In this case, Mr Justice Maugham stated:

> It must be remembered that foreign creditors ... can not be restrained from taking such proceedings ... in their own country; ... the only result of such an injunction ... may be to benefit other foreign creditors without in any way increasing the amount of the assets ... distributable in the liquidation in this country.[36]

The costs of an ancillary liquidation may well amount to the equivalent of a full liquidation, particularly if decisions of liquidators are contested in several jurisdictions. The increase in costs is a factor that often motivates courts in deciding whether to permit further litigation as, from a practical standpoint, the result can only be to the detriment of creditors. The discretion to permit proceedings is also influenced by the just merits of the creditors' claims and the unfair result on their position especially where the company concerned, as in the case of *Re Suidair*,[37] had acted to the detriment of creditors in one jurisdiction. The case involved a company incorporated in South Africa with an office in London, which defaulted on payments for goods sold by an English creditor, whereupon the latter commenced proceedings and obtained judgment in default. At the same time, a winding up petition was presented by a creditor in South Africa and a provisional liquidator appointed. On discovering this, the English creditor issued writs of fieri facias on goods of the company. The South African liquidation being final, the liquidator claimed the goods, at which point another creditor in England also presented a winding up petition. The first English creditor sought the benefit of their judgment against the liquidator in England. It was held that it was entitled to benefit from the judgment obtained, which but for

36 Ibid 205.
37 *Re Suidair International Airways Ltd* [1951] 1 Ch 165.

the conduct of the company, in allowing other creditors to come in, would already have been met. The rule stated in *Re English, Scottish and Australian Chartered Bank*, by which ancillary proceedings would largely act in aid to main proceedings, did not mean that issues in the ancillary winding up would be decided by rules of the main procedure nor that the ancillary jurisdiction would be bound to give effect to decisions of the other court on points of law or procedure. In *Re Suidair*, the effect of adhering to the rules of the main procedure would have meant that the South African liquidator would have been entitled to the assets in England at the expense of the creditor.

The ability of foreign liquidators appointed in the main liquidation to operate in the ancillary jurisdiction is of considerable advantage but not without some degree of difficulty. Apart from the question of recognition of the liquidator's qualification to act, there is the question of the degree of responsibility the liquidator may owe to the court in the main jurisdiction, which may lead to conflict between courts exercising jurisdiction in the same insolvency. This subject was treated in the case of *Schemmer*,[38] where in the course of an investigation by the US Securities Exchange Commission into the affairs of a company incorporated in the Bahamas, an action was brought in the US District Court in the Southern District of New York which resulted in the appointment of a receiver over assets, including the shares and assets of another company (also a Bahamian company) and its subsidiaries, controlled for the most part by the first company. The receiver sought to be appointed receiver of the company and its subsidiaries in the United Kingdom and requested injunctions against three banks holding money for the company. The company then applied for the discharge of the order granting leave to serve the writ.

It was held that before the English courts would recognise the title of a foreign receiver to assets in the jurisdiction or direct the establishment of ancillary receivership proceedings, the courts would have to be satisfied of the nexus between the defendant companies and the jurisdiction in which the receiver was appointed. Had the receiver been appointed in the Bahamas, as opposed to the actual fact of appointment by the United States court, there might well have been a sufficient connexion arising by the fact of the location of incorporation of the companies and the jurisdiction of the Bahamian courts. A particular result of the development of case law in this field is that the courts have not been slow to entertain the institution of ancillary proceedings where these are deemed appropriate. There is, however, a question of whether the ancillary jurisdiction may take a lead in the proceedings, especially where the connexion of the foreign company is greater with the ancillary jurisdiction.

38 *Schemmer and Others v Property Resources Ltd and Others* [1975] 1 Ch 273.

An example of this is the case of *Re A Company (1987)*,[39] in which a company registered in Liberia operated mainly through London shipping agents. It defaulted on payments due under an agreement for the construction of a vessel subject to a mortgage given to International Westminster Bank. The bank declared the whole indebtedness to be due under the loan agreement and obtained judgment for that amount. The bank subsequently presented a petition for the winding up of the company. For a court to make a winding up order against a foreign corporation, it was held not necessary to show that the company had assets within the jurisdiction but that there was a close link with the jurisdiction, which on the facts showing that company management, bank accounts and the main business of the company were situated within the jurisdiction, made the courts in England the most appropriate to deal with the matter. As there was conceivably an advantage to the creditors in having a winding up in England, an order would be made.

The precise role to be played by the ancillary jurisdiction in cases where proceedings are at an advanced stage in the main jurisdiction is often a point of contention between the courts. It may be that the ancillary jurisdiction would prefer a winding up to be instituted while the main jurisdiction has in mind preservation proceedings, enabling the company to continue its operations in a restricted form, with appropriate court supervision. These issues were the subject of the leading case of *Felixstowe*,[40] where United States Lines, a company incorporated in the United States, was registered as an oversea company in England. It entered a moratorium on payments under American bankruptcy law.[41] The plaintiffs instituted actions on debts owed in England by the American company and obtained Mareva injunctions,[42] the effect of which was to require the company to retain sufficient assets within the jurisdiction to meet any judgments against them.

The American company, which wanted to hive down its operations in Europe, applied to have the injunctions set aside, arguing that an English court should recognise the procedures being followed in the United States, under which a restraining order had been granted against any suit outside the United States. The maintenance of the injunction would serve to prevent administration according to United States procedures by a United States court and would have the effect of granting the plaintiffs priority over other creditors. The proper

39 *Re A Company (No 00359 of 1987)* [1988] 1 Ch 210.

40 *Felixstowe Dock and Railway Co v United States Lines* [1988] 2 All ER 77. This decision has been strongly criticised as an example of a lack of judicial restraint in Millett, 'Cross-Border Insolvency: The Judicial Approach' (1997) 6 *IIR* 99. For a view to the contrary, see Crystal, 'The Company Lawyer Lecture 1997 - Judicial Attitudes to Insolvency Law' (1998) 19 *Co Law* 49.

41 Chapter 11, United States Bankruptcy Code.

42 Named after the case of *Mareva Compania Naviera SA v International Bulkcarriers SA, The Mareva* [1975] 2 Lloyd's Rep 509.

approach of an English court was to regard the courts of the country of incorporation as the appropriate legal forum for controlling the winding up of that company. Where that company had assets in England, so the argument advanced on behalf of the company went, the normal procedure was to carry out an ancillary winding up in harmony with the main court. However, as is clear from the judgment of the English court, a United States restraining order that required assets to be moved outside the jurisdiction could have no effect in England without the English court accepting it was bound to come in aid of the American proceedings. It was noted that, as the English practice was in harmony with certain provisions of the United States Bankruptcy Code,[43] and, on the balance of convenience test, the American company suffered no material prejudice as the assets remained preserved with no garnishee orders being permitted, the injunctions would be continued. The judge noted:

> Counsel [for the Plaintiffs] submit that [*Re Commercial Bank of South Australia, Re English, Scottish and Australian Chartered Bank, Re Vocalion* and *Re Suidair*)] show that the English practice is to regard the courts of the country of incorporation as the appropriate legal forum for controlling the winding up of a company but that, insofar as that company had assets here, the usual practice is to carry out an ancillary winding up in accordance with our own rules, while working in harmony with the foreign courts. ...In my judgment, counsel are right in their interpretation.[44]

It is interesting that Mr Justice Hirst could conceive of English practice as being in harmony with that of the American courts while denying the validity of the restraining order. While it is undoubtedly correct to assert that the orders of a foreign court have no effect within the jurisdiction of the domestic court without the orders being recognised or adopted as those of the domestic court, it is nevertheless also true that denial of recognition would lead to some prejudice being suffered by the lack of consistency in the treatment of the assets concerned. This has an effect insofar as ancillary practice consists largely of the use of winding up procedures, thus having an impact on the rescue intended to have an impact over the totality of the assets of the company.

The case-law makes it clear that the courts retain a substantial discretion, particularly over whether to permit ancillary winding up proceedings as in the case of *Re Wallace Smith Group Ltd.*[45] The company in question, incorporated in Ontario, was an authorised institution under the Banking Act 1987 and had been

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43 Section 304, United States Bankruptcy Code (11 USC s304), for the operation of which see Re Banco Ambrosiano Overseas Ltd (1982) 25 BR 621; *Interpool Ltd v KKL* and others (1988) 102 BR 373; *Lindner Fund Inc v Polly Peck International PLC* (1992) 143 BR 807.

44 *Felixstowe Dock and Railway Co v United States Lines* [1988] 2 All ER 77 at 93-4 per Hirst J.

45 *Re Wallace Smith Group Ltd* [1992] BCLC 989.

wound up on the application of the Bank of England. Further to this, four other companies, all members of the same group of companies, were the subject of winding up petitions by the liquidators of the company. The petition relating to one of these other companies alleged substantial indebtedness arising out of the employment of two members of the staff whose employment had been for the purposes of the inter-company accounts attributed to that company. On the facts, the court held that the petition would be dismissed in order not to prejudice concurrent proceedings on the same issue being heard before the courts in Ontario. The court was of the view that, although indebtedness might be shown, together with a connexion with the jurisdiction and the possibility of benefit to creditors within the jurisdiction, an ancillary winding up order is not an automatic outcome to any petition. The courts retained a discretion to refuse a petition, one of the chief factors being whether there was a more appropriate jurisdiction before which the claim might be heard. In a similar context, it has also been held that where the connexion with the ancillary jurisdiction was fortuitous and the transfer of assets to the main jurisdiction could be effected without substantial cost, no purpose would be served by the granting of an ancillary winding up order.[46]

It is to be noted that the common law continues to develop rules to meet the inevitable challenges occasioned by the competing interests of the courts of several jurisdictions concerned with the activities of the same insolvent company. Many of these rules tend to qualify the nature of the interests that may legitimately be taken into account for the court to consider whether to exercise jurisdiction or, in appropriate cases, whether to decline jurisdiction in favour of another court. However, these principles have to a greater or lesser extent been supplemented or supplanted by statutory provisions that are the subject of the following sections dealing, respectively, with the phenomenon of statutory ancillary jurisdiction and the topic of co-operation measures. Nevertheless, as will be seen, common law principles continue to influence and dictate the extent of the judicial discretion that is exercised in the course of applying these statutory provisions.

Winding up of foreign companies by statute

Foreign companies that establish a place of business in England and Wales, or in Scotland, may register with the Registrar of Companies.[47] The courts in these countries may, by virtue of this registration, entertain winding up proceedings involving these companies.[48] A jurisdiction conferred by statute has long existed in England and Wales for the winding up of unregistered companies, which

46 *Re Wallace Smith & Co* [1992] BCLC 970.
47 Section 691, *Companies Act 1985*.
48 Sections 117, 120, *Insolvency Act 1986*.

definition has also been held to include foreign corporations.[49] An early inclusion in the Joint Stock Companies Act 1848 sought to define, by reference to the location of the registered place of business or head office, the allocation of jurisdiction between Irish and English courts over the winding up of companies.[50] A more sophisticated section in 1862 legislation saw the introduction of statutory authority for the winding up of any unregistered company in the part or parts of Great Britain, meaning England and Wales or Scotland, where it has a principal place of business.[51] This section was repeated in the 1908 consolidation.[52]

The application of this provision to companies in existence and operating within the jurisdiction was not in doubt, the definition of unregistered company including the foreign company by default.[53] However, this was not thought to be the case where the company had ceased to exist in accordance with a regular judgment or process in its jurisdiction of origin. This issue arose in cases before the courts in England because of the consequences of the 1917 October Revolution, following which the nationalisation of all Russian banks was decreed. The effect on creditors in England became apparent in the 1920s as various suits against banks established in Moscow with operations in London were struck out as wanting.[54] A provision was introduced into the Companies Act of 1928 to provide for the winding up of an unregistered company and was extended to cover the situation where a company, which though operating within the jurisdiction through a branch or other office, had been dissolved in its place of incorporation. The same provision was substantially enhanced in the 1929 legislative consolidation.[55]

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49 *Re Commercial Bank of India* (1868) LR 6 Eq 517. See also s 32(3), *Companies (Winding up) Act 1890* applying the Act to companies without a registered office within the jurisdiction and *Re Federal Bank of Australia* (1893) 62 LJ Ch 56.

50 Section 117, *Joint Stock Companies Act 1848*.

51 Section 199, *Companies Act 1862*.

52 Section 268, *Companies (Consolidation) Act 1908*.

53 *Re Jarvis* (1895) 11 TLR 373 (Missouri company); *Re Syria Ottoman Railway Company* (1904) 20 TLR 217 (Turkish company). This definition is wide and also includes the situation of Northern Irish companies operating in England as decided in Re A Company (No 007946 of 1993) [1994] 2 WLR 438. See Smart, 'Jurisdiction to Wind Up Companies Incorporated in Northern Ireland' (1996) 45 *ICLQ* 177.

54 *Banque Internationale de Commerce de Petrograd v Goukassow* [1923] 2 KB 682; *Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1925] AC 112; *Sedgwick Collins & Co v Rossia Insurance Company of Petrograd* [1926] 1 KB 1; *Lazard Brothers & Co v Midland Bank Ltd* [1933] AC 283.

55 See s 338(2), *Companies Act 1929* which reads:

> Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country in which it was incorporated.

In cases then coming before the courts, the operation of the provision was not without some difficulty. For example, it was not thought that it could extend to the situation where a company had ceased to exist before the passing of the Act. Judicial intervention putting an end to the question of the remit of the provision arrived in the shape of the case of the *Russian and English Bank*,[56] which followed the situation where the Russian Ministry of Agriculture purchased seed from a Danish firm and requested the bank, incorporated in the form of a company in St. Petersburg, to pay the sum due under the contract through its London branch. Reimbursement was then sought through payment, on instructions given by the Ministry of Finance, by moneys held at Barings to the bank. Barings failed to pay, prompting the bank to sue. It was discovered that the bank had been dissolved by Soviet legislation, and the suit was stayed for the commencement of winding up proceedings. An action was then brought in the bank's name against Barings, which the latter sought to have struck out on grounds that the bank was a dissolved corporation.

It was held in the case that a foreign company may, notwithstanding its dissolution in its place of origin, be wound up as an unregistered company in England, when an action may be brought in its name to recover moneys due and unpaid at the time of its dissolution. Lord Atkin, one of the members of the panel, opined:

> I think it is a necessary implication [of the provisions of the Companies Act] that the dissolved foreign company is to be wound up as though it had not been dissolved and therefore continued in existence.[57]

This extension of jurisdiction was confirmed in *Re Russian Bank for Foreign Trade*,[58] which concluded that the impossibility of a branch continuing to function when its main office had ceased to exist according to its statutes of incorporation was ample reason to order a winding up. The consequences of the Russian Revolution were to haunt the law reports for many years after and provide much material for commentaries.[59] Nevertheless, in the later case of *Re Banque des Marchands de Moscou (Koupetschetsky)*,[60] proceedings under a similar provision in later legislation,[61] the revival of the company for the purposes of winding up was

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56 *Russian and English Bank v Baring Bros & Co* [1936] AC 405.

57 Ibid 427.

58 *Re Russian Bank for Foreign Trade* [1933] 1 Ch 745. See also *Re Tea Trading Company* [1933] 1 Ch 647.

59 See Wortley, 'The Dissolution of Private Corporations in Private International Law in light of the Russian Bank Cases' (1933) 14 *BYBIL* 1; Lipstein, 'Jurisdiction to Wind Up Foreign Companies' (1952) 11 *Camb LJ* 198; Mann, 'The Dissolved Foreign Corporation' (1955) 18 *MLR* 8.

60 *Re Banque des Marchands de Moscou (Koupetschetsky) (Royal Exchange Assurance v Liquidator) [1952] 1 All ER 1269; (Ouchkoff v Liquidator)* [1954] 2 All ER 746.

61 Section 399, *Companies Act 1948*.

not held conditional on the fact of the company having conducted business within the jurisdiction, but could rest on the presence of assets. In any event, the claims of various creditors were held subject to Russian law with the effect that claims barred by the nationalisation decree could not be revived. It is instructive, though, that the court in one of a series of conjoined cases couched its acceptance of jurisdiction subject to its discretion to decline that jurisdiction where another appropriate forum existed.[62] Sir Raymond Evershed MR (as he then was) stated:

> As a matter of general principle, our courts would not assume and Parliament should not be taken to have intended to confer jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries. There must be assets here to administer and persons subject, or at least submitting, to the jurisdiction who are concerned or interested in the proper distribution of the assets. And when these conditions are present, the exercise of the jurisdiction remains discretionary.[63]

The situation of confiscatory legislation, which over the years was encountered in a number of different instances, has been generally held not to operate so as to remove those obligations that the company had acquired within the jurisdiction where proceedings were being instituted, whether this company was the subject of liquidation proceedings or proceedings for the enforcement of debt. This was the case in *Metliss*,[64] where a Greek decree of 1949 enforced a moratorium on the National Mortgage Bank of Greece, which was subsequently dissolved in 1953 and amalgamated to form a new bank. The plaintiff sued this bank on certain bonds, disputes about which were expressed as being subject to arbitration in London according to English law. It was held that, although Greek law had to be examined to ascertain the nature of the juridical body being created by the decree, the succession of this body to obligations acquired by its predecessor and expressed as being subject to English law must be examined by principles of English law. In the instant case, following the principle of rational justice, the courts could not admit the bank's status as a justiciable person without requiring it to admit its liability for acts entered into by its predecessor.

Part of the consideration for exercising jurisdiction has been to look at the nature of the obligations situated within the jurisdiction. Although an early case subordinated this question to the existence of a branch office in the country, later cases have relaxed the requirements by pointing to other material factors.[65] In *Re Compania Merabello*,[66] involving a claim in respect of a contract of carriage of cargo, subrogated by insurers, against a creditor of the company with view to

62 This may be taken as an early appearance of the doctrine of forum non conveniens in the insolvency context.

63 *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch 112 at 125.

64 *Metliss v National Bank of Greece and Athens SA* [1958] AC 509.

65 *Re Lloyd Generale Italiano* (1885) 29 Ch D 219.

66 *Re Compania Merabello San Nicholas SA* [1973] 1 Ch 75.

vesting the claim under the Third Parties (Rights against Insurers) Act 1930, it was stated that normally the Companies Act envisaged no need to establish that the company had a place of business or that it had carried out business in the jurisdiction, but required a connexion with the jurisdiction and the presence of some assets of benefit to creditors. The question of establishing what constituted a place of business was, in any event, open to interpretation by the courts on the strength of the evidence presented to them. This was, for example, the case where the management of the company was conducted from a North London hotel, a fact deemed by the court sufficient to ground jurisdiction.[67]

The early requirement for assets sufficient to provide some benefit to creditors has been considerably relaxed. Now, even the nature of these assets might be intangible, such as a right of action, the success of which need not be proved to obtain a winding up order, as was the case in *Re Allobrogia*,[68] where a claim by owners of a cargo against another person resulting from a contract of carriage, insured in England and Wales, which would allow that person to sue for recovery of that sum assured, was held a sufficient asset to found winding up procedure. The asset might even consist of a potential claim against a statutory scheme, as in *Re Eloc*, where the possibility of a payment from a statutory fund for employee redundancy contingent on the company being wound up was held a sufficient benefit for an order to be made.[69] Courts would be careful to exercise their discretion widely in these cases where there was some tangible benefit and would not restrict any order made to fetter the actions of officials acting under the direction of the court.[70] A further qualification on whether the presence of assets is even necessary was decided in the case of *Okeanos*,[71] where the tangible benefit consisted of the connection of the company with the jurisdiction and the likelihood that the creditors would obtain some benefit from the winding up being carried out in the jurisdiction.[72] Nevertheless, the issue of benefit remains of importance and continues to govern the case law. It was reiterated and summarised in the case of *Real Estate Development*,[73] where the requirements are for courts to determine the existence of a sufficient connection with the jurisdiction, a qualification that need not necessarily consist of assets, the existence of a reasonable prospect of benefit to those applying for the winding up order and that one of the individuals concerned must be a person (natural or legal) over whom the court could take jurisdiction. Nevertheless, there remains the question of the

67 *Re Tovarishestvo Manufactur Liudvig-Rabenek* [1944] 1 Ch 404. See Smart, 'Carrying on Business as a Basis of Recognition of Foreign Bankruptcies in English Private International Law' (1989) 9 *OJLS* 557.

68 *Re Allobrogia Steamship Corporation* [1978] 3 All ER 425.

69 *Re Eloc Electro-Optieck & Communicatie BV* [1982] 1 Ch 43. See Campbell, 'When British Courts have jurisdiction to wind up foreign companies' (1981) 2 *Co Law* 277.

70 *Re Hibernian Merchants Ltd* [1957] 3 All ER 97.

71 *International Westminster Bank plc v Okeanos Maritime Corp* [1987] BCLC 450.

72 See Dine, 'Jurisdiction to Wind Up a Foreign Company' (1988) 9 *Co Law* 30.

73 *Re Real Estate Development Co* [1991] BCLC 210.

appropriate action to take in cases where the assets at first sight appear intangible. In fact, the case of *Re Latreefers*[74] is treated as authority for the proposition that even the summary of the jurisdictional requirements in *Real Estate Development* are not to be treated as preconditions for the exercise of jurisdiction.[75] Nevertheless, courts will not accede to an order for ancillary liquidation, where there is doubt as to whether substantial assets located in the jurisdiction do in fact have a connection to the company in question and that proceedings already in progress in the company's home jurisdiction would be competent to determine this question.[76]

Co-operation between courts

The move away from statutory jurisdiction of the ancillary type to more complex co-operation measures seems to have been initiated largely because of the perceived inadequacy of submitting a foreign company to domestic jurisdiction without necessarily involving the consent of the jurisdiction of origin. The development of the doctrine of comity, requiring courts to have regard for the decisions given by courts of comparable status and to enforce them, further stimulated progress towards co-operation by inviting courts to make contact with each other and to develop working relationships, so as to be able to ascertain what outcome was feasible within the context of proceedings involving matters of joint concern. Furthermore, the development and expansion of corporate rescue measures meant that ancillary jurisdiction, geared as it was towards the liquidation of assets, was inadequate to deal with the problems of the preservation and continuing exploitation of assets necessary for ensuring the survival of businesses in financial difficulties. In these instances, co-operation was vital to allow corporate rescue measures to have effect. As will be seen below, co-operation measures have a long history.

The history of the present provision in England and Wales is largely that of the development of co-operation measures in the context of personal insolvency. These can be traced to 19th century provisions on enforcement of orders given by court within the United Kingdom and a requirement of assistance to other British courts.[77] The latter reciprocal assistance provisions were embodied in bankruptcy legislation as a response to the growing numbers of insolvencies of persons and

74 *Re Latreefers Inc* [1999] 1 BCLC 271, on appeal sub nom *Stocznia Gdanska SA v Latreefers Inc* [2000] EWCA Civ 36 (9 February 2000). See Dawson, 'Jurisdiction to Wind Up a Foreign Company and Cross-Claims: Re Latreefers Inc' (1999) 20 *Co Law* 304.

75 See paragraph 30 of the judgment (electronic version available at <www.bailii.org>).

76 *New Hampshire Insurance Co v Rush & Tompkins Group plc and another* [1998] 2 BCLC 471.

77 Section 220, *Bankruptcy Act 1849*; ss 73-74, *Bankruptcy Act 1869*; ss 117-118, *Bankruptcy Act 1883*.

partnerships affecting assets located in a number of Commonwealth jurisdictions. An early case qualified the courts included within the definition by emphasising that the scope of the law was limited to courts that had jurisdiction in bankruptcy.[78] Nevertheless, an early instance of their use saw an English court give effect to a pooling arrangement for creditors of a firm pursuant to a request from an Indian court despite the lack of express provision in the 1883 Act to give effect to such a scheme.[79]

The latest consolidation of these provisions saw their re-enactment in the *Bankruptcy Act 1914*.[80] The provisions of this Act were designed to co-ordinate proceedings and enabled the courts within the Commonwealth to request other courts to assist in the management of bankruptcy proceedings within their own jurisdiction. The making of an order seeking the aid of another court was deemed sufficient authority to enable the other court to exercise the jurisdiction it would if the matter were before it for consideration. Apart from the use of the word 'British' as part of the definition, which prompted enquiries in a number of cases as to whether particular courts were included,[81] the remit and purpose of the section were considered in *Re A Debtor*,[82] in which it was held that the definition of 'bankruptcy' referred to the judicial process dealing with insolvent persons and was to be construed in a wide sense as the section was designed to produce co-operation between courts acting under different systems of law. Once an English court was satisfied the request for aid fell within the ambit of the provision, there was no general duty to scrutinise anterior proceedings unless it could be shown that they were defective under the proper law of the court or that they offended against public policy.

Merger of the systems

The present provision in England and Wales relating to reciprocal assistance is contained in the *Insolvency Act 1986*.[83] Owing to the consolidation of provisions

78 *Callender Sykes & Co v Colonial Secretary of Lagos* [1891] AC 460.

79 *Re P MacFadyen & Co, ex parte Vizianagaram Company Limited* [1908] 1 KB 675.

80 Section 122, *Bankruptcy Act 1914*.

81 *Re Maundy Gregory* (1934) 103 LJ Ch 267 (Jerusalem District Court included); *Re James* [1977] 1 All ER 364 (post-UDI Rhodesian courts excluded).

82 *Re A Debtor (ex parte the Viscount of the Royal Court of Jersey)* [1980] 3 All ER 665.

83 Section 426, *Insolvency Act 1986*, the relevant parts of which read as follows:

> (4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.
>
> (5) For the purposes of subsection (4), a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.

relating to the insolvency of individuals and the insolvency procedures applicable to companies and other legal persons in the same Act, section 426 applies to both types of insolvencies.[84] Part of the reasoning behind this merger comes from the observations in the Cork Report in its chapter on extra-territorial aspects of insolvency law.[85] The report noted the aim of extra-territorial jurisdiction as being the avoidance of conflict and confusion in cases of concurrent jurisdiction, the obtaining of recognition and enforcement by other courts of orders as well as reciprocity in recognition and enforcement where this would not be repugnant to domestic concepts of public policy.[86] The statutory provisions then in existence were criticised insofar as they were ill fitted by their use of outmoded definitions to modern commercial reality, although the co-operation provisions were highlighted as affording a flexible framework for assistance. It was desirable, according to the report, that this assistance should include the situation of corporate insolvency and be extended as far as possible to other countries on the basis of reciprocity.[87]

The number of countries to which the rules on assistance apply at present is limited, the category being constituted predominantly of Commonwealth countries.[88] This section has, however, been considered in a number of leading cases, not least in the growing number of international banking insolvencies. The leading case in both Australian and English law with respect to co-operation measures is *Re Dallhold*.[89] Dallhold Investments, itself in liquidation, had applied

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(11) In this section 'relevant country or territory' means-
(a) any of the Channel Islands or the Isle of Man, or
(b) any country or territory designated for the purposes of this section by the Secretary of State by order made by statutory instrument.'

This section was a re-enactment of s213, *Insolvency Act 1985*, the short-lived predecessor to the 1986 Act.

84 For an early view of this section, see Woloniecki, 'Co-Operation between National Courts in International Insolvencies: Recent United Kingdom Legislation' (1986) 35 *ICLQ* 644. See also Smart, 'International Insolvency: Ancillary Winding Up and the Foreign Corporation' (1990) 39 *ICLQ* 827 for a discussion on the impact of s 426 on the ancillary winding up regime.

85 Chapter 49, paras 1902-1913.

86 Ibid para 1902.

87 Ibid paras 1909-1911.

88 The Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order (SI1986/2123) lists Anguilla, Australia, The Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Eire, Montserrat, New Zealand, St Helena, Turks & Caicos Islands, Tuvalu and the Virgin Islands. The Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1996 (SI 1996/253) designates Malaysia and South Africa with effect on 1 March 1996. A similarly titled order (SI 1998/2766) added Brunei to the list effective 11 December 1998.

89 *Re Dallhold Investments Pty Ltd and Re Dallhold Estates (UK) Pty Ltd* (1991) 6 ACSR 378, (1991) 10 ACLC 1374 (Australia); *Re Dallhold Estates (UK) Pty Ltd* [1992] BCLC 621 (UK).

for an order for the winding up of its wholly owned subsidiary Dallhold Estates. Dallhold Investments, with the support of the Australian provisional liquidator of Dallhold Estates also sought the issue of a Letter of Request addressed to the High Court of Justice in London seeking assistance by the making of an administration order in respect of the latter under Part II of the United Kingdom Insolvency Act. Other creditors opposed that course and sought to be substituted as applicants in lieu of Dallhold Investments and for a winding up order pursuant to the original application to be made in respect of Dallhold Estates.

The court noted the effect of the provision was to permit the court to request a foreign court to act in aid of the Australian court in an 'external administration matter', a phrase defined to include matters relating to the winding up of Dallhold Investments. The court accepted the submission by Dallhold Investments, also the principal creditor of Dallhold Estates, that an administration offered the possibility that the value of an agricultural lease owned by the subsidiary might be preserved for the benefit of the creditors as a whole through administration proceedings. This would not be achieved by the making of a winding up order either in Australia or in England. The court also accepted advice given by English solicitors that there were significant doubts as to whether an administration order may be made except at the request of this Court under the co-operation measures and concluded that was desirable that the best possible realisation of the assets of Dallhold Estates be achieved for the benefit of all its creditors. The court made a declaration that it is desirable to request the assistance of the English Courts and ordered the issue of a Letter of Request.

When the case was brought in England, it was held that the effect of s426 was to confer on the English courts a jurisdiction to apply any domestic remedy. As the pre-conditions in s8 for the granting of an administration order were satisfied, the court was able to grant the remedy sought. The discretion in s426(5) extended solely to the granting of the request and not the application of the rules of insolvency law to a request that, once granted, was mandatory. The judge at the hearing, Mr Justice Chadwick, held:

> It appears ... that the purpose of s426(5) ... is to give to the requested court a jurisdiction that it might not otherwise have in order that it can give the assistance to the requesting court ... .the scheme of subsection (5) appears to be this. The first step is to identify the matters specified in the request. Secondly, the domestic court should ask itself what would be the relevant insolvency law applicable by [it] to comparable matters falling within its jurisdiction. Thirdly, it should then apply that insolvency law to the matters specified in the request .... . The result is that an English court can act on a request by the Federal Court by applying to the matters specified in the request provisions of English insolvency law, including the provisions of s8 ...[90]

90 Ibid 398-399.

Following this case, it was reasonably clear that once a request for assistance is granted, it naturally follows that a court will apply all of the rules of insolvency law that would apply to a domestic insolvency subject to any exercise of discretion in the application of these rules that would feature in a domestic case.[91] This wide definition of domestic rules as interpreted by the judge allowed the extension of administration, not hitherto considered as available in the case of foreign companies subject to proceedings in England and Wales. This was favourably commented on as being an innovative order that allowed for the flexible treatment of foreign companies using all the means available under domestic legislation.[92] The case is also notable for expressing the nature of the assistance given under provisions as being mandatory, leading to the assumption that, as in *Re A Debtor*, courts were not bound to examine too closely the proceedings leading up to the request unless they would be manifestly contrary to public policy, because of the imperative terms in which the section is drafted. Later cases have, however, raised serious questions about whether mandatory means mandatory in all situations.

Consideration of whether courts had a particular choice as to what rules to apply came in *Re BCCI*,[93] where the liquidators in England and the Cayman Islands sought to commence proceedings against a former director of the bank and associated companies to recover the deficiency in the assets. The judge noted that:

> … the effect of s.426 is to give [the] court a discretion… as to whether it should apply English insolvency law whether 'procedural' or 'substantive' or the law of the requesting court….[94]

In this case, it was clear that once a request for assistance was granted, it naturally followed that a court, where it chooses to apply domestic law, will apply all of the rules of insolvency law that would apply to a domestic insolvency subject to any exercise of discretion in the application of these rules that would feature in a domestic case. The question remained, however, as to what foreign law rules the domestic court might choose to apply or disapply.[95] In *Re Focus*,[96] it was held that

91 See *Re BCCI International (Overseas) Ltd* [1988] 1 WLR 708 (Application made by liquidator of a bank in Cayman Islands claiming relief under ss 212-4 and s 238, IA 1986).

92 See Bannister, 'The Co-Operative Court - The Decision of Chadwick J in Re Dallhold Estates (UK) Pty Ltd' (1992) 8 *IL&P* 31 (Casenote); Stallworthy, 'The Application of the Administration Provisions of the *Insolvency Act* to Overseas Companies' [1992] 9 *ICCLR* 319; Rajak, 'Cross-Border Insolvency: UK Style' (1996) 24 *IBL* 246; Smart, 'Administration Orders and Foreign Companies' (1997) 13 *IL&P* 186.

93 Re BCCI [1993] BCC 787.

94 Ibid 801-802 per Rattee J.

95 *Re Bell Lines Ltd* (unreported) 6 February 1997, cited in Turing, 'Set-Off and Netting: Developments in 1996 affecting Banks' (1997) 4 *JIBFL* 155 at 158 (stay on set-off effective in Ireland given effect in England).

assistance would not be forthcoming where this would be contrary to the conduct of proceedings already on foot within the jurisdiction. The courts took the view that England and Wales was the proper forum for disclosure of the subject of the request relating to assets held outside Bermuda. A possible alternative formulation for the views of the courts may be seen in *Re Business City Express*,[97] where it was authoritatively stated that, unless good grounds existed for not making an order, the domestic courts should accede to the request emanating from the foreign court, in this case the Irish High Court seeking to bind creditors in England through a scheme of composition. It has also been held that the definition of insolvency contained in s426 should be given as wide an interpretation as possible so as not to fetter the exercise of the court's equitable discretion.[98] The limits of the assistance possible have been canvassed in two cases where orders were sought by a foreign court for the public examination of persons in connection with insolvency. The first instance courts refused the orders, drawing the analogy between the likelihood of refusal in the context of an exclusively domestic case.[99] In any event, the Court of Appeal qualified the question of whether oppression was a valid ground for refusal of the request by looking to the overall policy of the co-operation section. This was held to include the acceptance and, where appropriate, application of the foreign law, even where the results might have a different effect than the corresponding domestic provisions.[100] Extending the co-operation element further, a recent case has extended the ambit of assistance under s426 to ordering corporate voluntary arrangements in the case of a foreign company.[101]

The continuing evolution of co-operation is being seen in other proceedings in the context of insolvency, where application for injunctions and stays of process have been denied on the grounds that an English court should not interfere with foreign proceedings where proceedings are legitimately brought and maintained in the other jurisdiction. It has also been held that courts in this situation should not take the view that there is only one natural forum in which all proceedings must

96 *Re Focus Insurance Co Ltd* [1997] 1 BCLC 219.

97 *Re Business City Express* [1997] BCC 826, [1997] 2 BCLC 510.

98 *Hughes & others v Hannover Ruckversicherungs-AG* [1997] 1 BCLC 497. See Dawson, 'The Extent of the Jurisdiction under Section 426 Re Emlico'(1998) 22 *Ins Law* 14; Smart, 'English Courts and International Insolvency' (1998) 114 *LQR* 46.

99 *Re JN Taylor Finance Pty Ltd* [1999] 2 BCLC 256; *Re Southern Equities Corporation Ltd* [2000] 2 BCLC 21. See Nolan, 'International Insolvency Assistance' (1999) 20 *Co Law* 336.

100 *England v Smith* [2000] 2 BCLC 21. See Scott, 'Public Policy and International Co-Operation between Courts exercising Insolvency Jurisdiction: Section 426 *Insolvency Act 1986*' (2000) 1 *RALQ* 1.

101 *Re Television Trade Rentals Ltd* [2002] EWHC 211 (Ch) (19 February 2002).

be brought.[102] The application of rules has also been enhanced later by the availability of interim measures to assist preservation and recovery of assets in aid of legal proceedings elsewhere.[103] This must be seen as a remarkable step in the arena of co-operation. Nevertheless, the question of conflict of laws remains a current theme in international co-operation. This is amply illustrated by one of the many BCCI cases dealing with the issue of set-off where the case revealed that the practice in the United Kingdom was very different to that in the other jurisdictions involved and where the decision was, for a number of reasons, amply criticised by the commentators.[104] There remain also a few doubts about the interplay between legal systems within the United Kingdom, especially where insolvency provisions may differ in consequence of the different legal histories of these jurisdictions.[105]

International developments

The United Kingdom has been active in the negotiation and conclusion of a number of international projects in the insolvency field. The European Insolvency Convention 1995 was a project that received much attention from commentators and practitioners in the United Kingdom. This project, which began in the early 1960s, stemmed in part from the work on the Brussels Convention with the first draft convention being produced in the early 1970s. Work within the European Community was suspended in 1985 apparently after a failure to agree a consensus on the second draft of the convention. A fresh impetus seems to have been given by the production of a Council of Europe text, later adopted in 1990 as the Istanbul Convention,[106] although the working group was not reformed until 1989. A final discussion draft of the European Community text was produced in 1994, which formed the basis for the version that the Council of Ministers were to approve in 1995. The influence of the Council of Europe text on this document was

102 *Re Maxwell Communications Corporation* [1992] BCC 757; *Barclays Bank v Homan* [1993] BCLC 680. See Smart, 'Forum Non Conveniens in Bankruptcy Proceedings' (1989) *JBL* 126.

103 *The Civil Jurisdiction and Judgments Act 1982* (Interim Relief) Order 1997 (SI 1997/302) allows for extension of interim relief in aid of legal proceedings elsewhere (including non-Convention countries) to areas of law not otherwise covered by the Brussels Convention 1968, including insolvency. See Smart, 'Insolvency Proceedings and the *Civil Jurisdiction and Judgments Act 1982*' (1998) 17 *CJQ* 149.

104 Re BCCI (No 10) [1996] 4 All ER 796 [1996] BCC 980. See Turing, above n 95; Whiteson, 'Cross-Border Insolvency: Conflict of Laws Re Bank of Credit and Commerce International SA (in liquidation) ('No 10')' (1997) 13 *IL&P* 26 (Casenote); Fletcher, 'International Insolvency Issues: Recent Cases' [1997] *JBL* 471; Shandro, 'Judicial Co-Operation in Cross-Border Insolvency - The English Court Takes a Step Backwards in BCCI (No 10)' (1998) 7 *IIR* 63.

105 See Sellar, '*The Insolvency Act 1986* and Cross-Border Winding Up' (1995) 40 *JLS* 102; Aird, 'Winding Up Across the Legal Borders of the UK - and Beyond' (1997) *SLT* 241.

106 This Convention remains without force due to insufficient ratifications.

palpable, with commentators stating that the differences between early European Community drafts and the Convention represented 'a dramatic retreat from the universalism principle' inherent in previous drafts.[107] A comparison between the European Community and Council of Europe texts revealed similarities including the division between primary and secondary jurisdiction criteria, with the use of the 'centre of the debtor's main interests' to justify primary assumption of jurisdiction, although there were important differences in the later definitions used to develop the concepts. Differences, however, included the addition of uniform choice of law provisions, although some commentators regretted the territorial nature of some of these provisions.[108] The instrument, however, failed to enter into force because of a requirement for unanimity and the United Kingdom failed, for extraneous political reasons, to adhere in time.[109] The European Regulation on Insolvency Proceedings 2000, which revived this project without major amendment to its provisions, was adopted following a proposal co-authored by Germany and Finland in 1999. This Regulation entered directly into force on 31 May 2002 in all of the member states in the European Union subject to Title IV of the EC Treaty.[110]

Another international project in which there has been some interest in the United Kingdom is the UNCITRAL Model Law on Cross-Border Insolvency 1997.[111] The Model Law contains four key areas outlining the scope of the Model Law itself and rules for access by representatives of foreign insolvency proceedings, including those governing the treatment of foreign creditors. It also covers the effects of domestic recognition of foreign procedures and, most importantly, rules for co-operation and for co-ordination of simultaneous proceedings in several jurisdictions over the same debtor. The text represents essentially a compromise between different legislative traditions and is accompanied by a Guide to Enactment, which was produced in order to assist legislative draftsmen in adapting the Model Law to local conditions. In the United Kingdom, express recognition to the Model Law has been given through the Insolvency Act 2000, which includes a provision allowing the Secretary of State to adopt regulations giving effect to the Model Law.[112] The provisions also allow for amendment of the co-operation provisions of the Insolvency Act 1986 and for the modification of the application of insolvency law to foreign proceedings.[113]

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107 See Trautman et al, 'Four Models for International Bankruptcy' (1993) 41 *AJCL* 573, 602.

108 Ibid 604.

109 See Fletcher, 'The European Community Convention on Insolvency Proceedings: An Overview and Comment, with US Interest in Mind' (1997) 23 *BJIL* 25.

110 These are all the member states apart from Denmark, which secured, under the Treaty of Maastricht, a complete opt-out from all texts produced under this Title.

111 (1997) 36 ILM 1386 with an Introductory Note by Burman and Westbrook.

112 Section 14(1), *Insolvency Act 2000*. This Act applies to Scotland as well as to England and Wales, but not to Northern Ireland.

113 Ibid s 14(2).

Summary

International insolvency has aroused a great deal of interest in recent years, owing to the spectacular rise in cases of the collapse of banks and multinational companies situated in a variety of jurisdictions. There has been considerable progress in England and Wales from the traditional common law methods of asserting jurisdiction and their statutory equivalents, which lead inevitably to the winding up of the company, towards procedures for reciprocal assistance, which allow domestic procedures to be extended to the foreign company. This often has the effect of allowing the company to attempt to consolidate its economic future through the judicious use of those rescue regimes available in domestic law. The history in the United Kingdom for co-operation has been good, with many of the cases leading the way in developing the principle that domestic courts should allow the most efficient result to obtain for the benefit of creditors and other participants in the process as a whole. Often, this requires domestic courts to extend jurisdiction and the rules in the United Kingdom are framed widely, so as to allow for very wide bases for asserting jurisdiction, where there is a conceivable benefit from doing so. However, judicial restraint is also a strong feature of this process and the case law makes it clear that the benefit for creditors and the company may sometimes mean that courts must decline jurisdiction. The development of the s426 co-operation provision, one of the earliest of its type, has, together with the continued development of the case law, allowed courts in the United Kingdom to use the necessary tools in relation to the facts of the cases before them. Tailoring the remedies that may be suited to each case. This has done much to develop the reputation of the United Kingdom as a jurisdiction within the universalist tradition of the debate around co-operation in international insolvency.

In the United Kingdom as a whole, the rules relating to jurisdiction, recognition and enforcement rules are likely to undergo change, insofar as the other member states in the European Community are concerned, with the passing of the European Regulation on Insolvency Proceedings 2000. This Regulation will do much to promote the culture of co-operation within the European Single Market, allowing for the protection of the interests of participants wherever they may be located within the Community. Nevertheless, the Regulation is not designed to affect existing arrangements with parties outside Europe, a category that includes Commonwealth countries with which there are long-standing arrangements for dealing with cross-border insolvencies. There is commentary strongly suggesting that the United Kingdom Government should endeavour to develop an international protocol for these insolvencies.[114] The adoption of the Insolvency Act 2000 allows for the use of the protocol developed by UNCITRAL as part of the Model Law on Cross-Border Insolvency 1997. Although only applying at present to

114 See Morris, 'Lessons learnt from the Collapse of BCCI' (1994) 1 *RALQ* 5.

two of the jurisdictions within the United Kingdom, it is likely that if the Model Law is brought into use for the United Kingdom, it will be of some considerable utility. This is provided that there is sufficient consensus that will prompt the adoption by those states with which the United Kingdom has strong trading links.

SAME BANK, DIFFERENT CAPACITIES: KNOWLEDGE, REMOTENESS AND MEASURE OF DAMAGES

Robin Edwards[*]

Introduction

The measure of damages is always a difficult matter to assess and brings to mind the story *The Jar* by the Italian author Pirandello. A wealthy olive farmer had a five-foot high terracotta jar. Unfortunately it had a crack in it; so he sought the services of a repairer, paying him in advance. The repairer mended the jar but in the process imprisoned himself in the jar. The farmer's lawyer told him that he would have to break the jar or run the risk of an action against him by the repairer for false imprisonment. The farmer wanted to know what he could charge the repairer before he broke the jar and released him: the cost of a new jar? the worth of the jar when it was cracked? the worth of the jar when it was repaired? The lawyer devised a practical solution: ask the repairer to nominate a price before witnesses. But would such a nomination be obtained under duress? An impasse was arrived at. Meanwhile the repairer had taken a likening to life in the jar, having been furbished with wine, food and tobacco by friends and family. Frustrated and furious, the farmer smashed open the jar. This sense of frustration is often felt by litigants and not in the least in regard to damages awarded for conversion of cheques and non-payment of cheques.

What damages, for example, is the customer entitled to if the paying bank breaches its duty of care in regard to the customer's cheques? The face value of the cheques? The face value of the cheques plus the interest that could have been earned if there was no breach? The face value of the cheques plus damages for business loss?

As the true owner of a cheque, what damages is the plaintiff entitled to in conversion if a bank collects the cheques for a rogue? Just the face value of the cheques? Or damages for the face value of the cheques plus damages for business losses?

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These are some of the issues raised in *Nemur Varity Pty Ltd v NAB*[1] and the appeal case *National Australia Bank Ltd v Nemur Varity Pty Ltd*[2] decided on 1 March 2002, both being unreported judgements. Other important issues raised are whether the banker-customer relation is subject to concurrent duties in contract and tort and whether consequential damages can be claimed for conversion of a chattel.

It is not often that a plaintiff brings an action in regard to a cheque against both the paying bank and the collecting bank. In the *Nemur* case the plaintiff was both the customer and the true owner of the cheques. It was the latter because the cheques had not come into the hands of the payees: there had been no delivery of possession to the payees. Section 25 of the *Cheques Act 1986* (Cth) provides that a contract arising out of the drawing or the indorsement of a cheque is incomplete and revocable until delivery of the cheque. Here there was no delivery to the payee. Thus the drawer is the true owner of a cheque until possession is parted with.[3] As the customer Nemur could sue the bank in its paying capacity and, as the true owner, it could sue the bank in its collecting capacity even though it was the same bank.

Background facts of the *Nemur* case

Nemur Varity Pty Ltd (Nemur) was an insurance broker. The moving force behind Nemur was a man by the name of Jarman. Nemur had been approached by Australian National Intermediaries Pty Ltd (ANI) which led Nemur to believe that ANI could facilitate insurance with an insurer by the name of Reinsurance Co of America (RCA). Nemur wanted to transact business on behalf of its clients with RCA and ANI was to act as a non-brokering intermediary. The men behind ANI were James Charge and Richardson. There were five cheques written out by Nemur and they took the following form. The name of the payee was Reinsurance Company of America followed by the words 'or bearer'. Nemur signed the cheques and they were crossed and marked 'Not negotiable'. Essentially the case involved these cheques.

The cheques totalled about $202,000. Nemur posted four of the cheques to ANI's office in Melbourne.

They were in envelopes addressed to RCA. These cheques were collected by NAB in Melbourne for an account entitled 'International Insurance Exchange Pty Ltd Premium Trust Account' (IIE).

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1 [1999] VSC 342.
2 [2002] VSCA 18.
3 *Hunter B N Z Finance v ANZ Banking Group* [1990] VR 41, affirmed on appeal [1991] 2 VR 407.

Nemur took one of the cheques to NAB at Shepparton and the funds were telegraphed (TT), so Nemur thought, to RCA but the account number of the recipient was that of IIE. No insurance was effected with any of the above cheques.

There was also another cheque (called the 'ANI' cheque at trial and in the appeal case) drawn by Nemur in December 1989 for $74,293.21 payable to ANI or bearer which was crossed and marked 'Not Negotiable'. That cheque represented an additional premium payable in respect of the Roccisano insurances. It was collected by the ANZ Bank in favour of an account of ANI maintained at that bank. There was no conversion by the defendant bank of this cheque nor any breach of contractual duty in regard to this cheque but Nemur claimed consequential damages in regard to this cheque, the gist of the argument being that had there been no earlier fault on the part of the defendant bank it would have found out the real position and not written out the cheque (there was never any insurance effected with this cheque).

The role of International Insurance Exchange Pty Ltd (IIE)

At one stage it was proposed by Nemur and ANI that another entity be set up and that any broker (including Nemur) could place business with the entity. It was to be owned equally by Nemur and ANI and these shareholders were to share equally the fifteen per cent commission. Initially two bank accounts were opened in its name at Shepparton at the NAB. These were later shifted to the NAB at North Balwyn and by that time Richardson and Charge were in control of this entity.

The back of the cheques

Of the four cheques that ended up in the account of IIE one was indorsed 'ANI Intermediaries, Richardson'. Another was indorsed 'Pay International Insurance Exchange' and signed by Richardson. The other two cheques were not indorsed. As they were all bearer cheques there was strictly no need for any of them to have been indorsed.[4]

The case in conversion against the bank

It was argued by NAB at first instance that Nemur intended the proceeds of the cheques to be paid to IIE. Ashley J rejected this, saying there was no credible evidence that the IIE arrangement continued throughout the relevant period. At the time of the conversion IIE was under the control of Charge and Richardson

4 Ss 40(4), 95 *Cheques Act 1986* (Cth).

from ANI. Ashley J accepted Nemur's arguments that there was no intention to make the monies payable to IIE. Some of the telling points were that

- the payee on all of the cheques was RCA
- none of the cheques were made payable to IIE or ANI

Ashley J accepted the proposition that a failure to question a third party bearer cheque where the name of the payee, RCA, is different from that of the customer, IIE, was in all the circumstances evidence of negligence.[5]

He also accepted that the nature of the indorsements on a bearer cheque should have invited queries by the collecting bank.[6]

NAB's banking manual also prescribed the use of the third party cheque register for staff. Three of the four cheques were not recorded in this register.[7] This too was viewed as evidence of negligence.[8]

It was held that the bank converted each of the cheques and had not established it was not negligent and it was therefore liable for the full face value of the cheques as damages.

The case against the bank in its paying capacity

Part of Nemur's claim against NAB was that it was wooed over to NAB by representations that NAB was fully cognisant of the banking requirements of the *Agents and Brokers Act 1984* (Cth) under which Nemur had to operate. Under this Act Nemur had to make sure that premium moneys were payable only to insurers.

The judge was of the opinion that the payment of the cheques and the circumstances attending their presentation and acceptance for collection were unusual.

Ashley J accepted NAB's proposition that it was going too far to say that in every case a paying bank should inquire of its customer as to the intended destination of a cheque. Nevertheless, Ashley J suggested that in this case the moneys in the Nemur account were akin to 'trust moneys' and included premium moneys.[9] He also seemed to accept that proposition that there was something of a special obligation on the bank because of the nature of the account. Ashley J stated:[10]

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5 [1999] VSC 342 [84].
6 Ibid [86].
7 Ibid [89] and [143].
8 Ibid [138].
9 Ibid [151].
10 Ibid [146].

> There were, however, other circumstances of which the bank, viewed only as the paying bank, was appraised. It knew that the plaintiff was an insurance broker. It knew that the cheques were drawn on an insurance broking account. It knew that the moneys in that account were (or were akin to) 'trust moneys', and included premium moneys. In a largely undefined way it intended that deposits in such accounts be protected (the Flexicard reference in the relevant manual is the only suggestion of such protection). Without going so far as to conclude that the bank knew or ought to have known that cheques drawn on the account should only be paid in favour of the named payee when that payee was an insurer, the circumstances to which I have adverted, particularly when added to the fact that each of the cheques was drawn in favour of an insurer but was sought to be collected by a third party in circumstances which required but did not get investigation, constitute, I consider, a strong case of failure by the bank to abide its duty of care to the plaintiff by making payment in each instance. I do not doubt, as I said earlier, that had the bank enquired of the plaintiff whether it should pay the cheques in favour of IIE, the plaintiff would have answered 'no'. Moreover, had such an enquiry been made in the case of any one of the cheques, the probability is that the fraud would have been revealed.

In relation to the tele-transfer of funds Ashley J could not say on the evidence whether it was the fault of the Shepparton branch or the North Balwyn branch but said there was a duty owed to the person on whose behalf funds were being transferred to take reasonable care to ensure that the funds were intended for the credit of the intended beneficiary.

It was also held that Nemur was entitled to damages for loss of business stemming from the wrongs and breach of duty by the bank.

The Plaintiff was awarded the amount of $314, 510 for net loss of past and future business income and $74, 293.21 in regard to the ANI cheque.

Nemur on appeal

There was no challenge on the issue of liability but the bank appealed to the Court of Appeal on the issue of damages relating in particular to business losses referred to above.

The Court of Appeal of the Supreme Court of Victoria handed down their unanimous decision on 1 March 2002.

Causation

The Court of Appeal first reviewed the issue of causation.

The trial judge found that as a result of the bank's breach of duty Nemur was 'in each case left with the [erroneous] belief that the clients whose premiums had been represented by the cheques were insured with RCA'[11] and therefore Nemur could not tell they were not insured. Nemur learned of 'the true situation on 9 July 1990'[12] and told the clients they were uninsured. The trial judge considered it 'very reasonable to infer, as a generality, that the plaintiff's communication of the true situation was a cause of those clients abandoning dealings with the plaintiff'[13] given that they knew they were uninsured and had paid a premium for nothing. The trial judge was of opinion that 'loss of business occurring in those circumstances was a loss caused by the default of the defendant, whether the matter be looked at in contract or tort'.[14]

In short the trial judge was of the view that the bank's failures misled Nemur whereas had the bank acted properly the fraud of ANI would have been discovered.[15]

On appeal Counsel for the bank argued successfully that had the bank in its collecting capacity made enquiries (as it should have done) as to why cheques made out to Reinsurance Company of America were going into ANI's account, such enquiries would have been directed to its customer ANI, the perpetrator of the fraud, or to the payee, Reinsurance Company of America, but not to the drawer, the plaintiff Nemur. Thus had this duty been fulfilled this would not have made the plaintiff any wiser as to what was going on. Moreover, Counsel for the bank argued that had Nemur been aware that the cheques were going into ANI's account it did not logically follow that Nemur would have become aware of the fraud since the trial judge had found that Jarman was gullible and would have been likely to accept facile explanations.

Batt JA delivering the main judgement of the Court of Appeal found that the trial judge had erred in his finding on the issue of causation. Essentially he found that the trial judge had mainly applied the 'but for' test of causation that had been rejected as the sole criterion of causation by the majority of the High Court in *March v E & MH Stramare Pty Ltd*.[16] According to the Court of Appeal the trial judge should have applied common sense; the cause of Nemur's loss was fraud. Batt JA stated[17]

> the cause of the relevant clients' lack of insurance and of the belief by Nemur Varity and its relevant clients that the latter had insurance cover was that Nemur Varity had

11 Ibid [202].
12 Ibid [203].
13 Ibid [204].
14 Ibid [206].
15 Ibid [208].
16 (1991) 171 CLR 506.
17 [2002] VSCA 18 [41].

> chosen to deal with ANI as supposed agent for RCA and as able to bind it (or at any rate to deal with RCA through ANI).

Having found that the bank's conduct was not the cause of the loss, there was strictly no need to go into the issue of remoteness. However, he did so on the assumption that he might be wrong on the issue of causation. His findings on remoteness are therefore strictly speaking obiter dicta. Phillips JA agreed with Batt JA on the issue of causation but declined to comment on the issue of remoteness. Callaway JA found that the business losses were incidental rather than consequential and therefore found it was not necessary for him to decide whether Nemur's claim failed as a matter of causation or of remoteness.

Remoteness of damages in regard to breach of contract

The first problem Batt JA had to solve was whether the damages awarded against the bank in its paying capacity was on the basis of a breach of the banker-customer contract; or whether it was on the basis of a breach of some tortious duty of care. The judgement at first instance did not make this entirely clear, so Batt JA had to decide whether the damages flowed from breach of contract or from tort as there are different tests for remoteness according to whether the claim is in contract or in tort.[18] Batt JA came to the conclusion that the bank's duties in its paying capacity had to be looked at solely in the light of contract law and approved of the following passage from Lord Scarman's judgement in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*[19]

> Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. … [T]heir Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis.

Callaway JA agreed with this approach to the paying bank's liability and said:[20]

> I agree with Batt, JA that, putting statute and equity to one side, the duties of a bank to its customer with respect to cheques and telegraphic transfers lie in contract and not in tort. The relationship is too complex, and affected by settled commercial expectations, to be subverted by negligence.

Comments on the basis of the paying bank's duty

Normally the action for damages brought by a plaintiff involves a breach by the bank of duties arising from the banker-customer contract. Many of these duties

18 Ibid [42].
19 [1986] AC 80,107.
20 [2002] VSCA 18 [9].

established by case law were codified in the English *Bills of Exchange Act 1882* and found their way via the Australian *Bills of Exchange Act 1909* into the *Cheques Act 1986* (Cth). For example, s 90(1)(a) of the *Cheques Act 1986* (Cth) provides that the drawee institution must obey a countermand of its customer;[21] s 67 provides that the drawee institution must pay or dishonour a cheque as soon as possible;[22] similarly, s 32 provides that if there is a forgery or an unauthorised signature on the instrument it is not a valid cheque.[23] Conversely, there are duties imposed on the customer that can be seen to stem from the banker-customer contract, for example, the so-called *MacMillan*[24] duty to draw cheques in a way so as not to facilitate fraud; likewise the customer owes the bank the so-called *Greenwood*[25] duty, that is, where the customer knows her signature has been forged, she owes a duty to report it to the paying bank and failing to do so, she may be estopped from denying liability on the forged signature on the cheque. If there is a forgery the drawee institution has no mandate to pay.[26] All these rights and duties described above arise from the banker-customer contract.

However, it is not always entirely clear that the rights and duties of the paying bank and those of the customer stem solely from the banker-customer contract. Much of the discussion in the *Greenwood* case, for example, was in terms of estoppel rather than in terms of contract law and several subsequent cases to *Greenwood* seem to have been mainly in terms of estoppel.[27]

It is worthwhile pointing out that the paying bank's liability may sometimes be tortious. Apart from liability under s 93 (liability to the true owner for paying contrary to the crossing on the cheque) of the *Cheques Act 1986*, can a true owner of a cheque bring an action against the drawee institution in conversion? This is not, of course, an action brought by the customer unless the customer is the true owner, which is possible if the drawer-customer has not delivered the cheque to the payee. The action in conversion is based upon the idea of misappropriation of the chattel (the cheque). How can this be said of the drawee institution when it is just obeying the instructions for payment written on the cheque? It could be argued that the conversion is the wrongful payment of the cheque: it has the effect of destroying the cheque as a piece of property. This would seem to be the idea

21 AL Tyree, *Banking Law in Australia* (3rd ed, 1998) [5.58]-[5.63]; WS Weerasoria, *Banking Law and the Financial System in Australia* (4th ed) (1996) [13.38]-[13.59].

22 Tyree, ibid [5.65]-[5.67]; Weerasoria ibid 11.23].

23 See also Part II, Division 5 of the Act dealing with signature: ss 31-34 of the *Cheques Act 1986*; see also Tyree, ibid [6.69]-[6.70] and [10.39]-[10.44]; Weerasooria, ibid [23.34] and [23.40]-[23.52].

24 See Tyree, ibid [5.22]-[5.26], see also Weerasoria, ibid [23.5]-[23.33].

25 *Greenwood v Martins Bank Ltd* [1933] AC 51; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947.

26 *National Westminster Bank v Barclays Bank International Ltd* [1975] QB 654.

27 See, for example, *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187; *Tina Motors Pty Ltd v Australian and New Zealand Banking Group Ltd* [1977] VR 205.

behind s 93 of the *Cheques Act*. It has been suggested that conversion will only lie against the drawee institution when payment is made to a holder who cannot be a holder in due course.[28]

The Selangor duty

Another instance of the duties of the paying bank is the so-called *Selangor* duty, that is, if the bank has knowledge or suspicions that the monies are being paid for uses other than those contemplated by the customer, then the bank owes a duty, at the very least, to make enquiries to clarify the customer's wishes.[29] The *Nemur* case at trial suggests that when there is a distinct possibility that the funds are not going to the right person then the bank in its paying capacity should not pay the cheque even though the signature of the drawer is valid and even though the proceeds are paid according to the crossing on the cheque. The basis for this duty is not particularly well articulated in the trial judgement. The trial judge did not expressly refer to the *Selangor* case but said that the monies were akin to trust monies.[30] But had the monies of Nemur actually been trust monies, then a case against the bank on the basis of 'knowing assistance' would have had to be brought by the beneficiary against Nemur as the trustee acting wrongfully. But, there was no dishonest intent on Nemur's part.[31]

Then, why the reference by the trial judge to the monies being like 'trust monies'? Perhaps it was an attempt to explain the *Selangor* duty. If it were this then it is something of a misconception. In this well known case the bank acting on behalf of one of the parties in a fraudulent and illegal misapplication of the company's funds to purchase its own shares was held liable as a constructive trustee. However, the real ratio decidendi of the case is arguably that the bank owed its customer a duty of care in paying cheques and this duty is not necessarily discharged by paying the cheques according to their tenor and according to the

28 Ellinger and Lomnicka, *Modern Banking Law* (2nd ed, 1994) 361.

29 *Selangor United Rubber Estates v Craddock* (no 3) [1968] 2 All ER 1073.

30 [1999] VSC 342 [146].

31 Where a bank is a party to a breach of trust by the trustee customer there are two sorts of cases: 'knowing receipt' and 'knowing assistance' The characteristics of 'knowing receipt' are: first, the bank obtains a benefit; secondly, it knows that the monies beneficially belong to someone else: *Westpac Banking Corporation v Savin* [1985] 2 NZLR. With 'knowing assistance' the bank does not obtain a benefit but assists the trustee in breaching the trust. To succeed the beneficiaries must demonstrate that the bank had actual knowledge of trustee's dishonest intent: *DPC Estates Pty Ltd v Greg Consul Developments Pty Ltd* [1974] NSWLR 443. The decision by the Privy Council in *Royal Brunei Airlines v Tan* [1995] 2 AC 378 has narrowed the applicability of 'knowing assistance' to banks since it held that the accessory's liability is founded upon dishonesty. This would seem to suggest some dishonest involvement in the breach of trust. It could, however, be argued that actual knowledge by the bank of the trustee's breach of trust could be viewed as acting dishonestly.

mandate lodged at the bank. The constructive trustee aspect of the case stemmed from the breach of contract.

In *Lipkin Gorman (a Firm) v Karpnale Ltd*[32] it was held that a bank could not be held liable as a constructive trustee of its customer's money unless it was in breach of its contractual duty of care. But the reverse is not true. In *Ryan v Bank of New South Wales,*[33] a case decided by McGarvie J of the Supreme Court of Victoria who approved of the principle in *Selangor*, the plaintiff argued that the paying bank should not have paid out on its cheques against uncleared effects lodged in its account. (The uncleared effects were solicitor's trust account cheques but this had nothing to do with the decision on the duty of the paying bank.) McGarvie J found that there was a duty of care based on an implied term of the banker customer contract that the bank should not pay out on a cheque if circumstances were shown in which a reasonable banker properly applying his mind to the situation would know that, if the plaintiff knew the circumstances known to the banker, the customer would not want his cheque to be paid.[34] McGarvie J also made it clear in his judgement that the duty was based in contract law when he stated:[35]

> I have indicated that in my opinion *the proper implication from the contract* in this case is that the defendant bank is in breach of its duty of care if it pays a cheque drawn by a plaintiff, where, from circumstances known to the bank a reasonable banker properly applying his mind to the situation would have known that the plaintiff, if aware, of those circumstances would not have desired it to be paid. (author's italics)

On the facts in the *Ryan* case the plaintiff failed.

On appeal in the *Nemur* case it was found that the duty of the bank in its paying capacity was based solely on contract law and the Court of Appeal set its face against the possibility of any duty based on negligence.[36]

Remoteness in contract law

Having decided that the real basis of the paying bank's liability was contractual, Batt JA went on to examine the issue of remoteness on the basis of contract law.

Interestingly, both the trial and the appeal proceeded on the basis that the paying and the collecting branch were not to be treated as distinct as regards knowledge

32 [1989] 1 WLR 1340, [1992] 4 All ER 409.
33 [1978] VR 579.
34 Ibid 581.
35 Ibid 582.
36 [2002] VSCA 18 [45].

and conduct.[37] This seems at odds with cases that in this context have treated knowledge and conduct of branches of the same bank differently for the purposes of liability and defences of the bank in its paying and collecting capacities.[38]

Batt JA said:[39]

> Not only on liability but also on damages the appeal must proceed, as the trial had proceeded, on the basis that *the two branches of the Bank were not to be treated as distinct as regards knowledge and conduct*. However, the Bank did not know that the account into which, it was to assume, the cheques would through its default be paid was that of or associated with a fraudster. On the whole, I am not satisfied that the Bank should reasonably have contemplated that loss of the kind in question would probably (in the sense in which I have been using that word) result from a breach of its contractual duty of care in relation to the payment of cheques of Nemur Varity. That conclusion, I consider, is supported by the remarks of McHugh, J in *Kenny & Good*[40] set out earlier. To arrive at the contrary conclusion would, I think, be to impose liability upon the Bank exceeding that which it could be fairly regarded as having contemplated and been willing to accept, to adopt the words of Walsh, J. in *Wenham v. Ella,*[41] applied by McHugh, JA in *Alexander v Cambridge Credit Corporation*.[42] (italics added)

Treating both the branches as the same in terms of knowledge and conduct creates something of a tension. At trial in its collecting capacity the bank did not even try to establish that it had acted without negligence but the trial judge accepted evidence adduced by the plaintiff that the collecting bank had been negligent. Strictly speaking this was not necessary since the plaintiff's claim was in conversion. But had the bank in its collecting capacity made submissions that it had not been negligent, these would not have succeeded according to the trial judge.[43] Some of the matters raised in regard to the issue of negligence for the purposes of a defence for conversion under s 95 of the *Cheques Act* included failure to query the deposit of a third party cheque, failure by the staff to comply with the bank's procedures, and failure to query unusual indorsements on bearer cheques. These were matters within the collecting bank's knowledge and on appeal it was accepted that this knowledge was also to be attributed to the paying bank. Although this sort of knowledge is relevant to the issue of the defence of acting without negligence, it is also arguably relevant to the issue of whether the bank in its paying capacity should have reasonably contemplated the losses arising from

37 Ibid [53].
38 *Carpenter's Co v British Mutual Banking Co Ltd* [1938] 1 KB 501; see also *Chalmers and Guest on Bills of Exchange* (14th ed) (1991) 734
39 [2002] VSCA 18 at [53].
40 (1999) 199 CLR 413 at 437-8.
41 (1972) 127 CLR 454 at 466.
42 (1987) 9 NSWLR 310, 363-368 per McHugh, JA (obiter).
43 [1999] VSC 342 [138].

the breach of its contractual duty, given that the two branches of the Bank were not to be treated as distinct as regards knowledge and conduct. Yet Batt JA said that the bank in its paying capacity 'did not know that the account into which, it was to assume, the cheques would through its default be paid was that of or associated with a fraudster'.[44] It is a matter of degree, surely, as to what the bank must know before it can be positively said to know that the money was going into a fraudster's account. However, the knowledge it had in its collecting capacity was adjudged not to be enough for the bank to be viewed in a paying capacity as knowing the monies were going into a fraudster's account. Nevertheless, attributing knowledge that the bank has in its collecting capacity to its state of knowledge as a paying bank is fraught with the danger that the bank in its paying capacity may be lumbered with all sorts of knowledge acquired in its collecting capacity that may be quite damning.

Curiously the *Cheques Act 1986* has no provision that deals explicitly with the problem of a bank that is both the paying bank and the collecting bank. This is a situation that is quite common in Australia.

Not treating the branches as distinct as regards knowledge and conduct can also create problems that did not arise in the *Nemur* case. For example, the plaintiff and a rogue employee of the plaintiff have accounts at the same bank but at different branches. The rogue steals a cheque with the plaintiff's name as payee and, forging the plaintiff's indorsement, puts it into his account. Some English cases suggest that if the bank in its paying capacity can use s 94 of the *Cheques Act 1986* then it cannot be liable for conversion.[45] This seems illogical. It is submitted that it is conceptually better and fairer to allow the defendant that is being sued in both capacities to avail itself of both defences and for the different branches to be treated as separately as far as conduct and knowledge is concerned and this means, of course, that it should act with care in both capacities.[46]

Although bank branches are not separate legal entities and the bank is one single corporation, there are enough exceptions to this rule to justify treating different branches of the same bank as separate. It has been, for example, accepted that notice to stop payment to one branch does not constitute notice to stop payment to another branch of the same bank.[47] In the context of bankruptcy it is not permissible to aggregate the knowledge of one person (an agent) from one branch

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44 [2002] VSCA 18 [53].

45 Section 94 of the *Cheques Act 1986* (Cth) provides the paying bank with protection if it pays a cheque with a forged indorsement on it if it acts in good faith and without negligence- it is deemed to have paid the cheque to the rightful owner: see *Bissell & Co v Fox Bros & Co* (1885) 53 LT 193; 1 TLR 542; *Gordon v London City and Midland Bank Ltd* [1902] 1 KB 242.

46 EP Ellinger, *Modern Banking Law* (1987) 448.

47 *London Provincial & South -Western Bank Ltd v Buszard* (1918) 35 TLR 142; *Bank of New South Wales v Ross* [1974] 2 Lloyd's Rep 110.

with the knowledge of another person (another agent) from another branch to establish that the bank has reason to suspect that the company is insolvent unless there is a duty and opportunity for such persons to communicate with one another.[48]

Applying the second limb of the rules in *Hadley v Baxendale* on the issue of remoteness, namely, whether damages were within the actual contemplation of the parties when the contract was made, Batt JA encountered an immediate problem since the banker-customer contract was made in October 1986 while the breaches occurred in 1989. He therefore decided that the relevant time for the application of the test for contemplation was when the cheques were presented by the bank in its paying capacity and when the TT application was made.

As regards the TT transfer he found that it could not be said that the bank should have contemplated the business losses resulting from the breach. As to the payment of the cheques, Batt JA pointed out that the loss and remoteness of damages had to be looked at in the light of the fact that the bank did not know that through breach of its contractual duty the account into which the cheques would be paid was that of a company associated with a fraudster.[49] He was therefore of the opinion that this was not something that the bank could be said to have reasonably contemplated at the time of the breach of its contractual duty.

Remoteness of damages in regard to conversion

The bank in its collecting capacity was liable for conversion of the four cheques since it could not, indeed, did not even try to establish that it had acted without negligence which is a defence available to collecting banks under s 95 of the *Cheques Act 1986* (Cth).

The usual measure for damages is the face value of the goods converted: *Caxton Publishing Co Ltd v Sutherland Publishing Co;*[50] and with cheques it is their face value: *Morison v London County and Westminster Bank Ltd*.[51] However, his Honour pointed out that cases and text books acknowledge that consequential losses may be recoverable;[52] for instance, in *Harrisons Group Holdings Ltd v Westpac Banking Corporation*[53] consequential damages by way of interest were awarded for the loss of the proceeds of a cheque. But Batt JA was of the opinion that the application of the principles of remoteness of damages (reasonable

48 *Re Chisum Services Pty Ltd* (1982) 7 ACLR 641.
49 [2002] VSCA 18 [53].
50 [1939] AC 178, 192.
51 [1996] 1 VR 668.
52 [2002] VSCA 18 [56].
53 (1989) 51 SASR 36 at 40-41.

foreseeability) as established by *Wagon Mound No 1* and *Wagon Mound No 2* were not entirely clear in Australia as regards conversion of cheques.

Counsel for Nemur argued that all damages flowing naturally from the conversion were recoverable since conversion is a tort of strict liability. He also argued, in the alternative, that if the test for remoteness in regard to conversion was reasonable foreseeability, then this test was satisfied. Counsel for the bank, on the other hand, argued that the test for remoteness of damages in regard to conversion was whether the converter had special knowledge, that is, express notice or knowledge that loss beyond the face value of the cheques would be caused to Nemur.

First, Batt JA opined that a converter is not liable for all damages flowing naturally from the conversion.[54] His Honour seems to have been much taken with the idea of a sliding scale with strict liability being at the bottom, then negligence, and at the top intentional wrongdoing.[55] Batt JA thought that conversion was a tort of strict liability and that therefore it was to be found at the lower or less culpable end of the scale. In his opinion it was inappropriate that a converter be held liable for all damages flowing naturally from the conversion given that conversion can be innocent.[56]

He also thought that reasonable foreseeability as a test for remoteness in regard to conversion was inappropriate and that a tougher test was required. He was of the view that the test for remoteness in regard to conversion of cheques should be whether the converter had special knowledge or notice. Batt JA approved obiter dictum from *France v Gaudet* where it was stated:[57]

> …in order to enable a plaintiff to recover special damage which cannot form part of the actual present value of the things converted, as in the case of the withholding of the tools of a man's trade, in which the damage arising from the deprivation of his property is not, and apparently cannot be fixed at the time of the conversion of the tools. In that case, however, we are inclined to think that either express notice must be given, or arise out of the circumstances of the case. This point was not determined in *Bodley v Reynolds,*[58] but we think that there must have been evidence of knowledge on the part of the defendant that in the nature of things inconvenience beyond the loss of the tools must have been occasioned to the plaintiff.

54 [2002] VSCA 18 [63].
55 Ibid [58].
56 Ibid.
57 (1871) LR 6 QB 199, 205.
58 8 QB 779.

Batt JA thought there was no evidence of any special knowledge of the bank in its collecting capacity and that there was therefore no justification for the consequential damages awarded by the court below. He stated:[59]

> There must be knowledge on the part of a defendant that *in the nature of things* inconvenience beyond the loss of the goods *must* have been occasioned to the plaintiff. The matters relied on did not show directly that loss of business income would occur nor did they show that indirectly, by showing that the chain of events which his Honour found occurred and resulted in loss of business income would occur.

He pointed out that it is not enough for this test for remoteness that certain events *might* happen. In effect, what was really absent was the bank's knowledge that a rogue was involved.

Conclusions

One of the issues decided at trial was that where the customer's account is for a special purpose an obligation is imposed on the paying bank not to pay cheques to parties who were not obviously in the contemplation of the drawer when the drawer wrote out the cheques. At trial whether this obligation depended upon tort or stemmed from the banker-customer contract was not made clear. The Court of Appeal has now clarified this and established that such a duty is contractual in nature and that therefore the appropriate measure for damages is the contractual one. Batt JA made the point that there has been a trend in courts of final appeal to stop the expansion of negligence into areas governed by contract, equity or statute[60] and cited numerous cases to support this trend: *CBS Songs Ltd v Amstrad Consumer Electronics Plc;*[61] *Scally v Southern Health and Social Services Board;*[62] *Downsview Nominees Ltd v First City Corporation Ltd;* [63] *Hill v Van Erp.*[64] The only case mentioned in the judgement that supported the contention that a banker could be under coextensive duties in contact and tort was the case of *Barclays Bank plc v Quincecare Ltd* [65] but Batt JA thought this was not good law.

Deane J of the High Court in *Hawkins v Clayton*[66] has spoken of the erroneous idea of a dichotomy between contract law and tort law and said:[67]

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59 [2002] VSCA 18 [69], Judge's italics.
60 [2002] VSCA 18 [47].
61 [1988] AC 1013, 1059-1060.
62 [1992] 1 AC 294, 302-304.
63 [1993] AC 295, 316-317.
64 (1997) 188 CLR 159, 179.
65 [1992] 4 All ER 363.
66 (1988) 164 CLR 539; (1988) 78 ALR 69; (1988) 62 ALJR 240; (1988) Aust Torts Reports 80-163.
67 (1988) Aust Torts Reports 80-163 ¶ 80-163.

> The law of contract and the law of tort are, in a modern context, properly to be seen as but two of a number of imprecise divisions, for the purpose of classification, of a general body of rules constituting one coherent system of law.

Some learned authors believe it is still open for the courts to find that the paying bank's duties are not founded in contract alone in an appropriate case.[68] Indeed, the High Court in *Astley v Austrust Limited*[69] has made it clear that professional service providers can owe concurrent and independent duties in contract and tort. Batt JA cited various passages from the *Astley v Austrust Limited* case to support his view that there was a trend away from the expansion of negligence governed by contract, equity or statute.[70] These passages could, however, be equally interpreted as just supporting the ratio decidendi of the case, namely, that providers of a professional service can owe concurrent duties in contract and negligence but that such duties may be restricted or excluded by agreement.[71] However, Batt JA was of the view that in 'this area of discourse a banker is not a professional person'.[72] He did not advance any reasons as to why he thought this to be so. Nevertheless the *Nemur* case is a powerful precedent that suggests that a banker is not in a paying capacity vis-à-vis its customer under concurrent duties in contract and negligence.

The rationale of the *Selangor* duty was not explored at trial or on the appeal. On the facts of the case it even seems difficult to understand its application. The damning evidence of lack of negligence in the bank's collecting capacity seems to have coloured the view of the bank in its paying capacity given that they were to be treated as the same. This seems an erroneous approach.

Moreover, it is submitted that the Court of Appeal missed an opportunity to set some realistic boundaries to the *Selangor* duty. Parker LJ in the *Lipkin Gorman* case set the duty at a more realistic level when he stated[73]

> The question must be whether if a reasonable and honest banker knew of the relevant facts he would have considered that there was a serious or real possibility albeit not amounting to a probability that his customer might be defrauded.If it is so established then in my view a reasonable banker would be in breach of duty if he continued to pay cheques without enquiry. He could not simply sit back and ignore the situation.

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68 George A Weaver and PM Weaver, *The Laws of Australia*, Vol 18, 18.4 Chapter 18.4 [1].

69 (1999) 75 ALJR 403;(1999) 161 ALR 155.

70 [2002] VSCA 18 Para 47.

71 Brendan Sweeney and Jennifer O'Reilly, 'Service Providers' Breach of Duty of Care & Skill: Is there a Right to Apportionment for Contributory Negligence?' (2001) 7(1) *Current Commercial Law*, 56.

72 Para 47 of the appeal case.

73 [1992] 4 All ER 409 at 441.

Bearing in mind that Batt JA found that the bank in its paying capacity did not know that the account into which the cheque monies were going was associated with a rogue, it is difficult to see how on the facts there could have been a finding that the bank was in breach of its contractual duty as a paying bank by the trial judge. In addition, the trial judge's explanation of the liability is not very convincing: the bank knew the customer was a broker; the bank knew that the account included premium monies; and the bank knew the monies in the account were akin to trust monies. None of these things in themselves or even combined would lead to a conclusion that there was a breach of duty in the bank's paying capacity in terms of the *Selangor* duty. Perhaps when combined with the knowledge and conduct of the bank in its collecting capacity, yes. But this merging of knowledge and conduct of two branches acting in different capacities seems wrong.

The *Selangor* duty seems excessive given the customers' duties are relatively light, namely, the *McMillan* duty and the *Greenwood* duty. An opportunity in the *Nemur* case to define or limit the *Selangor* duty has been missed.

As to remoteness of damage for conversion of cheques, Batt JA, made much of the idea of a sliding scale going from strict liability to intentional wrongdoing in determining the test for remoteness. Starting at the top of the scale with intentional wrongdoing, Lord Steyn said in the *Smith v Scrimgeour Vickers* 'it is a rational and defensible strategy to impose wider liability on an intentional wrong doer'.[74] Thus with intentional torts like deceit and injurious falsehood, there is no requirement of reasonable foreseeability: *Palmer Bruyn v Parker*.[75] As pointed out by one learned author 'an innocent plaintiff may, not without reason, call on a morally reprehensible defendant to pay the whole of the loss he caused'.[76] Hence, with intentional torts, there is no requirement of reasonable foreseeability, since it extends the defendant's liability.

Placing conversion in the strict liability category, Batt JA therefore argued that a 'more stringent test of remoteness, satisfied only by express notice or special knowledge is required for conversion…'.[77] Being at the lower end of the scale, a test that lessens the defendant's liability is appropriate.

However, some confusion arises as to Batt JA's idea of strict liability. In terms of the sliding scale referred to in *Smith's* case, strict liability would seem to be referring to liability without fault, that is, liability for accidental harm, independently of either wrongful intent or negligence. In order to justify his

74 [1997] AC 254 at 279.
75 (2001) 76 A.L.J.R. 163 at 166, 170 and 172-176, [13], [54] and [63]-[81].
76 Hart and Honore, *Causation in the Law*, (2nd ed, 1985) 304.
77 [2002] VSCA 18 [58].

classification Batt JA points out that conversion may be 'entirely innocent'.[78] However, the fact that conversion may be intentional, he explains away by saying that it is not part of the definition of the tort of conversion. Be that as it may, surely it is an argument against characterising the tort of conversion as strict liability. The tort of conversion is usually classified as an intentional wrong. Fleming, for example, covers conversion in the chapter dealing with intentional interference with chattels.[79] Batt JA concedes in a footnote that the act of conversion must be committed intentionally but persists that it is not part of the definition of conversion. [80]

Setting aside for a moment the correctness of Batt JA's classification of conversion as a tort of strict liability, the problem with strict liability as epitomised by *Rylands v Fletcher* is that the doctrine seems on the retreat. In *Cambridge Water co v Eastern Counties Leather Plc* [81]the House of Lords returned the strict liability principle to nuisance (injurious consequences must be foreseeable). This test of remoteness seems inconsistent with the rationale for strict liability.[82] On the other hand, the High Court of Australia has declared the principle of *Rylands v Fletcher* to be subsumed into the law of negligence: *Burnie Port Authority v General Jones*.[83] Apart from strict liability imposed by statute, one has to query whether it still is a useful category for classification purposes.

The obvious problem with the tort of conversion is that it can encompass two extremes of behaviour, innocent conversion and culpable conversion. The former might logically require a test of remoteness that lessens the defendant's liability but the latter requires a test that increases the defendant's liability given that the defendant has a malicious intention.

It is respectfully submitted that Batt JA's selection of express notice or special knowledge as the appropriate test is somewhat strained since in *Harrison Group* King CJ used reasonable foreseeability as the test for remoteness in regard to conversion and it is not very convincing to say that in this case the 'point as to the test for remoteness did not command a reasoned expression of view by his Honour'.[84] Moreover, Batt JA's rejection of overseas precedents that put forward reasonable foreseeabily as the test for conversion, rest on his view that 'none of the cases on conversion discussed above is binding on this Court and there is on analysis little authority directly supporting that test'.[85] Given that Batt JA's view

78 Ibid [63].
79 Fleming, *The Law of Torts* (9th ed) (1998) Chapter 4.
80 [2002] VSCA 18 footnote 115.
81 [1994] 2 AC 264.
82 See McHugh J, in his dissenting judgement in *Burnie Port Authority v General Jones* (1994) 179 CLR 520.
83 (1994) 179 CLR 520.
84 [2002] VSCA 18 [62].
85 Ibid [62].

that special knowledge or actual notice is the test for remoteness for the tort of conversion rests upon obiter dicta in *France v Gaudet,* one might equally say there is little authority for the test he advances.

Logically, given that the tort may cover innocent as well as culpable behaviour, it would make more sense to either choose a midway test (reasonable foreseeability) or use two different tests depending upon whether the conversion is innocent or wicked.

Most conversions by banks of cheques are innocent and this is plainly what worried Batt JA about remoteness test in regard to intentional torts. Nevertheless, his characterisation of the tort of conversion as one of strict liability, requiring as a test for remoteness of damage that the converter have special knowledge or express notice is too sweeping given that conversion can cover culpable behaviour.

AGENCY, AUTONOMY AND A THEOLOGY FOR LEGAL PRACTICE

Reid Mortensen†

A papal challenge to Christian lawyers

The Catholic Church has consistently maintained the indissolubility of a properly established union between a husband and wife as a central tenet of its canonical jurisprudence. Early in 2002, a papal statement on indissolubility spelt out the implications that this had for Catholic lawyers practising in secular family law. Pope John Paul II said that a lawyer could only 'cooperate' in a divorce when the client did not intend that it be 'directed to the break-up of the marriage'.[1] That statement provoked immediate and widespread reporting in the Australian press, which showed that the responses from Catholic lawyers extended from outright dismissal of the church's authority to deal with a 'state issue' like divorce[2] to an immediate decision not to accept any more instructions in divorce proceedings.[3] The Archbishop of Sydney, Dr George Pell, questioned the initial English translation of the papal statement, which he said had misconceived the role of lawyers in civil divorce proceedings, and advised Catholic lawyers in Australia

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1 The Pope said that 'professionals in the field of civil law should avoid being personally involved in anything that might imply a cooperation with divorce. For judges this may prove difficult, since the legal order does not recognize a conscientious objection to exempt them from giving sentence. For grave and proportionate motives they may therefore act in accord with the traditional principles of material cooperation … Lawyers, as independent professionals, should always decline the use of their profession for an end that is contrary to justice, as is divorce. They can only cooperate in this kind of activity when, in the intention of the client, it is not directed to the break-up of the marriage, but to the securing of other legitimate effects that can only be obtained through such a judicial process in the established legal order': 'To The Roman Rota: Good of Indissolubility, Good of Marriage', *The Roman Observer* (Rome, Italy), 3 February 2002, <http://www.vatican.va/news_services/> ('Indissolubility').

2 B Lane, 'A Word from the Pope and the Divorce is Off', *The Australian*, 30 January 2002 (Sydney), 3. For an Anglican's response, see J Murray, 'Church Crosses Line into Civil Territory', *The Australian* (Sydney), 30 January 2002, 3.

3 Lane, above n 2, 3.

that they could still undertake divorce work.[4] In Sydney, the St Thomas More Society, following Archbishop Pell's lead, released a statement repeating the archbishop's view that the papal statement had been misinterpreted, and endorsed Catholic lawyers continuing to be involved in divorce practice.[5] Furthermore, some recognised that a refusal to make the initial application for divorce would probably leave little other family law work for a Catholic lawyer.[6] There was some belief that the papal statement unfairly assumed that lawyers encouraged divorce, when most divorce lawyers saw that their role was 'undertaking' – or 'mopping up' after family breakdown had occurred.[7]

The Catholic lawyer has the canon law and Catholic moral theology to answer questions about the status of the papal statement on indissolubility, and whether it does mean that Catholic lawyers have some obligation not to undertake divorce work.[8] However, lawyers from other Christian traditions may have similar moral concerns about participation in divorce proceedings. Formally, Anglican canon law also holds to indissolubility.[9] In contrast, Orthodox churches recognise the validity of divorce, though still 'as an exceptional but necessary concession to human sin'.[10] Since the early years of the Reformation Protestants too have recognised the dissolubility of marriage, although divorce has also generally been regarded as a regrettable means of preventing a greater evil.[11] Even modern liberal Protestant thinking, which often views relationship collapse alone as making divorce, at times, 'morally justifiable and consistent with God's will', begins with the assumption that '[t]he breakdown of marriage is another reflection of the

4 Ibid; N Bita, 'Vatican Stands by Divorce Edict', *The Australian* (Sydney), 31 January 2002, 4 (These comments preceded the English translation given in Indissolubility); R Mavey, 'When You're Talking Divorce, to Err is Human but, to Misstate is Divine', *Sydney Morning Herald*, 30 January 2002, 5.

5 St Thomas More Society, The Pope's Statement on Divorce and the Role of Lawyers, Press Release (29 January 2002), <http://lawsocnsw.asn.au/about/president/ 20020201_message.html>.

6 D Farrant, 'Lawyers Oppose Pope on Divorce', *The Age* (Melbourne), 30 January 2002, 6.

7 Ibid; Editorial, 'The Pope Puts Lawyers in the Dock', *The Age* (Melbourne), 31 January 2002, 10.

8 See P Quirk, 'The Pope, the Divorce, the Lawyer?', a paper presented at the Second Australasian Christian Legal Convention, 3 May 2002, Bond University, Gold Coast, Queensland.

9 T Briden and B Hanson, Moore's *Introduction to English Canon Law* (3rd ed, 1992) 73-4.

10 T Ware, *The Orthodox Church* (1963) 302.

11 R Phillips, *Putting Asunder: A History of Divorce in Western Society* (1988) 40-94. Luther thought divorce and remarriage (in the former spouse's lifetime) were acceptable where there existed grounds like adultery, desertion, impotence or wilful refusal to consummate: 'The Estate of Marriage' in *Luther's Works* (1955) vol 45, 20-1, 33-5; 'On Marriage Matters' in *Luther's Works* (1955) vol 46, 311-12.

sinfulness of the human condition'.[12] The typical diversity of Protestant responses to divorce undoubtedly reflects the ambiguity of the scriptural witness to Christ's teaching on the dissolubility of marriage.[13] Across the Christian church in the developed world the established pastoral practice of tolerating divorce, even within the traditions that adhere to indissolubility, also belies formal doctrinal conclusions of its inherent sinfulness.[14] Still, it is unlikely that any Christian thinking would consider divorce morally justified *merely* because the Australian civil standard of a 12-month separation were satisfied.[15] To some Orthodox and Protestants a divorce granted on this ground might be morally justified, but for more substantial reasons than the fact of separation.

Whatever their tradition, therefore, divorce presents a moral question that most Christian lawyers confront. Should the Christian lawyer arrange a divorce when she believes it is not morally justified? This question is just one of many that involves the rival claims of professional role morals and personal morals, a pet topic in the scholarship and teaching of lawyers' ethics.[16] In this connection, the papal statement on indissolubility presents a radical challenge to lawyers of all Christian traditions. For the Pope's reservations about divorce practice stem from a more basic principle that lawyers 'should always decline the use of their profession for an end that is contrary to justice'.[17] That principle is incompatible with the standard modern conception of the lawyer's role, which discounts the relevance of personal morals to the lawyer's decision to represent a client. I believe that it nevertheless states a catholic principle for all Christian lawyers about the relevance of morals to decisions about legal work.

In this article, I do not deal with the morals of divorce. I assume that, after her own thoughtful consideration of the question, a Christian lawyer has concluded that a given divorce is not morally justified. The lawyer's personal, but religious, moral view motivates an analysis of the rival claims of religious and professional role morals. These are addressed principally by reference to the concept of

12 Uniting Church in Australia. Assembly Task Group on Sexuality, Interim Report on Sexuality (1996) 37.

13 Especially Matt 5: 32, 19: 9; Mark 10: 9; Luke 16: 18.

14 M Keeling, *Morals in a Free Society* (1970) 98-9; cf P Ramsey, *Basic Christian Ethics* (1980) 70-3.

15 Under s 48 *Family Law Act 1975* (Cth).

16 The seminal articles include: R Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights* 1; MH Freedman, 'Personal Responsibility in a Professional System' (1978) 27 *Catholic University Law Review* 191; T Schneyer, 'Moral Philosophy's Standard Misconception of Legal Ethics' [1984] *Wisconsin Law Review* 1529; SL Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities' (1986) 4 *American Bar Association Research Journal* 613.

17 Indissolubility, above n 1, 9.

autonomy, as that concept relates to legal practice.[18] This also compels a discussion of autonomy, first as it is presented by the dominant secular liberal accounts of the lawyer's role, and secondly as it can be both redefined and repositioned from a Christian perspective. As will be seen, I accept that the Christian consciousness of God consumes decisions she is to make even as a lawyer in professional practice, and that this can demand 'careful' moral input in dealings with a potential client. If God is 'something greater than can be thought',[19] the believer's understanding of what it means to do God's will must consume the choices she has to make in all of the social roles she has to adopt. The results of this critique blend with Thomas Shaffer's 'moral counselling' role for the lawyer, although it justifies that role differently. Hopefully, it allows an ethically richer, though still ambiguous, experience of legal practice and the opportunity for the Christian lawyer to give expression to a deeper sense of God-given vocation.[20]

Liberalism's lawyer

To a large extent, the standard secular conception of the lawyer's role has been shaped by a liberal social tradition that has, by somewhat uneven developments over the last two centuries, enlarged the personal autonomy of individual citizens. For lawyers, this has had two important consequences. First, the role of the lawyer has been increasingly cast as an essential means by which the individual can enjoy his autonomy. However, the standard secular conception of the lawyer as a necessary means to realising the individual's autonomy paradoxically denies the lawyer any significant moral autonomy in her professional role. Secondly, in addition to claiming for the lawyer a central role in the liberal tradition, the 'autonomy paradox' creates a strong expectation that she become a liberal individual, and *that* is what forces a Christian critique of this approach to the lawyer's role.

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18 I do not deal with the position of judges. Pope John Paul's statement implicitly recognises that the different conditions under which judges make decisions about divorce lead to different ethical conclusions about their involvement in divorce cases: Indissolubility, above n 1, 9. There are stronger reasons to suggest that a judge making decisions qua judge does not have the autonomy to refer to his own personal morals - but also that the judge does not bear much, if any, moral responsibility for those decisions.

19 Anselm of Canterbury, *Monologion and Proslogion* (1995) 109.

20 The article largely addresses the question of rival religious and professional claims on the Christian lawyer by reference to the tensions between the moral philosophies of Kierkegaard, Kant, Rawls and MacIntyre. No attempt is made to extend the analysis to other traditions of moral philosophy (eg, utilitarian or Marxian), nor to address sociological or behavioural analyses of lawyers' conduct.

The agency ethic

There is a powerful professional expectation, although barely expressed in the rules of professional conduct, that suggests that client-controlled agency has an important, and near central, role in English-speaking systems of justice. In short, the 'agency ethic' assumes that only the law itself places limits on the lawyer's societal obligation to accept instructions from a potential client.[21] The lawyer should accept, and then pursue and conclude any work instructed by a paying client. So long as the work is lawful, any question of its justice or moral worth is consciously discounted as irrelevant to the principal decision by which the lawyer chooses to assume client-control: accepting the retainer. It is also often argued that the irrelevance of moral judgments to decisions to represent a client means that, under the standard conception of the lawyer's role, the lawyer carries no moral responsibility for the outcome of her work. From literature like Trollope's *Orley Farm*[22] to television like *North Square*, the lawyer who lives by the agency ethic is often caricatured as the thoughtless tool of an immoral client. But, while art might exaggerate the sins of this 'type', the standard secular conception of the lawyer's role is no figment of the artistic imagination.[23] As Justice Fortas explained of his own role as an attorney:

> Lawyers are agents, not principals; and they should neither criticize nor tolerate criticism based upon the character of the client whom they represent … They cannot and should not accept responsibility for the client's practices.[24]

The agency ethic seems to represent a common societal understanding of the lawyer's role, even if moral responsibility is a more contested issue than Fortas believed. That point deserves emphasis. In general, the agency ethic is a *socially constructed norm*, and rarely a requirement of any law or professional rule. In

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21 The decision to accept the retainer is the critical point at which broader ethical questions apply. Once a lawyer is retained, there are contractual and professional ethical duties that, with a number of exceptions, compel the lawyer's continued representation until the work is completed: GE Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2nd ed, 2001) 62-6. This forces greater deliberation in the decision to accept the work in the first place.

22 '[T]here was a species of honesty about Mr Chaffanbrass [the barrister] which certainly deserved praise. He was always true to the man whose money he had taken, and gave to his customer, with all the power at his command, that assistance which he had professed to sell … I knew an assassin in Ireland who professed that during twelve years of practice in Tipperary he had never failed when he had once engaged himself. For truth and honesty to their customers - which are great virtues – I would bracket that man and Mr Chaffanbrass together': A Trolloppe, *Orley Farm* (1985) 359.

23 Schneyer, above n 16, 1544-5; and see the aspirational statements in the American Bar Association's Code of Professional Responsibility, in C Wolfram, *Modern Legal Ethics* (1986) 569-78.

24 Quoted in TL Shaffer, *On Being a Christian and a Lawyer* (1981) 7 ('A Christian and a Lawyer').

most English-speaking countries, there is no formal obligation for a lawyer to accept any work instructed by a paying client. The exception, of course, is the 'cab rank rule' that applies to barristers in the English tradition and that, as a result, is limited almost to the independent bars in the United Kingdom, Ireland and Australia.[25] This can, at times, impose a legal obligation on barristers to accept work.[26] However, for most lawyers there is no cab-rank rule and both law and professional rules allow instructions to be refused for any reason.[27] Furthermore, it is probable that a competitive market for providing legal services does more to promote access to legal advice and representation than the cab-rank rule does.[28] The cab-rank rule's real significance may well be symbolic, as it is consistently presented as a central institution in English-speaking systems of justice.[29] It

25 See the Australian Bar Association's Advocacy Rules, r 85:

> 'A barrister must accept a brief from a solicitor to appear before a court in a field in which the barrister practises or professes to practise if:
>
> (a) the brief is within the barrister's capacity, skill and experience;
>
> (b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client's interests to the best of the barrister's skill and diligence;
>
> (c) the fee offered on the brief is acceptable to the barrister; and
>
> (d) the barrister is not obliged or permitted to refuse the brief under Rules 87, 90 or 91.'

Rule 87 includes situations in which the barrister has conflicting duties, or a conflict of duty and personal interest. Rule 90 deals with pre-existing commitments to be in court. Rule 91 sets out discretionary grounds for refusing the brief, including situations where it is not offered by a solicitor or where there is a risk that the barrister will not be paid. See also r 85 NSW Barristers' Rules; r 11.05 Rules of Professional Conduct for Barristers and Solicitors (NZ); r 15.2(a) Professional Conduct Rules (NT); r 85 Queensland Barristers' Rules; r 16.2(a) Professional Conduct Rules (SA); r 94 Rules of Practice 1994 (Tas); r 87 Barristers' Practice Rules (Vic).

26 NSW: s 57D *Legal Profession Act 1987* (NSW); NZ: s 17 *Law Practitioners Act 1983* (NZ); Tas: s 17 *Legal Profession Act 1993* (Tas); Vic: Pt 3 Div 2 *Legal Practice Act 1996* (Vic). There is no evidence in Australia that the cab-rank rule has ever been enforced by the courts or tribunals, and it is undoubtedly difficult both to police and apply. In Queensland, where the bar is voluntarily organised, the cab-rank rule may only apply to members of the Bar Association, and might not apply at all to those barristers who are not members.

27 Ie, which is consistent with the anti-discrimination law. This right is explicit in Queensland: r 5.01(1) Solicitors' Handbook; Dal Pont, above n 21, 56-7.

28 For a supportive account of the cab-rank rule that is sceptical of its effectiveness, see HHA Cooper, 'Representation of the Unpopular' (1974) 22 *Chitty's Law Journal* 333. Cf the position in the United States, where no cab-rank rule applies to attorneys but where, compared to the Commonwealth, there is arguably greater access to law: see Wolfram, above n 23, 576-7.

29 Eg, see *Rondel v Worsley* [1969] 1 AC 191, 227 per Lord Reid; *Gianarelli v Wriath* (1988) 165 CLR 543, 580 per Brennan J; *Arthur JS Hall & Co (a firm) v Simons* [2000] 3 WLR 543, 550 per Lord Steyn, 558 per Lord Hoffmann, 585 per Lord Hope, 610 per Lord Hobhouse.

therefore represents the inner core of what is, for many lawyers, a broader ethic that gives some direction as to how they should act. As Justice Fortas' comments reveal, the social construction of the lawyer's role brings a powerful claim on how a lawyer should make decisions about representing a potential client.

Ancestors of the cab-rank rule applied to medieval advocates,[30] but did not exclude the justice of the cause from the advocate's decision to represent a potential client. Indeed, St Thomas Aquinas advised lawyers not to act in a cause known to be unjust,[31] and given the dominance of Thomism in Catholic moral theology that probably informs the present papal statement on indissolubility. This earlier ethic of unprejudiced representation rested principally on the functional distinction between the roles of the advocate and the judge, and was credited to the structure of adversarial justice as late as Erskine's defence of Tom Paine. 'If the advocate refuses to defend, from what *he may think* of the charge or of the defence, he assumes the character of the judge'.[32] Interestingly, the Trial of Tom Paine also marks the emergence of an alternative rationale for the old ethic of unprejudiced representation. The successful prosecution of Paine for publishing *Rights of Man*, itself a book that popularised liberal ideas in England, witnessed widespread support for Paine and his right to publicise, what was then, an emerging liberalism.[33] The cab-rank rule (to use the term anachronistically) therefore received its definitive statement in the course of defending liberal ideas, in an embryonic liberal society. Significantly, it is within the liberal tradition that the agency ethic has an enhanced and philosophically central role.

The liberal tradition

It might initially seem inappropriate to call liberalism a tradition, given that the Enlightenment project was to free the individual from the despotism of traditions borne by church and state.[34] However, 'tradition' is here taken in MacIntyre's sense of 'a coherent movement of thought' that is, necessarily, relative to a given

30 See the references in *Gianarelli v Wriath* (1988) 165 CLR 543, 580 per Brennan J.

31 Thomas Aquinas, *Summa Theologiae* (1975) vol 38, 151: '[I]f [a lawyer] takes up a cause knowing that it is unjust, he is undoubtedly committing a grave sin, and he is bound to make good the loss which the other party incurred unjustly. If, on the other hand, he took up the cause in ignorance, thinking that it was just, he is excused to the extent that ignorance excuses'. See also M Harding, 'True Justice in Courts of Law' in Thomas Aquinas, *Summa Theologica* (1948) vol 3, 3345, 3355-6.

32 *R v Thomas Paine* (1792) 22 St Tr 357, 412. Samuel Johnson gave the same rationale for unprejudiced representation in 1773: J Boswell, *The Journal of the Tour to the Hebrides* (1985) 168-9.

33 J Keane, *Tom Paine: A Political Life* (1995) 330-3, 345-9.

34 I Kant, 'What is Enlightement?' in *Foundations of the Metaphysics of Morals* 51-2 ('Foundations').

place and culture but over an extended period.[35] This recognises that liberalism is both an 'ought' and an 'is'. It is a normative philosophy in a broad sense but one that 'belongs to the flesh and bones of our institutions'.[36] As intellectual scaffolding for English-speaking societies, it is the tradition within which enquiry and debate about justice, morals, institutions and our life together take place. So, its efforts at enabling individuals to transcend past dogmatisms have, paradoxically, transformed liberalism itself into a tradition by which individuals are expected to develop and enjoy their own life plans, preferences and priorities. The liberal tradition does not allow individuals, or government, the use of force to reshape society in accordance with any given idea of human good.[37] In this light, it can be seen how unilateral divorce after a minimal period of 12 months separation emerges as a liberal institution. The 12-month separation rule abdicates any responsibility for defining the moral structure of marriage other than requiring that a year's thought be given to the relationship. So long as they wait long enough, the rule leaves the circumstances in which marriage can, if at all, be dissolved to the choice of individuals involved.

At this point, the import of Lord Hobhouse's description of the cab-rank rule as 'a fundamental and essential part of a liberal legal system'[38] becomes apparent. Its supporters present the agency ethic as an essential structural characteristic of a liberal society. Although the functional role of an advocate could provide an alternative justification of a more limited ethic of unprejudiced representation, the liberal tradition has necessarily seen this ethic enlarged and extended. It is not limited to work in criminal defence or litigation, and it has become more central in defining the lawyer's role in the broader community. The modern accounts of the agency ethic, whether supportive or critical, assume that it directs

35 A MacIntyre, *Whose Justice, Which Rationality?* (1988) 326 ('Whose Justice'); see also ibid, 7. In more detail, '[a] living tradition then is a historically extended, socially embodied argument, and an argument precisely in part about goods which constitute that tradition. Within a tradition the pursuit of goods extends through generations, sometimes through many generations. Hence the individual's search for his or her good is generally and characteristically conducted within a context defined by those traditions of which the individual's life is a part, and this is true both of those goods which are internal to practices and of the goods of a single life … [T]he history of a practice in our time is generally and characteristically embedded in and made intelligible in terms of the larger and longer history of the tradition through which the practice in its present form was conveyed to us; the history of each of our own lives is generally and characteristically embedded in and made intelligible in terms of the larger and longer histories of a number of traditions': A MacIntyre, *After Virtue: A Study in Moral Theory* (2nd ed 1985) 222. For doubts as to whether liberalism can be called a tradition, see A Rudd, 'Reason in Ethics: MacIntyre and Kierkegaard' in JJ Davenport & A Rudd (eds), *Kierkegaard After MacIntyre* (2001) 131, 135.

36 G Grant, *English-Speaking Justice* (1998) 80.

37 *Whose Justice*, above n 35, 335-6.

38 *Arthur JS Hall & Co (a firm) v Simons* [2000] 3 WLR 543, 610.

the lawyer's conduct in all kinds of legal work,[39] but in doing so locate the ethic in the concept of individual autonomy.[40] These reached maturity in Pepper's 'autonomous citizenship' rationale for the agency ethic, in research conducted for the American Bar Foundation.[41] A brief sketch of this model, and of supporting accounts of the lawyer's role, show how it is argued that the agency ethic is embedded in the practical outworking of the secular liberal tradition.

The autonomy paradox

The autonomous citizenship model of the lawyer's role assumes that government and law are organised to allow individual citizens the right to choose their own ideas of the good life and, within limits required only to maintain personal and public safety, to be able to live their chosen lives to the greatest extent possible. In other words, it assumes a liberal tradition and that the law roughly embodies a liberal tradition. While the law must have a minimum moral content, it does not overly prescribe moral standards for all citizens to live by. Indeed, it has peculiar institutions like contracts, trusts, companies and wills that assist choice and the individual's right to plan his affairs in ways that others might think are immoral.[42] This represents 'a societal commitment' to individual autonomy.[43] So, to the Christian a man's serial monogamy might be symptomatic of a longstanding pattern of immoral promiscuous behaviour. The 12-month separation rule nevertheless leaves the moral judgment to the man himself, and even provides the means by which he can perpetuate his behaviour by allowing divorce without reference to moral wrongdoing, and at his own option.

Law is thus elevated as the basic institution by which individual autonomy is realised. The conclusion of the autonomous citizen model is, then, that if the individual citizen is to have access to law and to realise his autonomy he needs the help of a lawyer, and a morally heteronomous lawyer at that. The complexity of law means that it can often only be deployed with expert assistance.[44] As Schneyer points out, the individual often needs a lawyer's advice just to recognise what his rights are.[45] Pepper concludes that:

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39 Wasserstrom, above n 16, 12; Pepper, above n 16, 621-4; ML Schwartz, 'The Professionalism and Accountability of Lawyers' (1978) 66 *California Law Review* 669.

40 Freedman, above n 16, 197, 203, 204-5; Pepper, above n 16, 616-17; Schneyer, above n 16, 1539-40.

41 Pepper, above n 16. Pepper calls this the 'first-class citizenship' model. However, 'first-class citizenship' does not convey the specific liberal sense around which Pepper assumes a modern polity is organised. Given classical approaches to citizenship, Pepper's own term does not require the emphasis on autonomy that lies at the heart of his model.

42 Ibid, 616-17.

43 Ibid; Schneyer, above n 16, 1539-40.

44 Pepper, above n 16, 616-17.

45 Schneyer, above n 16, 1540.

> … [f]irst-class [ie autonomous] citizenship is frequently dependent on the assistance of a lawyer. If the conduct that the lawyer facilitates is above the floor of the intolerable – is not unlawful – then this line of thought suggests that what a lawyer does is a social good. The lawyer is the means to first-class [autonomous] citizenship, to meaningful autonomy, for the client.[46]

In the scholarly literature the lawyer's role under this model has been tagged the hired gun,[47] although Pepper rightly doubts that much legal work makes the lawyer anything analogous to the client's personal champion.[48] He prefers the image of a skilled machinist.

> … [T]he image more concordant with the first-class [autonomous] citizenship model is that of the individual facing and needing to use a very large and very complicated machine (with lots of whirring gears and spinning data tapes) that he can't get to work. It is theoretically there for his use, but he can't use it for his purposes without the aid of someone who has the correct wrenches, meters and more esoteric tools, and knows how and where to use them.[49]

However, it would be an even more accurate representation of the lawyer's role in this model to depict her as a cog in the justice machine. While the image of a lifeless cog is certainly more disturbing,[50] it does reinforce more immediately than the image of a skilled machinist that, according to this model, the lawyer is part of the scheme of liberal justice – not an outside operator who can choose to start the machine or not.

The reason why the lifeless cog is a better metaphor for Pepper's model of the lawyer's role is that he concludes that the role is amoral, as the lawyer has 'no moral input' into the client's plans.[51] This means that, so far as a lawyer's work is concerned, the control of its moral direction is given over entirely to the client. In

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46 Pepper, above n 16, 617.

47 The references are numerous. Eg, see ibid, 623; Freedman, above n 16, 192; Wolfram, above n 23, 580-1; T Schneyer, 'Some Sympathy for the Hired Gun' (1991) 41 *Journal of Legal Education* 11; TL Shaffer and RF Cochran, *Lawyers, Clients, and Moral Responsibility* (1994) 15-29.

48 Pepper, above n 16, 623. Kressel's study of the attitudes of New Jersey divorce lawyers revealed that few found the image of the hired gun appropriate: K Kressel, *The Process of Divorce: How Professionals and Couples Negotiate* (1985) 148.

49 Ibid 623-4.

50 Ie, because it parallels Weber's depiction - 'horrible to think' - of modern, dehumanised bureaucrats as 'those little cogs, little men clinging to little jobs and striving toward bigger ones—a state of affairs which is to be seen once more, as in the Egyptian records, playing an ever increasing part in the spirit of our present administrative systems': M Weber, 'Bureaucratization' in JP Mayer, *Max Weber and German Politics* (2nd ed 1956) 125, 127. Kressel uses the metaphor of a 'mechanic': above n 49, 131.

51 Pepper, above n 16, 626.

effect, the lawyer *qua* lawyer is a morally heteronomous agent. Here, two points need clarification. First, even within a liberal account of the lawyer's role the need to describe it as 'amoral' is doubtful. It is probably as accurate to depict the lawyer's role in the autonomous citizenship model as sharing the moral basis of the liberal tradition itself. The model's conclusion is that the lawyer's refusal to invoke her personal morals in her professional work is needed to realise a 'social good'[52] – the societal commitment to an individual's autonomy. For the most part the moral grounds that liberal philosophers claim for liberal polities descend from Kant's categorical imperative to treat individuals as ends in themselves, and not as means to another's or to government's own ends.[53] This immediately illuminates the paradox of autonomy in the standard secular conception of the lawyer's role. The model openly treats the lawyer as 'the *means* to first-class [autonomous] citizenship'.[54] The lawyer is a *means* of guaranteeing that the individual citizen is treated as an *end*. On this understanding, the question arises whether this role offends the basic Kantian ethic that it supposedly rests on.

This leads to the second point. The unexplored assumption of the model is that the heteronomous lawyer is indispensable if all are to be given access to law. Again, this is debatable. For example, a competitive market for legal services is another liberal institution that could ensure broad access to law, without requiring any individual to trade her moral autonomy for the right to become a lawyer. While *any* legal system demands that judicial decision-making be directed by law – and law could represent a moral scheme differing from the judge's personal morals - there is much greater doubt that a liberal society depends on morally indifferent lawyers.

Liberal agents

Liberalism is not necessarily limited to a political structure that enables individuals to be treated as ends in themselves, to the extent that that is possible. There are liberals – notably Rawls – who recognise a fuller conception of the good for individuals themselves.[55] Liberalism has its 'transformative dimension'. Even

52 Ibid 633.

53 This is the second version of the categorical imperative, stated in Foundations, above n 34, 51-2. See also I Kant, 'On the Common Saying: 'This may be true in theory, but it does not apply in practice' in H Reiss, *Kant's Political Writings* (1970) 73. Rawls effectively treats this is the 'thin' conception of the good, adapted to the limited political objective of neutral government, and 'thinner' than the different ideas of the good held by the individuals who make up the society in question: J Rawls, *A Theory of Justice* (1972) 395-9. Dworkin suggested that both Rawls and he ground liberalism on a thin ethic of equal concern and respect for individuals, a standard that has evident Kantian antecedents: R Dworkin, 'The Original Position' in N Daniels (ed), *Reading Rawls* (1975) 16, 51-2.

54 Pepper, above n 16, 617 (emphasis added).

55 Rawls, above n 53, 433-9, 548-54.

though it does formally allow citizens to pursue their own life plans and goals, liberalism necessarily has its own influence on the development of those plans and goals. It 'must constitute the private realm in its image, and it must form citizens willing to observe its limits and able to pursue its aspirations'.[56] A liberal society makes a liberal individual. And further, the agency ethic strongly promotes the idea of a lawyer as a liberal individual.

Liberal societies are marked by extensive social segmentation, whether because of the political accommodation of moral pluralism, an advanced division of labour, or the structural differentiation of economic, home, religious, cultural and educational life. In any liberal society, the individual must negotiate a range of different social settings, each potentially with different plans and goals. So, part of a liberal society's transformative dimension is that it encourages the individual to deny the existence of one conception of the good that embraces all social settings. It encourages the division of life into segments, and the limiting of God to one of those segments.[57] At this point, some deep differences between liberal thought and Christian belief emerge. Two advocates of individualism, Rawls and Kierkegaard, can agree that the Christian's single-minded desire for God is 'madness'. Rawls thinks it best to rationalise the madness by confining it to Sunday.[58] On the other hand Kierkegaard thought that, if it could be called religion at all, 'the Sunday God-relationship' was a lower form of religion. Only by choosing the madness - the religious life - could the individual develop personal coherence, as that choice levelled the different commitments embodied in different social roles and left the individual alone before God.[59] However, the individual who does not make that choice is capable of being transformed by liberalism's fuller conception of the good, and could develop a segmented existence. To return to MacIntyre, he concludes that:

> … to be educated into the culture of a liberal social order is, therefore, characteristically to become the kind of person to whom it appears normal that a variety of goods should be pursued, each appropriate to its own sphere, with no overall good supplying any overall unity to life.[60]

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56 S Macedo, 'Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism' (1998) 26 *Political Theory* 56, 58; R Ahdar, 'Religious Group Autonomy, Gay Ordination and Human Rights Law' in R O'Dair & A Lewis (eds), *Law and Religion: Current Legal Issues 2001, Volume 4* (2001) 275-7.

57 As MacIntyre has suggested from his earliest writings: *Whose Justice*, above n 35, 337; A MacIntyre, *Marxism: An Interpretation* (1953) 9-10.

58 Rawls, above n 53, 554.

59 SA Kierkegaard, *Concluding Unscientific Postscript* (1941) 423 ('Concluding Unscientific'); SA Kierkegaard, *The Present Age* (1962) 52-4, 68.

60 *Whose Justice*, above n 35, 337.

It is no wonder, then, that he casts lawyers as 'the clergy of liberalism'.[61] The lawyer's role in negotiating a life that subordinates her personal morals to the client's is characteristic, though more pronounced, of others' experience of pursuing different goals in different social settings. In this connection the agency ethic can be seen as demanding that the lawyer be more than a cog in the justice machine, giving effect only to its thin moral basis of delivering the equal treatment of individuals as ends. It demands that the lawyer embrace liberalism's fuller conception of the good, and become a liberal individual.[62] The 'clergy' must be exemplars of liberal belief.

The priority of Christian morals

Christians can, and must, endorse much that emanates from the broad liberal tradition.[63] After all, the genealogical descent of liberalism from Protestant theologies and political agitation itself suggests that there will be much common ground between liberal ideas and Christian theology. Nevertheless, the Enlightenment project has also seen modern liberalism depart from its theological or metaphysical sources.[64] Indeed, as will soon be explained, the specifically liberal definition of personal autonomy sits uncomfortably beside the Christian belief that man is inescapably God-dependent and possesses his dignity as one created and loved by God.[65] Still, the liberal justifications of lawyers' standard agency ethic themselves recognise the paradox that, as an important means by which individuals can enjoy personal autonomy, the lawyer *qua* lawyer must be denied the same right to personal autonomy. It is therefore no surprise that alternative accounts of the lawyer's role suggested by religionists should agonise over the agency ethic, and advocate greater lawyer autonomy.[66]

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61 Ibid 344.

62 Shaffer and Cochrane, above n 47, 67-8.

63 Eg, a liberal democracy could be considered a – though not the - Christian state to the extent that it generally allows the believer (along with others) to practise his faith as he believes he should: R Mortensen, 'A Christian State: A Comment' (1999) 13(2) *Journal of Law and Religion* 101.

64 Eg, see Grant's explanation of Rawls' admiration for Kant's egalitarianism, but without any acknowledgment of Kant's metaphysical conception of the will: Grant, above n 36, 31-4.

65 Cf G Tinder, *The Political Meaning of Christianity* (1991) 15, 17, 28.

66 Eg, *A Christian and a Lawyer*, above n 24, 21-33; Shaffer and Cochran, above n 47, 60-1. Sir Gerard Brennan claims broadly that 'there is no conflict between Christian and professional duty' but recognises that '[o]ur relationship with God … should so mould our conduct that we neither contribute to an injustice nor unreasonably suffer an injustice to go without remedy': 'The Christian Lawyer' (1992) 66 *Australian Law Journal* 259, 260, 261. For a Jewish example, see SH Resnicoff, 'Professional Ethics and Autonomy: A Theological Critique' in O'Dair & Lewis, above n 56, 329, 343-5. The following is partly an attempt to adjust Resnicoff's approach to a Christian theological perspective.

A theology of autonomy

Theological accounts of legal practice do not necessarily need a stronger conception of autonomy than secular liberalism espouses. As argued earlier, the assumption of a lawyer's moral heteronomy in the autonomous citizen model could compromise the standards of Kantian ethics and, therefore, even within liberalism there could be a re-presentation of the lawyer's ethic for client representation that both enhances lawyer autonomy and serves as a more coherent alternative to the agency ethic. Accordingly, some consensus on defining a professional role that allows a lawyer greater moral input into the work undertaken for a morally autonomous client is possible. The disagreement between Christian and liberal accounts of professional autonomy stem rather from the different conceptions of the *source* of human autonomy, and therefore the nature and motivation for the lawyer's having moral input into her professional work.

The secular liberal concept of autonomy makes man 'the glory, jest and riddle of the world'.[67] Individual autonomy therefore tends to be regarded as a condition of moral independence and self-sufficiency. Liberals may disagree as to whether morals inevitably originate within the individual or, more precisely, within human reason, but the characteristic view is that rational moral standards capable of measuring the rights and wrongs of divine and human action are a product of human reason.[68] Therein lies secular liberalism's radical disagreement with Christian belief.

A Christian must reject the idea that man is morally self-sufficient, and the idea that the conduct of God or man is to be judged against rational standards developed by man himself. Indeed, to the believer, any proposition that rationally developed human standards should be the measure of Christ, the god-man who is prior to and the source of all things,[69] must by definition be false. Some would say

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67 Alexander Pope, quoted in M Kuehn, *Kant: A Biography* (2001) 240. I adopt Kant's conception of autonomy as the most influential and commonly used in modern liberalism. As the dominant thinker of the Enlightenment and 'the philosopher of Protestantism', Kant has been regarded as both the fulfilment and negation of both the Enlightenment and reformed Christian thought. He therefore serves as an important, though often ambiguous, point of distinction between secular and Christian ideas: P Tillich, *A History of Christian Thought: From its Judaic and Hellenistic Origins to Existentialism* (1968) 361-2 ('Christian Thought').

68 Foundations, above n 34, 5-6, 37-8; I Kant, *Practical Philosophy* (1996) 255; JB Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (1998) 512-13. In Kantian thought, the categorical imperative is not a product of the will, as it is established a priori and without reference to experience: Foundations, above n 34, 37-9.

69 Col 1: 17.

it is blasphemous.[70] The Christian belief is that man is utterly dependent on God as his creator and nourisher. Therefore, the individual's being and dignity are necessarily God-dependent. Furthermore, Christian teaching is that, as the believer grows in grace, his consciousness that he is God-dependent expands and deepens. To develop the mind of Christ is to grow more aware of one's essential God-dependence and, as a result, to become more completely human. For the secular liberal, this is a wholehearted embrace of heteronomy and, thereby, denies much of the Enlightenment project. The Christian belief in God-dependence is therefore as repugnant to the liberal conception of moral autonomy as, for the believing Christian, the secular claim to moral self-sufficiency demands an exile from Eden.

Furthermore, this God-dependence is reinforced by man's epistemic and ethical condition after the Fall. There are limits to the human capacity to reason within a finite world,[71] and there is a perversion of man's will that disables his capacity to live in accordance with God's will.[72] The secular liberal may, at times, also agree with something akin to the Christian doctrine of original sin or, as Kant dubbed it, radical evil.[73] However, Christian theology is more conscious that the state of original sin reinforces the vulnerability of human existence and man's dependence on the will of God himself to transcend those limitations by a powerful act of grace.[74] Autonomy must therefore build on this comprehensive picture of man as God-dependent, and present the individual's moral independence in some sense different to self-sufficiency. For the most part, in Christian ethics autonomy is only presented as an explanation of the social or political basis on which the expression of the Christian freedom to live faithfully in relationship with God is grounded.

In this respect, autonomy is a response to both original sin and the possibility of grace. The Fall leads to the recognition that, as in the individual's own actions, evil can be done through collective human action in social institutions and government. It is therefore just as sensible to limit the social, political and legal claims made on the individual as it is to recognise the need to place social, political and legal restrictions on the individual's conduct when it has potential to do evil to others. As Tinder said:

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70 A MacIntyre, *Difficulties in Christian Belief* (1959) 105.

71 Kantian epistemology is the same. Human finitude is a function of 'the two pure forms of sensuous intuition': space and time. Man is limited in that he cannot represent to himself anything that transcends space or time: *Critique of Pure Reason* (1934) 43-54, but especially 61.

72 I Kant, *Religion within the Limits of Reason Alone* (1960) 27.

73 Ibid, 34-9.

74 *Christian Thought*, above n 67, 362.

> It is perverse to deny liberty to almost everyone because of human faults and then to grant some, who are human and thus presumably affected by the same faults as all others, the limitless liberty inherent in absolute power.[75]

Limitations on social and governmental claims made on individuals importantly provide space for the individual to choose to respond faithfully to God's grace. And, while the theological justification for this social and political autonomy is primarily to create freedom for the individual to make a choice *for* the religious life, it necessarily accepts that the same autonomy must create the possibility of freedom *from* religion.[76] Tinder fears that a Christian commitment to autonomy is a morally perilous decision to allow people not to resist evil.[77] Still, unless there is the freedom to choose to reject grace it remains that there can be no true freedom to choose to respond to it. This does not create an autonomy paradox, although paradox is a frequent feature of Christian theology. Autonomy in this sense respects the individual for what he can hope to be,[78] and so consistently responds to both the impaired condition of man after the Fall and the opportunity given to all to receive God's grace.

Initially, the effect of Christian autonomy seems indistinguishable from that of secular liberal autonomy. However, as we will see, the individual's God-dependence has implications for the enhanced autonomy of the Christian lawyer. First, while recognising that different ethical commitments can attach to different social roles, the autonomy exercised by a Christian does not allow any significant segmentation of his life into different moral universes - 'with no overall good supplying any overall unity to life.'[79] Life still brings social roles and role morals to all individuals, and if in a liberal society this kind of segmentation is exaggerated then, to a significant extent, the Christian must live with that and the ambiguities it leaves in its wake. However, the development of a Christian mind enlarges the power to transcend circumstance, and to liberate the believer from the control of socially constructed circumstance.[80] The believer's very consciousness that his dependence is on *God* - in St Anselm's words, 'something greater than can be thought'[81] - carries a profound intellectual recognition that God's will must be done. As Kierkegaard explained, 'the absolute consciousness of God consumes [the believer] as the burning heat of the summer sun when it will

75 Tinder, above n 65, 107; see also R Niebuhr, *The Children of Light and the Children of Darkness* (1944) 70-1.
76 Tinder, above n 65, 106-7; Ramsey, above n 14, 356-7.
77 Tinder, above n 65, 102.
78 Ibid 105.
79 *Whose Justice*, above n 35, 337.
80 Keeling, above n 14, 45; S Hauerwas, *Vision and Virtue: Essays in Christian Ethical Reflection* (1974) 60-2.
81 Anselm of Canterbury, above n 19.

not go down'.[82] Evidently, man's will to do what emanates from God remains impaired, but the Christian's growth in grace should naturally witness a closer alignment of his will with the will of God. The Christian might still know that he must negotiate different role morals in different roles, but in none could he fail to 'seek first [God's] kingdom, and his righteousness'.[83] So, recognising a degree of Christian autonomy to express our God-dependence in all social roles brings us to the point made by Pope John Paul in the statement on indissolubility. Lawyers 'should always decline the use of their profession for an end that is contrary to justice'[84] – 'justice' being a specific sense of morality.

Secondly, Christian autonomy implies humility. In particular, it suggests the need for reluctance, and even caution, in exercising moral judgment about another.[85] The action of God's grace does not rescue the believer from man's finitude - quite the opposite. It enhances the believer's consciousness of his own God-dependence and, as a consequence, his bounded knowledge and moral incapacities. There are Christian ethicists who suggest that this strictly limits us to judging our own actions, and to assessing what another's actions suggest about his needs. The 'morally serious' individual will be prepared to give moral reasons for his own actions, and submit them willingly to the test of others' reasoned judgment.[86] However, as a mild aspect of the Christian ethic of self-abnegation, the believer would make no equivalent demand of another. Indeed, on this understanding, the only judges qualified to evaluate another person's actions are God and the other himself.[87] I doubt that Christian ethics demand a moratorium on exercising moral judgment about others, and serious conclusions that evil is being done have to be made. But it is inevitably a hazardous exercise and, when our beliefs about God-given standards are involved, a weighty judgment to make about another. The moral priority is certainly to listen closely, to respond with care, and to suspend judgment if there is the slightest possibility that of making an unjust assessment of another.[88]

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82 Concluding Unscientific, above n 59, 433. The depth of the religious commitment in Kierkegaard is more rationally cast by Tillich as the individual's 'ultimate concern': P Tillich, *Dynamics of Faith* (1957) 1-4, 9-12.

83 Matt 6: 33. 'The Christian dependence on God is a little like falling in love; and like the marriage which follows falling in love it has its own difficulties, adjustments and disappointments; and its own dull patches; but like marriage, it sets limits on our freedom only as a necessary preliminary to the deeper exploration and adventure which is the nature of commitment, either to God or to another person. It is the exploration and the adventure that we really talk about when we use the words 'freedom' and 'responsibility': Keeling, above n 14, 49.

84 Indissolubility, above n 1, 9.

85 Matt 7: 1-5.

86 Hauerwas, above n 80, 60-1; Foundations, above n 34, 19-20, 39-41.

87 Cf Keeling, above n 14, 45-6.

88 Jas 1: 19.

In conclusion, the Christian claim to exercise autonomy in moral judgment rests on man's limited epistemic and ethical capacities. As a consequence, the believer must recognise that this autonomy simultaneously embodies his choice to respond in obedience to Christ, and his inherent capacities to misunderstand even what that might entail. Furthermore, the believer's obedience to Christ necessarily entails the priority of his duty to care for the other. The result is that the believer should be able to claim the freedom to transcend, albeit imperfectly, the discontinuities of the different roles he will assume in a liberal society. In those roles he does have an obligation to 'seek first his kingdom' and, it would seem, to give careful - in the sense of 'care-full' – moral input to the tasks assigned to those roles. Throughout, nevertheless, the consciousness of his human imperfection and his chronic deafness to the voice of God should, despite the obligation to give careful moral input, reinforce a reluctance to assume too quickly the role of moral judge.

Careful moral input and divorce practice

In Australia, the 12-month separation rule generally makes an application for divorce straightforward. There is often no need for a lawyer to be involved, let alone to navigate questions of law or contested evidence for the client. The reported cases show that there is litigation over contested questions of jurisdiction[89] and capacity,[90] and nominal prerequisites to a divorce like counselling[91] or arrangements for children.[92] Soon after the 12-month separation rule was introduced, the Family Court had to answer questions as to what amounted to 'separation'.[93] But, as these questions were resolved the proportion of

89 *In the Marriage of Woodhead* (1997) 23 Fam LR 559; *In the Marriage of Ferrier-Watson and McElrath* (2000) 26 Fam LR 169.

90 *In the Marriage of D* (2001) 27 Fam LR 736.

91 *In the Marriage of Phillipe* (1977) 4 Fam LR 153; *In the Marriage of Kelada* (1984) 9 Fam LR 576.

92 S 55A *Family Law Act 1975* (Cth); *In the Marriage of Warne* (1976) 1 Fam LR 11,602; *In the Marriage of Potter* (1976) 2 Fam LR 11,554; *In the Marriage of Cusano* (1976) 2 Fam LN 28; *In the Marriage of Opperman* (1978) 4 Fam LR 135; *In the Marriage of Maunder* (1999) 25 Fam LR 579.

93 *In the Marriage of Wiggins* (1976) 1 Fam LR 11,101; *In the Marriage of Zureb* (1976) 1 Fam LN 9; *In the Marriage of Todd* (No 2) (1976) 1 Fam LR 11,186; *In the Marriage of Tye* (1976) 1 Fam LR 11,235; *In the Marriage of Fenech* (1976) 1 Fam LR 11,250; *In the Marriage of Franks* (1976) 1 Fam LR 11,341; *In the Marriage of Pavey* (1976) 1 Fam LR 11,358; *In the Marriage of Lane* (1976) 1 Fam LR 11,385*; In the Marriage of McLeod* (1976) 1 Fam LR 11,280; *In the Marriage of Quigley* (1976) 1 Fam LR 11,526; *In the Marriage of Ikonomou* (1976) 1 Fam LN 17; *In the Marriage of Hodges* (1977) 2 Fam LR 11,524; *In the Marriage of Stokoe* (1976) 2 Fam LR 11,151; *Clift v Clift* (1976) 2 Fam LR 11,369; *In the Marriage of Potter* (1976) 2 Fam LR 11,554; *In the Marriage of Birch* (1976) 2 Fam LN 8; *In the Marriage of Cusano* (1976) 2 Fam LN 28; *In the Marriage of Hunt* (1977) 3 Fam LR 11,144; *In the Marriage of Falk* (1977) 3 Fam LR 11,238; *In the Marriage of Caretti* (1977) 3 Fam LR 11,374; *Velterop v Velterop* (1977) 3

cases that raise legal and factual disputes about divorce itself became negligible. The importance in Australia of instructing a lawyer for a divorce is that, in a minority of cases, it is an early step in dealing with the more complex questions of parenting, property division and ongoing maintenance. It is therefore likely to be within the broad context of comprehensive family breakdown that the lawyer might be confronted with the moral question of divorce.

Family breakdown can raise many other painful moral questions for the lawyers involved. Among these, the plight of children and the fair distribution of property are prominent. Increasing attention is being given to the problem that the liberal structure of the legal system compels the lawyer to consider only the interests of her individual client, even when that may injure the family as a whole.[94] And, there is a dilemma for lawyers that even reasonable legal costs can swallow a large proportion of the property left over for members of a family on average household income after the family has disintegrated.[95] In comparison, the question of divorce itself could seem insignificant, and to many of a secular mindset also a bit quaint or *passé*. However, for Christians it remains a moral question and one that, at times, is capable of conceiving all of the other moral questions that arise in family breakdown.

So far as divorce is concerned, the demarcation of a moral question will be clearer for the believer, most likely a Catholic or Anglican, who holds to the indissolubility of marriage. It becomes less distinct for Protestants, especially those who edge towards the belief that divorce can be morally justified even when no spouse is at fault. But assuming that, on the basis of her own understanding of God's will, the Christian lawyer does have moral misgivings about a divorce sought by a potential client, the question is again: should she arrange the divorce?

The liberal account of the lawyer's role suggests that the Christian's misgivings be discounted, and the divorce arranged. This may well be the real assumption underlying the thinking of those who dismissed the papal statement on indissolubility as intruding on a 'state issue'.[96] The lawyer might sincerely believe, say, that her own marriage is indissoluble, but either is unprepared to extend that belief to her client's marriage or, if she does think that the client's marriage is essentially indissoluble, believes that her work as a lawyer precludes her giving any moral input to her client's circumstances. In these cases, the lawyer commonly explains the discontinuities of her moral world by appealing to her

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Fam LN 3; *In the Marriage of Bates* (1977) Fam LN 10; *In the Marriage of Manning* (1978) 4 Fam LR 173.

94 Eg, TL Shaffer, 'The Ethics of Radical Individualism' (1987) 65 *Texas Law Review* 963 ('Ethics of Individualism'); RHS Tur, 'Family Lawyering and Legal Ethics' in S Parker & C Sampford, *Legal Ethics and Legal Practice: Contemporary Issues* (1995) 145.

95 Tur, above n 94, 147-51.

96 Lane, above n 2; Murray, above n 2.

client's sole right to decide the rights and wrongs of the divorce, or to the client's right to have access to law.[97] However, these reasons are a species of *liberal* justification for her behaviour. It is only in a rare case, where cab-rank duties might apply, that these reasons could amount to a strict appeal to legal or professional rules.

A greater recognition of Christian autonomy suggests that, when a lawyer has misgivings about a moral question like divorce, those misgivings must at least be expressed. Family law is well structured for allowing moral input throughout the course of a lawyer's representing a client. There is also strong evidence to show that family lawyers prefer negotiation and compromise, where moral input and outcomes developed by reference to moral choices are more likely.[98] The law, especially concerning children, is less determinate than, say, revenue or corporate law, and leaves larger spaces for choice and moral judgment in negotiating lawful outcomes.[99] However, the question concerning the initial application for a divorce is of a different kind to that raised by parenting and property disputes, as divorce raises the prospect of 'cooperation' in - as the lawyer concerned may see it - what could be an immoral purpose at the threshold of the retainer. As acceptance of instructions is the critical point at which the ethical question of a lawyer's cooperation in another's cause arises, it is also important that those misgivings are expressed and explored at the initial interview.

It should be evident that, framed by an awareness that there is a Christian responsibility to care for the other but that the Christian's moral judgment might simply be wrong, the lawyer giving moral input to a question of divorce should be sensitive to avoid preaching, self-righteousness and Pharisaism. The risk that the potential client might perceive that moral input is a judgmental attitude is especially pronounced in family law, even if lawyers in the field are reputed to have a higher degree of personal sensitivity to their clients' emotional conditions.[100] However, moral judgment would be even more Pharisaic and careless if the lawyer were to decide that the cause was immoral, without any discussion or mutual examination of the problem with the potential client. That degree of lawyer paternalism also denies the client's moral autonomy, and

97 As a Catholic lawyer in Melbourne said: 'I don't believe in divorce for myself … but there are a lot of people who get divorced … As lawyers we are supposed to uphold the law and if part of the law is you can get a divorce, then it would be hypocritical not to represent them': Farrant, above n 6.

98 R Ingleby, *Solicitors and Divorce* (1992) 156-61; Kressel, above n 48, 166-7. Cf A Sarat and WLF Felstiner, *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process* (1995) 145, who suggest that lawyers are reluctant to discuss the causes of a marriage failure with a client. The no fault law of divorce may well discourage that conversation.

99 Tur, above n 94, 167-8.

100 Ibid 164; Sarat and Felstiner, above n 98, 151-2.

assumes a certitude of moral knowledge that, after the Fall, a Christian should not be claiming.

Interestingly, the most influential of contemporary Christian accounts of the lawyer's role - Shaffer's - puts discussion about morals at the centre of an ethical response to any potential collision between the lawyer's personal morals and those of the client. Shaffer variously describes this as moral 'discourse',[101] 'counselling'[102] or 'conversation'.[103] However, the reason for a discussion about morals is to give expression to the Christian lawyer's duty *to* care.[104] Shaffer eschews the poles of the agency ethic and paternalism and values the creation of a deep personal relationship that transcends the socially constructed roles of lawyer and client, though with a more communitarian bent than I have been prepared to develop.[105] He adopts the idea of the lawyer as a 'friend'.[106] This may rest on an optimistic assessment of the time available for the development of deep personal relationships in legal practice and of the client's motives in wanting to pay a lawyer to represent him, but the primary goal is to deal with another's moral issues *as if* one were the other's friend.[107] The priority of care does demand a rejection of both client-control and lawyer-control of decisions about the morals of the lawyer's work, and, I have argued, this is reinforced by the Christian lawyer's consciousness that she may misunderstand the moral obligations entailed in being faithful to Christ.

It therefore seems that Christian autonomy is generally not exercised if instructions are bluntly refused simply because, in the lawyer's genuine belief, the

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101 *A Christian and a Lawyer*, above n 24, 28, 30, 32; Shaffer and Cochran, above n 47, 48, 50, 52.

102 Shaffer and Cochran, above n 47, 45.

103 *A Christian and a Lawyer*, above n 24, 32; Shaffer and Cochran, above n 47, 50.

104 *A Christian and a Lawyer*, 21-33. Shaffer and Cochran suggest that moral discourse must be conditioned by reflectiveness, tolerance, honesty and care: Shaffer and Cochran, above n 47, 52-3.

105 A Christian and a Lawyer, above n 24, 28-30; Shaffer and Cochran, above n 47, 44-7; TL Shaffer and M Shaffer, *American Communities and Their Lawyers: Ethics in the Legal Profession* 20-5.

106 *Ethics of Individualism*, above n 94, 982; Tur, above n 94, 170; cf C Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship' (1976) 85 *Yale Law Journal* 1060. For a small sample of critiques of the idea of the lawyer as friend, see RT Begg, 'The Lawyer's License to Discriminate Revoked' (2000) 64 *Albany Law Review* 153 (agency ethics); CA Gear, 'The Ideology of Domination: Barriers to Client in Legal Ethics Scholarship' (1998) 107 *Yale Law Journal* 2473 (agency ethics); JL Sammons, 'Rank Strangers to Me: Shaffer and Cochran's Friendship Model of Moral Counselling' (1998) 18 *University of Arkansas Little Rock Law Journal* 1; WB Wendel, 'Public Values and Professional Responsibility' (1999) 75 *Notre Dame Law Review* 1.

107 Shaffer and Cochran, above n 47, 45.

work is of an immoral kind.[108] In the case of divorce, a Protestant lawyer who believed that a situational assessment had to be made before deciding whether a divorce were morally justified probably would be deeply engaged in 'moral discourse' with a client before misgivings about a particular divorce could arise. In the Pope's more morally determinate statement on indissolubility, some discussion between lawyer and potential client about the rights and wrongs of divorce would seem to be implied in the lawyer's need to know whether she would be directing her efforts at the break-up of the marriage.[109] However, careful moral input demands more. In these examples, both the Protestant lawyer's situation ethics and the Catholic's tenet of indissolubility would, if both lawyers were morally serious people, themselves be subjected to testing in the course of the discussion. As a result of this kind of discussion, the lawyer may adjust her position, the client may change his, they may both realise that they only have a reasonable disagreement about the application of an agreed moral standard, or each may remain unconvinced by the other. Shaffer, again emphasising the personal relationship, values the discussion itself. 'And it is possible, given a mutual commitment to be honest …., to seek my client's growth, and to seek my growth as well as I deal with my client'.[110] It remains that, even where the greatest care is expressed, the lawyer's personal morals and those of the client could continue in collision. In a liberal society, this is inevitable. There might be a point where the lawyer thinks that her expertise is being used for an unjust end, as she sees it. Even Shaffer, a Catholic who believes that the family's interests should prevail over the individual's, apparently recognises that an extended moral conversation can take place between a lawyer and a client in a family law matter, but seems to baulk at suggesting that the lawyer should formalise the family's breakdown by divorce.[111] Where the lawyer and client cannot reach a mutually acceptable compromise through moral discourse, Christian autonomy demands that the retainer be declined.[112] That is naturally a weighty decision for a morally serious lawyer to make. It is also one that, given the lawyer's limited epistemic and ethical capacities, should only be carefully and reluctantly made. Even then, it will be no placebo for the common feeling of guilt.

While discussion between a lawyer and potential client about morals can be consistent with the agency ethic, it is when the lawyer refuses to represent

108 The ethical quality of the decision will differ if, eg, divorce work is refused because the lawyer only practises in, eg, criminal defence or takeovers and acquisitions.

109 Furthermore, in Australia the Catholic Church demands that a civil divorce be obtained before applying for an annulment in the church courts: Editorial op cit. If a divorce is sought for this reason, a Catholic lawyer could have fewer moral qualms about arranging it.

110 A Christian and a Lawyer, above n 24, 31. Sarat and Felstiner suggest that, given the push and pull of professionalism and client-control, the power that lawyer and client can exercise over each other is 'fragile and contingent': above n 98, 151.

111 *Ethics of Individualism*, above n 94, 974, 988.

112 Shaffer and Cochran, above n 47, 26, 52.

another because of the morals of the cause that a Christian conception of autonomy proves to be differently positioned and differently defined to the standard conception of the lawyer's role. It is no extension of this point to conclude that, in the rare case that the cab-rank rule were to apply and be insisted upon, civil or professional disobedience could be demanded.[113] But, as with the cab-rank rule itself, the real significance of a lawyer being prepared to give careful moral input to her work is more likely to be symbolic. The papal statement on indissolubility has reiterated, for all Christian lawyers, the importance of the Christian lawyer's own judgments about the justice or moral worth of her own legal work. As a symbol of the immanent Christ,[114] the believing lawyer can transcend powerful social expectations that she exemplify the liberal individual and, instead, show that even being a lawyer is a God-given vocation.

113 Cf Dal Pont, above n 21, 58-9.
114 Cf Zech 3: 8.

MARRIAGE, DIVORCE, AND THE CATHOLIC LAWYER

*Patrick Quirk**

> …'our affections are not in our own power'—which is true enough, of course, and is precisely the reason that the marital vow exists to bind us even as our affections come and go…'
>
> Gilbert Meilaender, quoting and commenting upon a letter written by Lord Byron to Lady Caroline Lamb[1]

Introduction – was this a ban?

On January 28, 2002 Pope John Paul II gave a speech to mark the inauguration of the judicial year before the Prelate Auditors, Officials, Advocates, Promoters of Justice and Defenders of the Bond of the Tribunal of the Roman Rota.[2] The widely reported speech drew much comment and some mystification from lawyers, as well as sparking substantial media debate over the moral duties of Catholic lawyers in civil divorce proceedings.[3]

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* Associate Professor, Bond University Law School. A variant of this note was delivered at the 2002 Australian Christian Lawyers Conference hosted at Bond University on 3 May, 2002. My thanks to Dr Tracey Rowland for her comments on an earlier draft of this note; mistakes and omissions remain entirely my own.

1 Gilbert Meilaender, 'The Mess That Is Marriage' (February, 2002) 120 *First Things* 18-19. <http://www.firstthings.com>.

2 The three levels of Church courts unfold in the following hierarchy: the diocesan tribunal, the metropolitan tribunal, and the Holy See. At the upper level sits the Roman Rota (Rota Romana)(appeal court) and the Apostolic Signatura (Signaturae Apostolicae) (supervisory court). The Apostolic Signatura is effectively the Church's supreme court, handling appeals from the Rota. Further see James A Coriden, *An Introduction to Canon Law* (1991) 184.

3 'John Paul Says Catholic Bar Must Refuse Divorce Cases', *New York Times* (New York, USA), 29 January 2002, 4, Patsy McGarry and Carol Coulter 'Lawyers dismiss Pope's proposal they should not handle divorces', *The Irish Times*, 30 January 2002, 7, 'Pope's message on marriage - it's still forever', *Sydney Morning Herald* 6 February 2002. 13, 'The Pope puts lawyers in the dock', *The Age*, 31 January 2002, editorial, Katie Grant, 'Why the Pope sees divorce as a 'plague'', *The Scotsman*, 30 January 2002, 10, 'Pope call to boycott divorce work stirs Catholic lawyers', *Law Society Gazette* (UK), 1 February 2002.

This brief note is intended to explain the context of the Pope's speech and to clear away the simpler misinterpretations of his message. It will also provide background for Dr Mortensen's accompanying piece in this issue of the *Bond Law Review*. A lengthy consideration of the interaction between the Catholic Church's teaching on marriage and the rules of legal professional ethics must be left for another day.[4]

Mistranslation and correction

Due in part to a mistranslation of the original Italian, some commentators interpreted the speech as requiring Catholic lawyers to withdraw from all civil divorce proceedings for all time. Most certainly the Pope did *not* forbid Catholic lawyers for evermore from acting in such matters, nor did he unilaterally 'change' the Church's position on this (or any) issue. Claims that he was formulating a new doctrine of 'conscientious objection' applicable only to lawyers, are likewise unfounded.

According to the former Catholic Bishop of Hexham and Newcastle (UK), the Right Rev. Hugh Lindsay, the problems arose because the Vatican had not issued an English text of the speech on the Internet, and an unofficial translation had several defects including 'a truncated version of the key sentence and the omission of the next one.'[5] The Archbishop of Sydney, Dr George Pell, described the English translations of paragraph nine of the speech as 'clumsy and somewhat misleading on the role of Catholic judges and lawyers in civil divorce proceedings.'[6]

In Australia at least, this mistranslation problem was corrected amongst the New South Wales legal community through a media release issued by the St Thomas More Society and distributed to members of the New South Wales Law Society via e-mail on 1 February 2002.[7] Accompanying press coverage saw the issue die down in other States and Territories but unfortunately there has been little scholarly analysis of the speech in Australia.

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4 For a useful discussion by a Catholic Law Professor from the United States see William Wagner, 'Ethics, Faith, and Catholic Lawyers - A guide for the Perplexed', *Legal Times* (USA), 25 March 2002, 42.

5 Rt Rev Hugh Lindsay, Catholic Bishop of Hexham and Newcastle, 1974-1992, 'Reluctant Divorce', *The Independent* (London), 9 February 2002, 2.

6 Press release, 29 January, 2002.

7 Kim Cull, President, New South Wales Law Society, Pope's Position on Lawyers and Divorce Proceedings, e-mail to members, 1 February 2002. See also Mary Rose Liverani, 'What the Pope said on divorce was lost in translation' (March 2002) *Law Society Journal*, 22.

Rather than being a speech about divorce, some commentators maintain that the Pope's principal aim was in fact to *endorse* marriage[8] in the light of towering divorce rates,[9] and at the same time sensitise the consciences of lawyers. Most certainly the Pope reiterated existing Catholic teaching on divorce, as well as encouraging Catholic lawyers to study the principles of Christian morality concerning cooperation in evil. We now turn to the sacramental context of the speech before considering the role of conscience and the words of the speech itself.

The Sacrament of Matrimony

The following five points, which illustrate the Church's enduring teaching on matrimony, provide essential background to discussion of the Pope's speech and the ensuing controversy.

Firstly, marriage is one of the Church's seven sacraments and therefore central to Catholic belief and practice.[10] The *Council of Trent* (1545-1563) defined this as an article of faith.[11] Only the baptised can receive the *sacrament* of marriage; yet even for the non-baptised it remains 'a true and binding contract and a state of life set up by God.'[12] The Church has always claimed jurisdiction rights over the fundamental aspects of marriage. Because of this, secular authorities, in her view, cannot maintain that the sacrament is mere 'decoration upon the cake' of a civil marriage contract. In fact the opposite is the case. Delivering a series of lectures

8 See Russell Shaw, 'What did the Pope really say about divorce? Secular media misrepresents his recent remarks about Catholic judges and lawyers as 'interference' in civil law', *Our Sunday Visitor*, 24 February 2002. <www.osv.com>.

9 For very recent and sobering US sociological data on the adverse effects of divorce see Stephen J Bahr, 'Social Science Research on Family Dissolution: What It Shows and How It Might Be of Interest to Family Law Reformers', (2002) 4 *Journal of Law & Family Studies*, 5. Bahr maintains that 'Numerous studies have found that compared with married persons, divorced persons tend to have more economic hardship, higher levels of poverty, lower levels of psychological well-being, less happiness, more health problems, and a greater risk of mortality.'

10 See Canon 1056 which states 'The essential properties of marriage are unity and indissolubility; in Christian marriage they acquire a distinctive firmness by reason of the sacrament.' The Code of Canon Law, in English translation (1983), prepared by The Canon Law Society of Great Britain and Ireland in Association with The Canon Law Society of Australia and New Zealand and The Canadian Canon Law Society English translation copyright 1983 The Canon Law Society Trust.

11 This was not an essential change in the church's position. For a discussion of that famous line from Scripture 'What therefor God has joined together, let no man put asunder' (Matthew 19:6) see 'Jesus on Marriage and Divorce', The Ignatius Catholic Study Bible (2000), Revised Standard Version, Second Catholic Edition, The Gospel of Matthew, with introduction, commentary and notes by Scott Hahn and Curtis Mitch, Ignatius Press, San Francisco, 51. See generally V Rev Msgr Peter J Elliott, *What God has Joined: the Sacramentality of Marriage* (Alba, 1990).

12 Thomas Gilby, *Morals and Marriage*, (1952), 19.

on professional ethics at the University of Sydney in 1933, and drawing on an Encyclical of Pope Leo XIII written some fifty years earlier,[13] the Rev. C. Thompson robustly declared that 'The Civil Authority … has no more power to legislate about the Sacrament of Matrimony in any of its essential aspects, than it has to determine the matter and form of Baptism.'[14] This claim to jurisdiction over both sacrament and sacred contract goes back as far as c.300 A.D.[15]

Secondly, the sacramental nature of marriage does not prevent its being, at the same time, a civil contract, since what is raised in status is not abrogated, but rather fulfilled by the coming of Jesus.[16] More than sixty articles of the *Catechism of the Catholic Church (CCC)* are devoted to discussion of the nature of Marriage (CCC 1601-1666) including its status in the order of creation, its status under the regime of sin, and its status under the old Law and the New Covenant. John Paul II has spoken often and at length on the topic.[17]

Thirdly, following from the above, the laws of marriage from the point of view of Canon Law are primarily decreed by the Church and only secondarily by the civil law. As the old Canon law expressed the matter: 'The Marriage of the baptised is ruled not only by Divine Law, but also by Canon Law, saving the authority of the Civil Power with regard to the purely civil effects of the same.' (Can. 1016 – quoted in Thompson, op. cit.). The new Code of Canon Law promulgated in 1983 mirrors this approach in Can. 1059.[18]

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13 Arcanum (On Christian Marriage), Encyclical of Pope Leo XIII promulgated 10 February 1880.

14 Rev J C Thompson, CM, MA (Rector of St John's College), Lectures on Medical and Legal Ethics (1934) given at St John's College, University of Sydney, Lent and Trinity Terms, 1933, Pelligrini and Co, 88.

15 Archbishop Michael Sheehan, *Apologetics and Catholic Doctrine* (a new edition revised by Father Peter M Joseph) (2001), The Saint Austin Press, 604.

16 According to the Catholic Encyclopedia entry 'Divorce (in Civil Jurisprudence)', (1909) Volume V, 'Before the adoption of Christianity as the state religion of the Roman Empire, it would appear that divorce in some form existed among all ancient peoples from whom European civilization is derived. Among the Hebrews no precedent for divorce can be found prior to the Mosaic Law.' <http://www.newadvent.org/cathen/05064a.htm>.

17 See for example the Apostolic Exhortation Familiaris Consortio, 'On the role of the Christian Family in the Modern World' (1981) and other speeches, letters and messages on the Vatican website http://www.vatican.va. See also his major text, published in 1960 before becoming Pope: Karol Wojtyla, *Love and Responsibility*, (1993) Ignatius, San Francisco. For a comprehensive survey of the Pope's work see Kenneth D Whitehead (ed), *John Paul II – Witness to Truth* (2001) St Augustine's Press, South Bend, Indiana. For a very fine survey of Church teaching on marriage and the family see Ramon Garcia de Haro, *Marriage and the Family in the Documents of the Magisterium* (1989) Ignatius.

18 Can. 1059 'The marriage of Catholics, even if only one party is baptised, is governed not only by divine law but also by canon law, without prejudice to the competence of

Fourthly, the Church *cannot dissolve a true marriage*. In the words of Archbishop Michael Sheehan 'The Church never dissolves, and has never claimed power to dissolve, a marriage [validly] entered into by two Christians, if the parties have actually lived together as man and wife.'[19] So-called 'annulments'[20] (decrees of invalidity) are also a different matter,[21] as is the issue of separation (eg due to violence), and the ancient Pauline privilege as applying to unbaptised persons and based on 1 *Cor* 7:12 ff.[22] The Petrine privilege, also called privilege of the faith, is likewise distinguishable. A detailed discussion of these is beyond the scope of this note.[23]

Finally, and importantly, according to the Catholic Catechism a *civil* divorce is not *per se* a moral offence (CCC 2383). It may indeed be necessary if it is the only possible way of ensuring certain legal rights, the care of children or the protection of inheritance (CCC 2383). Indeed, a Catholic Tribunal cannot begin any official examination of a marriage prior to a decree of civil divorce.

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the civil authority in respect of the merely civil effects of the marriage.' *The Code of Canon Law*, in English translation (1983).

19 Archbishop Michael Sheehan, above n 15, 602. 'Living together as man and wife' implies sexual intercourse by which the marriage moves from being 'ratified' only to the state of being 'ratified and consummated'. See further James A. Coriden, *An Introduction to Canon Law* (1991), Paulist Press, 133 and the Canon Law provisions there discussed.

20 The author prefers 'declaration of nullity' to 'annulment'. Declarations of nullity often receive an amused smile from the secular media. For a response to this in the light of the declaration made in respect of Sheila Rauch Kennedy and U.S. Rep. Joseph Kennedy II see Robert Royal, 'Catholic Gobbledygook' (October, 1997) 76 First Things 14-15. www.firstthings.com. For an Australian reference work on the relevant Canon Law and trial practice see Mons Doogan (ed) *Catholic Tribunals – Marriage Annulment and Dissolution* (EJ Dwyer, 1990) and Bishop Geoffrey Robinson, *Marriage, Divorce & Nullity: A guide to the Annulment Process in the Catholic Church* (Liturgical Press, 2000). See also the list of useful on line resources on divorce and annulment <http://www.catholic-pages.com/dir/divorce.asp>.

21 Some would argue they are certainly not unrelated and that the Pope is also very concerned about rising annulment rates in Church courts. See Robert H Vasoli, 'Houses of Worship: Loose Canons', *The Wall Street Journal* (USA), 11 September 1998, 9; and by the same author *What God Has Joined Together: The Annulment Crisis in American Catholicism*, (OUP 1998), and Clarence J Hettinger, 'Too many invalid annulments', *The Homiletic & Pastoral Review* (1993) 15-22.

22 A marriage between two unbaptised, though sacred, is not a sacrament. Should one party become Catholic, and the other 'refuse to live in peace with the convert' the Catholic party may seek permission from the Bishop to enter a new marriage with another. See further Sheehan op. cit. 603-4. See also Code of Canon Law (1983), cans. 1143-50.

23 See Sheehan above n 15, 602-604.

Nevertheless, this does not change the teaching that divorce *per se* is a grave offence against the natural law (CCC 2384) and so is an intrinsically evil act. Apart from divorce, other offences against the dignity of marriage include adultery (CCC 2380 ff), polygamy (CCC 2387), incest (CCC 2388) and so-called 'free unions' (CCC 2390 ff).

Conscience and Legal Professional Ethics

The predicaments of conscience confronting lawyers, Catholic Christian or otherwise, arise in many differing circumstances. Most lawyers have their private thoughts about the unjust law, the death penalty, the 'guilty' client, the lying witness, participation in a corrupt political regime, and so on. Beyond this, Catholic lawyers are called to rely upon a comprehensive set of principles of moral theology (Christian morality) which precede and inform their personal exercise of practical art of 'legal ethics'.[24] They are exhorted to inform their consciences and exercise enlightened moral judgment in a lifelong task which 'guarantees freedom and engenders peace of heart.' The *Catechism of the Catholic Church* discusses the moral conscience at length in the chapter on *The Dignity of the Human Person*.[25]

In relatively rare cases a choice must be made between a rule of professional conduct and a moral teaching of the Church. By way of illustration, one may take the recent case in Tennessee of a threat of professional discipline against a Catholic lawyer who refused to represent adolescent girls seeking to bypass parental permission for abortions.[26]

In the context of civil divorce, the Pope's speech has reminded Catholic lawyers around the world that they must inform their consciences on this issue and act accordingly. In particular, they must inquire, on a case-by-case basis, whether their actions are promoting a mindset which favours divorce or marriage. According to at least one commentator, those Catholic lawyers whose entire practice is based on divorce may have to face some difficult issues.[27]

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24 See CCC [1776] ff for a discussion of moral conscience, its formation, and the problem of erroneous judgment.

25 *Catechism of the Catholic Church* (1994) para. 1776 ff. For further discussion on conscience by a noted jurist see Cormac Burke, Conscience and Freedom, (2nd ed, 1992), Siag-Tala, Manila. See also Robert J Muise, 'Professional Responsibility for Catholic Lawyers: The Judgment of Conscience', (1996) 71 *Notre Dame Law Review* 771. More generally see Gerard B Wegemer, Thomas More on Statesmanship, Chap 10 'The Limits of Government and the Domain of Conscience', (1996), CUA Press, Washington DC 183.

26 Board of Professional Responsibility of the Supreme Court of Tennessee, Formal Op. 96-F-140 (1996).

27 See comments of Professor Jane Adolphe of Ave Maria Law School in Judy Roberts, 'Pope's Call to Arms for Lawyers: Combat 'Divorce Mentality'', National Catholic Register, February 2002, <http://www.ncregister.com/Register_News/022002div.htm>.

The Speech (Vatican Internet translation)

As mentioned, there was some confusion over translation of some parts of the speech. Correctly translated, the portions most relevant to this discussion are as follows:

> On the other hand, professionals in the field of civil law should avoid being personally involved in anything that might imply a cooperation with divorce.
>
> *For judges* this may prove difficult, since the legal order does not recognize a conscientious objection to exempt them from giving sentence. For grave and proportionate motives they may therefore act in accord with the traditional principles of material cooperation. But they too must seek effective means to encourage marital unions, especially through a wisely handled work of reconciliation.
>
> *Lawyers*, as independent professionals, should always decline the use of their profession *for an end* that is contrary to justice, as is divorce. They can only cooperate in this kind of activity when, *in the intention of the client*, it is not directed to the break-up of the marriage but to the securing of other legitimate effects that can only be obtained through such a judicial process in the established legal order (cf. *Catechism of the Catholic Church*, n. 2383). In this way, with their work of assisting and reconciling persons who are going through a marital crises, lawyers truly serve the rights of the person and avoid becoming mere technicians at the service of any interest whatever.[28] (*My emphasis*).

We now turn to the heart of the Pope's message to lawyers.

Cooperation in evil

Of central importance in the speech is the concept of 'cooperation' in evil. In Catholic moral tradition, cooperation is of two basic types: formal cooperation and material cooperation. So far as formal cooperation is concerned, Catholics have a personal responsibility for the evil acts committed by others when they 'cooperate in them: by participating directly and voluntarily in them; and by ordering, advising, praising, approving them; by not disclosing or not hindering them when [they] have an obligation to do so; [and] by protecting evil-doers.'[29]

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28 Address of John Paul II to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota, Monday, 28 January 2002 <http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/january/documents/hf_jp-ii_spe_20020128_roman-rota_en.html, accessed 15 March 2002>.

29 Catechism of the Catholic Church (1994) para. [1868]. A more poetic version appears in Watkins' *Manual of Prayers*: 'Nine ways of assisting in another's sin: by counsel, by command, by consent, by provocation, by praise or flattery, by concealment, by

Formal cooperation can never be justified and depends upon the mind of the cooperator being at one with the actual doer of the evil act. By way of contrast, mere material cooperation excludes the notion of united wills. Profesor Germain Grisez quotes St. Alphonsus, the once famous Neapolitan barrister, as differentiating the two in the following way: 'That [cooperation] is formal which concurs in the bad will of the other, and it cannot be without sin; [on the other hand] that [cooperation] is material which concurs only in the bad action of the other, apart from the cooperator's intention.'[30]

The New Catholic Encyclopedia[31] devotes considerable space this difference:

> Cooperation is material when it avoids participation in the evil intention of the sinner. The material cooperator does not want the sinful action to take place, and there is an ambiguity about what he actually does. His assistance, may in fact contribute to the sin, but it is not of its nature or in the circumstances exclusively ordained to the commission of the sin. To sell a bottle of whiskey may contribute to the drunkenness of the one who buys it; but whiskey has other than sinful uses, and the shopkeeper does not necessarily enter into the intentions of his customers who want to intoxicate themselves.
>
> Formal cooperation in the sin of another is always sinful because it involves, virtually at least, a sharing in a sinful purpose. Material cooperation, on the other hand, is considered permissible under certain conditions, namely, that the action of the material cooperator is not evil in itself, that his intention is good, and that he has a proportionately grave reason for doing something that may contribute in some way to the sin of another.
>
> The rendering of any aid whatever to the commission of sin is a thing to be avoided; but if the aforesaid conditions are verified, the principle of double

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partaking, by silence, by defence of the ill done.' James D Watkins, *Manual of Prayers* (3rd ed, 1998), Pontifical North American College, Rome, 48.

30 Germain Grisez, *The Way of the Lord Jesus, Volume Three, Difficult Moral Questions* (1997), Franciscan Press, Illinois, Question 873 (quoting St Alphonsus Liquori, Theologia moralis). See further Appendix 2: Formal and material cooperation in others' wrongdoing, 871, 876.

31 *New Catholic Encyclopedia* (1967), Vol XIII, McGraw Hill, 245-6. On material cooperation of lawyers see further Teresa Stanton Collett, 'Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil', (1998) 66 *Fordham Law Review* 1339, 1376. See also Teresa Stanton Collett, 'Marriage, Family and the Positive Law' (1996) 10 *Notre Dame Journal of Law, Ethics & Public Policy*, 467, Teresa Stanton Collett, 'The Common Good and the Duty to Represent: Must the Last Lawyer in Town Take Any Case?' (1999) 40 *South Texas Law Review*, 137, Teresa Stanton Collett, 'Love Among the Ruins: The Ethics of Counselling Happily Married Couples (1998), 22 *Seattle University Law Review*, 139, Teresa Stanton Collett, 'To Be a Professing Woman' (1996) 27 *Texas Tech Law Review* 1051.

> effect is applicable, and an action can be performed even though it is foreseen that an evil effect may ensue.[32]

In estimating the proportionate gravity of the reason for cooperating materially in the sin of another the authors state that:

> the immediacy or mediacy, the proximateness or remoteness, of the influence of the cooperation upon the sin should be taken into consideration, as well as the necessity of the cooperation to the commission of the sin. Obviously it requires a less grave reason to justify the doing of something that only mediately and remotely lends aid in the commission of sin than something that is proximately and immediately involved in the sinful act. Similarly, a form of cooperation readily available from other sources would be easier to justify than cooperation that no other could supply.[33]

Lawyers will be relatively at ease with the concepts of proximity, remoteness and necessity since these concepts have a life elsewhere in the law. Lawyers may not, however, be familiar with their use or application in the world of moral theory and the advice of a prudent counsellor is always recommended in difficult cases.[34] As one commentator proposed 'It seems to me that you've got to go on a case-by-case basis and see if you are promoting the divorce mentality or not.'[35]

Law reform and the Family Law Act (Cth)

We will deal briefly with this issue. In some circumstances, Australian law requires that the parties to a civil divorce seek counselling before filing their case.[36] According to the Family Law Council these measures have not been successful in promoting reconciliation and should be repealed.[37] Such compulsory attempts at reconciliation must of course be weighed by Catholic lawyers in deciding whether and how to act in a particular case, but they are not determinative. In its 1992 Report *Multiculturalism and the law*,[38] the Australian Law Reform Commission proposed changes to the Family Law Act to deal with the situation where, under the laws of a particular religion, a spouse had the option to remove or not to remove impediments to remarriage. This proposal was in the context of a Jewish Bill of Divorcement (a 'gett'), which can ultimately only be

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32 Ibid.
33 Ibid.
34 Ibid.
35 Professor Jane Adolphe of Ave Maria Law School quoted in Judy Roberts, 'Pope's Call to Arms for Lawyers: Combat 'Divorce Mentality'', *National Catholic Register*, February 2002, <http://www.ncregister.com/Register_News/022002div.htm>.
36 Anthony Dickey, *Family Law* (4th ed. 2002) 220 ff.
37 Ibid 223 citing Family Law Council: Annual Report 1984-85 (1985) 45.
38 Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992) p. 105-111.

given voluntarily by the husband to the wife. By way of contrast, a Catholic annulment requires intervention by a Church court.

Conclusion

In practical terms, how is a Catholic lawyer to recognize a necessary civil divorce from one that is unnecessary, serves no legitimate end, and is perhaps objectively sinful? Such questions exercise the minds of moral theologians. Is this for the busy lawyer? Yes and no. Catholic lawyers are not expected to be moral theologians, but nevertheless must take responsibility for both their professional as well as personal life. Catholic lawyers cannot hide behind the law to work an injustice and so must concern themselves both with obtaining a reasonable knowledge of their faith, together with access to experts in cases of doubt. In the case of civil divorce this will also aid Catholic clients who are often uncertain of the interaction between civil and Church law, and are in need of sympathetic advisers who 'understand' the spiritual ramifications of the steps they are proposing (or may be obliged) to take.[39]

In an interview with Vatican Radio, Francesco D'Agostino, president of the Union of Italian Catholic Jurists described the speech as 'an invitation to all jurists to be conscious of the height of their profession'.[40] It seems the Pope is keen to remind lawyers that indissolubility is the essence of marriage and what he dubs the 'divorce mentality' is to be countered not only by careful support of married persons, but also by clarification and defence of Catholic doctrine. Even if one disagrees with the Church's moral theology, the Pope has pricked the consciences of an influential professional group by reminding them that their cooperation in individual cases must always promote justice. Legal and moral excellence are inseparable.

39 In this regard see Pontifical Council for the Family, 'Recommendations for care of 'Divorced", L'Osservatore Romano, Weekly Edition in English, 6 March 1997 available online <http://www.ewtn.com/library/CURIA/PCFDIVOR.HTM>.

40 Reported on Zenit.org, Vatican City, January 30, 2002 <http://www.zenit.org>.

THE EFFECT OF THE ADVENT OF THE MIXED-MEMBER PROPORTIONAL VOTING SYSTEM UPON THE ROLE OF THE GOVERNOR-GENERAL OF NEW ZEALAND

Noel Cox[1]

Introduction

The Governor-General can be said to have three principal roles, constitutional, ceremonial, and community leadership. Of these, though it is the first which has been the subject of the most intensive study, it is perhaps the third which has greatest day-to-day importance. This role includes commenting on contemporary social trends and virtues. The ceremonial role of the Governor-General is seen as relatively unimportant, due to the lack of a tradition of overt symbolism and ceremony in New Zealand. The varied roles of the Governor-General will be examined in the first section.

The constitutional role of the Governor-General will be considered in the second section. The low profile of the office has encouraged a minimalist perception of the role. Examples from Australia and elsewhere show that this perception is not necessarily accurate. Yet the perception of the office is critical in determining its actual role.

A major factor at present impacting upon the constitutional role of the Governor-General in New Zealand, and therefore the function of the Crown is the on-going impact of the introduction of the Mixed-Member Proportional (MMP) voting system. MMP could alter the balance of the constitution, thereby possibly endangering the position of the Crown. The possible effects of MMP are evaluated in the third section. Whether MMP has weakened the office of Governor-General is yet to be determined, but it may be that the effects are more pronounced in the long-term than they may appear now.

Because the Governor-General is the principal personification of the Crown in New Zealand, the importance of the office within that body cannot be exaggerated. An assessment of the current state of the office is therefore made in the fourth section. In particular, this will ask whether the gradual departure from the

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Westminster model, and the changing relationships within the executive and between executive and Parliament has undermined the position of the Governor-General, or perchance strengthened it.

The roles of the Governor-General

Dame Catherine Tizard, a former Governor-General of New Zealand, has observed that some aspects of the job are not so readily apparent from the outside, in that 'the perspective of an incumbent does differ from that of a constitutional lawyer or political scientist'.[2] In her view, legal powers and political theory have little relevance to the way in which a Governor-General conducts him or herself when in office.[3]

It is generally accepted however that the Governor-General[4] performs three main types of functions, which might be classified as constitutional, ceremonial, and community leadership.[5] The Governor-General is the embodiment of the Crown, the manifestation of the organised community. This role (that of community leadership) is, in all normal circumstances, more important than the constitutional role, where the Governor-General represents legitimacy and the continuity of government.

It is also more important than the ceremonial role, whose place in New Zealand, aside from symbolically representing the highest level of government, is uncertain.[6] There is little tradition of overt symbolism and ceremony in New Zealand. Ceremonial events, such as the State Opening of Parliament, have never played a major part of public life in New Zealand.[7] Indeed, unless the Sovereign herself is present, the State Opening is little advertised and ill-attended by the general public.[8]

Why New Zealand, as a country, is not inclined to public display is uncertain, though it may have its origins in the predominantly Anglo-Saxon ethnic composition of the population. A similar attitude has been observed in Australia,

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2 Dame Catherine Tizard, Crown and Anchor; *The Present Role of the Governor-General in New Zealand* (1993) 1.

3 Interview with Dame Catherine Tizard (19 May 1998).

4 And the Sovereign when he or she is resident in New Zealand (and to a limited extent even when absent).

5 See, for example, *The Role of the Governor-General of New Zealand* (1997) 3.

6 Sir Denis Blundell, 'Some Reflections Upon the Office of Governor-General in New Zealand', 10 *VUWLR* 198 (1980).

7 Though the reduction of the frequency of the State Opening of Parliament was solely for reasons of political efficiency, by ending the address and reply debates, rather than as a deliberate attempt to reduce the public role of the Governor-General; Interview with David Lange (20 May 1998).

8 Reflected in the almost complete absence of reporting in the daily newspapers.

where Governors-General since federation have been criticised at times both for excessive ostentation and for 'penny-pinching'.[9]

Like Australians,[10] New Zealanders appear to prefer a Governor-General to live frugally and without state. The size of the vice-regal staff is an indication of this. In 1999/2000, 31 staff and a budget of $3.646m were provided for the New Zealand Governor-General, a mere 18% of the total budget for the Department of the Prime Minister and Cabinet, under whose responsibility it comes.[11]

This compares with 85 staff and A$9,699,314 in Australia, and some 100 staff in Canada.[12] In both these latter two countries the staff includes personnel responsible for the honours system, the responsibility in New Zealand of a separate office in the Department of the Prime Minister and Cabinet.[13] Comparatively low levels of funding for the office in New Zealand have both restricted the scope of its activities,[14] and reflect an official parsimoniousness apparent from the nineteenth century.[15]

It is perhaps the inheritance of a British tradition of simple though strong government that has meant that there is little official pageantry in New Zealand public life. What little ceremony existed focused on the Sovereign. Where the Sovereign is absent it focused on their representative- and was but a pale imitation.[16] This did little to foster a belief that the Governor-General was anything but the slightest of figureheads.

It is perhaps in their community leadership role that the Governor-General is most important. It is Dame Catherine Tizard's belief that the chief role of the Governor-General is more and more one of affirming moral and social ideas and ideals. She believes that the Governor-General is supposed to generalise, to

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9 Christopher Cunneen, *King's Men: Australia's Governors-General from Hopetoun to Isaacs: Australia's Governors-General from Hopetoun to Isaacs* (1983).

10 Ibid.

11 Estimates of Appropriations for the Government of New Zealand 1999-2000 (1999) B.5 vol III, 116.

12 Annual Report, 1994-95, Office of the Official Secretary to the Governor-General of Australia; Public Information Directorate, Government House, Ottawa.

13 The Honours Secretariat, itself also notoriously ill-funded, at least formerly.

14 The Office is particularly keen for publicity material to be disseminated, but lacks the resources to do so itself; Interview with Hugo Judd (14 April 1998).

15 Several Governors, including the Earl of Glasgow in 1897, resigned (or threatened to do so) because they could not live on their salary. This problem led to the passage of the Governors Salary and Allowance Act under Glasgow's successor, the Earl of Ranfurly.

16 This certainly would be consistent with the thesis that most British ceremonial is of modern origin, and created to encourage loyalty to the Crown; Eric Hobsbawn and Terence Ranger, The Invention of Tradition (1983).

suggest, to assert and instil civic virtues.[17] This is achieved principally through speeches, and the occasional written contribution.[18]

One of the former expressions of vice-regal thinking deserves to be quoted, as an indication of the considerations which constantly influence the Governor-General's speeches:[19]

> I have been asked to speak about 'Church and State': a very general topic, as Mr Logan commented to me. I take it that by 'State' is meant government in its wider sense, the body that governs by making laws and administering the affairs of the nation. And that makes it a delicate topic for a Governor-General, perhaps a dangerous one. For it comes close to being political, and the cardinal rule for a Governor-General is *never* to be political. There are those who think he or she should not even be controversial, but I don't go along with that. The question 'What do we pay you for, then?' that is sometimes the response to my refusal to speak or act politically, would surely be justified if the Governor-General spoke only airy nothings.
>
> I take my lead from my Australian counterpart, who has said that he is entitled to raise questions and to probe issues of social concern but that he becomes political if he proposes solutions; to which I would add this qualification, solutions about which political parties have differing views. It is a fine line indeed, and I shall do my best to tread on the correct side of it.[20]

It is in their community leadership role that the Governor-General enjoys the greatest freedom, and, potentially risks also. This will depend on how far the incumbent wishes to go in commenting on matters of political policy.[21] It is also a role which has little relation to the political or constitutional role of the office. Yet it is a role which allows them noticeably greater freedom than is enjoyed by the Sovereign in the United Kingdom, as their speeches are subject to less ministerial oversight.[22]

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17 Tizard, above n 2, 4.

18 Other recent examples include the Easter 1999 Guest Editorial for the Otago Daily Times, entitled, 'A Resurrection of Leadership' (emphasied the need for youth leadership); and 'Should New Zealand be a Dictatorship?' (Auckland Club Black Tie Dinner, Auckland 7 September 1999) (calling for people to become deeply involved in the life of our nation, and in our local communities).

19 Speeches are written by the Governor-General him or herself, with the occasional assistance of the Official Secretary; Interview with Hugo Judd, above n 14.

20 Building a Civil Society, (New Zealand Education Development Foundation's Seminar on The Family, Community, Church and State, Christchurch, 18 September 1999).

21 The qualification suggested by Sir Michael is consistent with the approach taken by the Prince of Wales. The creation of the Prince's Trust (1976), Business in the Community (1981) illustrate this practical role.

22 Interview with Hugo Judd, above n 14.

The constitutional role

As the Sovereign is normally absent, the Governor-General is the personification of the Crown in New Zealand.[23] The extent of the Sovereign's involvement in New Zealand is limited by the simple facts of geography, and by her being concurrently Sovereign of a score of other countries.[24]

The Sovereign may potentially be involved in instances of the active exercise, or failure to exercise, of the reserve powers of the Crown (as distinct from gubernatorial powers), as in the Fiji crisis.[25] But evidence would appear to show that the Governor-General, once appointed, is regarded by the Queen as being entirely responsible for the conduct of her government.[26] Sir Paul Hasluck observed that he would 'find it hard to conceive any situation in which the Sovereign would have either the wish or the opportunity to countermand what the Governor-General had done'.[27]

There have however been a number of occasions where a Governor-General, or the Governor of a colony enjoying responsible government, has been dismissed or has retired prematurely under political pressure.

The first was in 1932, when James McNeill was dismissed by King George V on the advice of de Valera, for attending an official reception at the French legation as a representative of the Crown, of which de Valera, as a republican, disapproved. Further instances are recorded.[28] None however has occurred in New Zealand.[29]

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23 In this respect the Governor-General is regarded by the Australians for Constitutional Monarchy as effectively the head of State of Australia; Tony Abbott, *How to Win the Constitutional War and Give Both Sides What They Want* (1997) 17-18.

24 In the course of a nearly 50 years reign, the present Queen has visited New Zealand nine times. Given its relative size and distance from her home, New Zealand has done well compared to Canada and Australia, which have had 20 and 14 respectively; Ronald Allison & Lady Riddell, *The Royal Encyclopedia* (1991) 614-616; private information.

25 FM Brookfield, 'The Fiji Revolution of 1987' (1988) *NZLJ* 250; GM Illingworth, 'Revolution and the Crown' (1987) *NZLJ* 207.

26 Andrew Ladley, 'The Head of State' in Raymond Miller (ed), *New Zealand Politics in Transition* (1997) 53-55.

27 Sir Paul Hasluck, *The Office of Governor-General* (1979) 28n.

28 David Butler and DA Low, *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth* (1991) 352. Examples since 1991 include St Lucia and Tuvalu.

29 Though several have retired early, including Sir Keith Holyoake, who had indicated when appointed that he would only serve three years. At least in part this may have been a concession to criticism of his appointment; Auckland District Law Society Public Issues Committee, The Holyoake Appointment (1977).

There has been no instance where the advice of a Prime Minister to dismiss a Governor-General has been rejected, but the Sovereign could legally do so.[30] It is uncertain whether in practice the Sovereign would always follow such advice, or indeed whether they would revoke the commission of a Governor-General other than in writing.[31] It is however unlikely that the Sovereign would act solely on a telephone conversation with his or her Prime Minister.[32]

The present Sovereign does maintain some involvement with New Zealand, aside from paying periodic visits to this country, during which she exercises as many constitutional functions as can be fitted into her schedule.[33]

Governors-General send regular letters to the Queen to keep her informed about significant political, economic and other events in New Zealand.[34] But the primary responsibility for the government always remains in the hands of the vice-regal officer, as was shown by the response of Buckingham Palace to the Australian crisis of 1975,[35] where the Governor-General dismissed the Prime Minister and government after they had failed to secure the passage of the Budget against the opposition of the upper house, and the 1987 coups in Fiji.[36]

In the Australian context, Sir John Kerr has made the point that the action of dismissing Prime Minister Gough Whitlam in 1975 was his and his alone.[37] Although there was much criticism of Kerr from various quarters, few seriously

30 Thereby presumably causing the Prime Minister to resign, or ask for a dissolution of Parliament. Either way, it would drag the Sovereign's decision down to the level of party political electioneering.

31 FM Brookfield, 'The Reconstituted Office of Governor-General' (1985) *NZLJ* 256, 260.

32 See evidence given to the Australian Constitutional Commission's Advisory Committee in 1986 by the Revd Mr Haldane-Stevenson (1 October 1986) 333, citing a 1982 letter from Sir William Heseltine. This is particularly so since the incident in 1995 when Her Majesty mistook a well-known Canadian hoaxer for the Prime Minister.

33 As, for example, opening Parliament, assenting to legislation, and receiving diplomatic representatives.

34 Similar practices are followed elsewhere- the Governor-General of Australia regularly reported to the Queen that he had appointed new Ministers; Hasluck, above n 27.

35 The constitutional convention to act on advice need hardly be questioned yet there remains some uncertainty as to the use of the formal procedure of tendering advice to the Sovereign in situations where the responsible Ministers are seeking to pre-empt threatened action of the Sovereign's own representative, the Governor-General.

36 Antony Wood, 'New Zealand' in David Butler and DA Low (eds) above n 28, 114-115. That the responsibility of Head of State had been delegated was reinforced by the response of the Queen to the call for the Crown to honour the Treaty of Waitangi; R Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (1990) 234.

37 Sir John Kerr, *Matters for Judgment: An Autobiography* (1978).

questioned that, once appointed by the Queen, it was his task, and his alone, to exercise the responsibilities of the office of Governor-General.[38]

In 1987, Her Majesty made clear on several occasions that she regarded the Governor-General, Ratu Sir Penaia Ganilau, as solely responsible for the government of Fiji for so long as he remained in office, and declined to receive former Prime Minister Timoci Bavadra after he had been dismissed by the Governor-General on advice of coup leader Lieutenant-Colonel Sitiveni Rabuka.[39]

Although there has been some criticism of this relative inaction, it must be justified on the grounds that the Queen was not able to form a balanced judgement of the unfolding events, and had to rely on her local representative. Had she had the benefit of an advisory staff in London the response of the Palace might have been more proactive.[40] In the circumstances it was perhaps inevitable that a cautious approach was adopted.[41]

Although the Governor-General has primary responsibility for a country, and the Sovereign is rarely involved unless actually visiting, the decision of the 1926 Imperial Conference that the Governors-General of the Dominions were in all essential respects in the same relationship with their Ministers as the king led to a belief that the Governor-General was virtually powerless. The Statute of Westminster 1931 had a similar affect. This was despite the fact that the legal powers of the British Sovereign were no wider than those of a Governor-General.[42]

Indeed, given that a Governor-General has powers specifically conferred upon him or her by a Constitution, they may have powers not possessed by the Sovereign, as may be the case in Australia.[43] Yet the perception was always otherwise, not because of doubts about legal powers, but of the willingness to use them:[44]

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38 The Speaker of the Senate had in fact called for the Queen to dismiss Kerr, but Buckingham Palace responded that the Queen would only do such a thing on the advice of her Prime Minister.

39 Brookfield, above n 25, 250.

40 Although the Royal Household numbers some 600 individuals, the Private Secretary, a deputy and an assistant are the only source of advice of a political nature. In contrast the German President's Office, which numbers only 100 individuals, includes some 20 advisory staff. Governors-General traditionally have also relied upon a sole Official Secretary; Franz Spath, 'Das Bundespräsidialamt' (1982); private sources.

41 See also GM Illingworth, above n 25.

42 Geoffrey Sawyer, 'The Governor-General of the Commonwealth of Australia' (1976) 52 *Current Affairs Bulletin* 20, 25.

43 *The Commonwealth of Australia Constitution Act 1900* appears to confer powers additional to those in the Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia (29 October 1900).

44 RQ Quentin-Baxter, 'The Governor-General's Constitutional Discretion', 10 *VUWLR* (1980) 289, 300.

> British Ministers have not doubted the free will of the Sovereign ... but in other Commonwealth countries Ministers have seldom had any real conviction about the free will of the Governor-General.

The Governor-General may for most purposes be said to be in a position analogous to that of the Sovereign, with one significant distinction. They remain, by definition, an official, subordinate to someone else from whom they derive at least part of their legal power, and much of their social standing. And, as an official, they are relatively transitory.[45]

This latter aspect in particular has led to the office of Governor-General becoming institutionalised, confined, like the Sovereign, to following precedent, but largely unable, because of their impermanence, to alter the conditions in which they find themselves.[46]

New Zealand

In New Zealand, as in Australia, formal legislation gives the Governor-General considerably wider authority than it would have been accepted that they would exercise if merely a simulacrum of the Sovereign. Both the New Zealand Constitution Act 1852 and the Letters Patent of 1917 constituting the office of Governor-General[47] gave considerably more power to the Governor-General of New Zealand than was ever exercised, or indeed was ever likely to be exercised.[48]

Yet because of the absence of an entrenched constitutional document,[49] and because, unlike both Canada and Australia, New Zealand does not have a federal Constitution, the legal and conventional position of the New Zealand Governor-General is more closely akin to the relationship between the British Sovereign and political structure than is any other realm.

Following the granting of responsible government, colonial executive councils had come more and more to conduct their business without the governor present.[50] By

45 Though not so transitory as Ministers; Interview with Sir Paul Reeves (11 November 1998).

46 Even to the extent of feeling a reluctance on the part of domestic staff to alter the way in which afternoon tea is presented; Interview with Dame Catherine Tizard, above n 3.

47 Letters Patent Constituting the Office of Governor-General of New Zealand (11 May 1917).

48 Ladley, above n 26.

49 Putting aside the problem of the status of the Treaty of Waitangi.

50 In the usual colonial arrangement, the Governor had chaired the Executive Council. The advent of responsible government saw more decisions being taken in the absence of the Governor, with the Council becoming a de facto Cabinet. Members of the Executive Council now include all Ministers, whether members of Cabinet or not, and

the 1920s the Governor-General's relationship with the Executive Council had become largely analogous with that of the Sovereign and the Privy Council in the United Kingdom.[51]

Even though after 1926 the scope of the Governor-General to act on their own initiative, or contrary to the advice of New Zealand Ministers rapidly declined, from 1917 to 1983 the content of the instruments creating the gubernatorial office and the standing instructions for the exercise of its powers remained virtually unchanged.[52]

In 1983 the legal basis for the office of Governor-General was reconstituted following a lengthy review. Redrafting of the letters patent constituting the office of Governor-General had begun in 1967, with the establishment of an inter-departmental committee. A proposed redraft was prepared in 1972.[53] There was consultation with Buckingham Palace during the process of drafting the new letters patent, and the Queen's informal approval was sought before the draft was referred to Parliament for debate prior to enactment by the Queen at the request of the Executive Council.[54]

The 1917 Letters Patent and royal instructions were replaced by a new prerogative instrument,[55] which more accurately reflected the contemporary position of the office. Obsolete elements removed included the requirement that a Governor-General's departure from New Zealand have the formal approval of the British government. Under the new prerogative instrument, the Governor-General is more clearly defined as representative of the Sovereign, and in no respect an agent of the British government.

In New Zealand, the Governor-General exercises most of the royal powers in terms of the Constitution Act 1986 and the Letters Patent of 1983. The Constitution Act 1986, re-enacting the effect of the provisions of the Administrator's Powers Act

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the usual presiding officer is the Governor-General; Interview with Sir David Beattie (15 April 1998).

51 The Privy Council is more than mere the Cabinet meeting in the presence of the Sovereign, indeed, though all Cabinet Ministers will be Privy Counsellors, only a few will attend each meeting, to transact primarily formal business. For the practical role of the Privy Council from the perspective of a former British Minister, see Richard Crossman, *The Diaries of a Cabinet Minister* (1977).

52 For example, the requirement of the *Constitution Act* that the Governor-General transmit to the Secretary of State a copy of every Bill assented to ceased only in 1947; Brookfield, above n 31, 256.

53 Alison Quentin-Baxter, Review of the Letters Patent 1917 Constituting the Office of Governor-General of New Zealand Report [2] (1980).

54 See Wood, above n 36.

55 Letters Patent Constituting the Office of Governor-General of New Zealand, (28 October 1983).

1983, and the Royal Powers Act 1983, and made the statutory role of the Governor-General clear. Section 2 (2) provided that:

> The Governor-General appointed by the Sovereign is the Sovereign's representative in New Zealand.

Any powers conferred by statute on the Governor-General or on the Sovereign might be exercised by either.

The Letters Patent Constituting the Office of Governor-General of New Zealand had a similar effect in respect of prerogative powers. Since 1983 there has been a general delegation of the prerogative, rather than a series of specific delegations.[56] Specifically, these powers and authorities are:[57]

> To exercise on Our behalf the executive authority of Our Realm of New Zealand, either directly or through officers subordinate to Our Governor-General.

It has indeed been questioned whether the Queen retains the right to exercise these delegated powers personally unless actually present in New Zealand.[58]

The Governor-General today enjoys broadly the same formal powers as his or her predecessor of 1926.[59] However, their real power is less. In part this is because the powers which remained with the Governor-General as agent of the British government, and which lingered for some years after 1926,[60] have now gone.

But the perceived powers of the Sovereign in the United Kingdom have also declined since that decade, and the consequences of this have been felt in New Zealand. In particular, this has resulted from the continued debate over the implications of the Glorious Revolution, and perfecting the dynamics of Cabinet government.[61] Thus whilst assuming 'the function of kingship',[62] the Governor-General has been both symbolically strengthened and politically weakened, to the advantage of the political executive.

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56 cl I. The term 'any other person who has been or may be appointed to represent Us in any part of Our Realm' includes the Queen's Representative in the Cook Islands.

57 cl III (a). Clause (b) expands slightly upon this.

58 Sir Michael Hardie Boys, (Speech to the Public Law Class at College House, Christchurch, 10 September 1997).

59 Excepting some obsolete provisions, such as reservation of legislation.

60 The role as channel of communication with London survived to some extent to 1940.

61 William Hodge, The Governor-General: The Evolution of the Office (1988). This paper canvassed the evolution of the office from colonial times to the constitutional reforms of the mid 1980s.

62 R MacGregor Dawson, *The Civil Service of Canada* (1929) 35.

As symbolic representative of the Sovereign the Governor-General is seen as having limited powers (a parallel which may be inapplicable in Australia). At the same the low profile of the office fosters this perception. Countervailing influences are few. But the advent of MMP may be one.

The advent of MMP

A variety of commentators predicted that the advent of Mixed-Member Proportional (MMP) voting for the House of Representatives in 1996 would result in a more activist Governor-General,[63] faced with the need to oversee the formation of a coalition or minority government.[64] They argued that the Crown's reserve powers, hitherto used extremely rarely, if ever, may be used more often, giving the Governor-General more opportunities to exercise control over the incumbent government.

However, as Stockley has observed,[65] it is flawed logic to assume that MMP will require a more interventionist Queen's representative. The Governor-General's role is essentially non-political, in that they do not seek to involve themselves, nor should politicians seek to involve them, in politics. Political power rests with Parliament and the responsible Ministers drawn from members of Parliament.[66]

Arguments that the Governor-General can act as a guardian of the Constitution also overstate the case. Unlike in Australia, there is no constitutionally ordained impasse which would require vice-regal intervention.[67] Like the Sovereign in the

63 Governors-General have published their own views of these matters; Dame Catherine Tizard, 'The Governor-General, MMP and what we want NZ to be', Press (7 July 1993); Sir Michael Hardie Boys, 'The Role of the Governor-General under MMP', 21 *New Zealand International Review* 2 (1996).

64 This, and other viewpoints, have been covered in Bernard Robertson, 'Governor-General Issue Ignored in MMP Debate', *Otago Daily Times*, 6 August 1993 and 'MMP Threatens Governor-General's Powers', *Dominion*, 3 August 1993; Sir Geoffrey Palmer & Matthew Palmer, *Bridled Power- New Zealand Government Under MMP* (1997); Keith Jackson & Alan McRobie, *New Zealand Adopts Proportional Representation* (1998).

65 Andrew Stockley, 'The Governor-General and MMP' (1996) *NZLR* 213.

66 See, for examples, Jonathan Boston, Stephen Levine, Elizabeth McLeay & Nigel Roberts, 'Experimenting with Coalition Government: Preparing to Manage under Proportional Representation in New Zealand' 35 *JCCP* 108 (1997); Jonathan Boston, Stephen Levine, Elizabeth McLeay, Roberts Nigel & Hannah Schmidt, 'Caretaker Governments and the Evolution of Caretaker Conventions in New Zealand', 28 *VUWLR* 629 (1998). Both papers place primary emphasis upon political actors, and make few references to the Governor-General.

67 Unlike in Australia (in one view at least), there is no requirement for the Governor-General to adopt the role of arbiter between two houses of Parliament.

United Kingdom, the Governor-General can only intervene to preserve the constitutional order itself.[68]

In forming governments and dissolving Parliament the Governor-General would have to follow the course of least political risk.[69] They would seek to leave matters of political choice in the hands of the politicians.[70]

If an election gives no clear result it should be a matter for the politicians, not the Governor-General, to resolve. Chen suggests that the Governor-General should commission the leader of the largest party to form a government.[71] But the largest party may be unable to form a government. It is the responsibility of politicians to ensure that the Crown is never without a ministry. The Governor-General should encourage the leaders to reach agreement, but it is their choice (or those of their supporters in Parliament) which determines the composition of a government.

In the event of the political leaders failing to achieve agreement, there is then a limited role for the Governor-General, though as the Governor-General should not prefer any particular form of government, minority or coalition this risks embarrassing the office.[72] The Clerk of the Executive Council, as agent for the Governor-General, liaised with the Prime Minister over the arrangements for the change to the new coalition Government in 1996.[73] But they did not attempt to suggest, let alone impose, any particular coalition.

While the viability of any minority or coalition government is dependent on parliamentary support, there is no need to make formal provision for this, as the conventions are quite clear. MMP reinforces the importance of Parliament, rather

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68 Though, indeed, there have been occasions when pressure groups have, rather optimistically, called upon the Governor-General to intervene in certain areas of government policy.

69 That is not to say that there are not occasional calls for this to change, usually by those opposed to the government of the day; see for example, Harold Evans, The case for a change: in which the author argues that the public interest requires a democratically selected Governor-General or Head of State, and that the people can and should now insist upon it. With an open letter to all Members of the House of Representatives (1979). See, generally, Jonathan Boston, *The Future of Cabinet Government in New Zealand* (1994).

70 Something which Sir Michael Hardie Boys has regularly stressed, and which Sir John Kerr perhaps overlooked to his cost in 1975; Sir Michael Hardie Boys, above n 58.

71 Mai Chen, 'Remedying New Zealand's Constitution in Crisis', (1993) *NZLJ* 22.

72 Boston, above n 69. When the Queen chose the Earl of Home (later Sir Alec Douglas-Home) in preference to RA Butler as British Prime Minister in 1963, there was some criticism of the choice; see Vernon Bogdanor, *The Monarchy and the Constitution* (1995).

73 Sir Michael Hardie-Boys, 'Continuity and Change' (1997 Harkness Lecture, University of Waikato, 31 July 1997).

than revives anachronistic Crown discretion,[74] anachronistic in that no Sovereign since 1839 has prevented the formation of a government. Politicians, rather than the Governor-General, must make the essential choices of selecting a Prime Minister and determining whether to end the life of a Parliament. In this the advent of MMP will make no essential difference.[75]

The task for the Governor-General is to ascertain the will of Parliament. In the case where parties have publicly formed alliances, there is no need for advice from the incumbent Prime Minister or any other source. The outcome would be clear. In other cases he or she would have to act as a facilitator (but not arbitrator), providing such assistance as he or she could to bring about the formation of a government.[76]

There could well be more uncertainty after an election than the nation is used to, perhaps for a period of some weeks. But uncertainty alone is not a problem, so long as there is a clear process for resolving it.[77] Such short-term uncertainty will have little long-term effect on the constitution. But it does serve to emphasise the role of the Governor-General as *pro tempore* head of State, and of the Crown as a part of the political structure of the country. It is the Governor-General, and not the Queen, that the public, as well as political leaders, would expect to resolve any impasse.

As with most other constitutional alterations since 1986, the advent of MMP may have actually brought the Governor-General more closely into alignment with the position of the Sovereign in the United Kingdom. For, in focussing attention once more upon the reserve powers of the Crown, it has acted as a counterbalance to the traditional view of vice-regal versus royal free will,[78] yet it has not gone as far as Australia arguably has.

The advent of MMP may still make a considerable difference to the law and working of the constitution.[79] But this will perhaps not be in the way commentators suggested. For it may be in the long-term evolution of the constitution that its efforts are most clearly felt. Thus, while the actual role of the Governor-General in the selection of Prime Minister may not have markedly

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74 Stockley, above n 65, 213, 217.

75 'The task is, as far as possible, to remain out of politics and inherently political decisions'; Stockley, above n 65, 213 (1996).

76 Boston, above n 72; Elizabeth McLeay*, The Cabinet and Political Power in New Zealand* (1995); Boston, et al, above n 66, 108; Boston, et al above n 66, 629.

77 Hardie Boys, above n 63.

78 RQ Quentin-Baxter, above n 44, 300. While an imperial agent the Governor-General's free will was, of course, held in abeyance by the requirement of adherence to imperial policy.

79 Andrew Sharp, 'Constitution' in Raymond Miller (ed) *New Zealand Government and Politics* (forthcoming) 37-47, 38, 41-42.

altered, an increased emphasis upon vice-regal reserve powers may encourage a reappraisal of the office.

More significantly, the advent of MMP may have had the effect of encouraging further political change, either because of a desire to avoid the uncertainty inherent in coalition governments, or because of a feeling that reform may not have gone far enough. For it might be said that with increased awareness of the office, so the Governor-General has come some way to overcoming the lack of conviction about the free will of the Governor-General.[80] In this it may be seen as continuing the process exemplified by the Constitution Act 1986, which brought the position of the Sovereign more fully within the constitutional apparatus of New Zealand.

In the short term the advent of MMP has not had a marked effect on the office; in the longer term it may strengthen it, if only because it may have strengthened the emphasis upon the office of Governor-General as part of the constitutional framework. In this it may have achieved what the 1975 crisis in Australia did, focussing attention upon the constitution and the role of the Governor-General.

The current state of the Office of Governor-General

Once seen as an instrument of imperial will, the Governor-General is now sometimes seen as a constitutional safeguard against executive despotism.[81] Sir David Beattie was in no doubt that the Governor-General has extensive and undefined powers to act in times of constitutional crises (such as if a government refused to resign despite lacking parliamentary support) and that he can act in his own right as the Queen's representative, informing her of his actions thereafter.[82]

Several instances have shown that the Crown retains a role in special circumstances,[83] but any action risks destroying the institution. To be politically active risks destroying the office, as nearly occurred in Australia in 1975.[84] But failure to act would also be criticised. In part because he or she is a representative of the Crown, the Governor-General seeks to minimise the chances of conflict with

80 Quentin-Baxter, above n 44, 300.

81 Auckland District Law Society Public Issues Committee, The Holyoake Appointment 7 (1977).

82 Sir David Beattie, interviewed in Council Brief, as quoted in Patrick Downey, 'A Constitutional Monarchy' (1986) *NZLJ* 1, 2.

83 *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 25, 90-1 (Grenada CA). The court relied on the doctrine salus populi suprem lex (the safety and preservation of the State is the supreme law).

84 Though arguably the problem there was that Kerr overstepped the mark between resolving constitutional impasses (by active measures) and settling political disputes (which should be left as far as possible to politicians).

Ministers, in most instances simply by seeking to know the wishes of Ministers and altering their actions accordingly.[85]

The right of the Governor-General to be consulted, to encourage, and to warn relies upon the maintenance of good working relations between the Governor-General and his or her Ministers. The giving of advice, and the regular flow of communications, are essential to keep the Governor-General sufficiently well informed so that he or she can fulfil their role. This means that they must try to be, in the words of the Queen as reported by Sir David Beattie, 'the best informed person in New Zealand'.[86] How this could be achieved with the minimal support available to the Governor-General remains unclear, though the resources of the whole of government is theoretically available to the Governor-General.

Both Sir David Beattie, and Hugo Judd, currently Official Secretary to the Governor-General, believed that, although the Governor-General did not receive Cabinet papers, and his or her contact with Ministers was relatively limited, they would be able to obtain any information from government were it their wish to do so.[87] However, in the absence of regular meetings with the Prime Minister, it remains uncertain that this is sufficient to enable the Governor-General to really gain an understanding of political developments were it the wish of the Ministry to keep him or her uninformed.[88]

Some contact is maintained with Ministers on purely social occasions, but the regular contact is limited to the largely formal meetings of the Executive Council.[89] These meetings have however occasionally led to the Governor-General expressing concerns about draft regulations, latterly under Sir David Beattie.[90] Some ministers have also sought to offer the Governor-General occasional briefings, as Sir Douglas Graham did at times during his days as Minister in Charge of Treaty of Waitangi Negotiations.[91]

The effectiveness of the office of Governor-General was limited by a perception of weakness (shared by public and politicians alike), and by the lack of an independent advisory office. Yet, following the advent of MMP, the position of the Governor-General might be strengthened over time, but not in the way usually posited.

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85 For this reason, vice-regal speeches, although not normally shown to Ministers prior to delivery, will always be written with current government (and opposition) policy in mind; Interview with Hugo Judd, above n 14.

86 Interview with Sir David Beattie, above n 50.

87 Ibid. Interview with Hugo Judd, above n 14.

88 It was Dame Catherine Tizard's impression that most Ministers ignored the Governor-General as much as possible; Interview with Dame Catherine Tizard, above n 3.

89 Interview, above n 86; Interview with Sir Douglas Graham (24 November 1999).

90 Interview, above n 86.

91 Interview with Sir Douglas Graham, above n 89.

As Sir Michael Hardie Boys has made clear, the task of making political choices is not one for the Governor-General. There are two considerations which followed from this. Firstly, that the people should understand that fact (that political decisions are made by politicians), and secondly, that there should be a full and frank relationship between the Prime Minister and the Governor-General (so that the Governor-General knows how he or she can assist the government in making these decisions).[92]

If Ministers, and the Prime Minister in particular, were to regard the Governor-General as the one individual, apart from the Queen, in whom they could confide,[93] then over time the office of Governor-General might be strengthened. There would be no increase in legal powers, but with the perception that the Governor-General, like the Sovereign, enjoyed some discretion, the independence, and ultimately the effectiveness of the office could be enhanced.

The advent of regular coalition government, and the decline in Cabinet collective responsibility - the one the consequence of MMP and the other largely unrelated, have both increased the possibility of the Governor-General becoming embroiled in party politics. But while the impression remains that the Governor-General is a 'nodding automaton', politicians are likely to continue to seek resolution of political problems through regular political channels, rather than recourse to the Governor-General.

The principal difficulty which faces the Governor-General is the uncertain perception of the office. Although the constitutional function may be better understood now than in past years, the actual role of the Governor-General is still not widely understood.[94] The office is misunderstood by some politicians, perhaps by most.[95] To some extent this may highlight a weakness in the Bagehot theory of government, with its somewhat artificial division between dignified and efficient elements of government.[96]

It would seem that this conceptual division may be misleading where the 'dignified' element- that which acts as a 'disguise for Cabinet government', is in fact less visible than the 'efficient' elements of government- Parliament and Cabinet. The tradition of a relatively low profile has fostered a minimalist

92 Hardie Boys, above n 63.

93 Even attempts at merely social contact with politicians is apt to be misconstrued by some of the more suspicious types; Interview with Dame Catherine Tizard, above n 3.

94 It is for this reason that Government House would like to see more material published on the office, including a study of past Governors-General, something their own limited budget would never allow; Interview with Hugo Judd, 14 April 1998.

95 Interview with Dame Catherine Tizard, above n 3.

96 Walter Bagehot, 'The English Constitution' in Norman St John-Stevas (ed), *The Collected Works of Walter Bagehot*, Vol 5, (1974) 203.

conception of the role of the Governor-General, not just in his or her constitutional role, but also in their social role.

New Zealand constitutional development since 1840 has been one of the adoption and then gradual departure from the Westminster model of parliamentary monarchy. The abandonment of the first past the post electoral system is arguably just one step in this process. The final direction which constitutional evolution will take will probably depend upon the solution of the most intractable problem in post-colonial New Zealand, the position of Maori.

The position of the Governor-General, and of the Crown, will be determined by the solution chosen. But it will not necessarily mean the abandonment of either, for New Zealand's constitutional structure has for many years been dominated, not by a desire to rid ourselves of an alien monarchy, but by a desire to resolve historic grievances and by contemporary uncertainties of identity and governance.

Conclusion

The decline in the Governor-General's powers over the last seventy years is a reflection of changing conventions. The formal powers of the Governor-General in 1983 were not greatly different from those in 1926, but the means by which they were exercised has changed fundamentally. In 1926 the Governor-General was an agent of the British government, thereafter he became solely the representative of the Sovereign in New Zealand. While an agent of the British government, the Governor-General was expected to exercise a personal discretion, and to refer contentious issues to the British government. As representative of the Sovereign in New Zealand he or she was assumed to have a role limited in the same way as that of the Sovereign.

Successive Governors-General have not sought to question this minimalist view of their role, which has been both emphasised by, and resulted in, a low profile, and have generally contented themselves with social and community activities.[97] Unlike in Australia, there has been, until recently, relatively little commentary on the office from former Governors-General.[98] It is clear however that they have not suffered from any misapprehensions about the limitations of the office.

There may have been an upturn in the status of the Governor-General for purely domestic reasons.[99] Governors-General such as Sir Paul Reeves and Dame Catherine Tizard brought more publicity to the office, but arguably little increase in influence.

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97 Interview with Dame Catherine Tizard, above n 3.

98 Hardie Boys, above n 63; Tizard, above n 2; Tizard, above n 63; Blundell, above n 6; Viscount Cobham, Governor-General's Constitutional Role, 15 *Political Science* 4 (1963).

99 Hodge, above n 61.

While the Governor-General has come to exercise most, if not all of the functions of the Crown in New Zealand, this has not necessarily resulted in a strengthening of the office. For the Governor-General is both strengthened and weakened by his or her position as representative of the Sovereign. They have the moral authority of the Crown, but share the vulnerability to criticism of that ancient office.[100]

In this respect they came to represent the concept of the Crown in a way which the Governor-General never could whilst remaining an imperial official.

As a Governor-General will occupy the post for only some five years, they have felt constrained to follow, to a great degree, the example set by their predecessors. Like the Sovereign, to a significant extent the office of Governor-General has become institutionalised.[101] It is in their constitutional and political role that this institutionalisation becomes clearest, and most significant. This tendency has been strengthened by the advent of MMP, but it has also encouraged a reappraisal of the office as part of the wider system of government. Most importantly, MMP has signalled reawakened interest in fundamental constitutional reform.

The role of the Governor-General is to represent rather than to act, and as such he or she is symbolic of the constitutional order represented by the Crown. Both by strengthening the executive, as seen in Canada, and by the development of a separate kingship, it has promoted independence from a colonial past. The actual political influence of the Governor-General appears to be slight.[102]

At the same time, the evolution of the office of Governor-General both encouraged and mirrored changes taking place in the constitution, particularly the development of an increasingly national Crown. Thus the symbolic change in focus has both directed and been driven by more substantive changes. Thus, the division of the prerogative, established in the 1930s and 1940s, and the division of the Crown itself, illustrated in 1936, were seminal developments which established national independence. The subsequent evolution of national monarchies not so much enhanced independence- which was already a political reality- but made it manifest.

Although the Crown was not used as overtly to gain independence as it was in South Africa, Ireland and Canada, in New Zealand it was one of the principal means through which this was achieved. In so doing it has influenced the development of independence, into a form of national or localised monarchy.

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100 Gareth Grainger, *Australian Constitutional Monarchy and the Future in The Australian Constitutional Monarchy* (Gareth Grainger & Kerry Jones eds., 1994) 163.

101 Interview with Dame Catherine Tizard, above n 3.

102 Interview with Dame Catherine Tizard, above n 3; For an illustration of the effectiveness of influence, see Vernon Bogdanor, above n 72.

CRITERIA TO IDENTIFY TRADE-RELATED INVESTMENT MEASURES IN CHINESE FOREIGN INVESTMENT LAW

Chen Xuebin[1]

Introduction

A new topic in the Uruguay Round, Trade-Related Investment Measures (TRIMs) was incorporated into the multilateral trade system under the government of WTO. The Agreement on Trade-Related Investment Measures (the TRIMs Agreement) is now an inherent part of the WTO Agreement. As well as several components of international trade, the multilateral trading system resembles an incipient investment regime.[2]

In order to develop its market-oriented economy, China made a formal application to rejoin GATT in 1986, later to accede to the WTO.[3] Negotiations lasted about 15 years, and the agreement on the terms of membership was concluded on 11 November 2001, and one month later, China became a full WTO Member.[4] China's entry into the WTO is the crowning achievement of the efforts of that country

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2 The objectives of the TRIMs Agreement, as defined in its preamble, include 'the expansion and progressive liberalization of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country members, while ensuring free competition'. See The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts, The WTO 1995, 163.

3 China was a founding father of the GATT in 1947, but the Jiang Jieshi government withdrew from the Agreement on 6 March 1950. See Yang Guohua and Cheng Jin, 'The Process of China's Accession to the WTO', (2001) 4 *Journal of International Economic* Law 2, 297-315.

4 11 Dec 2001, China becomes 143rd WTO member, <http://www.wto.org/english/news_e/news01_e/news01_e.htm>. Also see WTO Ministerial Conference Approves China's Accession, <http://www.wto.org/english/news_e/pres01_e/pr252_e.htm>.

since 1978 to integrate itself into the world economy and international economic institutions.[5]

Upon accession, China must comply with the TRIMs Agreement to eliminate all TRIMs in existence.[6] This article discusses Chinese Foreign Investment Law (FDI Law) and the criteria to be used in assessment of TRIMs. The standard for identifying TRIMs existing in Chinese FDI Law is the TRIMs Agreement and its extension in the Protocol of China's Accession which will be addressed.

A TRIM under the TRIMs agreement

With 9 clauses and 1 annex, the TRIMs Agreement, which includes a commitment by the WTO member governments to consider the need for complementary provisions on investment policy,[7] deals with trade-related investment measures (TRIMs).

There has been some reference in panel reports on discussion of what a TRIM is, notably Canada FIRA within GATT 1947 jurisdiction[8] and *Indonesian Car Programmes* within the WTO regime.[9]

Measures in respect of laws, regulations and requirements

The TRIMs Agreement states:

> An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.[10]

This shows the relationship between Article 2.2 of the TRIMs Agreement and Article III (4) and XI (1) of GATT 1994. The versions of GATT 1994 Article III (4)

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5 Hiddo Houben, 'China's Economic Reforms & Integration into the World Trading System', (1999) 33 *Journal of World Trade* 3 1-18, 2.

6 The Protocol on the Accession of the People's Republic of China, accepted by the Ministerial Conference, Decision of 10 November 2001, Doha, WT/L/432 (23 November 2001) 3, Section 7, Part I.

7 Foreign Direct Investment Seen as Primary Motor of Globalization, by Renato Ruggiero, speech on 13 Feb 1996, <http://www.wto.org/wto/wtonews/ 1996pressreleases.html>.

8 Canada - *Administration of the Foreign Investment Review Act*, Report of the Panel (7 February 1984) GATT L/5504 - 30S/140.

9 Indonesia – Certain Measures Affecting the Automobile Industry, Report of the Panel (2 July 1998) WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R.

10 Paragraph 2 of Article 2 of the Agreement on TRIMs.

and Article XI (1) invoked by paragraph 2 of Article 2 above are set out below. The former states:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin *in respect of all laws, regulations and requirements affecting* their internal sale, offering for sale, purchase, transportation, distribution or use. (Emphasis added)

GATT 1994 Article XI (1), General Elimination of Quantitative Restrictions says:

> *No prohibitions or restrictions* other than duties, taxes or other charges, whether made effective through *quotas, import or export licences or other measures*, shall be instituted or maintained by any contracting party on the importation of any product of territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party. (Emphasis added).

From these provisions, it can be concluded that TRIMs are measures, which may be constituted by or in respect of laws and regulations and/or government policy and administrative action of the host country.

Under the *Indonesian Car Programmes*, the measures were in respect of the government's regulations and policy, using the titles of 'decree', 'regulation' and 'presidential instruction'.[11] Although Indonesia argued that the reduced customs duties were not internal regulations and as such could not be covered by the wording of Article III (4), the Panel did not consider that the matter before them in connection with Indonesia's obligations under the TRIMs Agreement was the customs duty relief as such but rather the internal regulations.[12] In the light of the findings, the Panel noted:

> All the various decrees and regulations implementing the Indonesian car programmes operate in the same manner. They provide for tax advantages on finished motor vehicles using a certain percentage value of local content and additional customs duty advantages on imports of parts and components to be used in finished motor vehicles using a certain percentage value of local content.[13]

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11 Above n 9, [2.4] –[2.41]. Indonesian regulations and policies concerned are Decree No 114/1993, Decree No 645/1993, Decree No 647/1993, Decree No 223/1995, Decree No 36/1997; Presidential Instruction No 2/1996, Decree No 31/1996, Decree No 82/1996, Government Regulation No 20/1996, Decree of the State Minister for Mobilization of Investment Funds /Chairman of Investment Coordinating Board No 01/SK/1996, Ministry of Industry and Trade Decree No 002/SK/DJ-ILMK/II/1996, Presidential Decree No 42/1996, Regulation No 36/1996,Decree No 142/1996.

12 Ibid, [14. 89].

13 Ibid, [14.85].

Perhaps it is easy to identify the measures '*in respect of all laws, regulations*', but identification of '*requirements*' or '*prohibition or restriction …through …other measures*' sometimes is not so simple.

For instance, the 'purchase undertaking' under the 1974 Canada *FIRA* formed a 'measure' which violated the provision on the obligation of national treatment, so Canada should bring its *FIRA* consistent with GATT Article III (4). Whether such a 'purchase undertaking' was within the meaning of *'requirements'* was debated.

> The Panel could not subscribe to the Canadian view that the word 'requirements' in Article III (4) should be interpreted as 'mandatory rules applying across-the-board' because this latter concept was already more aptly covered by the term 'regulations' and the authors of this provision must have had something different in mind when adding the word 'requirements'.[14]

After having found that written purchase undertakings, once they were accepted, became part of the conditions under which the investment proposals were approved, and could be legally enforced, the Panel, therefore, noted that the word '*requirements*' as used in Article III (4) could be considered a proper description of existing undertakings.[15]

The word 'requirements' is to have its ordinary meaning. In general, the word 'requirement' means:

1. The action of requiring something; a request;
2. A thing required or needed, a want, a need. Also the action or an instance of needing or wanting something; and
3. Something called for or demanded; a condition which must be complied with.[16]

So in the light of its context in Article III (4), the Panel in *Canadian Automobile* said the word 'requirements' clearly implied government action involving a demand, request or the imposition of a condition but the term did not carry a particular connotation with respect to the legal form in which such government action is taken.[17] In this respect, the Panel went on to say:

> In applying the concept of 'requirements' in Article III (4) to situations involving actions by private parties, it is necessary to take into account that there is a broad variety of forms of government action that can be effective in influencing the conduct of private parties.[18]

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14 Above n 8, [5.5].
15 Ibid, [5.4].
16 *The New Shorter Oxford English Dictionary*, (1993) Vol II, 2557.
17 Canada – Certain Measures Affecting the Automotive Industry, Report of the Panel (11 February 2000) WT/DS139/R, WT/DS142/R, [10.107].
18 Ibid.

Similarly, in *Parts and Components*, the panel recognized that requirements that an enterprise voluntarily accepted to gain government-provided advantages were nonetheless 'requirements'.[19]

In the context of GATT/WTO, a 'measure' is interpreted broadly. For example, under the GATT, a ' 'measure' means any measure by a Member, whether in the form of law, regulation, rule, procedure, decision, administrative action, or any other form'.[20] So Japan in *Indonesia Car Programmes* insisted that 'in the light of the usage of the term within the context of the TRIMs Agreement, the notion of a 'measure' should be interpreted similarly.'[21]

Therefore, a measure under the TRIMs Agreement should be interpreted as any TRIMs of the host country, whether in the form of law, regulation, rule, and as requirement through procedure, decision, administrative action, etc. Restrictive business practices and restrictions by investors' country are not covered by the TRIMs Agreement.

Investment measures in relation to trade

First, the TRIMs should relate to trade in goods.

To determine whether certain measures are 'trade-related' is required by the TRIMs Agreement.

The panel in *FIRA* found, that measures in the practice of Canada inconsistent with Article III (4) of GATT, which allowed certain investments subject to the Foreign Investment Review Act conditional upon written undertakings by the investors to purchase goods of Canadian origin or goods from Canadian sources, were in relation to trade between contracting parties. According to that, the contracting parties should accord to imported products treatment no less favourable than that accorded to like products of national origin in respect of all internal requirements affecting their purchase[22] of the imported products.

Having considered that, the Panel in *Indonesian Car Programmes* analyzed that, if those measures (1993 and 1996 car programmes) were local content requirements, they would necessarily be 'trade-related' because such requirements, by definition, always favoured the use of domestic products over imported products, and therefore affected trade.[23]

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19 EEC - Regulation on Imports of Parts and Components, Report of the Panel (16 May 1990) BISD 37S/132, [5.21].
20 Article XXVIII (a) of GATT 1994.
21 Above n 9, [6.3].
22 Above n 8, [6.1].
23 Above n 9, [14.82].

Such a factor of 'trade-related', in *Canada Automobile,* is regarded as measures which 'affect' the 'internal sale, …or use' of imported products, notwithstanding the fact that CVA requirements, which confer an advantage upon the use of domestic products and deny that advantage in case of the use of imported products, must, do not in law, require the use of domestic products. [24]

Second, the TRIMs should refer to certain investment measures related to trade.

In *Indonesian Car Programmes,* claims raised by Japan showed:

(a) That the Indonesian National Car Programme had been established specifically 'with a view to supporting the development of the automotive industry';[25]
(b) That the Programme included 'investment measures' was also obvious from the fact that one of its implementing regulations was entitled '*Investment Provisions for Realization of the National Automobile Industry*';[26] and
(c) That Indonesia confirmed this by the statement that 'these policies were expected to encourage car companies to increase their local content, *resulting in a rapid growth of investments* in the automotive component industry.'(Emphasis added).[27]

So the complainants EU and USA, as well as Japan, regarded all those 1993 and 1996 Car Programmes as trade-related investment measures. Based on the facts, the Panel then found:

> These measures are aimed at encouraging the development of a local manufacturing capability for finished motor vehicle and parts and components in Indonesia. Inherent to this objective is that these measures necessarily have a significant impact on investment in these sectors. For this reason, we consider that these measures fall within any reasonable interpretation of the term 'investment measures'.[28]

The report pointed out that the sales tax benefits and customs duty benefits under the 1993 and 1996 car programmes were provided for local automobile manufacturers so as to encourage the development of a local manufacturing capability for finished motor vehicle and parts and components in Indonesia.

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24 Above n 17, [10.82].
25 Indonesia, Government Regulation No 36/1996, Preamble.
26 Indonesia, Decree of the State Minister for Mobilization of Investment Funds /Chairman of Investment Coordinating Board No 01/SK/1996.
27 Indonesia, Minutes of the Meeting Held on 30 September and 1 November 1996, G/TRIMS/M/5, [24], 27 November 1996.
28 Above n 9, [14.80].

Third, under the TRIMs Agreement, there is no requirement that TRIMs cover foreign investment.

TRIMs are adopted for FDI normally as the host country might impose certain conditions requiring the foreign investors to use locally produced materials and /or to export their products in order to avoid the negative impact of FDI.[29] Nevertheless, under the TRIMs Agreement, a TRIM must be an investment measure relating to trade. There is no particular requirement in the Agreement that TRIMs should cover foreign investment.

In *Indonesian Car Programmes,* the Panel noted:

> The use of the broad term 'investment measures' indicates that the TRIMs Agreement is not limited to measures taken specifically in regard to *foreign* investment. Contrary to Indonesia's argument, we find that nothing in the TRIMs Agreement suggests that the nationality of the ownership of enterprises subject to a particular measure is an element in deciding whether that measure is covered by the Agreement.[30]

Mandatory and Disincentive investment measures

Generally speaking, TRIMs are restrictive and mandatory, such as '*in respect of laws and regulations'* and '*prohibition and restriction*'. So the TRIMs Agreement uses the wording of 'TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, …and which require' local content requirements, and 'which restrict' trade balancing requirements.[31] Nevertheless, that is not always the case. Not all local content requirement and trade balancing requirements are legally binding as such. Article III (4) applies not only to mandatory measures but also to measures compliance with which is necessary to obtain an advantage, since incentive measures may sometimes be covered by the TRIMs Agreement though TRIMs are usually disincentives.

In *India Car Sector*, Public Notice No 60, a measure adopted by the Indian Government, clearly required that an MOU be signed in order to gain the right to apply for an import license. Automotive manufacturers were expected to comply with the terms of the MOUs they had signed. Once signed, the MOUs became binding and enforceable, first under Public Notice No. 60 itself, and also under the FTDR Act and under general principles of contract law. Prior to 1 April 2001, failure to comply with these conditions could lead to the denial of an import

29 M Rafiqul Islam, *International Trade Law* (1999) 246.
30 Above n 9, [14.73].
31 Illustrative List of the Annex to the TRIMs Agreement, [1].

licence.[32] By the jurisprudence[33] and on the facts, the Panel took into account that the TRIMs agreement expressly referred to mere enforceability in the context of the introductory paragraph of the Illustrative List, paragraph 1.[34]

In *EEC Parts and Components,* the Panel considered that the comprehensive coverage of 'all laws, regulations or requirements affecting' the internal sale, etc. of imported products suggested that not only requirements which an enterprise was legally bound to carry out, … but also those which an enterprise voluntarily accepted in order to obtain an advantage from the government constituted 'requirements' within the meaning of that provision.[35]

In *Indonesian Car Programme,* the Indonesian producers or assemblers of motor vehicles (or motor vehicle parts) had to satisfy the local content targets of the relevant measures in order to take advantage of the customs duty and tax benefits offered by the Government.[36] So compliance with the provisions on purchase and use of domestic products was necessary to obtain an advantage. The lower customs duty rates were clearly 'advantages' in the meaning of the chapeau of the Illustrative List to the TRIMs Agreement although the chapeau is not strictly part of the List..[37] The Panel thus concluded that the tax and tariff benefits contingent on meeting local requirements under these car programmes constituted 'advantages' and 'compliance with which is necessary to obtain an advantage.'[38] Thus the TRIMs Article 2 applied to such voluntary measures or incentive measures, as long as they fallen within the concept of 'TRIMs'.

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32 India – Measures Affecting the Automotive Sector, Report of the Panel, (21 December 2001) WT/DS146/R, WT/DS175/R, [7.190].

33 The Canada – FIRA panel, in considering an argument by Canada that the undertakings were 'private contractual' arrangements, found that:

> The Panel carefully examined the Canadian view that the purchase undertakings should be considered as private contractual obligations of particular foreign investors vis-à-vis the Canadian government. The Panel recognized that investors might have an economic advantage in assuming purchase undertakings, taking into account the other conditions under which the investment was permitted. The Panel felt, however, that even if this was so, private contractual obligations entered into by investors should not adversely affect the rights which contracting parties, including contracting parties not involved in the dispute, possess under Article III :4 of the General Agreement and which they can exercise on behalf of their exporters. This applies in particular to the rights deriving from the national treatment principle, which – as stated in Article III :1 – is aimed at preventing the use of internal measures 'so as to afford protection to domestic production'. (paras 5.4 to 5.6).

34 Above n 32, [7.192].

35 Above n 19.

36 Above n 9, [14.90].

37 Above n 9, [14.89].

38 Illustrative List of the Annex to the TRIMs Agreement, [1].

International minimum criteria under the TRIMs agreement

The TRIMs Agreement, which has three main features provides international minimum criteria for investment measures.

Investment measures relating to trade in goods

The investment activity is not a mere act of sale of goods, or supply of services, between parties from different countries. In international investment, a foreign direct investment (FDI) must involve ongoing operations in a foreign country[39] that lets a resident entity in one economy obtain a lasting interest through his capital control and management of an enterprise resident in another.[40]

The coverage of TRIMs was one of the hot topics in the Uruguay Round. During the negotiations, the United States actively promoted the notion of TRIMs, by identifying a number of measures which had distorting or prohibitive effects on FDI. But this approach stepped beyond the scope of the GATT in the sense that some measures—such as technology transfer requirements, remittance restrictions and local equity requirements—were not necessarily related to trade in goods. Then this broad approach was opposed by many countries, industrialized and developing alike.[41]

As a result, the negotiations on TRIMs were restricted by, and focused on, the investment measures related only to trade in goods under the GATT principles. The TRIMs Agreement expressly states that it 'applies to investment measures related to trade in goods only', thus limiting the scope of its application.[42] This provision is reinforced by Article 2. Thus, any battle on whether or not a particular investment measure violates the Agreement must be fought within the existing legal framework of the GATT. This is an essential characteristic of the Agreement on TRIMs, which has brought the FDI issues into the regime of the GATT, with qualifications.[43]

The TRIMs Agreement is not meant to be a general agreement on foreign direct investment.[44] But any TRIMs that fulfil the description of the Annex list are *ipso facto* prohibited and there is no permission to establish measures contrary to

39 Mo, *International Commercial Law* (2nd ed, 1999) 537.
40 UNCTAD, Foreign Portfolio Investment (FPI) and Foreign Direct Investment (FDI): Characteristics, similarities, and complementarities and differences, policy implications and development impact (15 April 1999) [5].
41 John Mo, 'China, the WTO Trade Organization, and the Agreement on TRIMs', 30 *Journal of World Trade* 5 (1996) 89-113, 96.
42 Article 1 of the Agreement on TRIMs.
43 Mo, above n 41, 96-97.
44 Ibid.

GATT Article III (4) and/or XI (1). It is seen that the TRIMs Agreement does not concern investment measures related to trade in services. These are governed by the GATT.

Adverse effect of TRIMs on trade

Does Article 1 mean that the TRIMs Agreement covers those investment measures which are directly applicable to trade in goods, or that it governs the measures which have distorting and adverse effects on trade in goods? If the first meaning prevails, an investment measure that does not apply to trade in goods but has a negative effect on trade in goods falls outside the scope of the Agreement. If the second is preferred, any measure which has the effect of distorting or restricting trade in goods will be covered, whether or not it is directly related to trade in goods.[45]

The latter also called the 'Effect Test', was proposed by US in the Uruguay Round to create a broad concept of TRIMs.[46] The 'Effect Test' approach appears to be largely consistent with the position of the GATT Ministers mentioned above during the negotiations. The 'Effect Test' approach was agreed by the Ministers in the Punta del Este Declaration and at last incorporated in the TRIMs Agreement.[47]

Under the 'Effects Test', a clear causal link would need to be demonstrated between the measure and the alleged effect. If such a link established, the nature and impact on the interests of the affected party would need to be assessed. Then appropriate ways and means would have to be found to deal with the demonstrated adverse effects, including in relation to the treatment accorded when development aspects outweigh the adverse trade effects.[48]

The 'Effect Test' was shown in Article III (4) of GATT 1947 itself by using version of 'affecting their internal sale, offering for sale…or use'. The ordinary meaning of the term 'affecting' has been understood to imply 'a measure that has 'an effect on' the 'internal sale, …or use' of products and thus indicates a broad scope of application.[49] Then it has been interpreted to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws,

45 Mo, above n 39, at 565.
46 Mo, above n 41, at 97.
47 The preamble of the Agreement on Trade-related Investment Measures, para 1.
48 Mina Mashayehki and Murray Gibbs, 'Lessons from the Uruguay Round Negotiations on Investment', (1999) 33 *Journal of World Trade* 6 1-26, 8-9.
49 EC – Banana III, ie EC – Regime for the Importation, Sale & Distribution of Bananas, Report of the Appellate Body (25 September 1997) WT/DS27/AB/R, [216]; Canada Automobile, Above n 17, [10.80].

regulations and/or requirements which might adversely modify the conditions of competition between domestic and imported products.[50]

Invoking GATT Article III (4) and XI (1), the TRIMs Agreement at last recognizes that certain measures can restrict and distort trade, no matter whether they are mandatory and act as disincentives or not. The version used in the preamble of the Agreement suggests the victory of the 'Effect Test'.[51] Thus the Agreement merely embodies provisions on outlawing certain investment measures that discriminate against foreigners or foreign products (ie violates National Treatment principle) or lead to restrictions in quantities,[52] which are adverse effects on trade, not on all measures.

International minimum standard for investment measures

The Agreement on TRIMs provides an international minimum standard for trade-related investment measures which clarifies that five types of illegal investment measures applied to enterprises appear on an Illustrative List and all measures inconsistent with the Agreement must be justified, and that Members would not implement such TRIMs.

Although intended to bring TRIMs within the WTO, some scholars believe, the Agreement merely reiterates what was already in GATT 1947, providing no new protections or remedies for foreign investors.[53] Its Illustrative List of prohibited measures addresses only a limited subset of TRIMs (as compared, for example, to the more comprehensive ban on performance requirements found in the investment chapter of NAFTA).[54] Moreover, the Agreement contains no plan or procedural framework for moving toward investment liberalization and shies away from innovation or experimentation. Hardly a 'GATT for Investment'[55] as some had hoped,[56] the TRIMs Agreement is at best a transitional arrangement

50 Canada Automobile, above n 17, para 10.80; Italian Discrimination against Imported Agricultural Machinery, Report of the Panel (23 October 1958) BISD 7S/60, [12].

51 Mo, above n 41, 98.

52 WTO Trade into the Future: Agreements--Non-tariff Barriers <http://www.wto.org/tradeintothefuture/agreements.htm>.

53 Paul Civello, 'The TRIMs Agreement: A Failed Attempt at Investment Liberalization', (1999) 8 *Minnesota Journal of Global Trade* 1 97-126, 97-98.

54 Article 1106 of the North American Free Trade Agreement between the Government of Canada, the Government of United Mexico States and the Government of the United States of America (1992, as effective on 1 January 1994).

55 Paul M Goldberg & Chales P Kindleberger, 'Toward a GATT for Investment: A Proposal for Supervision of the International Corporation', 2 *Law & Policy: International Business* 295 (1970)- proposing a GATT-like treaty for FDI.

56 Patrick Low & Arvind Subramanian, 'TRIMs in the Uruguay Round: An Unfinished Business?', presented at the Uruguay Round and the Developing Economies, A World

that may serve, at least, as a sign that future trade negotiations will have to address FDI.[57]

In addition, while the 'Effect Test' appears to be self-evident, its application may lead to ambiguities and confusions.[58] The precise scope of the prohibited TRIMs is left yet to be ascertained and developed.[59]

Therefore, it is noticeable that the Agreement on TRIMs is just functioning as supplying a general international standard, but is really not a detailed legislative code.

Notwithstanding this, the TRIMs Agreement, in fact, contains a variety of procedural and substantive obligations. Article 2 of the Agreement, formally, lays down an obligation which is distinct from the obligation contained in GATT III.[60] So the Panel Report noted in *Indonesian Car Programmes*, the Agreement is not an 'Understanding to GATT 1994', unlike the six Understandings which form part of the GATT 1994.[61] If the purpose of the TRIMs Agreement were to refer to Article III as applied in the light of other (non Article III) GATT rules, there would be no need in Article 3 to refer to such general exceptions.[62] Moreover, it has to be recognized that the TRIMs Agreement in Article 4 and 5, in addition to interpreting and clarifying the provisions of Article III where TRIMs are concerned, has introduced special transitional provisions, and notification requirements.[63] This reinforces the conclusion that the TRIMs Agreement has an

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Bank Conference, (26-27 January 1995) 5. US which proposed the original negotiating agenda for the TRIMs Agreement, had hoped for such a 'GATT for investment'.

57 Civello, above n 53, at 97-98.

58 Mo, above n 39, at 566.

59 Ibid, 569.

60 Above n 9, [6.84].

61 The General Agreement on Tariffs and Trade 1994 ('GATT') is defined as to consist of: (a) the provisions in the General Agreement on Custom duties and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement; (b) the provisions of a series of the legal instruments (protocols and decisions) set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement; (c) six Understandings on the interpretation of provisions of GATT 1994; and (d) the Marrakesh Protocol to GATT 1994.

62 A similar drafting technique was used with the TRIPs Agreement which cross-refers to provisions of other international treaties.

63 In Indonesia Car Programme, Indonesia put emphasis on a particular statement of the Bananas III panel concerning the relationship between Article III of GATT and the TRIMs Agreement. The Panel considered that that statement had to be understood in the particular context of that dispute between two developed countries (no transition

autonomous legal existence, independent from that of Article III GATT 1994.[64] So that the argument by Indonesia that the Agreement was not *lex specialis* to any dispute[65] is not correct, the Panel concluded the TRIMs Agreement applied to the case.

The criteria adopted in the TRIMs Agreement appear to deviate little from the adherence of GATT ministers to trade in goods. Perhaps considering this, the Agreement permits its members to determine whether a particular TRIM is inconsistent with the principles of GATT 1994, and requires the Council for Trade in Goods, within 5 years after the WTO Agreement effective, to review the operation of the Agreement and, as appropriate, propose amendments to its text complemented by provisions on investment policy and competition policy.[66]

Despite the above shortcomings, the Agreement has made a number of useful contributions. Chiefly among them are:

> (i) the incorporation of specific investment-related disciplines in the multilateral trading system;
> (ii) the transparency that is to result from the obligation to notify existing conforming TRIMs, an obligation that would automatically extend TRIMs added in future to the Illustrative List;
> (iii) the legal certainty provided by the obligation to eliminate notified TRIMs the end of agreed transition periods; and
> (iv) the acknowledgement that heightened policy interrelations in the fields of investment and competition will likely warrant more encompassing work on investment and competition policy within the multilateral trade system.[67]

Although the TRIMs Agreement could not be regarded as perfect, within its framework, Members are obliged to abolish and remove the use of harmful trade related investment measures as described in the Illustrative List, in order to open up more opportunities for foreign investment. At least, the Agreement has introduced one of the most important rules of international law in the world economy system to date.

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period was therefore applicable) where the panel had already reached a conclusion that the measure at issue violated Article III:4 of GATT. Therefore there was no need to further discuss the TRIMs Agreement since any action to remedy the inconsistency found under Article III:4 of GATT would necessarily remedy inconsistencies under the TRIMs Agreement. In the present case, the Panel addressed the legal relationship between these two agreements.

64 Above n 9, [14.62].

65 Ibid, [6.56].

66 Article 9 of the Agreement on TRIMs.

67 Pierre Sauve, 'A First Look at Investment in the Final Act of the Uruguay Round', (1994) 28 *Journal of World Trade* 5 5-16, 7-9.

Removal of TRIMs under amendments of Chinese FDI law

In Chinese FDI Law, there were some provisions requiring foreign investment enterprises (FIEs) to satisfy export-performance requirements, foreign-exchange balancing requirements and local content requirements. Bilateral and multilateral negotiations on China's accession pushed China to offer to eliminate legal references to them by the year 2000.[68]

To keep its promises, the Standing Committee of National People's Congress, China amended the *Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures* (CJV Law) and *the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises in China* (WFOE Law) on 30 October 2000. The National People's Congress (NPC), China amended the *Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures Law* (EJV Law) on 15 March 2001. Accordingly, the State Council revised the *Detailed Rules for the Implementation of the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises in China* (WFOE Implementation Rules) on 12 April 2001 and the *Implementation Regulations of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* (EJV Implementation Regulations) on 22 July 2001.

These amendments covered the following three areas:

Local purchase requirement

Article 9 of the previous *EJV Law* (1979) provided:

> …in its purchase of required raw and semi-processed materials, fuels, auxiliary equipment, etc., an equity joint venture shall give first priority to Chinese sources, but may also acquire them directly from the international market with its own foreign exchange funds.

Article 57 of the 1983 *EJV Implementation Regulations* went further:

> …in its purchase of required machinery, equipment, raw materials, fuel, parts, means of transport and things for office use, etc., a joint venture has the right to decide whether it buys them in China or from abroad. However, where conditions are the same it should give first priority to purchase in China.

The requirement that an equity joint venture (EJV) 'shall give first priority to Chinese sources' or 'should give first priority to purchase in China' underlined that a policy of purchasing domestic products prevailed. It would be likely to constitute 'the purchase or use by an enterprise of products of domestic origin or

68 The United States-China Business Council, China and the WTO: Critical Issues and Objectives, (June 1998) <http://www.uschina.org/press/wto.html>.

from any domestic source',[69] and to make import products from abroad at the position less advantageous than the domestic products. Therefore, it would fall within the term of 'local content requirement' and was obviously contrary to Article III (4) GATT 1994, so it should be removed.

According to the amendments, wholly foreign-owned enterprises (WFOEs) and contractual joint ventures (CJVs) may purchase raw materials, fuel and some fixtures and fittings in China or overseas, replacing the former stipulations that 'priority should be given to the Chinese market."[70]

Foreign exchange balancing requirement

These amendments also abolished the requirement for the balance of foreign exchange receipts and payments in order to conform to the TRIMs Agreement.

Article 20 of the previous *CJV Law* (1988) stated:

> Contractual Joint Ventures shall solve by themselves the balance of foreign exchange receipt and payments. If they cannot, they may apply for aid from concerned departments in accordance with the State regulations.

This provision was deleted. Due to the same reason, paragraph 3 under Article 18 of the 1986 *WFOE Law* was deleted as well.[71]

The former *EJV Implementation Regulations (*1983) requested EJVs keeping foreign exchange balance. Its Article 75 said:

> A joint venture shall in general keep a balance between its foreign exchange income and expenses. When a joint venture whose products are mainly sold on domestic market under its approved feasibility study report and contract has an unbalance of foreign exchange income and expenses, the unbalance shall be solved by the people's government of a relevant province, an autonomous region or a municipality directly under the central government or the department in charge under the State Council from their own foreign exchange reserves, if unable to be solved, it shall be solved through inclusion into plan after the examination and approval by the Ministry of Foreign Economic Relations and Trade together with the State Planning Commission of the People's Republic of China.

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69 Item (a) of Paragraph 1 of Illustrative List of the Annex to the TRIMs Agreement.

70 See Article 15 of the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises in China (2000 revision), Article 19 of the Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures (2000 revision). Also see 'New rules lure foreign money into China', China Daily (27 October 2000); <http://www.chinadaily.com/chinabusiness/cb-inves_a27.htm>.

71 Zhongguo Xinwen She, As WTO looms, China tweaks 3 key foreign investment regulations (24 October 2000) <http://www.chinaonline.com/topstories/001024/1/c00102302.asp>.

This article was removed by the amendment of the State Council in 2001.

Export ratio requirements

There was an export ratio requirement in paragraph 7 of Article 14 in 1983 *EJV Implementation Regulations*. It stated:

> The joint venture contract shall include the following main items:
> (7) The ways and means of purchasing raw materials and selling finished products, and the ratio of products sold within Chinese territory and outside China.

Under Chinese FDI Law, restrictive measures on the WFOEs seemed greater than the EJVs and CJVs. WFOEs must either (a) use advanced technology and equipment, develop new products or upgrade existing products, produce import substitutes, or economize in the use of energy and raw materials; or (b) export more than 50% of their products.[72] Although these criteria were presented in the alternative, some local administrations might attempt to require WFOEs to commit to a minimum export level even if they satisfy the other criteria. Various export requirements also existed in other provisions in the previous *WFOE Implementation Rules (1990)*, i.e. Article 45-48 relating to such restriction.

Article 45, to take an example, stipulated:

> In selling products in the Chinese market, a wholly foreign-owned enterprise shall follow its approved sale ratio.
> In case a wholly foreign-owned enterprise intends to sell more of its products than the approved sale ratio in the Chinese market, an approval is required from the examination and approval authority.

Paragraph 2 of Article 48 went further:

> The prices for products sold in the Chinese market by a wholly foreign-owned enterprise in line with the approved sale ratio shall follow the provisions of the price control regulations in China.

Fortunately, these articles had been amended or abolished under the amendments. Now the State encourages the founding of WFOEs whose products are export-orientated or involved in the high-tech field, the new law states. It is instead of the former wording which said, 'wholly foreign-owned enterprises in

72 Article 3 of the Detailed Rules for the implementation of the Law of the People's Republic of China on Wholly Foreign-owned Enterprises (1990).

China are required by existing laws to export all or most of their products, or failing that, must use high-tech and advanced equipment."[73]

Further examination of Chinese FDI Law against the TRIMs agreement

As requested in the Protocol on China's Accession, upon its accession, China must comply with the TRIMs Agreement, and eliminate and cease to enforce trade and foreign exchange balance requirements, local content and export or performance requirements made effective through laws, regulations or other measures.[74] Just before its accession, China revised three key laws and their implementation rules or regulations on FDI in China. It seems that Chinese FDI Law, at the national level, was revised in accordance with the rules of the WTO and pledges China had made to other countries.[75]

Would the revisions of three key FDI laws be enough for China to eliminate all the TRIMs under the Chinese FDI Law? Could people say that Chinese FDI Law has already complied with the WTO Agreement and the Protocol of China's Accession? Now in Chinese FDI Law, does any TRIM the Agreement on TRIMs concerned exist?

To answer these questions, it is necessary, first, to view Chinese FDI Law under the international standard of the TRIMs Agreement.

Identification: a TRIM or a subsidy

TRIMs are usually not very easily identified. Disincentive measures would be likely to be found in them, but incentives are not.

TRIMs are government measures that require private investors to do specific business, like performance requirements, as well as encourage specific behavior by private investors,[76] like investment incentives. For example, a government may require that an investor who manufactures goods in the country purchase a minimum percentage of inputs from domestic sources. This is known as a local content requirement. *Canada FIRA*[77] is an example. The trade balancing

73 Article 3 of the Law of the People's Republic of China on Wholly Foreign-owned Enterprises (1986).

74 Above n 6, para 3, Section 7, Part I.

75 Zhongguo Xinwen She, above n 71.

76 Robert H Edwards, JR & Simon N Lester, 'Towards a More Comprehensive World Trade Organization Agreement on Trade Related Investment Measures', (1997) 33 *Stanford Journal of International Law* 169-214, 170.

77 Above n 8, Canada - Administration of the Foreign Investment Review Act, Report of the Panel (7 February 1984) GATT L/5504 - 30S/140.

requirements may be disincentive as well, like *India Car Sector* case where the manufacturers were required to sign an MOU to keep their trade balancing so that they could gain the right to apply for the import licence.[78] Alternatively, the government may give the investor an incentive to purchase from domestic sources by granting a subsidy for such a purchase, *Indonesia Car Programme,*[79] for instance. So a comprehensive study of investment in ASEAN countries noted:

> Regulations specifying a minimum level of local content, a minimum proportion of production that must be exported, and a minimum amount of technology transfer have largely been dismantled by the ASEAN countries. . . . [I]nstead of rules specifying minimum levels, incentives are granted to firms that produce goods with a certain local content ratio, firms that export a specific proportion of their output, and/or firms that transfer advanced technology.[80]

No matter what form they take, the disincentive requirements and incentives described above might aim to promote domestic production to the disadvantage of foreign producers or suppliers.

However, it should be aware that certain incentives might constitute subsidies under the Agreement on Subsidies and Countervailing Measures (SCM), TRIMs under the TRIMs Agreement as well. Because of that, under the WTO, one measure may fall within the discipline of TRIMs as well as the discipline of subsidy.

Investment incentives and TRIMs tend to be closely related policy instruments. Where the latter exist, they might be often linked to the former: firms agree to comply with certain performance requirements in exchange for an incentive to invest in a particular location. These linkages have led to calls for developing a coherent set of disciplines in both areas so as to mitigate and progressively eliminate their potentially distortive effects on trade, investment and corporate decisions.[81] So it sometimes would be confusing whether a conduct by enterprises to obtain an advantage or an incentive measure constitutes a TRIM or a subsidy, or both. In this regard, *Indonesian Car Programmes* is an example. Clearly, the Panel pointed out that the two agreements designed to prohibit different measures. However, if a Member were to apply a TRIM (in the form of local content requirement) as a condition for the receipt of a subsidy, the measure would continue to be a violation of the TRIMs Agreement if the subsidy element

78 See India – Measures Affecting the Automotive Sector, Report of the Panel (21 December 2001) WT/DS146/R, WT/DS175/R.

79 Above n 9, Indonesia – Certain Measures Affecting the Automobile Industry, Report of the Panel (2 July 1998) WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R.

80 Janis Togashi & Pearl Imada, 'The Legal Framework for Investment in ASEAN' *Investment Regulations and Incentives* 3 (1993) 19.

81 Pirre Sauve, 'Qs and As on Trade, Investment and the WTO', (1997) 31 *Journal of World Trade* 4, 59-60.

were replaced with some other form of incentive. By contrast, if the local content requirements were dropped, the subsidy would continue to be subject to the SCM Agreement, although the nature of the relevant discipline under the SCM Agreement might be affected.[82] The Panel concluded that the TRIMs Agreement and the SCM Agreement might have overlapping coverage in that they might both apply to a single legislative act, but they had different *foci*, and they imposed different types of obligations.[83]

Normally, in the case of the SCM Agreement, what is prohibited is the grant of a subsidy contingent on use of domestic goods, not the requirement to use domestic goods as such. In the case of the TRIMs Agreement, what is prohibited are TRIMs in the form of local content requirements or others, not the grant of an advantage, such as a subsidy.[84] One action, however, may violate two different WTO disciplines but the SCM and TRIMs Agreements could not be in conflict, as they cover different subject matter and do not impose mutually exclusive obligations.[85]

Criteria: the TRIMs Agreement and the Protocol on China's Accession

It must be admitted that accurate statistics on the use of TRIMs are difficult to gather because defining and identifying TRIMs is a complex and idiosyncratic process.[86] The difficulties somewhat in isolating the effects of specific TRIMs from complex packages of government rules have resulted in a relative paucity of empirical studies on the impact of these measures.[87] As Moran and Pearson note, there is incomplete empirical evidence of the extent and characteristics of performance requirements and even less analysis of their economic effects.[88]

Nevertheless, no matter how hard it is to sort out all TRIMs while reviewing Chinese FDI Law, the general standard of interpretation will be used to check them strictly and identify them from the number of Chinese legislative documents and legal practice. The basic criteria are the provisions under the TRIMs Agreement, at least the Illustrative List as such.

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82 Above n 9, [14.51].
83 Ibid [14.52].
84 Ibid [14.50].
85 Ibid [14.52].
86 United Nations, The Impact of Trade-related Investment Measures on Trade and Development, at 12, UN Doc ST/LTL/120, UN Sales No E 91.II.A. 19 (1991); also see generally Oliver Morrissey & Yogesh Rai, 'The GATT Agreement on Trade-related Investment Measure: Implications for Developing Countries and Their Relationship with Transnational Corporations', (1995) 31 *Journal of Development Study*, 702.
87 Stephen E Guisinger & Assoc (ed), *Investment Incentives and Performance Requirements: Patterns of International Trade, Production and Investment* (1985) vii.
88 Theodore H Moran & Charles S Pearson, 'Tread Carefully in the Field of TRIP Measures', (1988) 11 *The World Economy* 119, 124.

Under Article 2 of the TRIMs Agreement, there is an Annex, containing an Illustrative List of measures that are inconsistent with GATT 1994 Article III (4) or Article XI (1). The agreement reaffirms and clarifies existing GATT disciplines by specifically applying them to the investment area.

The Illustrative List in the Annex to the TRIMs Agreement covers:

- two measures which require particular levels of local procurement by an enterprise ('Local Content Requirements') and
- three measures which restrict the volume or value of imports such an enterprise can purchase or use to an amount related to the level of products it exports ('Trade Balancing Requirements').[89]

Under paragraph 1, the Annex provides examples of TRIMs that are inconsistent with the obligation of National Treatment in Article III.4 of the GATT 1994. These TRIMs relate to:

- local content requirement (subparagraph (a)), and
- import limitation and export requirement (subparagraph (b)).[90]

Under paragraph 2, the Annex provides examples of TRIMs that are inconsistent with the obligation in Article XI.1 of the GATT to eliminate quantitative restrictions. This paragraph applies generally to:

- import restrictions and trade-balancing requirements (subparagraph (a)),
- trade balancing through foreign-exchange restrictions (subparagraph (b)), and
- various export restrictions (subparagraph (c)).[91]

In addition, the Protocol of China's Accession goes further. Besides those within the Illustrative List, the Protocol extends the elimination of TRIMs to other performance requirements, such as distribution of import licences, quotas, tariff-rate quotas, the conduct of research, the transfer of technology, so long as they are used as conditions to permission of the right of importation or investment.[92] Permission to invest, import licences, quotas and tariff rate quotas should be granted without regard to the existence of competing Chinese domestic supplies.[93]

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89 Legal Texts: the WTO agreements—A Summary of the Final Act of Uruguay Round, <http://www.wto.org/wto/documents/legaltexts. html>.

90 Ibid.

91 Ibid.

92 Above n 6, para 3, Section 7 Non-tariff Measures, Part I.

93 The Working Party on the Accession of China, Report of the Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 2001, Restricted, [203], Section D. 5, Part IV.

Identification of TRIMs existing in Chinese FDI Law per the TRIMs Agreement

China has started to revise its FDI Law, and the amendments of three FDI laws are examples. However, it is still at the first stage. There still remains a number of TRIMs in administrative regulations and local regulations. It needs to continue to identify and justify all TRIMs in existence in Chinese FDI Law by assessment under the TRIMs Agreement and the Protocol on China's Accession.

Measures inconsistent with national treatment

Through the examination, several provisions and requirements have been found in Chinese FDI Law, both at the state level and local level, which are in relation to some TRIMs inconsistent with the Agreement on TRIMs, for instance, local-content requirements.

There are certain measures, including local content requirement and import limitation and export requirement under Chinese laws and regulations, particularly under administrative regulations as well as local regulations, which may be construed not consistent with National Treatment principle under the TRIMs Agreement.

The requirement that an investor who manufactures goods in the country purchase a minimum percentage of inputs from domestic sources is known as the local content requirement. There is an automotive industrial policy designed to foster development of a modern automobile industry in China. The policy explicitly calls for production of domestic automobiles and automobile parts as substitutes foe imports, and establishes local content requirements, which would force the use of domestic products, whether comparable or not in quality or price.[94] Some local content requirements are found in *Provisional Regulations of the State General Administration for Industry and Commerce on Automobile Trading Market Control* (Issued by the State Administration of Industry & Commerce in 1985), and other rules and regulations. Although there is a transition period needed for elimination of TRIMs in the industrial policy for the automotive sector,[95] the wording of the Illustrative List of the TRIMs Agreement makes it clear that a simple advantage conditional on the use of domestic goods is considered to be a violation of Article 2 of the TRIMs Agreement even if the local content requirement is not binding as such.

Since import substitution has been a longstanding Chinese trade policy designed to foster development of a modern automobile industry in China, it explicitly calls

94 Inventory of Foreign Trade Barriers 1998: China, <http://www.ustr.gov/reports/nte/1998/contents.html>.

95 Above n 93, [204]-[207], Section D.5, Part IV .

for production of domestic automobiles and automobile parts as substitutes for imports, and establishes local content requirements, which would force the use of domestic products, whether comparable or not in quality or price.[96] So some measures of import substitution have been dealt with in *Regulations of the Shanghai Municipality for the Encouragement of Foreign Investment in the Pudong New Area* (1990)[97] and *Implementing Provisions for Encouraging Foreign Investment in Guangdong Province* (1987).[98]

The following table shows some legislation against the obligation of National Treatment.

Figure 1: Examples of measures inconsistent with the obligation of national treatment

Title	**Local Content Requirement**	**Import Limitation & Export Requirement**
Formal Policy on Development of Automobile Industry (1994)	Article 34.2 Local content	
Measures relating to the Import Substitution by Products Manufactured by Chinese-Foreign Equity Joint Ventures and Chinese-Foreign Cooperative Ventures (1987)		Article 8 and 9 Requiring import substitution

96 Above n 94.

97 The Regulations of the Shanghai Municipality for the Encouragement of Foreign Investment in the Pudong New Area (Promulgated by Shanghai Municipal People's Government on 10 September 1990).
Article 20. Foreign-invested enterprises may sell certain quantities of their products manufactured as substitutes for imports on domestic markets on approval of the relevant competent department and after paying customs duties and consolidated industrial and commercial tax according to relevant regulations. A portion of foreign currencies may be obtained when necessary.

98 The Implementing Provisions for Encouraging Foreign Investment in Guangdong Province (promulgated by the People's Government of Guangdong province on 26 April 1987 and went into effect on the same day).
Article 13. Production acceptable as import-substitutes shall be encouraged. Chinese enterprise shall buy from foreign investment enterprise if the latter's products have satisfied the following requirements: i) That their quality and specifications have reached the required international standards of similar import; ii) That their prices are competitive, and iii) That the foreign investment enterprise can deliver its products at the required time. Under such an arrangement, the production and sale by the foreign investment enterprise will be considered as having met its export obligations, and purchase by the Chinese enterprise, its import needs.

Figure 1 cont

Title	Local Content Requirement	Import Limitation & Export Requirement
Resolution of the Standing Committee of the National People's Congress Approving the Regulations on Special Economic Zones in Guangdong Province (1980)	Article 17 Requiring preferential price offer locally	
Several Regulations of Beijing Municipal People's Government on the Implementation of the State Council Regulations concerning Encouragement of Foreign Investment (1986)		Article 12 Requiring import substitution

Measures inconsistent with elimination of quantitative restrictions

Under the TRIMs Agreement, measures of quantitative restrictions are 'TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994,' which require import restriction and trade-balancing requirement, trade balancing through foreign-exchange restriction and various export restriction.[99]

Measures of quantitative restrictions are usually 'mandatory or enforceable under domestic law or under administrative rulings', but sometimes they would be in the form of 'compliance with which is necessary to obtain an advantage'.[100]

In Chinese laws and regulations, both at State level and at local level, there are certain measures including requirements for volume or value of exports and restriction on balance of foreign-exchange earnings and payments fallen within the category of measures of quantitative restrictions under the TRIMs Agreement.

Import licences used by MOFTEC to exercise an additional, nationwide system of control over some imports. Many products have been subject to both quotas and import licensing requirements. For these products, after permission has been granted by other designated agencies for its importation, MOFTEC must decide whether to issue a licence.

99 Illustrative List of the Annex to the TRIMs Agreement, [2].
100 Ibid.

Notwithstanding this, there is a preferential provision for FIEs. Import by FIEs on machinery and equipment, vehicles used in production, raw materials, fuel, bulk parts, spare parts and components, machine component parts and fittings (including imports restricted by the State), are not required to apply for examination and approval and are exempt from the requirement for import licences. But there is, as well, a condition that those goods are needed by FIEs to import in order to carry out their export contracts.[101] In addition, there is another requirement that 'the imported materials and items mentioned above are restricted to be used by the enterprise itself only and may not be sold on the domestic market.'[102] 'If they are used in products to be sold domestically, then they are required to go through the import procedures retroactively in accordance with the provisions and the taxes shall be made up according to the governing stipulations.[103] These conditions and requirements may constitute quantitative restrictions.

In this regard, there are also other measures of quantitative restrictions. Import restriction and trade-balancing requirement appears in *Detailed Rules and Regulations for the Implementation of the Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises* (1991)[104] and others regulations. They may restrict the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports.[105]

In addition, there are various export restrictions in other regulations. They may restrict the exportation or sale for export by an enterprise of products, whether

101 The Regulations of the State Council on Encouragement of Foreign Investment (promulgated by the State Council on 11 October 1986), [1], Article 13.

102 Ibid [2], Article 13.

103 Ibid.

104 The Detailed Rules and Regulations for the Implementation of the Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises (Issued by the State Council of China on 30 June 1991).
Article 75. The relevant regulations promulgated by the State Council before the entry into force of this Law mentioned in Article 8 Paragraph 2 of the Tax Law refer to the following regulations concerning the exemption and reduction of enterprise income tax promulgated by the State Council:
7. Export-oriented enterprises with foreign investment may, upon the expiration of the tax exemption and reduction period as provided for in the Tax Law, further enjoy a 50% reduction in enterprise income tax based on the rate stipulated by the Tax Law, if the value of their export products of the year exceeds 70% of the total value of products of the year. But for the Special Economic Zones and the Economic and Technological Development Zones and other export-oriented enterprises where income tax has already been reduced to 15% and the above requirements are met, the enterprise.

105 Item (a) of Paragraph 2 of Illustrative List of the Annex to the TRIMs Agreement.

specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.[106]

Such export restrictions exist in the *Provisional Regulations on Direction Guide to Foreign Investment.* For restricted sub-category A projects that are included in part 1 of Article 6, when export sales account for more than 70% of their total sales, the projects can be raised to the kind of being allowed upon an approval, and therefore are no longer bound by restrictions laid down in Article 9.[107] That means no requirement that an EJV engaged in project of the restricted categories should have a definite operation term; that for projects of restricted sub-category B, fixed assets put in by the Chinese side should come from the own capital or assets of the Chinese investors.[108] Such a stipulation obviously restricts the exportation or sale for export by an FIE of products.

There is another table to figure certain measures inconsistent with the General Elimination of Quantitative Restrictions.

Figure 2: Examples of measures inconsistent with general elimination of quantitative restrictions

Title	**Import Restriction & Trade Balancing Requirement**	**Trade Balancing through FE Restriction**	**Various Export Restriction**
Implementation Measures for the Administration on Import by Foreign-funded Enterprises (1995)	Article 3 Import licence requirement		
Regulations of the State Council concerning the Balance of Foreign Exchange Income and Expenditure by Sino-Foreign Equity Joint Ventures (1986)		Article 2 Keeping foreign exchange balance	
Provisions of the State Council on the Encouragement of Foreign Investment (1986)			Article 2 Import & export ratio
Implementing Provisions for Encouraging Foreign Investment in Guangdong Province (1987)	Article 10 Export licence & quotas restriction		

106 Item (c) of Paragraph 2 of Illustrative List of the Annex to the TRIMs Agreement.
107 The Provisional Regulations on Direction Guide to Foreign Investment (1995), Article 11.
108 Ibid. Article 9.

Figure 2 cont

Title	**Import Restriction & Trade Balancing Requirement**	**Trade Balancing through FE Restriction**	**Various Export Restriction**
Measures of Shanghai Municipality Governing Commodity Purchasing Product Sales by Foreign Investment Enterprises (1989)		Article 11.2 Requiring FE balance	
Provisions of Fujian Province for Encouragement of Foreign Investment in Agriculture (1991)			Article 5 Export licence & quotas restr's

There are still other measures left to sort out.

Special note should be taken when classifying and identifying TRIMs. It is crucial to make sure that all TRIMs included in notification documents are identified correctly, precisely and appropriately, and that they are notified properly. In *Indonesian Car Programmes,* the Indonesian government used to report to the TRIMs Committee that its 1993 Incentive System was a TRIM under Article 5.1 of the TRIMs Agreement.[109] On 28 October 1996, Indonesia notified the TRIMs Committee that it was 'withdrawing' its notification related to automobiles because it considered that its car programme was not a TRIM (G/TRIMS/N/1/IDN/1Add.1), and made another notification with respect to its 1993 and 1996 Car Programmes to the SCM Committee.[110] Such commitments put Indonesia into a particular disadvantageous position in the case.

Why TRIMs should be prohibited under the TRIMs agreement

Nowadays most countries and regions in the world have taken and still take, to some different extent, certain encouragement and/or restrictive measures on foreign investment. They have made and still make relevant policies and laws with these TRIMs as well.[111]

109 G/TRIMS/N/1/IDN/1, 23 May 1995.

110 G/SCM/N/16/IDN, 28 October 1996; Also see Indonesia – Certain Measures Affecting the Automobile Industry, above n 11, [2.44].

111 Edwards et al, above n 76, at 180.

Local content requirements, for instance, will mandate that an investor source more inputs locally than the investor would have absent the requirement. If other things are equal, this will result in a decrease in imports into the country applying the TRIM.[112] Certain TRIMs may have an uncertain impact on trade flows. For instance, it is difficult to predict *ex ante* how a restriction on the remittance of profits may affect trade flows. If profits cannot be remitted, they may be used either to purchase more local goods, or to purchase foreign goods as inputs for the manufacturing process (which leads to an increase in imports).[113]

Considering this, in *FIRA,* the Panel recognized that:

> Purchase requirements may reflect plans which the investors would have carried out also in the absence of the undertakings; that undertakings with such provisos as 'competitive availability' have an adverse impact on imported products only in those cases in which imported and Canadian goods are offered on equivalent terms; and that the undertakings are enforced flexibly. … However, understanding GATT practice, a breach of a rule is presumed to have an adverse impact on other contracting parties (BISD 26S/216), and the Panel also proceeded on this assumption.[114]

Since there is a broad variety of forms of government of action that can be effective in influencing the conduct of private parties,[115] it very important to assess whether there is a condition upon which a TRIM exists. For instance, if the allocation, permission or rights for importation and investment is conditional upon performance requirements set by national or sub-national authorities, or subject to secondary covering, for example, the conduct of research, the provision of offsets or other forms of industrial compensation including specified types or volumes of business opportunities, the use of local inputs or the transfer of technology,[116] it would be regarded as a TRIM under the Protocol on China's Accession.

Taking another example, in *India Car Sector,* under Public Notice No. 60, the signing of an MOU was therefore in itself a condition, including indigenization and trade balancing, to obtaining a licence.[117] The MOUs themselves also contained the same conditions, including the indigenization condition, whose acceptance as legal obligations by the signatories was necessary in order to obtain the right to import the restricted kits and components under licence.[118] Therefore, the Panel found that the indigenization condition, as contained in Public Notice

112 Ibid.
113 Ibid.
114 Above n 8, [6.4].
115 Ibid.
116 Above n 93, [203], Section D. 5, Part IV.
117 Above n 32, [7.188].
118 Ibid [7.189].

No 60 and in the MOUs signed thereunder, constituted a 'requirement' within the meaning of GATT Article III (4).[119] Such conclusion was equally applicable to the trade balancing requirement, obligation which was, like the indigenization requirement, one of the conditions provided for in Public Notice No. 60 and to be accepted by MOU signatories as a condition for obtaining the advantages of a licence. Thus the Panel concluded that it was a requirement as well.[120] It 'has an effect' adversely on either the internal purchase, offering for sale etc of the product or the imported product.[121]

Nonetheless, investment liberalization provisions may be used as one of criteria to examine the key investment-related elements in the WTO Agreement, whose aim is to promote and secure non-discriminatory treatment.[122] Local content requirements on the other hand, like *FIRA* and *Indonesia Car Programmes*, distinctly accords less favorable treatment to these imported products than to like products of domestic origin, within the meaning of Article III (4) of GATT 1994. That is to say, they are inconsistent with the non-discrimination principle. Under the WTO, members should provide MFN and National Treatment to other members, which means a state should provide at least national treatment for foreign investors. Local content requirements lead to a decline in imports and results actually in unfair competition between nationals and foreign investors, and may aim to promote domestic production to the disadvantage of foreign producers,[123] but are inconsistent with National Treatment. So in *Canada Automobile,* the Panel noted that the CVA requirements accorded less favourable treatment within the meaning of Article III (4) to imported parts, materials and non-permanent equipment than to like domestic products because, by conferring an advantage upon the use of domestic products but not upon the use of imported products, they undermined the equality of competitive opportunities of imported in relation to like domestic products.[124] Such measures of the host country concerned shall be deemed as investment measures against the obligation of National Treatment under the Agreement.[125] From this angle, TRIMs also demonstrate somewhat direct and significant restrictive and adverse effects on trade or investment. It is the reason that certain TRIMs are inherently distorting trade or investment why they should be prohibited outright.

The National Treatment principle is a fundamental tenet of the WTO/GATT under which each Member treat goods from each other Member on a level comparable to those produced in its own territory for the purposes of internal sale.[126] Under the

119 Ibid [7.193].
120 Ibid [7.303].
121 Ibid [7.305].
122 Sauve, above n 67, at 6-7.
123 Ibid.
124 Above n 17, [10.85].
125 Sauve, above n 81, at 60.
126 Article III of GATT 1994.

TRIMs Article 2, any breach of the rule 'is presumed to have an adverse impact on other contracting parties'. The preamble of the TRIMs Agreement shows that the Punta del Este Ministerial Declaration which launched the Uruguay Round included the subject of TRIMs as a subject for the round through a carefully drafted compromise:[127]

> Following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade.

Conclusion

TRIMs may be defined, in general, as certain investment measures relating to trade provided for investors in respect of the laws, regulations, policies and/or administrative actions of the host countries, which apply to certain conditions, or are adopted in special areas. TRIMs include not only mandatory measures but also those measures which are not mandatory but create advantages if observed.[128]

Upon accession, China must eliminate and cease to enforce trade and foreign exchange balancing requirements, local content and export or performance requirements made effective through laws, regulations or other measures.[129] Although China amended its three FDI laws before its WTO accession, there still remain a number of TRIMs in administrative rules and local regulations. To comply with the WTO rules, it needs to further review Chinese FDI Law. Since TRIMs exist, they must be eliminated. China must not enforce provisions of contracts imposing TRIMs inconsistent to the TRIMs Agreement.[130]

To do such work, China needs to identify TRIMs correctly, precisely and appropriately. The criteria are the TRIMs Agreement, which provides an international minimum standard for investment measures in relation with trade in goods and the Protocol on China's Accession, which provides China's commitments to perform its obligations under the WTO agreements. The rules apply both to measures affecting existing investments and to those governing new investments.[131]

127 The Preamble of the TRIMs Agreement.
128 Above n 93, [122], Section B.8, Part IV.
129 Above n 6, [3], Section 7 Non-tariff Measures, Part I.
130 Ibid.
131 Above n 93, [122], Section B.8, Part IV.

NOTE

I&L SECURITIES PTY LIMITED V HTW VALUERS (BRISBANE) PTY LIMITED: THE HIGH COURT CONFIRMS ITS VIEWS ON DAMAGES UNDER SECTIONS 82 AND 87 OF THE *TRADE PRACTICES ACT 1974*

*Paula McCabe**

In *I&L Securities Pty Limited v HTW Valuers (Brisbane) Pty Limited*,[1] the High Court confirmed the decision of *Henville v Walker*[2] when it revisited issues of causation and contributory negligence in the context of awarding damages under sections 82 and 87 of the *Trade Practices Act 1974 (Cth)* (the TPA).

The issues before the High Court were whether section 87 of the TPA conferred a discretionary power to reduce the damages that the appellant would otherwise be entitled to recover under section 82 of the TPA, and whether damages under section 82 of the TPA should be reduced for the appellant's failure to take reasonable care to protect its interests.

Material Facts

In July 1995, the appellant advanced $950,000 to the borrower, Camworth Pty Limited. The loan was made on the basis of a valuation of real estate (security for the loan) provided by the respondent. The respondent valued the real estate at $1.567 million in March 2002, and advised the appellant it could rely on the valuation. The borrower defaulted on the loan soon after the advance was made. Although the appellant took reasonable steps to realise the security, the property was not sold until January 1997. Net proceeds of the sale were $592,367.

The appellant claimed as damages the difference between the amount of the loan and the net proceeds of the sale, expenses connected with the exercise of power of sale and interest.

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* Solicitor, Baker & McKenzie.

1 [2002] HCA 41 (2 October 2002).

2 (2000) 206 CLR 459.

The Supreme Court of Queensland

Williams J found there were two independent causes of the loss sustained by the appellant:

- the respondent breached section 52 of the TPA by providing an erroneous valuation of the real estate to the appellant; and
- despite the valuation provided by the respondent, the appellant failed to take reasonable care to protect its own interests as it did not properly investigate the credit-worthiness of the borrower.

His Honour held the loan would not have been made, regardless of the value of the real estate offered as security, had the appellant made proper enquiries about the borrower's capacity to service the loan.[3] The award of damages was reduced accordingly.

Williams J acknowledged it was not appropriate to approach the case as if it were based on common law notions of contributory negligence. But he believed the appellant's failure to appropriately enquire as to the borrower's ability to service the loan, was an 'independent cause of the loss'[4] suffered. His Honour said:

> In deciding how the consequences of how those two causes should be divided I am of the view that the approach that should be adopted is broadly similar to that which would apply in determining apportionment of negligence.[5]

His Honour went on to say:

> Experience shows that many, perhaps most, commercial losses have a number of causes which would satisfy the *March v Strarmare*[6] test. It seems abundantly clear that the legislature did not intend to deprive someone who suffered loss as a result of deceptive and misleading conduct of the right to recover at all if there was some other demonstrable cause of that loss. Equally, in my view, the legislature did not intend that the total loss should always be recoverable regardless of the number or significance of established causes other than the misleading or deceptive conduct in question.[7]

The appellant was awarded damages for $440,987.68 (two-thirds of the amount claimed).

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3 Above n 1, [7].
4 Ibid [97].
5 Ibid [96].
6 *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506.
7 Above n 1, [97].

The Court of Appeal of Queensland

The Court of Appeal of Queensland upheld William J's decision, but on different grounds. It held that pursuant to section 87 of the TPA, it was permitted to make an order that the respondent pay part only of the loss caused by the respondent. In other words, section 87 enables a court to modify (or indeed completely remove) a right to compensation conferred by section 82.

Section 87 provides:

> (1) Without limiting the generality of section 80, where, in a proceeding instituted under, or for an offence against, this Part, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in … in contravention of a provision of Part IV, IVA or V, the Court may, whether or not it grants an injunction under section 80 or makes an order under section 80A or 82, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention … if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

The Court of Appeal said the words 'in whole or in part for the loss or damage' enabled it to make an order requiring a defendant to compensate a plaintiff for only part of a loss that is causally connected with the contravention.[8]

The Court formed the view that the appellant's failure to make sufficient enquiries about the borrower's capacity to service the loan was 'quite independent'[9] of the respondent's contravention of section 52 of the TPA. Accordingly, the Court awarded damages to the appellant only for the loss causally connected with the respondent's breach.

The High Court

The appellant was successful on appeal to the High Court. Glesson CJ, Gaudron, Gummow, Hayne, McHugh and Callinan JJ decided in favour of the appellant, with Kirby J dissenting.

In reaching its decision, the High Court examined both sections 82 and 87 of the TPA.

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8 Ibid [18] per Glesson CJ, at [41] per Gaudron, Gummow and Hayne JJ; I&L *Securities Pty Limited v HTW Valuers (Brisbane) Pty Limited* (2000) 179 ALR 89, 94 and 95.

9 (2000) 179 ALR 89, 95; above note 1, [41].

The High Court on section 82

On section 82, Gleeson CJ said:

> The relevant purpose of the statute was to proscribe misleading and deceptive conduct in circumstances which included those of the present case. In aid of that purpose, the statute provided for compensation, by an award of damages, to a victim of such conduct. The measure of damages stipulated was the loss or damage of which the conduct was *a* cause. It was not limited to loss or damage of which such conduct was the *sole* cause. In most business transactions resulting in financial loss there are multiple causes of the loss. The statutory purpose would be defeated if the remedy under s 82 were restricted to loss of which the contravening conduct was the sole cause. … In a financing transaction, a lender takes security to protect itself against the risk of default by the borrower. One aspect of that risk is that the lender might have failed adequately to assess the borrower's capacity to service the debt. I cannot see why, as a matter of principle, such failure by a lender should be treated, in the application of s 82, as a factor which diminishes the legal responsibility of a valuer by negativing in part the causal effect of the valuer's misleading conduct. The statutory rule of conduct found in s 52, when applied to the relationship between a valuer and a prospective lender, gives rise to a legal responsibility in a case such as the present which extends to the *whole of the loss* of which the valuer's misleading conduct is a *direct* cause.[10] (emphasis added)

Gaudron, Gummow and Hayne JJ said:

> In particular, it follows from the decision in *Henville v Walker*[11] that there is nothing in s 82(1), in other provisions of the Act, or in the policy of the Act, to suggest that a claimant's carelessness may be taken into account to reduce the amount of the loss or damage which the claimant is entitled to recover under s 82(1).[12]

It follows that it will be sufficient for the purposes of section 82 to demonstrate that contravention of section 52 was a cause of the loss or damage sustained (not the sole cause).

Their Honours went on to say:

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10 Above n 1, [33].

11 Above note 2, 482 [66] per Gaudron J, 505 [140] per McHugh J, 507 [153] per Gummow J, 510 [166] per Hayne J.

12 Above note 1, [50].

> As was recognised in *Henville v Walker,*[13] there may be cases where it will be possible to say that some of the damage suffered by a person following contravention of the Act was not caused by the contravention. But because the relevant question is whether the contravention was *a* cause of (in the sense of materially contributed to) the loss, cases in which it will be necessary and appropriate to divide up the loss that has been suffered and attribute parts of the loss to particular causative events are likely to be rare. Further, it is only in a case where it is found that the alleged contravention did not materially contribute to some part of the loss claimed that it will be useful to speak of what caused that separate part of the loss as being 'independent' of the contravention.[14]

McHugh J acknowledged that the appellant's conduct 'undoubtedly contributed to its loss.'[15] But His Honour noted that *Henville v Walker* precludes the apportionment of loss or damage suffered by a plaintiff according to the parties' culpability.[16]

His Honour said:

> The statutory nature of the right of action under s 82 necessarily distinguishes it from actions at common law in tort or contract. Section 82 contains no express limitation on the kinds of loss or damage that may be recovered under the section. Nor does it contain any express indication that some kinds of loss or damage are to be regarded as too remote to be compensated.[17] Because the Act does not state the principles applicable in determining an award under s 82,[18] courts have used the principles applied in awarding damages in tort and contract cases as a guide to awarding compensation for loss or damage falling within s 82. In many cases, the application of tort or contract principles leads to a just result. But while analogies with the law of tort and contract are useful aids, they cannot be substituted automatically for the flexible and general language of s 82[19]. Focusing on the similarity of the circumstances involved in s 82 cases with those involved in tort and contract cases may sometimes result in the section being treated 'as a mere supplement to or eking out of' pre-existing law.[20]

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13 Above note 2, 474 [35] per Gleeson CJ, 481-483 [65]-[72] per Gaudron J, 493 [106] per McHugh J, 507 [153] per Gummow J, 510 [166] per Hayne J.

14 Above note 1, [62] per Gaudron, Gummow and Hayne JJ.

15 Ibid [69] per McHugh J.

16 Ibid [69] per McHugh J.

17 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 509 [34] per McHugh, Hayne and Callinan JJ.

18 See *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 11 per Mason, Wilson and Dawson JJ.

19 cf *Marks v GIO Australia Holdings Ltd (1998*) 196 CLR 494 at 529 [103] per Gummow J: 'Analogy, like the rules of procedure, is a servant not a master.'

20 Pound, 'Common Law and Legislation', (1908) 21 *Harvard Law Review* 383, 388 cited by Gummow J in *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 528 [100]; see also at 503 [15] per Gaudron J, 510 [38] per McHugh, Hayne and Callinan JJ, 549

> Too much emphasis on tort and contract analogies also overlooks that s 82 provides a remedy for breach of a range of provisions different in kind from that provided by s 52.[21]
>
> Just as s 82 is free from the restraint of common law rules regarding measure of damages, so also is it free from doctrines that reduce those damages at common law.[22]

His Honour was also concerned that if the High Court adopted the reasoning of Williams J, it would lead to inconsistencies in applying section 82 to the broad range of provisions to which it may apply, namely breaches of sections 51AC and 52, and Parts IV, IVA, IVB and V.[23]

In a strong dissent, Kirby J agreed with the approach (and result) of Williams J's decision. Concerned more with policy and achieving a just result, Kirby J said:

> If the view is taken, as Callinan J puts it (correctly in my opinion), that the outcome favoured by the majority is 'unfair … [and] unlikely to have been intended by the legislature',[24] the mind of a judge naturally searches for an alternative construction that avoids such an affront to justice. Where alternative constructions are available, conventional rules of statutory interpretation encourage judges to attribute to Parliament a purpose to produce a just outcome rather than one that causes unfairness and unjust over-compensation at the price of another. The principle of consumer protection reflected in the Act is one of fairness to consumers. Except to the extent expressly provided in terms of penalties and punishments, it is not one of over-compensation and unjust excess. Providing windfall gains to litigants is not part of the scheme of the legislation. That scheme contemplates that all should be responsible, but only responsible, for the damage that they cause.
>
> Care must be taken in adopting too narrow a view of what is involved in a 'discrete', wholly severable and 'independent'[25] cause. A narrow view would hardly be 'principled'. Why would such an arbitrary basis of disentitlement be adopted by the Parliament? Classifying a cause or causes of events as 'discrete' or 'independent' obviously involves elements of judgment. One person might consider the view that the borrower's default in the present case was an 'independent' cause and the assessment of the consequential loss or damage to be a matter of 'common sense'. That, after all, is the

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[152] per Kirby J. See also *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281, 290.

21 See *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd* [No 2] (1987) 16 FCR 410, 418-419 per Gummow J, to which I referred in *Henville v Walker* (2001) 206 CLR 459, 503-504 [135].

22 See above n 1, [84]-[85] per McHugh J.

23 Ibid [104] per McHugh J.

24 Ibid [211] per Callinan J.

25 Ibid [62] per Gaudron, Gummow and Hayne JJ.

> ordinary touchstone adopted by this Court for judging issues of causation.[26] Others might describe it as 'visceral' or a 'bare assertion'.[27] I am of the former school because its approach promotes a just operation of the Act. It avoids manifest unfairness. And it achieves the policy of the Act as I perceive it.[28]

The High Court on section 87

The majority agreed the words 'in whole or in part' in section 87 does not confer any discretion to reduce the amount of damages to which the appellant would otherwise be entitled to under section 82.[29]

Kirby J did not comment on the application of section 87.

Conclusion

While some members of the High Court recognised that the result may have been 'unfair' or 'unlikely to have been intended by the legislature',[30] the majority confirmed its strict interpretation of sections 82 and 87 of the TPA. The High Court again definitively rejected the application of common law notions of contributory negligence to these provisions.

Callinan J suggests that the legislature urgently consider amending section 82 of the TPA, as it did in relation to sections 75AD (liability for defective goods causing injuries – loss by injured individual) and 75AE (liability for defective goods causing injuries – loss by person other than injured individual) by introducing section 75AN (contributory acts or omissions to reduce compensation).[31] Interestingly, the legislature chose not to amend section 82 at the time it amended the TPA to include section 75AN.

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26 Above n 6, 515, 522-523 applying *Fitzgerald v Penn* (1954) 91 CLR 268, 277-278; *Chappel v Hart* (1998) 195 CLR 232, 243 [24], 256 [63], 269 [93], 290 [148]; *Rosenberg v Percival* (2001) 205 CLR 434, 460 [85], 464-465 [95], 500-501 [211].

27 Above n 1, [59] per Gaudron, Gummow and Hayne JJ; *S&U Constructions Pty Limited v Westworld Property Holdings Pty Limited* (1988) ATPR 40-854.

28 Ibid [178] per Kirby J.

29 Ibid [69], [118] and [122] per McHugh J and [220] per Callinan J.

30 Ibid [211] per Callinan J, [178] per Kirby J.

31 Ibid [211] per Callinan J.