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EDITOR'S NOTE

The thought that law journals seldom provide advantages that outweigh the collective effort of their publication is a very old one indeed. Much of the literature about legal publishing and law reviews of the previous century seem to revolve around the perennial questions: Are law journals worth it? Do they achieve anything? Are they ever good enough? Leaving aside the minor irony that the airing of these, and contrary, views are all made possible by the journals themselves, it is easy to lose sight of the fact that academic legal journals can and do often play an important role in the explication, critique and even development of the law.

Marking the publication of the first edition of the *Macquarie Law Journal* in 2001, the Hon Justice Michael Kirby, a Patron of this journal, brought to light some of the periodically forgotten contributions that law reviews can make to legal developments. In rebutting Fred Rodell, who famously despaired of American law journals in a 1936 *Virginia Law Review* article titled 'Goodbye to Law Reviews', Michael Kirby firstly acknowledged some of the 'deadly sins' committed by all reviews, their editors and the contributors who publish in them. But he reminded us also that there are often overlooked benefits. As a High Court judge, he acknowledged that law reviews can often contribute to legal principle, make timely commentary on contemporary legal problems and contribute to judicial practice – even admitting that he will 'immediately pounce upon them if they touch a current case'. At their best they 'permit exploration of ideas by a judge freed from the constraints of authority that must be obeyed' in the judicial decision-making process. It hardly needs to be stated as well that, so long as publishing remains an important feature of academic work, law reviews provide a much needed outlet for many researchers, particularly those who may not yet have amassed a string of monographs and collaborations beside their names.

But perhaps just as importantly, Michael Kirby recognised that law journals are primarily a fine training ground for good legal writing and editing, an almost self-evident fact that appears to recede from the view of busy law school researchers. The rediscovery of this simple truth is made inevitable when the editorial team is made up of enthusiastic students for whom the precision and sagacity of legal writing represents one of the great challenges and joys of studying law. The *Macquarie Law Journal* is known for the considerable contribution made by its student editors.

This 2012 edition of the *Macquarie Law Journal* continues a tradition of student involvement, although it must also be acknowledged that this year the contributions of our editorial team were voluntary, a sure sign of the high regard that students of Macquarie Law School have for legal publishing. But this edition also marks a new beginning in two ways. The first is that this 2012 edition begins an exclusively online publication of our journal, which befits Macquarie University's concern for sustainability. The second is that this is the first general edition not devoted to a specific theme. Both of these firsts promise greater flexibility for the future of the journal. It should however also be noted that the 2013 edition, for which a Call for Papers will issue shortly, will focus on the theme of Animal Law and Welfare, to complement the October

2012 *Tomorrow's Law* conference 'The Future of Animal Law', organised by the Centre for Legal Governance at Macquarie Law School.

Finally, special thanks need to be given to the student editors, associates and staff of the Macquarie Law School who have in various ways contributed to this edition and to the Dean of Macquarie Law School, Professor Natalie Klein, whose support made it possible.

Ilija Vickovich
Staff Editor

DOUBLE JEOPARDY? TEAM TEACHING IN A LAW SCHOOL ELECTIVE

ALISON CLELAND AND KHYLEE QUINCE*

The authors of this article had not taught or researched together before developing a new elective course for the undergraduate LLB program at the University of Auckland. They carried out a review of team teaching literature and of traditional law school teaching. They developed the course to be taught by both of them at the same time. While the initial motivator for using team teaching was to provide the most comprehensive view of the subject possible, the authors agreed that they wanted to inquire into whether team teaching could reduce the intimidation and surface learning that traditional methods caused. They also wanted to test the claimed benefits for team teaching, since very little of the research related to law. The inquiry collected qualitative and quantitative data. Students' responses to the method showed that they engaged with the lecture material more readily, that they participated in class discussions and debates more often, and that they found the lecture atmosphere less intimidating, than in traditional compulsory law school subjects. Although the students recognised different perspectives, the authors conclude that there is not yet enough evidence to state that the students learning was improved or deepened directly by team teaching.

I INTRODUCTION

The ability to identify both sides of an argument and to adopt and defend opposing positions is an essential skill for lawyers. Despite this, few undergraduate law courses make use of the most obvious method for modelling debate: having two lecturers discussing the issues at the same time. In designing a new law elective course, we placed the idea of the 'legal team' at the heart of the course delivery. We planned to explore topics by presenting contrasting perspectives to the students during lectures.

As we designed the course, we reviewed literature on traditional and team teaching methods of delivery, noting the drawbacks of the Socratic method and the claimed benefits of team teaching. It was notable that there was almost no literature on the use of team teaching in undergraduate law subjects. We decided to conduct an inquiry into our use of team teaching in the course. We wanted to know whether students would find the method helpful to their learning.

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This article firstly sets out the literature review that helped us to identify the dangers to student learning posed by traditional law teaching and the benefits claimed for team teaching. It then explains the research methodology used to conduct our inquiry into team teaching and analyse the data obtained. The conclusion considers the significance of the inquiry's results, not only for our own teaching, but also for law teaching more generally.

II EXPLORING APPROPRIATE TEACHING METHODOLOGIES

We have both worked in legal practice and are acutely aware of the potential impact – sometimes positive, often negative – of the law on clients' lives. Our areas of practice were criminal law (Khylee in Aotearoa/New Zealand) and child law (Alison in Scotland) and it was no surprise that we very quickly moved from discussion of similarities and differences in the two small jurisdictions, to specific consideration of their respective youth justice systems and the effects of these on the young people involved. Both New Zealand and Scotland have developed unique youth justice procedures that are regarded as largely in line with international law standards. We wanted to offer an elective in Youth Justice that would allow the students to explore the New Zealand youth court and family group conference system, in the context of international instruments and with a comparative element. We were passionate about allowing the students to explore the responses of legal systems to young people and to understand how, in practice, lawyers could be important advocates for young people. Youth Justice, an elective available to Part 3 and 4 students, was proposed and approved during 2008.¹

It was obvious that neither of us alone had all the knowledge and expertise required to bring the subject of Youth Justice to life for the students. In particular, the over-representation of Maori young people required a Maori critique of the Aotearoa/New Zealand system. Khylee's particular expertise is in this area. We began to explore the idea of operating in lectures as a 'legal team'. One of us could take responsibility for leading discussion on particular topics and the other would add observations and pose questions. Our model would be the classic legal team used to present a case in court. Each member of the team has particular strengths and the resulting arguments are stronger, since they draw on all aspects of the team's knowledge and expertise.

Our initial discussions about teaching as a team, then, arose from our desire to fill perceived gaps in our knowledge and to present students with the most comprehensive picture of the subject possible. However, as we planned the learning outcomes, content and methods of assessment, we discovered that we both had frustrations with the traditional teaching model used in law schools. We began to discuss moving away from a traditional model when implementing a team approach. As part of that discussion, we gathered relevant literature on both teaching methods.

¹ This was the first elective dedicated exclusively to the issue of youth justice to be taught in a New Zealand Faculty of Law as part of the LLB programme. We have had excellent support from the Principal Youth Court Judge and from other Youth Court judges, who have addressed the students.

A *Literature on traditional teaching methods*

Good teaching is nothing to do with making things hard.
It is nothing to do with frightening students.²

As we developed the course, we reviewed research on traditional law school teaching methods. The Socratic method has been the signature pedagogy of law school teaching in common law jurisdictions, since its introduction at Harvard Law School by Christopher Langdell in the 1870s. In addition to the Langdellian method, modern teachers of law also use a range of other techniques in teaching, including the ‘problem’ method or the more traditional ‘lecture-textbook’ method. The problem method involves providing students with written fact patterns to which they apply legal rules and principles to discern a ‘correct answer’. The lecture-textbook approach is more passive, with students receiving instruction by lecture that is supplemented by reading cases and texts to clarify understanding.³

We agreed that the literature suggested that law students’ engagement and learning could be at risk as a result of three factors: the use of the Socratic method; the demands of the professional curriculum; and the failure to accommodate individual learning styles. It would seem that rather than being driven by research determining ways in which students’ learning could be enhanced and their learning styles provided for, much law teaching falls back on these traditional methods as a quick means of conveying a vast amount of information. To some extent we believe this is the result of the tail wagging the dog – and the view that the externally imposed requirements to be satisfied for certain compulsory subjects cannot be met in any other way.

1 *The Socratic Method*

After observing Alison’s teaching in 2008, a colleague from another faculty had indicated that he was ‘quite traumatised’ by the classes he had been in. At that time, Alison was using the ‘casebook method’ in a compulsory course and her teaching was partly Socratic. The Socratic method is the traditional model used in law school teaching in common law jurisdictions. A case is dissected to understand the law, then questioning and answering between students and lecturer takes place, to challenge assumptions and examine assertions. Alison’s peer observer indicated that several students seemed anxious and unable to concentrate as they anticipated being asked to contribute or recovered from being questioned. We had both experienced this model as law students and versions of it were used widely in the compulsory subjects that we now taught. We reflected on the observer’s comments and talked about what aspects of existing law school teaching might be stopping students from learning.

We both agreed that student fear was likely to be a significant inhibiting factor. There would be a fear of the subject of law itself, which has a reputation as inherently difficult. That fear would be compounded by the use of Socratic – or even partly Socratic – interactions that required immediate student responses. The Socratic

² Paul Ramsden, *Learning to Teach in Higher Education* (Routledge, 1992) 98.

³ See Cynthia G Hawkins-Leon, ‘The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Method Continues’ (1998) *Brigham Young University Education and Law Journal* 1, 4.

method is regarded as the characteristic form of teaching and learning – what Shulman has called the ‘signature’ pedagogy⁴ – in law schools.⁵

Researchers have found that use of this method means that some students have far better chances of success than others because their personality types are much better suited to the teaching used.⁶ Women⁷ and minority ethnic groups can be placed at particular disadvantages.⁸ Feminist scholars claim that the ‘hierarchical and authoritarian’ approach of the Socratic method is counterproductive in its embarrassment of students and its lack of accounting for the relationships and emotions relevant to legal practice that are associated with a feminine ethic.⁹ It is claimed that the structure of the learning exchange at the core of the method is also masculine in its contest-like nature in which the student seeks the discernible objective truth.

In New Zealand there is a significant and growing body of research literature on effective teaching and learning practice for Maori students in all educational contexts. Known as *kaupapa Maori* educational theory, this invariably criticises existing ‘mainstream’ methods of teaching and learning, and posits an alternative culturally appropriate theory and praxis of education. Kaupapa Maori educational theory challenges the Cartesian tradition in learning (which is embedded in the Socratic method) that there is a value-free body of knowledge that can be obtained through application of reason and logic.¹⁰ While there is no direct research on the effectiveness of Socratic Method for Maori, we can extrapolate from kaupapa Maori educational literature that traditional teaching methods in law are likely to be less effective for Maori than other approaches.

A similar body of educational literature is being developed concurrently for Pasifika learners. Some of this research argues that distinct cultural values and behaviours amongst Pasifika communities – for example acceptance of teacher authority in a

⁴ Lee S Shulman, ‘Signature pedagogies in the professions’ (2005) 134(3) *Dædalus* 52.

⁵ The Socratic Method in its pure form is used predominantly in law schools in the United States of America, but a limited form is used in the common law jurisdictions in the United Kingdom, Australia and New Zealand.

⁶ Vernellia R Randall, ‘The Myers-Briggs Type Indicator, First Year Law Students and Performance’ (1995) 26 *Cumberland Law Review* 63. Vernellia Randall discusses ‘people of colour’ in particular and Khylee, who runs the Maori support programme, noted that there is no research on the effects of the Socratic method on Maori and Pacific Island students, who make up a significant minority of the student body in the University of Auckland Faculty of Law.

⁷ Jennifer L Rosato, ‘The Socratic Method and Women Law Students: Humanize, Don’t Feminize’ (1997-8) 7 *South California Review of Law & Women’s Studies* 37. Jennifer Rosato is supportive of the Socratic method, but advocates an ‘ethic of care’ in the classroom that will limit the psychological damage to all students, especially females.

⁸ Elizabeth Mertz et al, ‘What difference does difference make? The Challenge for Legal Education’ (1998) 48 *Journal of Legal Education* 1. This work carried out empirical studies of student participants in 25 law schools in the USA.

⁹ See, eg, Susan H Williams, ‘Legal Education, Feminist Epistemology and the Socratic Method’ (1993) 45 *Stanford Law Review* 1571.

¹⁰ See, eg, R Bishop et al, *Te Kotahitanga Phase 3 Whanaungatanga: Establishing a Culturally Responsive Pedagogy of Relations in Mainstream Secondary School Classrooms* (Ministry of Education, 2007); K Hawk et al, ‘The Importance of the Teacher/Student Relationship for Maori and Pasifika Students’ (2002) 3 *SET: Research Information for Teachers* 44.

unilateral learning environment with little student input – make the Socratic Method even less suitable than for Maori.¹¹

Further research has shown that physical and emotional problems can result from the intensely competitive environment in law schools.¹² Gerald Hess has argued that the law school experience removes students' enthusiasm and self-confidence.¹³ The net result of traditional teaching is to make students less confident, more stressed and more likely to take a 'surface' approach to learning. We agreed that this was what we saw in our compulsory classes and what we wanted to avoid in the new course.¹⁴

Socratic teaching in law schools uses the case-dialogue method that had been observed by Alison's peer observer and which had elicited such a strong negative reaction in him.¹⁵ Áine Hyland and Shane Kilcommins have argued that the case method can undermine student learning in various ways.¹⁶ First, the method suggests that inquiry into law is a scientific endeavour that can result in certainty about the content and meaning of the law, when in fact, law is highly contestable and will have social, political and cultural dimensions that are all relevant to its meaning. Karl Llewellyn has argued that 'the more "progressive" the school, the less time is left for anything but reading cases and chasing references'.¹⁷ Second, the method concentrates largely on decided appeal cases, while most legal practice will not be concerned with the complex, esoteric points that reach the appellate courts. O Kahn-Freund has criticised the method eloquently: 'Is legal education based on case law not like a medical education that would plunge the student into morbid anatomy and pathology without having taught him the anatomy and physiology of the healthy body?'¹⁸

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- ¹¹ Some common threads of the kaupapa Maori and Pasifika educational research include the promotion of teaching approaches that are holistic and affirming of cultural identity, as well as the positive influence of non-lecture based teaching and learning. See, eg, M Clark, 'Cross-Cultural Issues with Students from the South Pacific' (2001) 57 *Australian Mathematics Teacher* <<http://www.freepatentsonline.com/article/Australian-Mathematics-Teacher/206688328.html>>; Dr Airini et al, *Success for All: Improving Maori and Pasifika Student Success in Degree-Level Studies* (Auckland Uniservices Limited, 2009).
- ¹² See, eg, Barbara A Glesner, 'Fear and Loathing in the Law Schools' (1990-1991) 23 *Connecticut Law Review* 627.
- ¹³ Gerald F Hess, 'Hearts and Heads: Creating an Effective Teaching and Learning Environment in Law School' (2002) 52 *Journal of Legal Education* 75.
- ¹⁴ The reader may well ask why we did not tackle the compulsory subjects themselves. The difficulties presented by the heavily information-based curriculum in these subjects and the economic necessity that one lecturer take one stream, in a year of around 330 students, presented enormous difficulties in the short term. We decided to use and evaluate team teaching in an elective, before discussing its possible use in compulsory subjects.
- ¹⁵ Introduced by Christopher Columbus Langdell, Dean of Harvard Law School, in 1855. The Langdellian case method is based on the premises that written court judgments are the empirical data that can be used to construct the law and that, since legal reasoning is deductive, legal principles can be discovered and deduced from reading and analysing cases.
- ¹⁶ Áine Hyland and Shane Kilcommins, 'Signature pedagogies and legal education in universities: epistemological and pedagogical concerns with Langdellian case method' (2009) 14(1) *Teaching in Higher Education* 29.
- ¹⁷ Karl N Llewellyn, 'On what is wrong with so called legal education' (1935) 35(5) *Columbia Law Review* 651, 663.
- ¹⁸ O Kahn-Freund, 'Reflections on legal education' (1966) 29(2) *Modern Law Review* 121, 127.

It seemed that the case method could be discouraging students from questioning the assumptions underlying the law and seeing its operation in a broader context. Hyland and Kilcommins conclude that the case method stifles the creative and critical emotions of law students and stops them from thinking analytically about law and its outcomes.¹⁹ In an extensive review of the use and impact of the case method, Russell L Weaver suggests that to avoid the limitations of the method, care should be taken in explaining aims and objectives of courses to students and in developing techniques for independent thought.²⁰

2 The demands of the professional curriculum

There is only one way to qualify as a lawyer in Aotearoa/New Zealand and that is by successfully completing a Bachelor of Laws (LLB) degree. The Council of Legal Education specifies the compulsory subjects that form the core of the degree.²¹ The professionally specified curriculum results in a degree that has a heavy emphasis on information transmission. As a result, students can be overwhelmed by the amount of material and have no time to think carefully about it. F Marton and R Säljö identified this type of learning as 'surface' learning and found that students who used this did not grasp the real meaning of the text.²² John Biggs and Catherine Tang note that there are several factors that will encourage 'surface' learning, including anxiety and trying to cover too much.²³ They quote Howard Gardner: 'If you're determined to cover a lot of things, you are guaranteeing that most kids will not understand, because they haven't had time enough to go into things in depth [...]'²⁴

It seemed to us that the combination of the heavy curriculum and the use of the Socratic method would produce surface learners. Suddenly, we revisited the constant complaints of the law lecturer. Why did the students only care about 'the answer'? Why did we see so much templating?²⁵ They were under extreme pressure due to the competition, the amount of material and the teaching methods used. We were unintentionally encouraging them to do what we did not want them to do.

We also noted that tests and examinations were used as instruments of assessment in all the compulsory subjects. We thought back to our own student days and agreed that 'instruments of torture' might be an equally valid description. The emphasis was on learning and reproducing large amounts of information judged essential by the Council of Legal Education and the Law Society of Scotland. Looking back, we regretted the limited chance to think about the law, to critically analyse it and to grasp

¹⁹ Hyland and Kilcommins, above n 16, 38.

²⁰ Russell L Weaver, 'Langdell's Legacy: Living with the Case Method' (1991) 36 *Villanova Law Review* 517.

²¹ For discussion of the core subjects, see Chris Gallavin and Richard Scragg, 'The Value of an LLB: Comparative Perspectives Between New Zealand and England and Wales' (2006) 4(2) *Journal of Commonwealth Law and Legal Education* 123.

²² F Marton and R Säljö, 'On Qualitative Differences in Learning – II: outcome and process' (1976) 46 *British Journal of Educational Psychology* 115.

²³ John Biggs and Catherine Tang *Teaching for Quality Learning at University* (Society for Research into Higher Education, 3rd ed, 2007) 39-41.

²⁴ Howard Gardner, 'Educating for Understanding' (1993) July *The American School Board Journal* 20-24, 24 quoted in John Biggs and Catherine Tang, *Teaching for Quality Learning at University* (Society for Research into Higher Education, 3rd ed, 2007) 40.

²⁵ It is common in the compulsory subjects for students to pass down templates or outlines of what should be covered in answers to test and examination questions from one year to the next.

its principles and concepts in a deep and meaningful way. We wanted the new course to provide students with these opportunities.

3 Assumptions about learning styles

Entry to Part II of the law degree is highly competitive and demand for places keeps class numbers high.²⁶ Research indicates that the use of large classes in the early years of the law degree assumes that students' needs are generally the same and that one style of teaching will suit all students.²⁷ Numbers in our compulsory course streams are typically around 100, with elective numbers around 60-80. There is an assumption that the main thing to be learned in law school is 'how to think like a lawyer' and that close textual analysis of cases and Socratic dialogue will develop these thinking skills. The assumption does not take any account of students' individual learning styles. Robin A Boyle and Rita Dunn tested the hypothesis (which they believed was widespread among law lecturers) that students would have similar learning styles because they were all pursuing a career in law.²⁸ They found diverse learning styles and that the traditional lecture would reach only around 30% of students.²⁹ John Sonsteng and colleagues had similar results.³⁰ They found that law students learned verbally, aurally, physically and visually.³¹

We agreed that there appeared to be little consideration given to the different ways in which our students might learn. Khylee also raised concerns about the different learning needs of Maori and Pacific Island students. She pointed out that while we had programmes designed to support these students, there has been no real attempt to introduce a range of teaching styles to accommodate these needs in the lectures themselves.

Our review identified some results of traditional law school teaching that we wanted to change or avoid: fear and anxiety arising from too much content and the use of the Socratic method; alienation of some students, by use of limited teaching techniques that took no account of difference learning styles; and encouragement of surface learning, by over-emphasis of content and use of particular forms of assessment.

B *Review of team teaching literature*

Our initial decision to teach together had not been informed by theories of the benefits to student learning and to teaching practice that might derive from our both being in

²⁶ From a class of around 800 students in Part 1 of the LLB degree at Auckland, only around 330 will be admitted to Part 2.

²⁷ Alice K Dueker, 'Diversity and Learning: Imagining a Pedagogy of Difference' (1991-1992) 19 *New York University Review of Law & Social Change* 101. The research concerns students at law schools in the USA; the key difference between these students and those in law school in New Zealand (and Australia and the UK) is that these are post-graduate students, rather than school leavers; it might be suggested – although the suggestion would require testing – that difficulties experienced by students who were 'different' would be more pronounced for younger, less experienced students.

²⁸ Robin A Boyle and Rita Dunn, 'Teaching Law Students Through Individual Learning Styles' (1998) 62 *Albany Law Review* 213.

²⁹ Ibid 227.

³⁰ John Sonsteng et al, 'Learning by Doing: Preparing Law Students for the Practice of Law – The Legal Practicum' (1995) 21 *William Mitchell Law Review* 111.

³¹ Ibid 137.

the class at the same time. As we had developed the course, we had thought much more about how the teaching methods used might affect the students' experiences. We now realised that we wanted to conduct an inquiry into our students' responses to the team teaching methodology. We therefore reviewed team teaching literature to place our practice in context and to identify appropriate research questions.

1 *Definitions of team teaching*

The first issue in the literature is the question of definition. Rebecca S Anderson and Bruce W Speck note that one of the key differences between definitions is whether they address the planning and implementation of the course or the actual teaching practice used in the classroom.³² There are definitions that emphasise the planning of the course and the joint responsibility for marking but in which each teacher will address the class alone.³³ There are some models that emphasise two or more teachers in the class at the same time.³⁴ Karin Goetz, in her analysis of the various forms of team teaching, identifies a range of different models.³⁵

Dick M Carpenter and colleagues found the same divisions in their review.³⁶ They adopted Lee C Deighton's 1971 definition: 'two or more teachers [who] regularly and purposefully share responsibility for planning, presentation and evaluation of lessons prepared for the same group of students.'³⁷

This definition extends the team approach beyond that of simply being in the class together. We felt that this definition was appropriate for our inquiry. We were making joint decisions on learning outcomes, content, assessment and teaching methods as well as working with the students together in class.

2 *Claimed benefits of team teaching*

The literature on potential benefits of team teaching drew experiences from a variety of settings, many of which were very different from an undergraduate law programme. There were studies dealing with language teaching,³⁸ adult education,³⁹

³² Rebecca S Anderson and Bruce W Speck, "“Oh What a Difference a Team Makes”: Why Team Teaching Makes A Difference" (1998) 14(7) *Teaching and Teacher Education* 671, 672.

³³ See, eg, Rex Ennis, 'Team teaching in adult basic education' (1986) 26(3) *Australian Journal of Adult Education* 4.

³⁴ See, eg, E B Gurman, 'The effect of prior test exposure on performance in two instructional settings' (1989) 123(3) *The Journal of Psychology* 275, 275 where the author defines team teaching as 'an approach in which two or more persons are assigned to the same students at one time for instructional purposes'.

³⁵ Karin Goetz, 'Perspectives on Team Teaching' (2000) <<http://www.ucalgary.ca/~egallery/goetz.html>>.

³⁶ Dick M Carpenter et al, 'Testing the Efficacy of Team Teaching' (2007) 10(1) *Learning Environments Research* 53.

³⁷ Lee C Deighton, *The Encyclopedia of Education* (1971) 89 quoted in *ibid* 54–5.

³⁸ See, eg, Peter Boyd-Bowman et al, 'A comparative study in the teaching of Spanish through team-teaching and supervised independent study' (1973) 57(4) *The Modern Language Journal* 199; S S Magnan, 'Teaming teaching and modifying class size: An experiment in first-year French' (1987) 60(4) *The French Review* 454.

³⁹ Tom Stehlik, 'Reflections on Team Teaching in Adult Education: Opportunities for Professional Development' (1995) 35(2) *Australian Journal of Adult and Community Education* 101.

and nursing,⁴⁰ none of which seemed directly relevant to legal pedagogy. We wondered how far we could extend the perceived benefits in these studies to our own work. However, several clear themes emerged from the diverse studies.

The most frequently claimed benefit was the one that had set us on the team teaching path in the first place: bringing different perspectives to students. Students would hear different points of view and this would broaden their intellectual range of inquiry.⁴¹ Interestingly, this benefit also had a flip side which studies recognised: there was a danger of students being uncomfortable with different opinions and conflicts between teachers and becoming anxious about what the 'right' view might be.⁴² In her fictional dialogue between advocates for and against team teaching, Ingrid Shafer has the opponent of the model assert that all team teaching does is to confuse and frustrate students, while the proponent counters by saying that the Socratic admission of ignorance is the start of learning.⁴³ This engaging way of presenting the arguments is particularly relevant for those considering team teaching in law schools, given its reference to – and illustration of – the Socratic Method.

Another claimed key benefit to students is the increased likelihood of student-teacher interaction and encouragement of student participation in class. Educational theory states that engaging students in their learning will create the conditions for a transformative experience.⁴⁴ Fauneil J Rinn and Sybil B Weir refer to intellectual excitement as a direct benefit of there being two teachers in the class together.⁴⁵ We were enthusiastic about the prospect of using team teaching practice to model intellectual debates, to encourage our students to participate in these and to allow them to develop their own arguments and perspectives. Mike S Wenger and Martin J Hornyak found these outcomes emerging in their own team teaching as their interactions with each other and with the students became more complex.⁴⁶

The literature also discussed benefits to teachers and improvements in teaching practice. Francis J Buckley referred to clarification of class goals and to improved teacher morale and creativity.⁴⁷ S Caplow and M Fullerton found that team teaching improved their preparation and performance and noted that one of the benefits of team teaching in law was that legal practice was often collaborative and they were able to

⁴⁰ A E Garner and C Thillen, 'Is your school of nursing ready to implement interdisciplinary team teaching?' (1977) 16(7) *Journal of Nursing Education* 27.

⁴¹ Ibid 28.

⁴² Discussed in Garner and Thillen, above n 40 and in Anderson and Speck, above n 28.

⁴³ Ingrid Shafer, 'Team Teaching: Education for the Future' (2000) <<http://www.usao.edu/~facshaferi/teamteaching.htm>>.

⁴⁴ Lee Harvey and Peter T Knight, *Transforming Higher Education* (The society for Research into Higher Education and Open University Press, 1996) 9–10 where the authors state 'Students are encouraged to think about knowledge as a process in which they are engaged [...] an approach that encourages critical ability treats students as intellectual performers rather than as a compliant audience.'

⁴⁵ Fauneil J Rinn and Sybil B Weir, 'Yea, Team' (1984) 32(1) *Improving College and University Teaching* 5, 9.

⁴⁶ Mike S Wenger and Martin J Hornyak, 'Team Teaching for Higher Level Learning: A Framework of Professional Collaboration' (1999) 23(3) *Journal of Management Education* 311, 323–4.

⁴⁷ Francis J Buckley, *Team Teaching: What, Why and How* (Sage Publications, 2000). The author is referring specifically to secondary school teaching.

model such practice to their students.⁴⁸ A further benefit for a teacher may be the opportunity to engage critically with familiar material from a different perspective.⁴⁹

3 Practices to support team teaching benefits

Carpenter and colleagues point out that much of the literature on team teaching is 'overwhelmingly descriptive or qualitative in nature'.⁵⁰ They note that R S Schustereit's 1980 review of empirical research into team teaching showed that the results were inconclusive.⁵¹ In their own work, they found that while some measures of engagement and learning did improve following team teaching, some did not.⁵² We felt it was important to bear this in mind as we embarked on team teaching, particularly as much of the literature highlighted difficulties for students and teachers that could arise from the practice. The danger of student confusion has already been mentioned. Other dangers referred to were student anxiety about how assessments would be marked,⁵³ the unsettling effects for students of adjusting to different teaching and presentation styles,⁵⁴ and student suspicion of material coming from fellow students in discussions rather than from lecturers.⁵⁵

The literature contained descriptions of practices that could minimise the identified dangers. We tried to build these into our course structure and teaching plans. M A George and P Davis-Wiley describe how they drew up agreed marking criteria which they both then independently applied to papers.⁵⁶ Professors Anderson and Landy recommend that team teachers be explicit about mutually agreed standards, so that students are clear what is expected.⁵⁷ It is important to refer to, and if necessary explain, different styles that members of the team may use. S Caplow and M Fullerton discussed their different presentation styles with their students and commented on these in class.⁵⁸ If one of the benefits of team teaching is to increase student

⁴⁸ S Caplow and M Fullerton, 'Co-teaching International Criminal Law: New Strategies to Meet the Challenges of a New Course' (2005-2006) *Brooklyn Journal of International Law* 103.

⁴⁹ Charlotte Woods, 'Researching and developing interdisciplinary teaching: towards a conceptual framework for classroom communication' (2007) 54 *Higher Education* 853. Charlotte Woods is specifically discussing teaching and learning that crosses subject boundaries, but the comments appear equally applicable to the use of different perspectives within a discipline.

⁵⁰ Carpenter et al, above n 36, 55.

⁵¹ R S Schustereit, 'Team Teaching and Academic Achievement' (1980) 28(2) *Improving College and University Teaching* 85.

⁵² Carpenter et al, above n 36, 60. The authors found that graduates in an introductory research and statistics course did not have higher levels of achievement overall when team taught, as opposed to when taught by a sole teacher, but that they did have a statistically significant increase in their comfort with research and statistics, a factor likely to promote learning.

⁵³ Melissa C Leavitt, 'Team Teaching: Benefits and Challenges' (2006) 16(1) *Speaking of Teaching: The Center for Teaching and Learning Stanford University Newsletter* 1, 3 <<http://ctl.stanford.edu/speaking-of-teaching-newsletters.html>>

⁵⁴ Henry C Morlock et al, 'A Rotational Format for Team Teaching Introductory Psychology' (1988) 15(3) *Teaching of Psychology* 144.

⁵⁵ M M Helms et al, 'Planning and Implementing Shared Teaching: an MBA Team-Teaching Case Study' (2005) 81(1) *Journal of Education for Business* 29. The authors discuss students' initial negative reactions to formats other than the traditional lecture. MBA students are used to large formal classes, as are law students.

⁵⁶ M A George and P Davis-Wiley, 'Team Teaching a Graduate Course: a Clinical Research Study' (2000) 48(2) *College Teacher* 75.

⁵⁷ Professors Anderson's and Landy's approach is discussed in Leavitt, above n 53, 3.

⁵⁸ Caplow and Fullerton, above n 48. It was notable that in the feedback, the authors' students said

participation, then, logically, more class time should involve listening to the views of students rather than teachers. Barbara J Millis and Philip G Cottell, Jr note that it is not only students who are suspicious of group discussions; some teachers say that it is important for students to hear from ‘the authority figure’.⁵⁹ Millis and Cottell refer to extensive research supporting the use of cooperative and active learning strategies and advise that teachers should explain to students exactly what they are going to do and why they think the activities will benefit the students.

III OUR INQUIRY INTO TEAM TEACHING

An honest assessment would show us that law schools have almost no use for teamwork.⁶⁰

Team teaching in law schools – at least in undergraduate classes – appears to be rare. There may be various reasons for this, including economic pressures and demands on staff time, and a perception that the concept of the ‘team’ is not one that is important to learning the law. The literature on team teaching contains very little analysis of possible benefits of team teaching in law schools. We hoped that we might be able to add something to the understanding of how the model could benefit law students and law teachers.

The project felt risky, however, and that is why we refer to ‘double jeopardy’ in the title. One risk that we identified at the start of the project was having our inadequacies as teachers exposed to each other. Although the literature did not always explicitly state whether the researchers had previously taught together, this could be deduced easily from surrounding information in the studies.⁶¹ It seems reasonable to assume that teachers may decide to work together where they have a level of trust that makes them comfortable with such close peer observation. We had never taught or carried out research together. What if we did not like the other’s approach? What if our styles did not work well together?

A second risk was student resistance as we tried new teaching and assessment formats. The literature did set out a range of difficulties that might arise from the use

that at the beginning of the team taught course, they knew more about each teacher’s style than the other teacher seemed to, since most had been taught individually by one or other (or both) of these law teachers; we were very interested in this and it allowed us to reflect on how our students might perceive our teaching styles, since many of the students enrolled in the elective had been taught by one or both of us previously.

⁵⁹ Barbara J Millis and Philip G Cottell, Jr, *Cooperative Learning for Higher Education Faculty* (1998, American Council on Education) 27.

⁶⁰ Beverly I Moran, ‘Trapped by a Paradox: Speculations on Why Female Law Professors Find it Hard to Fit into Law School Culture’ (2002) 11 *Southern California Review of Law & Women’s Studies* 283, 294. Beverly I Moran is not specifically discussing team teaching, but contrasting the co-operative working that many women colleagues engage in and the individualistic, authoritarian nature of the teaching often used in law schools and which she argues suits male colleagues in particular.

⁶¹ The researchers had often written previous papers together and worked in the same field of inquiry for several years. See, eg, Judith A Winn and Trinka Messenheimer-Young, ‘Team Teaching and the University Level’ (1995) 18(4) *Teacher Education and Special Education* 223. The authors had been involved in writing projects together, before undertaking team teaching of mainstreaming children with special educational needs.

of team teaching. What if the enterprise was not a positive learning experience for the students? As we began our inquiry we felt that our professional credibility and reputations could be in jeopardy, although we believed the risks were well worth taking.

A *Research Methodology*

We offered the elective course for the first time in 2009. It was open to all students in Parts 3 and 4 of the degree. The elective ran in 2009, 2011 and 2012 and the numbers of students enrolled for those years were 73, 79 and 83 respectively. We wanted to collect three years worth of team teaching data to try to reduce the impact of 'teething troubles' on the inquiry. Our review of the literature had given us our project aim and objectives.

The aim was to explore benefits and drawbacks to student learning of team teaching in a law school elective. The objectives were to:

- (i) explore student expectations and experiences of team teaching;
- (ii) identify student responses to team teaching methods, particularly debates and discussions; and
- (iii) analyse the effects of team teaching on student learning.

The first objective was included to place the team teaching in the context of our Faculty teaching and of law teaching more generally. Given the natural 'fit' of a team style presentation for adversarial legal debate, we wanted to know whether students might have experienced this previously and what might be their expectations of the method. In respect of the second objective, we were particularly interested in whether students' responses to the method would change over time. If there were anxieties as identified by the literature, these might dissipate as the course progressed. We planned to gather student data midway through the course and at the end.

The third objective was problematic. The effects of any method on learning may emerge a long time after a course has finished. Learning may be influenced by many factors, only some of which are within the lecturers' control. We knew that any conclusions about improved learning – or otherwise – would be limited to a snapshot of a portion of the students' experiences.

We felt that it would be ideal to collect both qualitative and quantitative data, and wanted to use student focus groups during the course and at the end. Group discussion was seen as an appropriate way to allow the students to explore their reactions to the teaching method and any changes in their views that occurred as the course progressed. It was hoped that this format would also encourage reflection on what the effects of the teaching might have been on learning. We would also use a quantitative questionnaire. Students are very familiar with evaluation questionnaires at the end of courses and we thought this would ensure a fairly high participation rate.

1 Satisfying ethical concerns: 'buffering'

We were clear about what we wanted to do and how we wanted to do it. However, to gain ethics approval for the research, we had to make several modifications to the data

collection methods. The reason for the modifications is best described as ‘buffering’. We were the teachers and we would be marking the students’ work and giving them grades. It was essential to the integrity of the research and the freedom of choice of the students that they were completely confident in their decisions about whether or not to participate. They needed to know that these decisions would have no bearing on how their performance on the course would be assessed.

Data collection had to be anonymous. This meant that we were to have no knowledge of which students, if any, participated in focus groups. It also meant that we should have no access to digital voice recording of the groups, since we might have been able to identify individual students. We were extremely lucky that Dr Ian Brailsford, the Head of the University’s Academic Practice Group,⁶² agreed to be our research assistant. He conducted and recorded all focus groups and provided us with transcriptions of the discussions.⁶³

Anonymity was not an issue in respect of the questionnaires. However, we could not use the usual practice of collecting these in class. Students might have felt inhibited in expressing criticisms of our teaching when their final assessment had not yet been marked. We arranged for the questionnaires to be handed out by administrative staff once we had left the final class and for the students to place their completed questionnaires in a box in the Faculty office. Students were advised that we would have no access to the completed questionnaires until final marks for the course had been released.⁶⁴

2 Responding to student apathy

We had been concerned about student resistance to a new teaching method. But that was eclipsed in the middle of the first semester of 2009 by a more pressing concern: would we manage to collect any data at all?

To ensure that the students did not feel any pressure from us to participate in the research, we asked Dr Brailsford to address the first class in our absence. He explained what we were trying to do and why and said that he would be in touch about the focus groups. A week out from the designated date for the group, there were no volunteers. Several reminders by Dr Brailsford eventually produced a few students, but the average participation rate over the three years – eight and a half per cent – was very disappointing.⁶⁵ We (through arrangements made by Dr Brailsford) tried increasing participation in various ways. The only change that appeared to affect numbers at all was the offer of pizza, but even this did not increase buy-in greatly.

The end of 2009 produced a further disappointment: only three questionnaires were returned from a class of 73 students. We concluded that the use of the drop-box at the

⁶² Dr Ian Brailsford has been advising the Faculty of Law on teaching and learning matters for several years. We are immensely grateful to him for his assistance and wise advice during the inquiry.

⁶³ We had a confidentiality agreement with the transcription service. Dr Brailsford placed the recordings in a secure drop box. The transcriptions were sent to him, with any identifying student information (such as students calling each other by their names) removed. Dr Brailsford then sent the fully anonymised transcripts to us.

⁶⁴ The advice was given in the research Participant Information Sheet.

⁶⁵ Focus group participant numbers were 7 of 73 in 2009, 10 of 79 in 2010, and 3 of 83 in 2012.

Faculty office could be the problem. It did not seem prudent to rely on students remembering to deliver the questionnaires, particularly if they had other classes after ours. Despite our ethics statement that we would use the reception box, in 2011 and 2012 we asked Faculty staff to collect questionnaires in the last class and to retain them for us until assessment was complete. The result was a 19 per cent return rate.

B *Research findings*

At the end of our inquiry, we had quantitative data from 44 questionnaires and qualitative data from a total of 20 students who had taken part in 4 focus groups. The questionnaire had 6 pages and contained 33 questions on five topics,⁶⁶ with one open ended 'any other comments' question. We were pleased to note that the material in the focus group transcripts was very detailed and that the students had explored the possible effects on their learning of the team teaching method.

We analysed the extent to which the material met the three research objectives and grouped the findings into three headings:

- (i) Student experiences and expectations of team teaching
- (ii) Student responses to team teaching
- (iii) The effects of team teaching on student learning.

1 *Student experiences and expectations of team teaching*

Student responses overwhelmingly indicated that they had not previously experienced team teaching as defined by Deighton, that is, with two or more lecturers interacting with them at the same time. Only four students out of all those who took part in the focus groups or completed the questionnaires indicated such previous experiences and none had been in a law subject.⁶⁷

It was clear that most students had experience of what many of them described as 'block' teaching in the compulsory subjects of the law degree: 'multiple lecturers, but never in the same lecture sort of thing. Like one will do their part and then they'll leave and then another one will come on.' This methodology was very familiar to the students and it influenced some of their expectations of what team teaching might be like: 'I thought it might be a bit more traditional like the other law papers where they kind of tag team, they're not in the class at the same time.'

Many students had no expectations, positive or negative about the teaching method: 'I didn't have many expectations of it, I was just like, "oh yeah, could be different."' Those who did, often said that they were excited or intrigued to see what the course would be like: 'I thought it might be interesting to see how there was a balance between two different outlooks on the same topic.'

Students were asked to identify any initial concerns they had about team teaching. Eight did so and, of these, six mentioned lack of clarity or confusion in respect of

⁶⁶ Topics were: previous experience of team teaching; initial attitude to team teaching; response to teaching method; response to assessment methods; and views on quality of learning.

⁶⁷ The four students each mentioned different settings: a tertiary foundation certificate, an accounting course, a commerce course and while working in high school as a teacher.

material because contrasting views would be given.⁶⁸ All these concerns were noted in questionnaires and, on each one, the student added that the concerns had not arisen or had been dealt with.

2 Student responses to team teaching

To gauge students' responses to our team teaching, the focus groups and questionnaires asked a range of questions. There were three questions dealing with some of the dangers that the literature had highlighted. Students were asked if it was clear who was in charge of each class, if they thought that both lecturers had equal authority, if the teaching methodology had been clearly explained and if they knew exactly how assessments would be marked. Every student answered each question 'yes', with several in the focus groups saying 'definitely' and one saying: 'incredibly clear – they really went on about it.' We were delighted that our planning had avoided some of the potential difficulties – even if it did appear that we had laboured our explanations at times.

Students were specifically asked to comment on the use of small group discussion and on the whole class debates and discussions. In the first year, we had booked break out rooms for the small groups. The students were very anxious about losing lecture time as they moved into the rooms:

[I]n the beginning they were breaking out into groups and it just seemed to be a lot of time. I don't know, I mean I think they thought what came back was probably quite good but I just felt like it was a waste of a lot of time. I mean I think you could do it in different ways and they have tried to do that where you just turn to your neighbour and talk about something or, so they're wanting to get that same discussion but the actual break away groups I just don't think were that effective.

Several students approached us and asked that we stop using the break out rooms. The class representative explained 'we just want to hear from you guys'. This was somewhat dispiriting, but we changed our practice and asked the students to form small discussion groups in the lectures. The research data suggests that we may have been too hasty in giving up the approach. One student said: 'when we broke into the smaller groups I was much more comfortable, like I didn't know any of the people in the group, which was fine, but it was more comfortable being in a less formal kind of atmosphere. And so you're able to exchange and everyone kind of feels like equal.' Another commented:

When you had a good group, the discussion was really good and I got to develop ideas and you get to know other people, what they take from the readings. Cos sometimes you read something and go "I don't understand what that's all about" and then you talk about it and you go "oh yeah, I get it now."

While responses to the small groups were mixed, students were overwhelmingly enthusiastic about the class debates and discussions. Two linked themes emerged. First, the format made the classes less daunting: 'Yeah, it was less intimidating, especially with sort of the core papers, like land and equity, in the huge lecture theatres and you never want to raise your hand.'

⁶⁸

The other two concerns were contradictory expectations for assessment and which person to go to outside class with questions.

In some lectures those, that minority that actually talks makes you feel really dumb, like you don't know enough about the subject. But because of the culture and how the lectures were structured you actually felt like even if you didn't participate you, you're not as, you're just like everyone else, you're not dumber, or what-not, it was just, yeah, really good.

Second, the format encouraged participation: 'I don't like to contribute in class generally, but I felt like we were sort of given a mandate to because there was already an interruptive flow, or it was structured that way so that it didn't seem like you were interrupting a lecturer if you asked a question or made a statement.' Others said:

I've definitely been more involved, like I've asked a couple of questions in class which I don't normally do. So this course was a lot more interactive and I think it was because team teaching made it feel less formal ... because if you're in the class and there's one person you all focus on that but if those, if your lecturers are both interacting with each other and encouraging everyone else to interact it's a lot less, I don't know, authoritarian.

It's not like your normal law class. I find like you'll go and sit in Family [Law] or whatever and it's kind of the same people that say the same thing all the time. But with Youth Justice there's, just the way they teach and how, it feels a lot more relaxed and less formal which I think encourages a lot more people to speak and it isn't the same people you're hearing from all the time ...

Students also appreciated the opportunity to hear different perspectives on the topics discussed: 'I guess coming from such different backgrounds they can give different perspectives, so obviously Scottish versus New Zealand.'

The different perspectives that students specifically mentioned were based solely on ethnicity or jurisdiction:

They were good because they raised different points as well and also because there were like lots of people coming from different like ethnic backgrounds, it was quite good to see their point of view and then Khylee and Alison also have their own views from, obviously Khylee from the Maori background and Alison from the Scottish UK kind of view so yeah that was quite good.

Alison's definitely giving a more sort of Scottish/European perspective because that's what her speciality is. And then Khylee's probably, they complement each other quite well really because Khylee's such a kiwi girl, it's a really full on kiwi perspective and approach.

It was not surprising that students identified these perspectives most easily. Our different accents and discussion of practice in different jurisdictions would have reinforced them throughout. We were disappointed that there was no reference to some of the different theoretical perspectives that we had tried to present.

Students were specifically asked whether they thought that the team teaching format would work or be appropriate in other law school subjects. The majority of students who answered this question were clear that the approach would not work for the compulsory papers.⁶⁹ Several said that courses with 'more content' or that were

⁶⁹ A significant minority of those completing questionnaires stated they were not sure or did not know whether there were courses for which team teaching would not be appropriate.

statute-based should not use the approach. Contract, Company and Tax law were mentioned as particularly problematic.

The literature had noted that students could be anxious when presented with differing views. Our students seemed comfortable with this. In fact, several questionnaire comments suggested some students would have liked us to argue with each other more. Interestingly, they linked their positive reactions to the perceptions that we got on well together. One student said:

I do question whether team teaching can work for others because I know Khylee and Alison are so close and they socialise outside of uni and [are] quite good friends I would say. Whether it would work maybe if the team of lecturers weren't friends outside, maybe there would be a power struggle or something.

3 The effects of team teaching on student learning

Students were asked whether the teaching method helped their learning and if so, in what ways. They were also asked whether the format helped them to challenge our views and the views in the readings. We were very pleased that some students took time to answer these questions in detail.

Students identified several effects of our teaching:

- holding their interest;
- providing coherence to the subject;
- enabling them to challenge academic views; and
- providing different perspectives.

The clearest effect of the team teaching was that it held the students' interest better than a single lecturer would: 'They'd ask us a lot of questions during the lectures. Which was good, and we'd talk about things. Which is, I find it a much better way of learning than just being lectured at for two hours, so that was really good.' The student comments suggested that the effect was to entertain them and this does not necessarily suggest deeper learning:

I personally really like it, like I really like this style of teaching, it's more, it just, they're able to hold my interest a lot longer than just one lecturer, cos sometimes just one lecturer can be very hard to listen to and they both seem to work really well together, they're able to bounce off one another.

Students equated our personalities and the way we worked together with the level of their interest: 'Do you know what I mean, like it wasn't like two teachers who you didn't want to be in the same room with. With these guys you actually wanted to learn and you did learn because they made it really enjoyable, they made it understandable. So yeah, it was really good.'

Our different practice experience was often commented on positively:

I think one thing that really helps in the learning process for people, things that people really appreciate is anecdotes and stories, especially from people who have practised, so when you have two lecturers you just have twice the wealth of experience and anecdotes and I think that's quite valuable and makes the paper more enjoyable.

Students often contrasted our teaching with ‘block’ teaching in the compulsory subjects. They felt that the team approach gave more consistency and coherence to the way a subject was taught: ‘I much prefer this way of teaching rather than people coming in, doing their stint and then leaving, for lots of reasons just it’s harder to try and see all the links between sections when people do that.’ Another said:

I like having different lecturers, but the thing that makes it sometimes hard is when you’ve got to try and merge those different concepts, like if you were to have two lecturers in Contract that would be very different ... So that’s why I think working, like having both lecturers in the room at the same time so they all know what’s going on works better than having people just coming in for their like, two or three weeks kind of thing.

The results suggested that the method was at least partially successful in enabling students to challenge the academic views that they heard from us and encountered in the readings: ‘Because they occasionally disagree with each other it was easy to feel comfortable holding a conflicting view.’ Comments from the questionnaires reinforce this: ‘Analysis was particularly aided by having two lecturers give their views – it was interesting to see where they did not agree.’ This was an encouraging comment: ‘Presentation of more than one view encouraged me to work at formulating my own, rather than just absorbing what is taught.’

As noted above in the discussion of responses to team teaching, students identified as useful the different perspectives that we presented:

I do find that it is quite good to have two different kinds of opinions happening in the class, where it does help us, or it does help me, is to sort of look at things from the different angles and how to approach the issues, yeah. I do find that quite helpful. Hm, and plus they make it really clear that “I don’t agree with you on this point because blah, blah, blah”.

This comment: ‘I think it’s really good, it gets a better discussion going, it gets more perspectives going...’, and this one: ‘I think it was good to have some different views and show where areas were more unclear or controversial’ both suggest that the method allowed exploration of different viewpoints.

The results of our inquiry suggested that the team teaching approach engaged students more effectively for longer and that it helped them to identify and challenge different perspectives. But did this indicate deep learning? We had decided to use a team teaching approach partly because we were persuaded that more traditional teaching approaches in law school encouraged surface learning.

Marton and Säljö’s research into different outcomes from learning described students’ approaches to study as surface learning and deep learning.⁷⁰ In contrast to surface learning, in which students tried to rote learn material to reproduce it later, deep learning involved students in a search for meaning, in order to understand the

⁷⁰ F Marton and R Säljö, ‘Approaches to Learning’ in F Marton, D Hounsell and N Entwistle (eds) *The Experience of Learning* (University of Edinburgh Centre for Teaching, Learning and Assessment, 3rd internet ed, 2005) ch 3.

material. Marton and Säljö showed that deep learning was associated with student work that was qualitatively better than work produced by surface learning.⁷¹

We had introduced the new elective and the new teaching approach simultaneously. We therefore had no control group of students who had experienced youth justice taught in a traditional way, which meant we could not compare work produced under both approaches. Instead, we had two potential sources of data on deep learning. We examined transcripts for indications that students were constructing meaning from what they were reading and hearing. We analysed questionnaire answers about how students thought the approach had affected their learning.

Some student comments from the focus groups did suggest that they were beginning to construct their own understanding of the material: 'approaching issues from different angles got me thinking. I now understand that everything comes with a perspective and background.' Some students seemed to be approaching the material in a more questioning, analytical way as a result of the way in which we had presented the issues. Most students completed the questionnaire section about how team teaching had affected their learning. None said the approach had a negative effect on their learning. Some students simply stated 'it was better' or 'it helped' without further explanation. However, there were several indications that deep learning could be occurring: 'it made me think more about the issues' and 'the class discussions were good for showing me other ways of looking at things'.

We found it particularly encouraging that some students were beginning to think about how they learned. Deep learning can involve students monitoring their developing understanding.⁷² We deliberately held focus groups during the semester and at the end of the course, to explore whether the students' views about team teaching changed over time. There were no changes in views of team teaching since the students had not previously experienced the approach. However, a few students referred to the ways in which they were learning:

They raised different points as well and also because there were like lots of people coming from different like ethnic backgrounds. It was quite good to see their point of view because a lot of what they had to say wouldn't normally even enter my head.

I took more notes in this class because there was a lot more information being shared yeah and just because there was always kind of two or more views on something.

Several positive themes emerged from the students' responses and we concluded that there were some indications that deep learning was beginning to take place for some students. However, one fascinating exchange in a focus group, reproduced here in full, reminded us that no matter how much effort we put into creating the conditions

⁷¹ For detailed discussion of Marton and Säljö and other research on deep and surface learning, see K Trigwell and M Prosser, 'Improving the quality of student learning: the influence of teaching context and student approach to learning on learning outcomes' (1991) 22 *Higher Education* 251.

⁷² N Entwistle and A Entwistle, 'Revision and the experience of understanding' in F Marton, D Hounsell and N Entwistle (eds), *The Experience of Learning* (University of Edinburgh Centre for Teaching, Learning and Assessment, 3rd Internet ed, 2005) ch 9.

in which deep learning may occur, some students will choose not to use that opportunity:

Researcher

So were there any negative impacts of that sort of mode of team teaching on your learning in the course?

Participant 1

It was just like I kind of felt like “oh my gosh this is going to go on and on, where does the debate end? It just seemed a bit endless. Limitless.

Researcher

Okay

Participant 3

It might depend on your approach to the class, though. I think some people approach it really wanting to understand issues on youth justice and then it can be really helpful and engaging. I think I probably approached it more for “I want my 10 points” and that’s probably how I approach university, get a degree not an education.

Participant 1

Which isn’t necessarily the way you should do it, but then it can be frustrating because you kind of feel like “What’s the right answer? What can I put in the exam?”

Participant 3

This isn’t a course for that. And it probably should be flagged as such. It’s not one where there’s a right answer. You don’t have long established case law, you don’t have massive tomes written on it. You have to think. So in that respect it’s actually quite refreshing, but it could be frustrating if you were just in it for the...

Participant 1

For the 10 points.

Participant 3

For the mark, yeah.

Ironically, although these students had been asked to identify any negative impact from the team teaching, their responses suggested some positive effects on student learning. The references to ‘endless’ and ‘limitless’ pleased us. It sounded as though we had really managed to open up the topics and present some of their complexities. We loved the suggestion that our course should be ‘flagged’ as one that did not provide ‘the right answer’. We are considering the inclusion of the following in the course book: ‘Warning: this course requires you to think. Enrolment may severely sharpen your intellect.’

IV CONCLUSIONS AND FUTURE CONSIDERATIONS

Our initial decision to team teach arose from our desire to present students with the most comprehensive view of our subject that we could. The results of our inquiry suggest that we succeeded in presenting students with different perspectives and in encouraging at least some of them to explore their own and others’ assumptions and views of the material, and to challenge those. The fact that there were always two lecturers in the class who had demonstrably different backgrounds and experience

interacting with the students together, reinforced the broader and more contextual approach that we hoped the students would adopt.

We can also say with some confidence that the use of this model of team teaching increases students' engagement during lecture time. Two teachers can hold student attention better than one, and for longer. Participation in class discussions and debates was at a high level compared with students' experiences in some other courses and this indicated that students were more engaged in what was happening during the classes. It might be argued that the increase in participation could have led to the higher learning outcomes of synthesis and evaluation which are seen in B S Bloom's taxonomy.⁷³ We would need a further inquiry to confirm this, probably involving analysis of completed student assessments.

Our inquiry showed that it is possible to overcome the difficulties that can sometimes arise with team teaching. We had identified the difficulties and tackled them in two ways: through class structure and through detailed explanations given to the students in class time. In fact, our students felt that the course was presented more coherently than in some 'block' taught courses and commented that the coherence helped them to learn. This confirmed to us that we had managed to avoid the danger of confusion and turned our dual input into an advantage for the students.

One further benefit to emerge from our inquiry was the creation of a less intimidating lecture environment. This appeared to have given some students the confidence to challenge their own and others' opinions of the issues under discussion. Taking this with the different perspectives that we presented to the students, we might hope that some deep learning began to occur. Again, evidence of this would have to be sought by looking at students' written work.

We do not have the evidence to state categorically that student learning was improved by our use of team teaching. What we can say is that their engagement in lecture time was increased and that we created an environment in which high quality learning might have occurred. However, if one of the measures of deep learning is the confidence and ability to analyse and synthesise, then some of the students' negative reactions to the small group work must be considered. We did not see an increase in the students' appreciation that discussing material with their peers would produce valuable material and improve their learning. Perhaps the necessary confidence in small group discussion needs to develop over time. We may have given in too easily to the students' requests that we stop using the small groups. Perhaps if we had persisted with the groups, the evidence of their value would have changed the students' attitudes towards them.

In the future, we intend to reinstate some small group work and spend more time explaining to the students why we think that work will be beneficial for them. We also intend to disagree with each other more in class, challenging each other and inviting

⁷³ B S Bloom et al, *Taxonomy of Educational Objectives: Cognitive Domain* (1956, McKay, New York). The learning objectives in the original version were knowledge, comprehension, application, analysis, synthesis and evaluation. A revised version of the taxonomy is available at <http://www.odu.edu/educ/roverbau/Bloom/blooms_taxonomy.htm>. In the revised version, the intellectual behaviours are remembering, understanding, applying, analysing, evaluating and creating.

the students to defend or attack our positions. We were encouraged that some students specifically expressed disappointment that we had not engaged in more arguments. We have now developed a comfortable team teaching style and are less anxious about confusing the students or exposing our inadequacies to each other. Over the three years of the inquiry, our concerns about the risks we faced have dissipated and we are confident about and committed to continuing with team teaching in the course.

One other issue emerged from our inquiry. When our students talked about their experiences in the Part 2 compulsory subjects, they confirmed the research messages about traditional teaching in law. They described being intimidated. They noted confusion when different lecturers presented different parts of some courses. As they explained how our classes were different from those in the compulsory subjects, they left us in no doubt that they believed that the lecturers in those subjects did not want them to question, to challenge or to think for themselves. We were slightly bewildered. Khylee teaches criminal law, Alison contract law. Except for the fact that we lecture on our own in the classes, we have the same approach in these subjects as we do in Youth Justice. We explain about contestability, about arguing in the alternative and about the policy contexts. Why do the Part 2 students not take this on board?

We wonder if the answer might be that students cannot disentangle the teaching methodology used from the content of the compulsory courses. Students appear to have fixed and rather pessimistic views of what they will be expected to learn in the compulsories. These views may stop them appreciating how different teaching methods can help them to learn. If we do ever decide to introduce new methods in a Part 2 subject, it will certainly be challenging.

KEEPING MUM: SUPPRESSION AND STAYS IN THE RINEHART FAMILY DISPUTE

MIIKO KUMAR^{*}

This article examines Gina Rinehart's numerous attempts to suppress information and stay proceedings in the extraordinary litigation in the Rinehart family trust dispute. The Rinehart litigation, while only at its pre-trial stage, has delivered significant judgments on the new legislative powers to depart from the principle of open justice and the law relating to stays of proceedings (stays of a substantive claim and stays pending an appeal to the High Court). The new legislation is the Court Suppression and Non-publication Orders Act 2010 (NSW), which has national significance as it is the model statute that aims to be implemented in all Australian jurisdictions and is a Federal Bill. The Rinehart litigation proves that the principle of open justice continues to be fundamental under the model statute and that the media has an important role in ensuring its protection. Possible future questions under the statute could be about the meaning of 'suppression' and the operational differences in seeking review under the Federal and NSW model. The Rinehart litigation is significant as it has redefined the test for seeking a stay of orders pending proceedings in the High Court. It has also considered whether a claim can be stayed due to an agreement to use alternative dispute resolution mechanisms. Further, it signals that future legal developments may occur on the issue of whether trustee disputes are arbitrable.

I INTRODUCTION

How does litigation proceed when the defendant has immense wealth¹ and is desperate to avoid the public airing of her family dispute? Can a pre-dispute agreement keep a dispute away from the court? Is it possible to suppress information

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¹ Gina Rinehart is a mining magnate who is Australia's richest person and the richest woman in the world as ranked by BRW's 2012 Rich 200: Adele Ferguson, 'Rinehart World's Richest Woman', *BRW* (online), 23 May 2012 <http://www.brw.com.au/p/sections/features/rinehart_world_richest_woman_JucE8ndw9hYfzDk5NuudTI>.

about the litigation from the public so that private matters escape the embarrassment caused by the public spectacle of litigation? The aim of this article is to examine these questions by analysing the extraordinary pre-trial litigation in the proceedings commenced by three of Gina Rinehart's children in relation to the affairs of a family trust in which Gina Rinehart is trustee. This lengthy interlocutory litigation has already examined two significant areas of civil procedure and the hearing of the substantive proceedings has not yet begun. Gina Rinehart's repeated attempts at suppressing information and stopping her children's litigation appear unconstrained by the usual cost barriers. This litigation has interpreted the *Court Suppression and Non-publication Orders Act 2010* (NSW) (CSPO Act) which is the legislative model that aims to be implemented in each Australian state and territory, and is currently a bill before the Australian Federal Parliament.² The Rinehart litigation is used to evaluate the effectiveness of the new legislative model and to consider any unresolved issues of statutory interpretation. This article will then discuss the procedural developments in respect of the law relating to stays. The Rinehart litigation has focused on stays in two respects. First, it has redefined the test in New South Wales for the exercise of an appellate court's discretion to grant a stay pending an application for special leave to appeal to the High Court and, second, it has considered whether substantive proceedings should be stayed to give effect to a pre-dispute agreement for alternative dispute resolution. Another issue, one which divided the New South Wales Court of Appeal, is whether the Supreme Court's equitable or statutory jurisdiction for the removal of a trustee is susceptible to 'private justice' by way of an agreement to arbitrate.

II THE PRINCIPLE OF OPEN JUSTICE AND THE POWER TO DEPART FROM IT

The principle of open justice is one of the most fundamental aspects of the system of justice in Australia.³ It means that a court is physically open to the public and filed documents or tendered evidence can be accessed by the public. The reality is that few members of the public physically access the court; rather the public's knowledge of what occurs inside the courtroom is enabled by media reports of court proceedings. This means that a consequence of the open justice principle is that, absent any restriction ordered by the court, anybody may publish a fair and accurate report of the legal proceedings.⁴ Reports about court proceedings are usually undertaken by media organisations. This is important because 'publicity of proceedings is one of the great protections against the exercise of arbitrary power and a reassurance that justice is

² *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* (Cth). This Bill is before the Senate having been referred to the Senate Legal and Constitutional Affairs Legislation Committee for report. A report published 29 March 2012 recommends its implementation: Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* (2012).

³ *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344, 352 (Spigelman CJ). This was a case where a trial judge made a non-publication order in respect of guilty verdicts. On appeal, the non-publication order was found to be not necessary for the administration of justice.

⁴ *Hogan v Hinch* (2011) 243 CLR 506, [22] (French CJ). This case concerned suppression orders prohibiting publication of information that might identify certain sex offenders who were the subject of post-custodial extended supervision.

administered fairly and impartially'.⁵ The purpose of open justice is to ensure integrity and the accountability of those who administer justice.⁶ Further, it has been said that witnesses are more likely to tell the truth if they testify in public.⁷ Open justice enhances the public's confidence in the justice system and perpetuates the rule of law.⁸ The provision of reasons by the court for its decision is also an expression of the open justice principle.⁹

Openness is usually placed with the right to a fair trial when set out as a right in bills of rights. Open justice is expressed as a right to have a 'fair and public hearing'.¹⁰ Privacy is also protected in some statutes and it is balanced with the right to a public hearing.¹¹ In jurisdictions without a bill of rights, such as Australia, the common law first recognised the principle of open justice.¹² It has also been observed that the exercise of judicial power implied in Chapter III of the Australian Constitution, includes a requirement of openness.¹³ In addition to the common law, there are statutes which expressly permit departures from the open justice principle.¹⁴ A further constitutional argument has been raised in respect of statutory powers that depart from

⁵ *R v Richards & Bijkerk* (1999) 107 A Crim R 318 (Spigelman CJ). In this case, the closing of the court was held to be necessary for the administration of justice to prevent tampering with jurors.

⁶ *Russell v Russell; Farrelly v Farrelly* (1976) 134 CLR 495, 520 (Gibbs J). See generally, Peter Wright, 'The Open Court: The Hallmark of Judicial Proceedings' (1947) 25 *Canadian Bar Review* 721; Garth Nettheim, 'The Principle of Open Justice' (1984) 8 *University of Tasmania Law Review* 25; J J Spigelman, 'Seen to be Done: The Principle of Open Justice – Part I' (2000) 74 *Australian Law Journal* 290; Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press, 2002); New South Wales Law Reform Commission, *Contempt by Publication*, Report No 100 (2003).

⁷ Sir William Blackstone, *Commentaries on the Laws of England* (3rd ed, 1768) vol 3, 373; Jeremy Bentham, *Judicial Evidence* (1825) 67-8. Also see *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, 45 (Fitzgerald P and Lee J).

⁸ See generally, J J Spigelman, 'Seen to be Done: The Principle of Open Justice – Part II' (2000) 74 *Australian Law Journal* 378. Also see *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 607-608 and *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, [39].

⁹ *Wainohu v New South Wales* (2011) 243 CLR 18, [58] (French CJ and Kiefel J).

¹⁰ See for example *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14 (Australia is a party to this Covenant and it is scheduled and annexed to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)); *European Convention on Human Rights*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 6 (which is incorporated into English law by *The Human Rights Act 1988* (UK)); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1); and the *Human Rights Act 2004* (ACT) s 21(1).

¹¹ For example, art 8 of the *European Convention on Human Rights* recognises the right to privacy. However, this right is subject to the limitations in art 8(2) and also art 6 refers to the protection of the 'private life of the parties' as an exception to open justice if the test of strict necessity is met.

¹² The oft cited case for the foundation of the open justice principle is *Scott v Scott* [1913] AC 417 which stated that the general principle that a court must administer justice in public. This English case was soon followed in Australia: *Dickason v Dickason* (1913) 17 CLR 50.

¹³ *Grollo v Palmer* (1995) 184 CLR 348, 379 (McHugh J); *John Fairfax Publications Pty Ltd v A-G (NSW)* (2000) 181 ALR 694, 703 (Kirby J); and writing extrajudicially, J J Spigelman, 'Seen to be Done: The Principle of Open Justice – Part I' (2000) 74 *Australian Law Journal* 290, 293.

¹⁴ For example, *Civil Procedure Act 2005* (NSW) s 71 permits court proceedings to be conducted in the absence of the public; *Federal Court of Australia 1976* (Cth) s 50 permits non-publication orders (this section will be repealed by the *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* (Cth)); and the power to make non-publication and suppression orders pursuant to the *Court Suppression and Non-publication Orders Act 2010* (NSW).

open justice. In a case involving a statutory power that permitted Australian Security Intelligence Office officers to give evidence anonymously, it was argued that such a power undermined the institutional integrity of the State court and therefore rendered it a less effective vehicle for the exercise of Federal jurisdiction.¹⁵

A *Power to Depart from Open Justice at Common Law*

The principle of open justice can be departed from in various ways. First, by in camera hearings, that is, by ordering the exclusion of the public from some part or all of a hearing.¹⁶ Second, by restricting access to information, for example particular exhibits in a trial,¹⁷ or by making pseudonym orders to prevent the disclosure of a witness' identity.¹⁸ Third, by ordering non-publication of all or parts of proceedings or of the evidence.¹⁹ Of course, more than one order can be made to protect information. For example, when an undercover police officer testifies, several orders are made to protect the operative's identity (a pseudonym order is made to protect the true identity, a closed court order is made to prevent the public seeing the operative and a non-publication order is made to prevent reports of the description of the operative). The Australian common law recognises that open justice is not absolute and there are departures from it. The test to depart from the open justice principle is based on necessity, namely, whether it is 'really necessary to secure the proper administration of justice'.²⁰ The power to depart from open justice could be in the exercise of a superior court's inherent jurisdiction or an inferior court's implied power.²¹ The word 'necessary' was recently considered by the High Court in *Hogan v Australian Crime Commission*²² where French CJ observed that 'necessary' in the context of the

¹⁵ This argument was raised in *BUSB v R* (2011) 248 FLR 368 ('*BUSB*'). It invokes the line of authority commencing with *Kable v Director of Public Prosecutions* (1996) 189 CLR 51. However, the issue did not arise in *BUSB* as the Court found that the critical issue was that the court had the implied power to do what was necessary for the administration of justice: *BUSB* (2011) 248 FLR 368, [22] (Spigelman CJ).

¹⁶ For example, *R v Richards & Bijkerk* (1999) 107 A Crim R 318.

¹⁷ For example, *Seven Network (Operations) Limited & Ors v James Warburton (No 1)* [2011] NSWSC 385 (5 April 2011) where orders were made to prevent access to documents relating to the remuneration of senior executives.

¹⁸ For example, *Witness v Marsden & Anor* (2000) 49 NSWLR 429 (in a defamation case a witness who was a prison informer was known by pseudonym to the public but the parties knew his identity); *R v Hawi & Ors (No 2)* [2011] NSWSC 1648 (19 April 2011) (149 innocent bystanders sought to be known to the defendants and the public by pseudonym in a murder trial involving a several defendants who were all members of motorcycle gangs); *X v Sydney Children's Hospitals Specialty Network* [2011] NSWSC 1272 (27 October 2011).

¹⁹ For example, *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 (non-publication order was not made in respect of disciplinary proceedings of Roger Rogerson); *Commissioner of Police v Nationwide News Pty Ltd* (2007) NSWLR 643 (non-publication orders were made in relation to the identity of undercover police officers and police methodology).

²⁰ *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 477 (McHugh JA, Glass JA agreeing).

²¹ For the exercise of implied power see *Grassby v The Queen* (1989) 168 CLR 1, 16-17 (Dawson J, Mason CJ, Deane and Toohey JJ agreeing); *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435, [52] (Gaudron, Gummow and Callinan JJ); *TWLJ v The Queen* (2002) 212 CLR 124, [44] (Gaudron J). For applications of the exercise of implied power to depart from open justice see *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 476 (McHugh JA); *John Fairfax Group Pty Limited v Local Court of NSW* (1991) 26 NSWLR 131, 161; *R v Mosely* (1992) 28 NSWLR 735, 739.

²² *Hogan v Australian Crime Commission* (2010) 240 CLR 651. This approach was applied in

statutory provision applicable in the Federal Court²³ did not mean ‘convenient, reasonable or sensible or to serve some notion of the public interest’.²⁴

The departures from open justice, that is, the categories of cases that could permit an order to close justice, are ‘few and strictly defined’.²⁵ But the categories are not absolute and may be extended to categories ‘closely analogous’ to the existing categories.²⁶ However, courts are loathe to expand the field.²⁷ The accepted categories are wards of State and mentally ill people,²⁸ blackmail and extortion cases,²⁹ where the disclosure of information would affect its commercial value,³⁰ informers³¹ and to protect matters of national security.³² As stated above, departures from open justice can also be permitted by specific legislation,³³ although such legislation has been criticised for enabling orders to be made too frequently and for producing uncertainty through the different legal bases.³⁴

B Court Suppression and Non-publication Orders Act 2010 (NSW)

The CSPO Act commenced on 1 July 2011. It is based on model legislation developed and endorsed by the Standing Committee of Attorneys-General (SCAG).³⁵ At this stage, New South Wales is the first (and only) jurisdiction to adopt the model. However, there is a Federal Bill³⁶ that proposes that the model applies to the four Federal courts.³⁷ A Senate inquiry has recently (March 2012) supported

²³ *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) [27] (Bathurst CJ and McColli JA).
²⁴ *Federal Court of Australia* 1976 (Cth) s 50.

²⁵ *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 664.

²⁶ *John Fairfax publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344, [19] (Spigelman CJ).

²⁷ *R v Kwok* (2005) 64 NSWLR 335, 340-341 (Hodgson JA).

²⁸ *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 55; *Commissioner of Police (NSW) v Nationwide News Pty Ltd* (2008) 70 NSWLR 643, 648 [32]-[38] (Mason P and Ipp JA), 657-658 [90]-[91] (Basten J); *P v D1 [No 3]* [2010] NSWSC 644, [11]-[20].

²⁹ *Scott v Scott* [1913] AC 417, 437 (Viscount Haldane LC); *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 181 ALR 694, 723 [165] (Meagher JA).

³⁰ See *R v Socialist Worker Printers & Publishers Ltd; Ex Parte Attorney-General* [1975] QB 637; *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131.

³¹ *Seven Network (Operations) Limited & Ors v James Warburton (No 1)* [2011] NSWSC 385 (5 April 2011).

³² See *Cain v Glass (No 2)* (1985) 3 NSWLR 230, 246 (McHugh JA); *Arthur Stanley Smith* (1996) 86 A Crim R 309; *Witness v Marsden* (2000) 49 NSWLR 429; *R v Lodhi* (2006) 65 NSWLR 573, 584 [25]-[26] (McClellan CJ at CL).

³³ See *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1, 19 (Hunt J); *John Fairfax Group Pty Ltd v Local Court of NSW* (1991) 26 NSWLR 131, 159 (Mahoney JA); *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344, 357-358 [45]-[48] (Spigelman CJ); *BUSB* (2011) 248 FLR 368, [36].

³⁴ See examples at above n 14 and also see *Children (Criminal Proceedings) Act 1987* (NSW); *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW) s 34; *Civil Procedure Act 2005* (NSW) s 71; *Witness Protection Act 1995* (NSW) s 26.

³⁵ See Andrew Kenyon, ‘Not Seeing Justice Done: Suppression Orders in Australian Law and Practice’ (2006) 27 *Adelaide Law Review* 279.

³⁶ In July 2008 SCAG formed a working group to develop a proposal on the harmonization of suppression and non-publication orders. In May 2010, SCAG agreed to endorse and consider implementation of the model: Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2011, 13553-4 (Brendan O’Connor). Note that SCAG is superseded by the Standing Council on Law and Justice.

³⁷ *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* (Cth).

The High Court, Federal Court, Family Court and the Federal Magistrates’ Court.

implementation of the Bill.³⁸ The Senate inquiry concluded that the Bill accords with how the principle of open justice has been stated and applied at common law.³⁹ The Explanatory Memorandum to the Federal Bill notes that the Bill provides a ‘more robust legislative framework’ and that it ensures orders are ‘made only where necessary on the grounds set out in the Bill, taking into account the public interest in open justice and in terms that clearly define their scope and timing’. Significantly, the Explanatory Memorandum makes reference to *Hogan v Hinch*,⁴⁰ where French CJ said: ‘a statute which affects the open-court principle, even on a discretionary basis, should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle’.⁴¹

The CSPO Act defines ‘non-publication order’ as an order that ‘prohibits or restricts information’, and a ‘suppression order’ means ‘an order that prohibits or restricts the disclosure of information (by publication or otherwise)’.⁴² The legislation co-exists with the inherent jurisdiction and any other power that a court has to regulate its proceedings.⁴³ A central provision in the CSPO Act mandates that in deciding whether to make a suppression or non-publication order a court must take into account that ‘a primary objective of the administration of justice is to safeguard the public interest in open justice’.⁴⁴ The CSPO Act enables the court to make orders to suppress or not publish information that would reveal the identity of a party or witness, or information that is evidence or about evidence given in proceedings.⁴⁵ The grounds for making a suppression or non-publication order are: the order is ‘necessary to prevent prejudice to the proper administration of justice’; the order is ‘necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security’; the order is ‘necessary to protect the safety of any person’; the order is ‘necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency)’; and/or ‘it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice’.⁴⁶

³⁸ Senate Legal and Constitutional Affairs Legislation Committee, above n 2. This report recommends that the Senate pass the Bill.

³⁹ Ibid 7.

⁴⁰ Explanatory Memorandum, *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* (Cth) [25], referring to *Hogan v Hinch* (2011) 243 CLR 506 and *Hogan v Australian Crime Commission* [2010] HCA 21, in particular where French CJ states that suppression orders conferred by statute should be construed so as to minimise their intrusion on the open justice principle: *Hogan v Hinch* (2011) 243 CLR 506, [27].

⁴¹ *Hogan v Hinch* (2011) 243 CLR 506, [27] (French CJ). This approach was applied in *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) [26] (Bathurst CJ and McColl JA).

⁴² *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3.

⁴³ Ibid s 4.

⁴⁴ Ibid s 6.

⁴⁵ Ibid s 7.

⁴⁶ Ibid s 8. An example of suppression and non-publication orders under the legislation were made in coronial proceedings to restrain the publication and release of a DVD because it would prejudice future criminal proceedings: *Bisset v Deputy State Coroner* [2011] NSWSC 1182 (4 October 2011) (RS Hulme J). In another case, orders were made requiring a publisher to remove articles about the accused from a website to ensure a fair trial: *R v Perish*; *R v Lawton*; *R v Perish* [2011] NSWSC 1101 (11 July 2011) (Price J). Suppression orders were made in another case to protect the identity of an informer: *Nichols v Singleton Council* [2011] NSWSC 946 (25 August 2011) (Schmidt J). Non-publication orders were made in respect of evidence about police methodology relating to payments made by the Commissioner of Police to informers: *Da*

The court may make an order on application or on its own initiative.⁴⁷ Further, people entitled to appear and be heard on an application under the CSPO Act include: the applicant, a party to the proceedings, a government agency and a news media organisation.⁴⁸

III SUPPRESSION ORDERS AND STAYS IN THE RINEHART LITIGATION

A *The Litigation Commences and an Urgent Suppression Order Follows*

On 5 September 2011, Gina's Rinehart's four children filed a summons in the Equity Division of the New South Wales Supreme Court alleging breach of trust and seeking orders removing Gina Rinehart as trustee and varying the trust deed.⁴⁹ An application was made, *ex parte*, seeking relief in relation to the affairs of a family trust of which Gina Rinehart is the trustee.⁵⁰ The trust was created in 1988 by Langley Hancock with a deed of settlement where the principal assets were shares in Hancock Prospecting Pty Limited. The deed provided that on Hancock's death, Gina Rinehart became absolutely entitled to a proportion of the shares in the company, which constituted part of the trust fund. The balance of the shares in the fund was to be held by the trustee on trust until the date on which the youngest of the surviving children of Gina Rinehart attained the age of 25 years. After the execution of the trust deed, Gina Rinehart and her four children entered into a settlement deed which contained a clause that required the parties to resolve disputes under the settlement deed by way of confidential mediation or arbitration.⁵¹

From Gina Rinehart's first appearance to defend the claim brought by her children, she sought a suppression order⁵² over information in the proceedings and a stay of

Silva v R (No 2) [2012] NSWCCA 106 (9 May 2012) (Whealy JA, Hidden J and Schmidt agreeing). Non-disclosure orders were not made in another case to prevent disclosure of scandalous allegations: *Ashton v Pratt* [2011] NSWSC 1092 (12 September 2011) (Brereton J), however they were made in another case to prevent publication of the address of a party: *Showtime Touring Group Pty Ltd v Mosley Touring Inc* [2011] NSWSC 1401 (22 November 2011) (Walmsley AJ).

⁴⁷ *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9(1).

⁴⁸ *Ibid* s 9(2).

⁴⁹ The youngest child subsequently removed herself as a plaintiff and joined proceedings as a defendant. On 21 September 2011, Brereton J made orders by consent that Gina Rinehart was removed as a plaintiff and joined as a second defendant: *Uniform Civil Procedure Rules 2005* (NSW) rr 6.29 and 6.24.

⁵⁰ The plaintiffs sought orders varying a deed of settlement made by Langley George Hancock as amended by a subsequent deed of amendment ("the trust deed") to vary the trust deed by splitting the trust into separate trusts and removing the trustee from one of the newly created trusts (the "second trust") and appointing themselves as trustees of that second trust. The plaintiffs also sought a declaration that the trustee had misconducted herself in the administration of the trust: *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) [7]-[8] (Bathurst CJ and McCall JA).

⁵¹ In particular, the settlement deed provided at cl 20.8:

"Confidentiality of Proceedings:

The dispute the subject of the mediation/arbitration, the mediation and arbitration hearing and the submissions thereto and the decision of the mediation and/or arbitration shall be kept confidential."

⁵² Rinehart sought suppression and non-publication orders in all applications, except in *Welker v*

proceedings on the basis that they were an abuse of process because they were commenced without prior compliance with the confidential alternative dispute resolution (ADR) procedures in the settlement deed.

On 13 September 2011, the suppression order was resisted by the media (but not objected to by the plaintiffs).⁵³ Brereton J granted a suppression order as it was 'necessary to prevent prejudice to the proper administration of justice',⁵⁴ because 'publication of the current proceedings would negate the purpose of the confidentiality provisions in the deed and circumvent the rights of the defendant to have the dispute resolved by confidential ADR'.⁵⁵ Further, Brereton J found that it is 'otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice' to enable the attainment of justice.⁵⁶ Brereton J suppressed 'information as to the relief claimed, or any pleading, evidence or argument filed, read or given in, the proceedings'.⁵⁷ The order applied throughout Australia and until the dismissal of the defendant's motion for a stay of the proceedings. In short, Brereton J found that the disclosure of information would deprive Rinehart's stay application of much of its utility. His reasoning assumed a favourable outcome of the stay application. Interestingly, Brereton J found that the litigant's interest in pursuing her rights for confidential ADR outweighed the public interest in open justice, and found that the attainment of justice prevailed over open justice.⁵⁸ Further, Brereton J noted that the public interest in open justice may attract less weight where private issues are concerned.⁵⁹

B *Lifting of the Suppression Order due to the Failed Stay*

By notices of motion dated 16 September 2011 and 6 October 2011 respectively, Gina Rinehart (and her youngest child, Ginia Rinehart) applied to have the substantive proceedings stayed.⁶⁰ The basis for their application was that the dispute was one arising under the settlement deed and the parties were required to resolve their dispute by confidential ADR. The application for a stay was dismissed on the basis that the children's proceedings did not involve a dispute under the settlement deed,⁶¹ and even if they were disputes under the deed, judicial discretion was not to be exercised to order a stay because of the viability of the potential defences that could be raised by Gina Rinehart under the settlement deed.⁶² Brereton J also declined to refer the dispute to mediation because the matter was not 'ripe' for it, since further disclosure

Rinehart (No 6) [2012] NSWSC 160 (6 March 2012) (Ball J) she only sought a non- publication order.

⁵³ A contradiction in this litigation is that at the same time that Gina Rinehart sought suppression orders she was receiving significant publicity because she was acquiring a substantial quantity of media shares in Fairfax and Channel 10 at a fast rate.

⁵⁴ *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(a).

⁵⁵ *Welker & Ors v Rinehart* [2011] NSWSC 1094 (13 September 2011), [16] (Brereton J).

⁵⁶ *Ibid* [25] (Brereton J) applying *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(e).

⁵⁷ *Ibid* [25] (Brereton J).

⁵⁸ *Ibid* [14] (Brereton J).

⁵⁹ *Ibid* [17] (Brereton J).

⁶⁰ The application for a stay was made pursuant to s 67 of the *Civil Procedure Act 2005* (NSW) which provides that a 'court may at any time and from time to time, by order, stay any proceedings before it, either permanently or until a specified day'.

⁶¹ *Welker & Ors v Rinehart & Anor (No. 2)* [2011] NSWSC 1238 (7 October 2011) (Brereton J).

⁶² *Ibid* [50] (Brereton J).

of information between the parties was required first.⁶³ However, Brereton J did order interim suppression pending an appeal.

C *Appeal Commences and an Urgent Suppression Order Follows*

Gina Rinehart filed an appeal against the refusal of a stay decision and applied for a suppression order in respect of that appeal. An application was made before a single justice of the Court of Appeal (Tobias AJA) for a suppression and non-publication order. Both the media and plaintiffs objected to the order. Tobias AJA granted the order on the same ground as Brereton J⁶⁴ and suppressed information about the relief claimed or any pleading, the summary of argument, submissions, the draft notice of appeal, evidence or argument filed, read or given in these proceedings, and including the contents of the appeal books.⁶⁵ Tobias AJA found that if the order was not made then it would ‘negate the purpose of the confidentiality provisions in the Deed and would circumvent the rights of the applicants to have such disputes resolved by confidential mediation or arbitration in the event the leave to appeal was granted and the appeal succeeded’⁶⁶ and would render the appeal ‘nugatory’.⁶⁷ The basis of the suppression was that the confidentiality clause in a deed had the effect of suppressing court proceedings. Tobias AJA dealt with the principle of open justice by observing:

...that the public interest in open justice is not said by s 6 to be either **the** primary objective of the administration of justice or the only objective thereof. It is **a** primary objective, meaning that there are other primary objectives of the administration of justice, or may well be, which should be taken into account. One of these is that parties should be held to their bargain.⁶⁸

This above paragraph demonstrates that Tobias AJA did not view the open justice principle as the primary objective of court process. Rather, like Brereton J, he valued the private right of contract and the substantive justice to the parties as more important, in this particular case, than open justice. Tobias AJA did not give any weight to the public interest in the misconduct of a trustee.⁶⁹

D *Review to the Court of Appeal – Lifting of Suppression Order*

The media companies and plaintiffs successfully sought review of Tobias AJA’s order in the Court of Appeal.⁷⁰ The plurality (Bathurst CJ and McColl JA) followed *Hogan v Hinch* and construed the CSPO Act with the least adverse impact on open justice.⁷¹ They found that Tobias AJA erred in failing to construct the statute in that manner.⁷²

⁶³ Ibid [51] (Brereton J).

⁶⁴ *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(a).

⁶⁵ *Rinehart v Welker & Ors* [2011] NSWCA 345 (31 October 2011) (Tobias AJA).

⁶⁶ Ibid [25] (Tobias AJA).

⁶⁷ Ibid [26] (Tobias AJA).

⁶⁸ Ibid [38] (Tobias AJA).

⁶⁹ Ibid [30] (Tobias AJA).

⁷⁰ *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) (Bathurst CJ and McColl JA, Young JA).

⁷¹ Ibid [26] (Bathurst CJ and McColl JA). This was applied in *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 (13 June 2012) [49] (Bathurst CJ, Basten JA and Whealy JA) where suppression orders were made to prevent public access to existing material, including a publication on a website, to ensure the fairness of a forthcoming trial.

⁷² *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) [49] (Bathurst CJ and McColl JA).

The plurality held that ‘necessary’⁷³ was a strong word and suppression orders should only be made in exceptional circumstances.⁷⁴ The plurality found that none of the exceptions to the principle of open justice in the common law applied to Gina Rinehart’s application.⁷⁵ Like the common law, the CSPO viewed open justice as fundamental.⁷⁶ The plurality found that it was not necessary for the proper administration of justice to give effect to a confidentiality clause in a deed. Further, they found that the conduct of trustees did warrant close public scrutiny.⁷⁷ They observed that the ‘price of open justice was that allegations about individuals are aired in open court’.⁷⁸ The plurality highlighted the errors in Brereton J and Tobias AJA’s approach by concluding:

In our view, having regard to the nature of the proceedings it was neither "necessary to prevent prejudice to the administration of justice" and, further contrary to the requirement to treat open justice as "a primary objective" referred to in s 6 of the Act for the Court to exercise its power under s 8 to suppress information of the nature of that caught by Tobias AJA's orders. Suppression of such information would undermine, rather than ensure, public confidence in the administration of justice.⁷⁹

E *Application for a Stay Pending High Court Proceedings*

Two days after the Court of Appeal’s lifting of the suppression orders, an application was made before a single justice of the Court of Appeal for a stay to seek special leave to appeal to the High Court of Australia. A short stay was granted taking into account the time of the year.⁸⁰ Later, the Court of Appeal reconvened and refused a stay.⁸¹ Significantly, the Court of Appeal considered whether it would apply the strict approach to granting stays taken by the High Court⁸² or follow the less stringent approach in New South Wales.⁸³ The High Court’s approach is that the jurisdiction to grant a stay is ‘extraordinary’ jurisdiction and ‘exceptional’ circumstances must be shown before its exercise is warranted.⁸⁴ Prior to the Rinehart litigation, the NSW

⁷³ ‘Necessary for the administration of justice’: *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(a).

⁷⁴ *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) [27] (Bathurst CJ and McColl JA). In a subsequent case, the Court of Appeal has held that ‘necessary’ should not be given a narrow construction and it will depend on the purpose for the order: *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 (13 June 2012) (Bathurst CJ, Basten JA and Whealy JA), see in particular [8] (Bathurst CJ), [46]-[48] (Basten JA).

⁷⁵ *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) [38] (Bathurst CJ and McColl JA). Young JA agreed that the orders should not have been made but he agreed with Tobias AJA that the CSPO Act would not necessarily conform to the exceptions at common law.

⁷⁶ *Ibid* [32] (Bathurst CJ and McColl JA), referring to *Court Suppression and Non-publication Orders Act 2010* (NSW) s 6.

⁷⁷ *Ibid* [52] (Bathurst CJ and McColl JA).

⁷⁸ *Ibid* [54] (Bathurst CJ and McColl JA).

⁷⁹ *Ibid* [55] (Bathurst CJ and McColl JA).

⁸⁰ *Ibid* (Beazley JA). It was vacation time.

⁸¹ *Ibid* (Bathurst CJ, Beazley JA, McColl JA).

⁸² *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)* [1986] HCA 84; (1986) 161 CLR 681

⁸³ *John Fairfax & Sons Ltd v Kelly (No 2)* (1987) 8 NSWLR 510

⁸⁴ *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)* (1986) 161 CLR 681, 684 (Brennan J). The Court of Appeal cited further authorities to support the High Court approach: *Edelsten v Ward (No 2)* (1988) 63 ALJR 346; *Gerah Imports Pty Ltd v The Duke Group (in liq)* (1994) 119 ALR 401; *Haydon v Chivell* (1999) 165 ALR 1; *Comandate Marine*

approach was to normally grant a stay to permit an application for special leave to appeal to the High Court until the leave application and/or appeal were dealt with.⁸⁵ The Court of Appeal noted that an approach that ‘normally’ grants a stay is not an approach that recognises that the jurisdiction is exceptional and granted in extraordinary circumstances.⁸⁶ The Court of Appeal departed from its earlier authority and followed the High Court approach to applications for stays pending an appeal to the High Court.⁸⁷ The Court reviewed the special leave grounds and found that Gina Rinehart did not have substantial prospects of obtaining special leave. In particular, the court observed that the High Court considered open justice in its case of *Hogan v Australian Crime Commission* and this case provided a barrier to Rinehart’s prospects of success.⁸⁸ Further, any point about the effect of the *Commercial Arbitration Act* and the CSPO Act was not raised before the primary judge or in the Court of Appeal.⁸⁹ Finally, the fact that the legislation was ‘new and potential model legislation’ did not warrant special leave being granted, as leave was more likely if there were a divergence of views or problems in the construction of the statute.⁹⁰

However, a short stay was granted to early February 2012. Shortly before the stay was due to expire an application was made to a single justice of the High Court (Crennan J) seeking a stay until the special leave application was determined. That application succeeded.⁹¹ Crennan J found that the circumstance that a refusal to grant a stay would have the result that the confidentiality based on the deed will be lost forever, and the special leave applications rendered nugatory, to be an exceptional circumstance that warranted the exercise of extraordinary jurisdiction.⁹²

F *Fresh Suppression Applications Based on Security Risks*

The desperation of Gina Rinehart’s quest for secrecy is demonstrated by two further fresh applications in the Supreme Court for suppression. The first application was for a suppression order based on the need to protect the safety of the Rinehart family. This application relied on evidence to establish a security risk. The application failed⁹³ and one consequence was that the evidence adduced in support of Rinehart’s application came into the public domain, and was in fact posted on the website of the *Daily Telegraph*. A second attempt was made based on another ‘security risk’ argument. Again, that application failed.⁹⁴

⁸⁵ *Corp v Pan Australia Shipping Pty Ltd* [2006] HCATrans 353; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 2)* (1998) 72 ALJR 869.

⁸⁶ *John Fairfax & Sons Ltd v Kelly (No 2)* (1987) 8 NSWLR 510, 512 (Kirby P, Mahoney and McHugh JJA).

⁸⁷ *Rinehart v Welker* [2012] NSWCA 1 (13 January 2012) [22].

⁸⁸ *Ibid* [47].

⁸⁹ *Ibid* [54].

⁹⁰ *Ibid* [61].

⁹¹ *Ibid* [68].

⁹² Transcript of Proceedings, *Rinehart v Welker* [2012] HCA Trans 7 (1 February 2012) (Crennan J).

⁹³ *Ibid* 1610, 1680 (Crennan J). It seems that a very relevant matter was that the special leave application was listed in March and the stay was therefore for a short period.

⁹⁴ *Welker v Rinehart (No 5)* [2012] NSWSC 45 (2 February 2012) (Ball J).

⁹⁴ *Welker v Rinehart (No 6)* [2012] NSWSC 160 (6 March 2012) (Ball J). This application sought a non-publication order.

Gina Rinehart applied to reopen her case to adduce evidence of a threat from an anonymous source. Ball J refused her application to reopen her case ‘as the threat or so-called threat simply came from an anonymous person who Mr Francis (a security expert) met in the street and it was no different from any sort of threat or adverse comment that may be made against or about a person on a website or a blog or similar social media sites’.⁹⁵ Further, Ball J found that the evidence did not establish any connection between the threat and the need to make an order.⁹⁶

G *Special Leave to Appeal to the High Court on the Suppression Order*

Gina Rinehart sought special leave to appeal to the High Court of Australia against the Court of Appeal’s lifting of the suppression orders that Tobias AJA had ordered in respect of her appeal against the refusal of a stay of her children’s substantive claim. The special leave application was heard on 9 March 2012 – only 6 months after the commencement of proceedings, after seven applications before single justices of the Supreme Court, four applications/appeals before the Court of Appeal sitting as one or three justices and one application before a single justice of the High Court. Gina Rinehart sought special leave to appeal two errors. The first error was that the Court of Appeal erred in its application of the CSPO Act. The second error was that the Court of Appeal did not give legislative recognition to party autonomy in the *Commercial Arbitration Act 2010* (NSW).⁹⁷

The first point contended that the Court of Appeal erred in approaching the CSPO Act by equating it with the common law power to make suppression orders, that is by viewing that a suppression order is made in ‘exceptional circumstances’ and taking the view that it is not subject to judicial discretion.⁹⁸ In support of this approach, it was submitted that s 7 does not contain the words ‘if it appears necessary’.⁹⁹ French CJ and Gummow J, hearing the special leave application, responded to this submission by commenting that Rinehart’s application would be aided if she could argue that a suppression order would be granted at common law.¹⁰⁰ Interestingly, Gummow J raised a future constitutional issue with the CSPO Act and cautioned that Chapter III questions should not be ‘rushed into’.¹⁰¹ French CJ observed that Rinehart’s argument in respect of the effect of the confidentiality provision in the settlement deed could be a powerful factor in her application for a stay, but he commented that it would be difficult to apply it so that it has the effect of applying in the context of curial proceedings.¹⁰²

The second error identified by Rinehart was that the *Commercial Arbitration Act* required that the matter be referred to arbitration by the court because Rinehart’s

⁹⁵ *Welker & Ors v Rinehart & Anor (No 7)* [2012] NSWSC 222 (6 March 2012) [6] (Ball J).

⁹⁶ *Ibid* [6] (Ball J).

⁹⁷ Transcript of Proceedings, *Rinehart v Welker & Ors* [2012] HCATrans 57 5 (9 March 2012) (Holmes SC).

⁹⁸ *Ibid* 100-120 (Holmes SC).

⁹⁹ *Ibid* 305 (Holmes SC).

¹⁰⁰ *Ibid* 141 (Gummow J).

¹⁰¹ *Ibid* 154 (Gummow J). This issue would raise the institutional integrity argument that was raised in *BUSB v R* (2011) 248 FLR 368, see above n 15.

¹⁰² Transcript of Proceedings, *Rinehart v Welker & Ors* [2012] HCATrans 57 (9 March 2012) 233 (French CJ).

application for a stay constituted a request under that Act.¹⁰³ This argument was not run before the primary judge or in the Court of Appeal.¹⁰⁴ This special leave point was that the Court of Appeal had misinformed itself by failing to give proper weight to the clear legislative intent of the *Commercial Arbitration Act* which required that courts give effect to domestic arbitration agreements.¹⁰⁵ Questions from the High Court bench focused on whether there was a commercial arbitration.¹⁰⁶ Gummow J observed that if Rinehart was seeking to hold her children to their agreement then the better course would have been to seek an injunction rather than a stay.¹⁰⁷

Counsel for the media highlighted the ‘contingency’ aspects of the special leave application, as the case would only arise if Rinehart was successful in seeking the stay in the Court of Appeal.¹⁰⁸ In reference to the test of necessity, Counsel for the media asked, “How can it be necessary to do something that may never be required?”¹⁰⁹ If the application for a stay failed, then the suppression orders would be futile. In respect of the *Commercial Arbitration Act* point, Counsel for the media submitted that there was no application under that Act and that the High Court did not have material before it to determine the question.¹¹⁰ Counsel rebutted the discretion argument as ‘absurd’ and submitted:

Is it imaginable that a court says “it is necessary to do this for the administration of justice, but we have got a discretion not to and we will not?” It is an absurd proposition and in our submission there goes away the one thing that might at first sight have seemed to be of that substantial general importance for the doctrine of the law such as to attract a grant of special leave. It disappears and one comes back then to what is particular about these cases, and what is particular about these cases is their great degree of contingency, their pervasive character of being hypothetical, and therefore the great risk that this Court will be seized of something which is nothing but moot.¹¹¹

Counsel for the plaintiffs disagreed that the matter was a commercial dispute and that it was a dispute under a deed that was entered into almost 20 years after the trust was settled.¹¹² The children also resisted the constraints of a suppression order and submitted:

When one asks the question, given what is already known, why is it necessary to prevent prejudice, how is the administration of justice in New South Wales prejudiced ... such that it is necessary that this order be granted. In light of everything which is already known, we say the case is, with the greatest respect, a hopeless one.¹¹³

¹⁰³ Section 8 of the *Commercial Arbitration Act 2010* (NSW) provides that a matter can be referred to arbitration.

¹⁰⁴ Transcript of Proceedings, *Rinehart v Welker & Ors* [2012] HCATrans 57 (9 March 2012) 355-365. That there had been an application was contested by the respondents, especially at such a late stage in the proceedings: Ibid 656, 684.

¹⁰⁵ Ibid 450 (Walton SC).

¹⁰⁶ Ibid 454 (French CJ). Rinehart’s Counsel submitted that the trust involved a business: 465 (Walton SC).

¹⁰⁷ Ibid 494 (Gummow J).

¹⁰⁸ Ibid 615 (Walker SC).

¹⁰⁹ Ibid 729 (Walker SC).

¹¹⁰ Ibid 633, 705 (Walker SC).

¹¹¹ Ibid 825 (Walker SC).

¹¹² Ibid 865 (Bell SC).

¹¹³ Ibid 1062 (Bell SC).

The High Court refused special leave and asserted the primacy of the open justice principle. It found that the Court of Appeal correctly found that the primary judge had failed to approach the question of whether a suppression order should be granted on a basis that would have the least impact upon the open justice principle.¹¹⁴ The Court of Appeal approach gave ‘appropriate weight’ to that principle in its approach to the construction of the CSPO Act.¹¹⁵ Further, the proper conduct of trustees warranted close public scrutiny.¹¹⁶ French CJ noted that the interaction between the CSPO Act and the *Commercial Arbitration Act* was not raised in the court below and this rendered it an inappropriate vehicle for leave.¹¹⁷

H *Appeal on the Stay to the Court of Appeal*

Gina Rinehart’s appeal from the refusal of Brereton J’s dismissal of the stay was determined by the Court of Appeal in April this year. The Court of Appeal found that the children’s claim was not a dispute ‘under this deed’ and there was no error in refusing to stay the proceedings. While Gina Rinehart’s potential defences rely on the settlement deed in answer to the children’s claim, those defences will not determine the outcome of the proceedings.¹¹⁸ They found that the primary judge correctly exercised his discretion by refusing the stay,¹¹⁹ and that he did not err in declining to refer the proceedings to mediation.¹²⁰

One issue which divided the Court of Appeal was whether the children’s claim was arbitrable. There was no legal authority on the question of whether a claim to remove a trustee was arbitrable.¹²¹ Bathurst CJ held it was and said:

...it is my opinion that at least in circumstances where the trustee and each beneficiary have expressly agreed to their disputes being referred to arbitration, a court should give effect to that agreement. The supervisory jurisdiction of the court is not ousted. It continues to have the supervisory role conferred upon it by the relevant legislation, in this case the Commercial Arbitration Act. There may be powerful commercial or domestic reasons for parties to have disputes between a trustee and beneficiary settled privately. It does not seem to me that the matters to which I have referred above should preclude a court from giving effect to such an agreement provided the jurisdiction of the court is not ousted entirely.¹²²

McColl JA agreed with the Chief Justice.¹²³ In contrast, Young JA found that a claim for the removal of a trustee was not arbitrable and it was undesirable for such disputes to be referred to arbitration because of the difficulties in a court enforcing any decision of the arbitrator.¹²⁴

¹¹⁴ Ibid 1193 (French CJ).

¹¹⁵ Ibid 1196 (French CJ).

¹¹⁶ Ibid 1200 (French CJ).

¹¹⁷ Ibid 1205 (French CJ).

¹¹⁸ *Rinehart v Welker* [2012] NSWCA 95 (20 April 2012) [132]. *Hancock Prospecting Pty Ltd v Welker* [2012] NSWCA 104 (20 April 2012) joined the proceedings.

¹¹⁹ *Rinehart v Welker* [2012] NSWCA 95 (20 April 2012) [184]-[192]. Brereton J refused to stay the proceedings as Gina Rinehart had failed to demonstrate that the conduct of the plaintiffs in commencing the proceedings were in breach of a valid and enforceable arbitration agreement: Ibid [100].

¹²⁰ Ibid [193] - [194].

¹²¹ Ibid [173], [226].

¹²² Ibid [175].

¹²³ Ibid [210].

¹²⁴ Ibid [226].

This decision contains a schedule that contains the pleadings for the breach of trust together with the pleaded defences. This permits one to appreciate the type of material that was the subject of the initial suppression orders.¹²⁵ After viewing this material, one thing is clear: it is difficult to see the basis for suppression in the first place, that is, how the suppression orders were necessary to prevent prejudice to the administration of justice.

IV ISSUES FROM THE RINEHART LITIGATION

A *Fundamental Nature of Open Justice*

The application of the statutory tests by the full bench of the Court of Appeal in the Rinehart litigation shows that the CSPO Act is being construed consistently with the common law. Further, the Court of Appeal's reference to the common law exceptions to the principle of open justice indicates that these are the categories where necessity could possibly be established. The Court of Appeal's interpretation of the CSPO Act places central importance on the principle of open justice. This follows High Court authority that requires statutory construction that favours the open justice principle.¹²⁶ The facts of the Rinehart dispute show the tension between privacy rights and the role of a public hearing. However, the Court of Appeal's decision demonstrates that the open justice principle is paramount. The primary judges who initially granted suppression orders erred by placing importance on the private rights of the litigants, rather than considering that departures from the open justice principle must be necessary and are exceptional orders. The Court of Appeal found that there is a public interest in the disclosure of the affairs of a trustee. In a subsequent consideration of the CSPO Act, the Court of Appeal has emphasised that 'necessity' should not be narrowly construed and will depend on the circumstances of the particular case.¹²⁷ After a period of operation of the CSPO Act, empirical research will be beneficial so that consideration can be given to whether the statute has made it easier to depart from the open justice principle. An assessment of the legislation could be undertaken from data collection about the frequency and types of orders made pursuant to the legislation. When the Senate Committee Report on the Federal Bill heard evidence about the operation of the NSW Act, there was evidence from the NSW Attorney-General's Department that there was an increase in the orders granted after the introduction of the Act.¹²⁸ However, it could not point to a reason for the increase; one reason submitted by the organisation *Australia's Right to Know* was that the judiciary views the provisions as a licence to make orders.¹²⁹

¹²⁵ The allegations made by the plaintiff are that Gina Rinehart, to not disclose trust information, falsely represented that the beneficiaries needed to execute a Deed Poll to extend the vesting date of the trust, breached her duty to act honestly and in good faith, acted with gross dishonesty in her dealings with the beneficiaries of the trust; acted deceitfully in her dealings with the beneficiaries of the Trust: Schedule to *Rinehart v Welker* [2012] NSWCA 95 (20 April 2012).

¹²⁶ *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 664.

¹²⁷ *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 (13 June 2012) [8] (Bathurst CJ, Basten JA and Whealy JA).

¹²⁸ Senate Legal and Constitutional Affairs Legislation Committee, above n 2, 6.

¹²⁹ *Ibid* 5.

Another question to consider is the frequency of orders for a ‘super-injunction’. This is an injunction which restrains a person from publishing information which is confidential or private and also restrains publication of the existence of the non-disclosure order and the proceedings. Recent questions were asked in New South Wales’ Parliament about their existence.¹³⁰ Of course, information about this type of injunction is difficult to obtain and could also be the subject of data collection by the courts. Of note is the situation in the United Kingdom where the issue has been litigated¹³¹ and where it was the subject of a Parliamentary Enquiry chaired by Lord Neuberger, which recommended a data collection system for all interim non-disclosure orders including super-injunctions.¹³²

Another issue is the effectiveness of orders when information has already been issued in circumstances where information has already been made public (which is done at rapid speed due to social media in the courtroom such as Twitter). The Court of Appeal has recently held that the CSPO Act could support an order directing an internet host to remove material from a website, but the Act could not support an order addressed to the world at large which could cover material on internet sites of which the hosts were unaware.¹³³ Future issues may arise due to the fast pace of technology. One issue is whether courts should monitor or prohibit text-based communications inside the courtroom.

B *Meaning of ‘Suppression’*

What is the meaning of ‘suppression’? While this definition has not been contentious in the Rinehart litigation, it is an important question as it determines whether the CSPO Act applies. One writer has suggested that the term ‘suppression’ includes orders to close the courtroom, prohibit publication of the matter and provide the use of pseudonyms.¹³⁴ In contrast to this wide definition, another writer defines suppression orders as non-publication orders.¹³⁵ This difference highlights the difficulty in using a legislative term that was and is not utilised in the common law. Prior to the statute, the usual orders to depart from the open justice principle were non-publication orders, closed court orders and orders for the non-disclosure of certain types of information (for example, the identity of undercover officers).

¹³⁰ In the estimates hearing on 26 October 2011, David Shoebridge MLC requested that the Attorney-General estimate the number of super injunctions issued under the new legislation: Transcript, Attorney General, Justice, *Budget Estimates 2011-2012*, 26 October 2011, 7.

¹³¹ See for example, *Terry v Persons Unknown* [2010] EWHC 119 (QB); *Ntuli v Donald* [2010] EWCA Civ 1276; *DFT v TFD* [2010] EWHC 2335 (QB). An anonymised injunction restrains the publication of the names of either or both of parties: *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42.

¹³² Master of the Rolls, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice* (2011) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf>>. Also see Master of the Rolls, *Practice Guidance: Interim Non-Disclosure Orders* (2011) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/practice-guidance-civil-non-disclosure-orders-july2011.pdf>> .

¹³³ *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 (13 June 2012) [94]-[95] (Basten JA, Bathurst CJ and Whealey JA agreeing).

¹³⁴ Melissa Woodroffe, ‘Closed courts: open door to justice’ (2011) 49 *Law Society Journal* 51, 52.

¹³⁵ Lisa Grindley, ‘Closing the courts without closing the doors – what are suppression orders?’ (2007) 78 *Precedent* 26.

One issue that may require clarification is whether closed court orders are covered by the CSPO Act. Obviously, an order closing the court is not a ‘non-publication order’. The question is whether it falls within the definition of ‘suppression order’.¹³⁶ A better view is that the definition in the CSPO Act applies to an order restricting the disclosure of information rather than preventing physical access to a courtroom. On the other hand, one method to restrict the disclosure of information is to prevent the public from physically accessing the court. If an application for a closed court is a ‘suppression order’ then the formal procedure under the CSPO Act will need to be adopted. In particular, the media will need to be informed of the application and have standing at it (presently, the media can only intervene in closed court applications if they happen to have notice of them).

The CSPO Act would also appear to cover pseudonym orders. Such orders were sought in great number in a recent murder trial involving accused who were members of the Comanchero and Hells Angels Motorcycle Clubs. In *R v Hawi & Ors (No 2)*, the NSW Commissioner of Police sought orders that 149 ‘innocent bystander’ witnesses be described by pseudonym in the trial. This application did not succeed as the Commissioner had not adduced evidence to justify that the orders were necessary to secure the administration of justice.¹³⁷ The application was made before the commencement of the CSPO Act and it is likely that the same result would occur under the Act even though such orders can be made to ‘protect the safety of a person’.

C *Role of the Media*

The Rinehart litigation demonstrates the pivotal role of representation by the media. Initially, media companies were the sole objector to the suppression orders (the plaintiffs joined in the application once the proceedings were in the Court of Appeal). This litigation proves that it may be in both parties’ interests to have proceedings suppressed and thus the active involvement in the media ensures that the principle of open justice is given its primary status in court proceedings. A question remains as to the lack of similar standing in respect of applications to physically close the court to the public (such orders do not appear to be within the ambit of the CSPO Act). Another point is that the involvement of the media can result in cost orders against the party that fails in its application for a non-disclosure order under the CSPO Act.¹³⁸

D *Mechanism for Seeking Review*

One difference between the Federal Bill and the NSW Act is that the Federal Bill does not allow for review of suppression and non-publication orders.¹³⁹ The Senate report

¹³⁶ Section 3 of the CPSO Act provides that ‘suppression order means an order that prohibits or restricts the disclosure of information (by publication or otherwise)’.

¹³⁷ [2011] NSWSC 1648 (29 April 2011) [115] (RA Hulme J).

¹³⁸ Gina Rinehart and Ginia Rinehart were ordered to pay the costs of the plaintiffs and the media companies in respect of the review of the orders made under the CSPO Act by the Court of Appeal: *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) (Bathurst CJ and McColl JA, Young JA). They also had to pay the plaintiffs and media companies costs of the High Court special leave application: *Rinehart v Welker* (No 3) [2012] NSWCA 228 (30 July 2012) (Bathurst CJ, Beazley JA and McColl JA).

¹³⁹ *Court Suppression and Non-publication Orders Act 2010* (NSW) s 13 permits review of orders

notes that as suppression orders are interlocutory in nature, there is power to vary them and, further, that an appeal could be brought so long as leave was obtained first.¹⁴⁰ The lack of a power to review orders under the Federal Bill could have the effect of delaying Federal proceedings due to the appeal process. It is noted that the suppression order made by the High Court (Crennan J) had the effect of suppressing publicity of the litigation in respect of the appeal against the stay in the Court of Appeal. It has been observed that the ‘temporal relationship between the progress of the trial’ and the ‘resolution of the appeal on publication bans has concerning implications for open justice’.¹⁴¹ Rodrick notes that the delay means there is a risk that the media’s interest in reporting the material will be diminished and may not spark public debate.¹⁴² Consideration ought to be given to amending the Federal Bill so that it adopts the NSW system of review.

E *New Test for Granting a Stay Pending High Court Proceedings*

An applicant for a stay, so that he or she can apply for special leave to appeal to the High Court, must now prove exceptional and extraordinary circumstances in order to justify the granting of a stay. This will now involve the Court of Appeal reviewing the proposed special leave grounds. Such a procedure recognises that the likelihood of a grant of special leave is low and the decision in this case brings NSW in line with other Federal and State jurisdictions.¹⁴³

F *Implications for ADR Processes*

The Rinehart litigation raised a new issue in ADR that may signal further legal development is yet to come. This is the question of whether trustee disputes are arbitrable. While Bathurst CJ and McColl JA separately agreed that they were, Young JA was firmly of the view that such disputes were not. In addition, Brereton J declined to refer the matter to mediation as there had not been sufficient disclosure on information between the parties. This position may seem incongruous to the amendments to the *Civil Procedure Act* that enact pre-litigation protocols in civil litigation because such protocols would require mediation before litigation commences.¹⁴⁴

by the same court that made the order. See also *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 (13 June 2012) [20] (Bathurst CJ, Basten JA and Whealy JA).

¹⁴⁰ Senate Legal and Constitutional Affairs Legislation Committee, above n 2, 9.

¹⁴¹ Sharon Rodrick, ‘Open Justice and Suppressing Evidence of Police Methods: The Positions in Canada and Australia’ (2007) 31 *Melbourne University Law Review* 172, 199.

¹⁴² Ibid, 200. Rodrick was writing about the suppression of the crime boss scenario technique and how the impact of delay between the trial and appeal of the publication ban could risk the level of the media interest and the public debate about the use of the particular police method, in this case. Rodrick was writing about the failed suppression orders in Canada and Victoria to ban publication about this particular police method. It is also noted that NSW failed in suppressing the method: *Attorney-General for NSW v Nationwide News Pty Ltd & Anor* [2007] NSWCCA 307 (5 November 2011), special leave to the High Court refused.

¹⁴³ See *Rinehart v Welker* [2012] NSWCA 1 (13 January 2012) [9]-[18] and [31]-[36] (Bathurst CJ, Beazley and McColl JJA).

¹⁴⁴ *Civil Procedure Act 2005* (NSW) ss 18A-18O. These provisions are enacted but have not yet commenced. It is noted that the protocol would also require the appropriate exchange of information: s 18C.

V CONCLUSION

The Rinehart litigation offers a plethora of issues on civil procedure and shows the multitude of points that can be litigated when litigation funding is not an issue. The litigation has all the ingredients of a soap opera: wealth, commercial sensitivities, private family matters. However, one point is clear: the litigation shows that these reasons are not a basis to close justice. This case demonstrates that the new statutory framework for making suppression and non-publication orders will mirror the common law's reverence for the principle of open justice. The exceptions to open justice are well known categories where the necessity of such orders depends on the type of information involved, for example, the protection of the identity of an informer or information that may harm national security. In the case of suppression orders sought by Gina Rinehart, it could be argued that a party has used their wealth to keep information from the public by testing the limits of the CSPO Act. In this battle, openness is the victor. Rinehart's enormous wealth was not able to keep the proceedings private or bind her children to ADR.

Just before Mother's Day 2012, the Rinehart family dispute took a twist as Gina Rinehart brought the vesting date of the trust forward from 2068 to April 2012.¹⁴⁵ This affects the children's claim that their mother extended the expiry of the family trust. However, it has been reported that the plaintiffs will continue their claim to have their mother removed as trustee and they will press for disclosure of financial records in respect of the trust. Of course, an obvious solution to ensure privacy of these matters is for Gina Rinehart to reach settlement with her three children. However, after so many pre-trial battles that appears quite unlikely.

¹⁴⁵ The claim was before the court on 9 May 2012 when it was announced that Gina Rinehart had changed the vesting date which meant that the children had immediate access to trust funds.

PETROLEUM AND MINERAL RESOURCE RENT TAXES: COULD THESE TAXATION PRINCIPLES HAVE A WIDER APPLICATION?

JOHN MCLAREN*

The Australian Government introduced a Petroleum Resource Rent Tax (PRRT) on offshore oil and gas deposits in 1984 and since then it has raised in excess of an additional \$1 billion a year in revenue over and above the normal company tax on income. The Australian Government has introduced a Mineral Resource Rent Tax (MRRT) on iron ore, coal and gas from coal seams effective from 1 July 2012. The MRRT has been met with criticism from certain mining companies and noted economists. However, Australia currently has a budget deficit and an MRRT is being viewed by the government as a possible solution to balancing the budget. A Resource Rent Tax (RRT) has been used by a number of countries such as the United Kingdom and Norway to increase government revenue from their 'North Sea' oil reserves. It would appear that this type of tax has a number of desirable attributes, especially in relation to efficiency. Is it now time for governments to consider a wider application of a rent tax to other industries and resources? A 'rent tax' being a tax on land is now an accepted form of taxation in many western economies such as Australia, New Zealand and the United Kingdom. There are a number of businesses such as the airline industry, the fishing industry, the Australian funeral industry and the timber industry that generate an economic rent due to their dominance in a particular business sector. This paper examines a number of those industries and contends that, due to the super profits being generated by these businesses, governments should consider the imposition of a rent tax.

I INTRODUCTION

The purpose of this paper is to explore the potential for governments throughout the world to raise revenue through the imposition of a 'rent tax' not only on land and non-renewable mineral resources but also other resources such as timber, water, fish, hydro-electricity, geothermal electricity and industries such as airports, toll-roads and airlines. Part III of this paper will briefly describe the way in which the MRRT and the PRRT work in imposing a tax on the 'super' profit from mining. However, prior to this examination, Part II of the paper will discuss the general concept of a 'rent tax'

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and 'economic rent'. The terms 'rent tax', 'economic rent' and 'resource rent tax' are used in this paper to describe the surplus value derived from land, resources or other business activity that is then subject to a separate 'rent' tax. The original concept of taxing 'rent' was developed by classical economists such as David Ricardo¹ and Adam Smith.² The concept was subsequently adopted by Henry George in the late nineteenth century and led the way for land tax to be levied on the unimproved value of land in the Australian colonies.³ This section of the paper will discuss the original philosophical basis for the taxation of the rent from land.

The use of a rent tax by governments to collect revenue has been in existence for many years. Henry George advocated a rent tax as the main source of revenue.⁴ Land tax is a form of rent tax imposed on the unimproved value of land. However, the same system of taxation could be applied to assets devolved to beneficiaries on the death of the owner as a form of inheritance tax. This application of the tax will be discussed later in the paper. Could a rent tax be imposed on businesses that have a monopoly or dominant market position together with the imposition of the income tax on companies' taxable income? This paper will examine the possibility of an economic rent tax being imposed on finite resources such as geothermal electricity generation as well as businesses that have a strong market presence in Australia and other countries.

Part IV of the paper will examine the various applications of a rent tax to the surplus generated by the exploitation of non-renewable resources and the super profits generated by various industries. Part V will provide concluding remarks about the potential for governments to raise additional revenue through a rent tax and then pass on the benefits to society by possibly reducing personal and company rates of income tax as a direct consequence of embracing this form of taxation.

II THE CONCEPT OF A RENT TAX

The Henry Tax Review advanced arguments for cash flow business taxes as a replacement for business income tax and for bequest duties, both of which are arguably further examples of the taxation of economic rents or, in the latter case at least, of the taxation of unearned gain. This is an important part of the thinking underpinning economic rent. Indeed, it has been argued that the Henry Tax Review has, as one cornerstone of its vision for the Australian tax system, the taxation of economic rents rather than income and capital. The Federal Government has adopted one small part of such a tax, namely a minerals resource rent tax, and to date has rejected two other aspects of such a tax – a land tax and a bequest duty. However, it has accepted that at some time in the future it may be appropriate to look at a business level expenditure tax or cash flow tax, i.e. a tax on the economic rents of business.

Economic rent is the return over and above the return necessary for the activity to take place.⁵ For example, what does it take to get a super model to work? Linda

¹ David Ricardo, *Principles of Political Economy and Taxation* (London: John Murray, 3rd ed, 1821).

² Adam Smith, *An Inquiry into the Nature and Cause of the Wealth of Nations* (London: Methuen, 6th ed, 1950).

³ Henry George, *Social Problems* (New York: Doubleday Page & Co, 1904).

⁴ Ibid 179.

⁵ W.H. Wessel, 'A Note on Economic Rent' (1967) 57(4) *American Economic Review* 873, 885.

Evangelista told *Vogue* that ‘we don’t wake up for less than \$10,000 a day.’ While the example is hardly scientific, for the purposes of exposition it is appropriate. If a supermodel were paid anything more than that (and they are) it is economic rent. So a Government could tax almost all of that excess without affecting a supermodel’s work decisions at all. They would still go to work even if the economic rent tax reduced the return to ‘just’ \$10,000 a day.

The following comment from Robin Broadway and Michael Keen is a good description of economic rent, and an argument in favour of taxing it:

Economic rent is the amount by which the payment received in return for some action – bringing to market a barrel of oil, for instance – exceeds the minimum required for it to be undertaken. The attraction of such rents for tax design is clear: they can be taxed at up to (just less than) 100 percent without causing any change of behaviour, providing the economist’s ideal of a non-distorting tax.⁶

The Henry Tax Review echoes this and applies the general logic of economic rent to the specifics of minerals. The following passage provides an excellent explanation:

The finite supply of non-renewable resources allows their owners to earn above-normal profits (economic rents) from exploitation. Rents exist where the proceeds from the sale of resources exceed the cost of exploration and extraction, including a required rate of return to compensate factors of production (labour and capital). In most other sectors of the economy, the existence of economic rents would attract new firms, increasing supply and decreasing prices and reducing the value of the rent. However, economic rents can persist in the resource sector because of the finite supply of non-renewable resources. These rents are referred to as resource rent.⁷

However, as the Henry Tax Review recognises,⁸ it is not just the minerals sector which profits from economic rents. There appears no reason in logic to limit the economic rent analysis to resources since the overriding consideration is above normal profits. As Garnaut and Clunies Ross put it, the term ‘rent’ can be applied to any profits of any kind of enterprise that exceed those whose prospect the investor would have required to induce him or her to invest in the enterprise.⁹ For resources, the reason for that above normal rate of return is, according to the Henry Tax Review, the finite supply of non-renewable resources.¹⁰ Yet monopoly or oligopoly can create the same above average rates of return¹¹ and arguably they should be taxed in a similar fashion. Indeed, these conditions might actually reflect something even deeper. Economic rent arguably arises not from monopoly per se but from monopolised property relations, i.e. private property. Thus Garnaut and Clunies Ross say that most discussion of economic rent is about windfall profits, barriers to entry

6 Robin Broadway and Michael Keen, ‘Theoretical Perspectives on Resource Design’ in Philip Dean, Michael Broadway and Charles McPherson (eds), *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (2010), 9.

7 Henry Final Report Detailed Analysis Chapter C: Land and resources taxes C1. Charging for non-renewable resources C1–1. The community’s return from the exploitation of its resources. Viewed 3 December 2010.

8 Ibid.

9 Ross Garnaut and Anthony Clunies Ross *Taxation of Mineral Rents* (New York: Clarendon Press, 1983) 33.

10 Ibid 76.

11 This is at the expense of other business since what is happening is actually a reallocation of value from all sectors of capital to the monopoly and/or resource sectors.

and transfer rents, but that these terms are inadequate. For them windfall profits do not necessarily come as a surprise.¹²

The 'barrier to entry' that gives rise to what might appear to be transfer rent is the institution of property rights itself. Exclusive property rights are necessary for the emergence of mineral rent in the same way as they are to land rent. This is true also of business monopolies or oligopolies. Exclusive property rights are the ultimate legal expression of monopoly either expressly, through for example ownership of particular property, or indirectly through the lack of competition, which elevates the particular property rights to a level of exclusivity or near exclusivity for as long as the monopoly exists. Thus Henry's proposal to tax land rent is based on the idea that luck or position increases the unimproved value of land.

The taxation of land is the taxation of rent because rent is the increment of market gain that accrues to choice land parcels.¹³ The Henry Tax Review proposed a land tax¹⁴ as part of its vision for the taxation of economic rent, in conjunction with a raft of other taxes mainly on economic rent. It sees the unimproved capital value of land as the surplus over and above the costs of production and adequate returns on those costs. So at the heart of Dr Henry's ideas about land tax is the concept of economic rent. An unimproved land value tax does not seemingly tax the labour and capital input into land because it arguably removes from the calculation process those inputs into the value of land itself.

A very succinct explanation of the concept of 'economic rent' is contained in the following definition provided by Professors' Garnaut and Clunies Ross:

Economic rent is the excess of total revenue derived from some activity over the sum of the supply prices of all capital, labour, and other 'sacrificial' inputs necessary to undertake the activity... In essence, it referred to the reward that a landowner could derive by virtue simply of being a landowner and without exerting any effort or making any sacrifice.¹⁵

Garnaut and Clunies Ross acknowledge that this definition is based on the work of Ricardo.¹⁶ Adam Smith also examined the concept of economic rent in his treatise '*The Inquiry into the Wealth of Nations*' and contended that rent is an unearned surplus, which is appropriated by the landlords through the exercise of their monopoly power.¹⁷ Smith and Ricardo considered rent to be the unearned income obtained from renting land to entrepreneurs who then grew crops or livestock. The entrepreneur took the risk in buying seeds, planting the crop, harvesting the crop and finally selling the product. The fact that the owner of the land had a monopoly and was able to extract a rent without undertaking any activity or risk, caused political economists such as

¹² Garnaut and Clunies Ross, above n 9, 34.

¹³ H William Batt, *The Compatibility of Georgist Economics and Ecological Economics*, 2003 *Wealth and Want in 21st Century America* <http://www.wealthandwant.com/docs/Batt_GEE.html>.

¹⁴ AFTS Chapter C: *Land and resources taxes* C2. *Land tax and conveyance stamp duty* C2-1 *Land is (potentially) an efficient tax base*, 6 December 2010.

¹⁵ Garnaut and Clunies Ross, above n 9, 26.

¹⁶ Ibid 27.

¹⁷ Joseph Keiper, Ernest Kurnow, Clifford Clark et al, *Theory and Measurement of Rent* (Philadelphia: Chilton, 1961) 14.

Smith to develop the theoretical concept of taxing the economic rent of the landowner.

Similarly, a mine owner obtained a rent after capital and labour costs were deducted from the price of the minerals that had been sold. It is also acknowledged that a tax on the economic rent has a neutral effect on the landowner or mine owner.¹⁸ A landowner or a mine owner would continue with their activity even though their excess profit or economic rent was subject to tax. The costs of capital and labour are already a factor in arriving at the economic rent.

A simple way of demonstrating the way in which economic rent is calculated is found in the following formulation:

$$\text{Economic rent} = \text{total revenue} - \text{total economic cost}^{19}$$

A tax is then imposed on the amount of economic rent derived from the resource at a specific rate. It is in effect a tax on the free cash flow from a resource project. In determining the costs of a project, it also takes into account the 'opportunity costs of capital' by incorporating an uplift factor such as a long term bond rate plus a further component.²⁰ For example, with the PRRT in Australia the carry forward rate for undeducted general project costs is the long term bond rate plus 5 per cent.

It must be noted that economic rents would not persist under standard competitive conditions.²¹ In other words, if other mining companies entered the market because of the attraction of the size of the economic rent, then the rates of return and supply of minerals would drive the commodity price down or bid up the cost of fixed assets until economic rents were eliminated.²² The economic rent is eliminated when commodity prices fall or the extraction costs are too high. In order to overcome this type of problem, many of the oil producing countries formed a cartel, namely the Organisation of the Petroleum Exporting Countries (OPEC)²³ as a means of controlling the price of crude oil.

¹⁸ Ibid.

¹⁹ G. C. Watkins, 'Atlantic Petroleum Royalties: Fair Deal or Raw Deal?' (2001) *Atlantic Institute for Market Studies*, The AIMS Oil and Gas Papers (2), 5.

²⁰ Martin Van Brauman and Clifford Mangano, 'Resource Rent Taxation as a Basis for Petroleum Tax Policy by Foreign Governments and its Relationship to US Foreign Tax Credit Policy and Tax Law' (2000) 18(1) *Journal of Energy & Natural Resources Law* 19, 20.

²¹ Michael Hinchy, Brian Fisher and Nancy Wallace, 'Mineral Taxation and Risk in Australia, Discussion Paper 89.8', *Australian Bureau of Agricultural and Resource Economics* (1989) 6.

²² Ibid.

²³ The Organization of the Petroleum Exporting Countries (OPEC) was founded in Baghdad, Iraq with the signing of an agreement in September 1960 by five countries namely Islamic Republic of Iran, Iraq, Kuwait, Saudi Arabia and Venezuela. They were to become the Founder Members of the Organization. These countries were later joined by Qatar (1961), Indonesia (1962), Socialist People's Libyan Arab Jamahiriya (1962), the United Arab Emirates (1967), Algeria (1969), Nigeria (1971), Ecuador (1973), Gabon (1975) and Angola (2007). From December 1992 until October 2007, Ecuador suspended its membership. Gabon terminated its membership in 1995. Indonesia suspended its membership effective January 2009. www.opec.org 7 January 2011.

The rent of land, therefore, considered as the price paid for the use of the land, is naturally a monopoly price.²⁴ As will be seen from the following analysis, the imposition of a rent tax is only feasible when an industry has a monopoly over certain resources such as land or minerals, or a dominant position in a market such as an airport corporation in a major regional location such as Sydney or Melbourne.

The private revenue of individuals arises from three sources: rent, profit and wages.²⁵ Smith contends that a tax upon rent of land may either be imposed according to the location of the land or on the real rent of the land which is determined by the improvements on the land. Land tax that was imposed in Great Britain at that time was seen by Smith as being tax neutral and the following statement aptly summaries this fact:

It does not reduce productivity and does not raise the price of what is produced. It does not obstruct the industry of the people. It subjects the landlord to no other inconvenience besides the unavoidable one of paying the tax.²⁶

Henry George takes the concept of rent a step further by advocating that a tax on the unimproved value of land could replace all other forms of taxation, including taxes on labour and capital.²⁷ However, under the Henry George model all land is owned by the state and the land tax, based on the unimproved value, is paid to the state.²⁸ Henry George also recognises that a rent tax on the value of land is efficient in that it does not lessen the incentive to produce and prevents restrictions on production.²⁹

The land tax that was introduced in Australia in 1910 had, as its main effect, the redistribution of large land holdings to other farmers who at that stage were precluded from obtaining land. The rate of tax was such that it became prohibitive for absent landholders to merely occupy land without producing income.³⁰ In effect the introduction of the rent tax in the classic form of a land tax achieved, to some extent, the redistributive function of land as proposed by Henry George.³¹

The Commonwealth of Australia introduced a land tax with the enactment of the *Land Tax Act 1910* (Cth) and the *Land Tax Assessment Act 1910* (Cth). It was contended that the main purpose of the legislation was to control the ownership of land in Australia and to penalise land owners who were not resident in Australia by imposing a progressive rate of land tax on the unimproved value of land in excess of five thousand pounds. The High Court of Australia in the case of *Osborne v The Commonwealth and George Alexander McKay*³² examined the legality of the legislation on the basis that it was not concerned with raising tax but with breaking up large land holdings in order to promote greater agricultural pursuits and reward

²⁴ Adam Smith, *An Inquiry into the Nature and Cause of The Wealth of Nations* (London: Strahan and Cadell, in the Strand, 6th Ed 1961) 162.

²⁵ Ibid 350.

²⁶ Ibid 353.

²⁷ George, above n 3, 179.

²⁸ Ibid.

²⁹ Ibid 186.

³⁰ A.M. Woodruff and L.L.Ecker-Racz, 'Property Taxes and Land Use Patterns in Australia and New Zealand' (1965-66) 18 *Tax Executive* 16, 31.

³¹ Ibid.

³² (1910-11) 12 CLR 321.

returning soldiers from the First World War.³³ Griffith CJ acknowledged that a consequence of the Act may have been to prevent large holdings of land but that this did not affect the competence of the Act to impose a land tax.³⁴

III THE MRRT, THE PRRT AND RENT TAXES IN OTHER COUNTRIES

The Henry Tax Review examined the various options for taxing mineral and petroleum resources. There are two versions of an RRT that are referred to in Chapter C of the report as well as in the literature on this area of taxation. The first version is a 'Brown Tax', which is based on the work of the American economist, E Cary Brown and published in 1948.³⁵ The second version is what is known as the Garnaut and Clunies Ross rent tax. Both versions of the rent tax are similar except the 'Brown Tax' requires the state to recompense the mining company for expenses incurred in the exploration and early production phases when there are negative cash flows. The payment required by the state is equal to the product of the tax rate and the amount of the negative cash flow. In other words, the mining project is paid compensation by the state based on the losses incurred in the project up to that point. This would mean that governments bear some of the risk of the project and this may be substantial with very large projects that are non-productive. In some instances it may create sovereign risk for the state. The second version, the Garnaut and Clunies Ross model, is similar except negative cash flows are carried forward until such time as the project becomes cash positive. In order to compensate the project, the losses are carried forward with an uplift factor such as the long term bond rate plus a percentage. For example, under the PRRT in Australia, the uplift factor is the long term bond rate plus 15 percent for exploration expenditure or 5 percent for project development and operating expenditure. The Garnaut and Clunies Ross model has been accepted by the Australian Government and this is acknowledged in the MRRT Explanatory Memorandum.³⁶

The final raft of legislation creating the MRRT and amending the PRRT was introduced into Parliament on 2 November 2011.³⁷ The object of the *Minerals Resource Rent Tax Act 2012* (Cth) is stated in section 1-10 as follows:

The object of this Act is to ensure that the Australian community receives an adequate return for its taxable resources, having regard to:

- (a) the inherent value of the resources; and
- (b) the non-renewable nature of the resources; and
- (c) the extent to which the resources are subject to Commonwealth, State and Territory royalties.³⁸

³³ Woodruff and Ecker-Racz, above n 30.

³⁴ *Osborne v The Commonwealth and George Alexander McKay* (1910-11) 12 CLR 321, 335.

³⁵ E. C. Brown, 'Business-income taxation and investment incentives' in *Income, Employment and Public Policy: Essay in honour of Alvin H. Hansen* (1948), 300. (Also referred to in Ross Garnaut, 'The New Australian resource Rent Tax', 20 May 2010, University of Melbourne.)

³⁶ Explanatory Memorandum, MRRT Bill (2011) 8.

³⁷ Minerals Resource Rent Tax Bill 2011, Minerals Resource Rent Tax (consequential amendments and transitional provisions) Bill 2011, Minerals Resource Rent Tax (imposition—customs) Bill 2011, Minerals Resource Rent Tax (imposition—excise) Bill 2011, and Minerals Resource Rent Tax (imposition—general) Bill 2011 <www.aph.gov.au> at 3 November 2011.

³⁸ Explanatory Memorandum, above n 36.

The Act does this by taxing above normal profits made by miners (also known as economic rents) that are reasonably attributable to the resources in the form and place they were in when extracted.

A 'taxable resource' is defined in Division 20 of the Act as coal, iron ore and coal seam gas. The MRRT is based on taxing projects, similar to the PRRT. Mining projects that do not generate resource profits of more than AUD 50 million in a given year will not be subject to the MRRT. This is designed to reduce the compliance costs for small mining companies.³⁹ The MRRT is imposed at a rate of 30 percent and not 40 percent which is the current rate of tax under the PRRT. The profit or loss calculation is based on the assessable receipts less deductible expenditure less the uplift carry forward losses. The uplift factor is the long term bond rate plus 7 percent.⁴⁰

The MRRT is a deductible expense when calculating taxable income for income tax purposes. This is the current situation under the PRRT where the PRRT is a deduction against assessable income pursuant to s 44-750 of the *Income Tax Assessment Act 1997* (Cth). Royalties paid to the states and the Northern Territory are credited against any MRRT liability and any excess royalty payments will be uplifted and applied against future MRRT liabilities. Any excess royalty payments will not be refundable.⁴¹ The MRRT only applies to iron ore, coal and coal seam gas projects. It does not apply to other minerals.⁴² The MRRT applies from 1 July 2012 but the market value of assets acquired for projects after 1 May 2010 will be included in the expenditure calculation for the MRRT.⁴³

The Explanatory Memorandum provides the following outline and financial impact summary of how the tax will operate:

The Minerals Resource Rent Tax (MRRT) is a tax on the economic rents miners make from the taxable resources (iron ore, coal and some gases) after they are extracted from the ground but before they undergo any significant processing or value add. 'Economic rent' is the return in excess of what is needed to attract and retain factors of production in the production process.

The MRRT is a project-based tax, so a liability is worked out separately for each project the miner has at the end of each MRRT year. The miner's liability for that year is the sum of those project liabilities. The tax is imposed on a miner's mining profit, less its MRRT allowances, at a rate of 22.5 per cent (that is, at a nominal rate of 30 per cent, less a one-quarter extraction allowance to recognise the miner's employment of specialist skills).

A project's mining profit is its mining revenue less its mining expenditure. If the expenditure exceeds the revenue, the project has a mining loss. Mining revenue is, in general, the part of what the miner sells its taxable resources for that is attributable to the resources in the condition and location they were in just after extraction (the 'valuation point'). Mining revenue also includes recoupments of some amounts that have previously been allowed as mining expenditure.

³⁹ Ibid 67.

⁴⁰ Ibid 8.

⁴¹ Ibid 8.

⁴² Ibid 11.

⁴³ Ibid 95.

Mining expenditure is the cost a miner incurs in bringing the taxable resources to the valuation point. Mining allowances reduce each project's mining profit. The most significant of the allowances is for mining royalties the miner pays to the States and Territories. It ensures that the royalties and the MRRT do not double tax the mining profit. In the early years of the MRRT, the project's starting base provides another important allowance. The starting base is an amount to recognise the value of investments the miner has made before the MRRT.

Other allowances include losses the project made in earlier years and losses transferred from the miner's other projects (or from the projects of some associated entities). If a miner's total mining profit from all its projects comes to less than \$50 million in a year, there is a low-profit offset that reduces the miner's liability for MRRT to nil. The offset phases out for mining profits totalling more than \$50 million.⁴⁴

The MRRT is expected to generate revenue of \$3.7 billion in 2012-13; \$4 billion in 2013-14; and \$3.4 billion in 2014-15.⁴⁵ However, this is starting to look unlikely due to the drop in the price of coal and iron ore.

A *The Australian PRRT*

In 1984 the Federal Government announced the introduction of an RRT for new offshore petroleum projects and their exemption from the imposition of royalties and the crude oil levy.⁴⁶ It was a further three years before the legislation was finally passed by parliament. The government was not able to extend the rent tax to onshore petroleum production in lieu of state royalties because the state governments of Western Australian and Queensland objected.⁴⁷ In 1990, Bass Strait petroleum projects became subject to the PRRT.⁴⁸ The North West Shelf projects are subject to a federal royalty and the crude oil levy.⁴⁹

The Act was effective from 15 January 1984, even though the legislation was not passed by Parliament until 1987. The Act applied retrospectively to exploration permits awarded on or after 1 July 1984 and recognised expenditure incurred on or after 1 July 1979. It was originally imposed on offshore petroleum projects other than Bass Strait and the North West Shelf. However, oil and gas production in Bass Strait moved from a royalty and excise regime to the PRRT regime in the fiscal year 1990-1991. The PRRT was imposed on oil companies with the enactment of the *Petroleum Resource Rent Tax Act 1987* (Cth) and the *Petroleum Resource Rent Tax Assessment Act 1987* (Cth). The resource rent tax is imposed on the taxable profit of a petroleum project that is located 'offshore' in Australia. The Hawke Labor Government of 1984 introduced a resource rent tax, based on the Garnaut and Clunies Ross model, in order to remedy the state-based taxation system of imposing royalties on resource production output.⁵⁰ The *Petroleum Resource Rent Tax Act 1987* (Cth) is imposed on the profit at the rate of 40 percent. The *Petroleum Resource Rent Tax Assessment Act*

⁴⁴ Explanatory Memorandum, Mineral Resource Rent Tax Bill 2011 (Cth).

⁴⁵ Ibid 3.

⁴⁶ Michael Crommelin, 'Governance of Oil and Gas Resources in the Australian Federation' (2009) *University of Melbourne Law School*, Research Series 8, 12.

⁴⁷ Ibid 13.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Rob Fraser, 'The state of resource taxation in Australia: "An inexcusable folly for the nation"?' (1999) *The Australian Journal of Agricultural and Resources Economics* 259, 260.

1987 (Cth) contains the provisions relating to the calculation of the profit subject to the rent tax. The PRRT raised in excess of an additional \$1 billion a year in revenue over and above the normal company tax on income⁵¹

B *Resource Rent Taxes in Other Countries*

Many countries impose additional taxes on mining companies selling petroleum and mineral resources that have been extracted from their land. Given this situation, why then should there be reluctance on the part of mining companies to accept an MRRT in Australia which will only apply to coal, iron ore and coal seam gas? The following examination is very limited in its scope of the resource rent regimes adopted in other countries but it does show that this form of taxation of mineral resources has been used elsewhere – thus supporting the argument that it perhaps should not be subject to criticism in Australia.

Many countries have imposed a resource rent tax on petroleum and mineral extraction projects. Australia was one of the first countries to introduce an RRT in 1984, but Papua New Guinea (PNG) had already introduced an RRT in 1977 on petroleum projects and then in 1978, on mining projects. PNG subsequently removed the RRT in 2002 on mining and introduced a progressive profits tax.⁵² In 1984, Ghana and Tanzania also introduced an RRT.⁵³ Since then, many countries have either contracted with mining companies to impose an RRT on profit or legislated to impose the RRT. Russia introduced an RRT in 1994; Kazakhstan in the mid-1990s; Angola in 1996; British Columbia in Canada in 1990; Namibia in 1993; and Timor-Leste in 2006, to name just a few.⁵⁴

Both the United Kingdom (UK) and Norway impose a resource rent tax on petroleum profits derived from the North Sea on the 'Continental Shelf'. The UK introduced a petroleum resource tax when the North Shelf was first developed in 1975. Since then it has been amended and altered a number of times.⁵⁵ The UK and Norway abolished royalties based on the value of oil and gas extracted in 2002 and 1986 respectively.⁵⁶ The reason given for abolishing royalties was that it was a regressive tax as it applied to gross revenue and acted as a disincentive to exploration and production.⁵⁷ The UK applies a petroleum rent tax (PRT) at the rate of 50 percent as well as the normal company income tax. Norway applies a special petroleum tax (SPT) at 50 percent and the normal company tax on income.⁵⁸ The UK government imposed a supplementary charge of a further 10 percent in 2002 and in 2005 increased the rate to 20 percent on the company income. However, the PRT is deductible for income tax purposes.

⁵¹ Australian Taxation Office statistics – 2002-03 = \$1.2 billion; 2003-04 = \$1.5 billion; 2004-05 = \$2.0 billion; 2005-06 = \$1.8 billion; 2006-07 = \$1.9 billion and 2007-08 = \$ 1.6 billion.

⁵² J. Sarma and G Naresh, 'Mineral Taxation around the World: Trends and Issues' (2001) *Asia-Pacific Tax Bulletin* January 2, 7.

⁵³ Bryan Land, 'Resources rent taxes Chapter 8', in *The Taxation of Petroleum and Minerals: Principles, Problems and Practice*, Ed. Philip Daniel, Michael Keen and Charles McPherson (2010).

⁵⁴ Ibid 243.

⁵⁵ Carole Nakhle, 'Can the North Sea still save Europe?' (2008) *OPEC Energy Review* 123, 134.

⁵⁶ Ibid 133.

⁵⁷ Ibid.

⁵⁸ Ibid.

Norway does not allow the SPT to be deductible for income tax purposes and the effective marginal tax rate on the income of the company is 78 percent.⁵⁹

The UK system is complicated by the fact that the PRT is based on the development of the oil fields given development consent before 1993 as distinct from those given consent after 1993. In the former case, the fields are taxed on their income at a company tax rate of 50 percent and a PRT at the rate of 50 percent whereas the later fields are subject only to a company tax rate of 50 percent.⁶⁰ In 2002 the UK government introduced a 10 percent supplementary charge on the same basis as company tax but there was no deduction for financing costs against the supplementary charge.⁶¹ The royalty was abolished on older fields that had received development consent before 1993 in an attempt to encourage fuller exploitation of reserves from those fields.⁶² In 2005 in light of an increase in oil prices the UK government doubled the supplementary charge to 20 percent.⁶³ This means that in the UK oil and gas is taxed at the highest rate of any industry: for fields given approval after 1993, a company tax rate of 30 percent and the supplementary charge of 20 percent. For those fields given approval prior to 1993, the marginal rate of tax is 75 percent and they are also liable to company tax at the rate of 50 percent.⁶⁴

Zambia nationalised its copper industry in 1964 but this was later repealed in 1985. Since then the government has imposed a royalty rate of 3 percent, a variable income tax rate and a windfall tax applied to the value of production. However, in 2009 the windfall tax was repealed.⁶⁵ A similar situation occurred in Chile, Bolivia, Peru, Democratic Republic of the Congo, Ghana and Jamaica where the mining industry was nationalized.⁶⁶ Some countries have subsequently privatized part of the mining industry but the sovereign risk still remains. Chile now has a mixture of state participation and private investment in the mining industry and has imposed a sliding scale of rates of royalties based on the value of sales.⁶⁷ Kazakhstan and Liberia have introduced a rent based tax on the exploitation of their mineral resources.⁶⁸

IV APPLICATIONS OF A RENT TAX

In 2009 the Australian Government commenced a review of Australia's future tax system under the Chairmanship of the Secretary of the Treasury, Dr Ken Henry. The *Review of Australia's Future Tax System* (The Henry Tax Review)⁶⁹ states that the future Australian tax system should increasingly rely on land values as a tax base. The

⁵⁹ Ibid 134.

⁶⁰ Ibid.

⁶¹ Carole Nakhle, 'Chapter 4- Petroleum fiscal regimes: evolution and challenges,' in *The Taxation of Petroleum and Minerals: Principles, Problems and Practice*, Ed. Philip Daniel, Michael Keen and Charles McPherson (2010)

⁶² Ibid 111.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Lindsay Hogan and Brenton Goldsworthy, 'Chapter 5: International mineral taxation', in *The Taxation of Petroleum and Minerals: Principles, Problems and Practice*, Ed. Philip Daniel, Michael Keen and Charles McPherson (2010) 122, 126.

⁶⁶ Ibid 127.

⁶⁷ Ibid 125.

⁶⁸ Nakhle, above n 52, 149.

⁶⁹ Henry, above n 7.

Review recommended that a rent tax should be applied to land either at a flat rate or at marginal rates on all land including owner-occupied housing.⁷⁰ The review also recommended the introduction of a mineral resource rent tax at the rate of 40 per cent on the free cash flow profit. As discussed earlier in this paper, the free cash flow profit is the profit that is left after allowing for the mining company to obtain a return on labour and capital at, for example, the long term bond rate plus an uplift factor, which is then deducted from the value of the sale of the minerals. As a result of this review and the examination of the imposition of an economic rent tax on minerals in Australia and the reform of the current land tax, the idea of applying this system of taxation to other resources and industries may evolve over time. A rent tax could be imposed on a range of resources and a range of industries and not just land and mineral resources. This part of the paper will now examine instances where a rent tax could be applied to a variety of business activities.

A *Rent Tax on the Airline Industry*

The source of economic rents in the airline industry is the monopoly ownership of airports and the barriers to entry permitted by law to restrict airlines from operating in certain routes. Airports have a monopoly in most single hub facilities located near a major city because of the expense associated with having a number of airports within a geographical radius.⁷¹ The airport authority is able to set the price of all services provided to the travelling public as well as the airlines using the airport.⁷² A good example of this situation is found in the protection afforded to Australian airlines operating the Australia to US route. Singapore Airlines has been precluded by law from operating that route from Australian cities, thus being able to service the Australian public and threaten the monopoly profit being derived by certain airlines in Australia. There are many examples of this type of protection throughout the world especially where a national airline is being protected by the government owning the airline.⁷³ The monopoly situation is a classic element of 'economic rent' and therefore capable of being subject to a rent tax – the rent being the 'super profit' that is generated because of the monopoly situation.

B *Ocean Fishing*

The original concept of 'freedom of fishing' as advocated by Hugo Grotius, is no longer applicable due to the global demand for fish protein and the profit to be made from fishing.⁷⁴ Professor Prewo contends that fishing can command high economic rent and that the rent could be collected on the following: (i) the value of the output such as fish caught; (ii) the value of the inputs such as the boat, fishing gear or labour; or (iii) the lump sum charged for the fishing license.⁷⁵ Prewo suggests that the best option may be to auction the fishing permits and that the bids would reflect the economic rent, that is, the difference between harvesting costs and the market price at

⁷⁰ Commonwealth of Australia, *Review of Australia's Future Tax System*, (2010), 247.

⁷¹ Elizabeth Bailey and Jeffrey Williams, 'Sources of Economic Rent in the Deregulated Airline Industry' (1988) 31 *The Journal of Law and Economics* 173, 184.

⁷² Ibid.

⁷³ Examples are found with Singapore Airlines, Malaysian Airlines, Emirates and Etihad Airlines.

⁷⁴ Wilfried Prewo, 'Ocean Fishing: Economic Efficiency and the Law of the Sea' (1980) 15 *Texas International Law Journal* 261, 262.

⁷⁵ Ibid 273.

the socially optimal level of fishing.⁷⁶ The rent would accrue to the public rather than to the individual fishermen.⁷⁷ Governments would then collect additional revenue that could be used to fund the management of fishing resources or as part of their normal government revenue. The number of licences to be auctioned would safeguard future fishing stocks and replace quota systems.

Professor Muraoka examined the ‘sea urchin’ fishery off the coast of California in terms of managing the threatened species by the introduction of an auction system for the permits, which would generate an economic rent to be collected by the government and not the harvester of sea urchins.⁷⁸ In this case the economic rent is the additional value attaching to the permit being sold by the government.

C *The Australian Funeral Industry*

Small family owned funeral services have been taken over by large firms and multinational corporations. In Australia, the Texas-based ‘Service Corporation International’ (SCI) owns 25 per cent of the funeral business in Australia; 14 per cent in the United Kingdom; and 28 per cent of the French industry.⁷⁹ SCI maintains profits through economies of scale where the costs of hearses, chapels, embalming and crematoria, as well as ancillary services such as flowers, headstones and urns are augmented.⁸⁰ It is estimated that since the emergence of SCI in Australia the average price of funerals has increased by 40 per cent.⁸¹ SCI has effectively monopolised the most lucrative demographic death markets within Australia and is focusing on the 1.5 million Australians aged over 70 years.⁸²

At present approximately 134, 000 Australian die each year.⁸³ However, with a large proportion of the baby-boomers reaching the age of 70 years by 2016, which SCI and other funeral companies call the ‘death age’, the profit margins will start to increase.⁸⁴ This will be the ‘golden age’ for SCI.⁸⁵ Everyone requires a funeral service once in their lifetime. It is clear that the funeral business is becoming concentrated in the hands of very few corporations and the ability to increase profits is evident. This industry may present future governments with an ideal opportunity to impose an economic rent tax on the profits to be made as a direct result of an ageing population, especially the baby-boomer population. A rent tax could be imposed on the ‘super profit’ generated by the funeral industry after allowing for a normal rate of return to be earned on labour and capital costs, together with an uplift factor along similar lines to the MRRT or PRRT in Australia.

⁷⁶ Ibid 273.

⁷⁷ Ibid 274.

⁷⁸ Dennis Muraoka, ‘Managing the Sea Urchin Fishery: An Economic Perspective’ (1990) 30 *Natural Resources Journal* 139, 151.

⁷⁹ Drew Cottle and Angela Keys, ‘The Monopolisation of the Australian Funeral Industry’ (2004) 54 *Journal of Political Economy* 32, 33.

⁸⁰ Ibid.

⁸¹ Ibid 36.

⁸² Ibid.

⁸³ Ibid 39.

⁸⁴ Ibid.

⁸⁵ Ibid.

D *Geothermal Electricity Production*

Electricity is able to be generated either from geothermal steam or the heat found within the earth. The generation of electricity from geothermal steam has been in operation in the US since 1960.⁸⁶ According to Professors Muraoka and Mead, the US government was deriving revenue from this activity by leasing the land based on a per acre charge to the operator and, once production occurred, royalty payments were then made to the government.⁸⁷ However, they contend that among economists the goal of natural resource management should be to maximise the present value of the economic rent. They describe economic rent in the context of geothermal electricity production in the following terms:

Economic rent is the payment to a factor of production, like public lands, that is necessary to retain the factor in a particular use. For public lands used for geothermal energy production, economic rent is the difference between the discounted social value of the revenues that can be generated from the geothermal steam and the discounted social costs of production. ... We assert that the American people, as the owners of these lands, are entitled to the economic rent. The federal government, as trustee, should collect this value.⁸⁸

Muraoka and Mead advocate a bidding system based on a competitive auction for the various leases as promoting economic efficiency and collecting economic rent.⁸⁹ They are opposed to a royalty system which they contend leads to delays in production and premature abandonment of a geothermal field. Further, some investment in steam production becomes submarginal with royalty payments.⁹⁰ This reinforces the Australian government's view that royalties imposed on mining companies in Australia lead to inefficiencies in production decision making.

E *Hydropower Generation*

Hydropower generation of electricity uses nature's scarce resource but very few countries impose an economic rent tax on the profit derived from this industry.⁹¹ In Norway, 99 per cent of electricity is generated from hydropower and the current tax system is not able to elicit surpluses and rents in this sector.⁹² However, in 1992 the Norwegian government required power plants to cost electricity correctly and charge market prices for the electricity. This change has opened the way for the introduction of an economic rent on the production process. As Amundsen and Andersen contend, economic rent is residually determined by the demand for electricity.⁹³ If the demand for electricity increases as a result of income growth, then the rent will increase. If the demand decreases through conservation measures then the rent reduces.⁹⁴ In this way

⁸⁶ Dennis Muraoka and Walter Mead, 'Economic Issues in Federal Geothermal Leasing Procedures' (1987) 27 *Natural Resources Journal* 675, 675.

⁸⁷ Ibid 679.

⁸⁸ Ibid 682.

⁸⁹ Ibid 683.

⁹⁰ Ibid 687.

⁹¹ Eirik Amundsen and Christian Andersen, (1992) 13(1) *Energy Journal* 97, 97. The authors explain that this may be partly due to the fact that hydropower plants are government owned.

⁹² Ibid 97.

⁹³ Ibid 99.

⁹⁴ Ibid.

the rent tax is neutral and will not interfere with the marginal social value of the electricity produced.⁹⁵

F *Timber*

Many developed and developing countries have a considerable store of wealth in their timber resources. If governments wish to promote the efficient use of the resource and to collect fair value then the prospect of imposing an economic rent may provide the best solution.⁹⁶ The economic rent from timber is defined by Professors Muraoka and Watson as the following:

In the context of timber resources, economic rent can be expressed as the value of logs produced less total necessary cost of production including a normal rate of return for the developer.⁹⁷

In other words, the economic rent is the value or profit derived after deducting all expenses such as labour, equipment and capital and allowing for a normal rate of return to the developer along the lines of the MRRT (a long term bond rate plus an uplift factor). Muraoka and Watson conclude that species log scale bidding with payment at harvest is not maximising the economic rent.⁹⁸ In fact where excessive bidding occurs this leads to default in payment to the government. They advocate a lump sum payment bidding process as the best option to ensure economic efficiency and an increase in the available economic rent to be paid for the public timber resources.⁹⁹

G *Freshwater or Coastal Space – New Zealand*

The New Zealand Government introduced the *Resource Management Act 1991* (NZ) to impose a resource rent tax on those people using coastal land to store their boats.¹⁰⁰ The land was owned by the government and as such it was able to impose a charge on the users of the land. However, as Sinner and Scherzer point out, imposing a rent will produce positive net benefits to public welfare but sometimes political considerations such as maximising votes at the next election take precedence.¹⁰¹ As a result of the political considerations, no tax was imposed at that time. In the context of fresh water and coastal land, Sinner and Scherzer contend that collecting a resource rent tax protects against inefficient allocation of the resource.¹⁰² They identify two different kinds of inefficiencies: over-allocation and misallocation. In the first instance, a resource rent tax will ration the resource and in the second instance, misallocation would be resolved if the coast could be used for marine farming at the expense of recreational fishing.¹⁰³

⁹⁵ Ibid.

⁹⁶ Dennis Muraoka and Richard Watson, 'Improving the Efficiency of Federal Timber Sales Procedures' (1983) 23 *Natural Resources Journal* 815, 816.

⁹⁷ Ibid 817.

⁹⁸ Ibid 822.

⁹⁹ Ibid 825.

¹⁰⁰ Jim Sinner and Jorn Scherzer, 'The Public Interest in Resource Rent' (2007) 11 *New Zealand Journal of Environmental Law* 279, 280.

¹⁰¹ Ibid 286.

¹⁰² Ibid.

¹⁰³ Ibid.

V CONCLUSION

A resource rent tax has been in existence in many countries rich in mineral resources for many years, and it appears to be a logical form of taxation where limited resources which are owned by governments are taxed in such a way as to maximise the welfare of its citizens. An economic rent tax has been imposed on the owners of a range of factors of production: airports, airlines, timber, fish stocks, geothermal power, hydropower and even coastal land.

In the context of the above analysis, there seems to be no reason why governments should not consider imposing an economic rent tax on those industries that operate in a monopolistic environment and generate 'super profits' such as power generators and airports. Moreover, a rent tax would satisfy the requirements of a 'good' tax system by being equitable – both vertically and horizontally. Such a system is simple in form, relatively simple to assess and collect, and efficient in that it does not interfere with operational decisions because the cost of capital and labour has already been taken into account.

ASSESSING THE ROLE OF FAMILY CONSULTANTS WHEN PROVIDING EVIDENCE IN PARENTING DISPUTES

LIAM MEAGHER*

One role of family consultants is to provide expert evidence to the court on what is in a child's best interests when making parenting orders. Yet deciding a child's best interests is a complex and value-laden determination, on which legislation provides considerable guidance. Rational Choice Theory may be used to disaggregate the best interests question into four stages: outlining the options of the court, determining possible outcomes for a child within these options, determining the likelihood these outcomes will occur and placing value on these outcomes. The last stage in this process involves a subjective value judgement as to what is 'best' for a child, which family consultants have no expertise in addressing.

The author argues that family consultants should cease the practice of making recommendations to the court on what orders are in a child's best interests, as such recommendations exceed the boundaries of their knowledge base, misrepresent their knowledge base, engender a likely conflict with the legislation and lead to the possibility of institutionalising expert biases within the court system. Despite this, a considerable amount of evidence should continue to be provided by family consultants. Guidelines are suggested to help ensure the quality of this evidence.

I INTRODUCTION

The appropriate role of experts who provide evidence when courts make parenting orders is a matter of significant controversy.¹ Indeed, it has been claimed that 'there is probably no forensic question on which overreaching by mental health professionals has been so

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I wish to thank George Tomossy for his guidance on earlier drafts of this paper. Any errors and views in this paper remain my own.

¹ Timothy M. Tippins, and Jeffrey P. Wittman, 'Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance' (2005) 43 *Family Court Review* 193; Gary B. Melton et al, *Psychological Evaluations for the Courts* (Guildford Press, London, 1987) 331; Daniel Krauss and Bruce Sales, 'Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases' (2000) 6 *Psychology, Public Policy, and Law* 843, 866; Jonathan W. Gould and David A. Martindale, 'A Second Call for Clinical Humility and Judicial Vigilance: Comments on Tippins and Wittman' (2005) 43 *Family Court Review* 253, 253.

common and so egregious.’² Notwithstanding this, the ‘family consultant’ has numerous roles in child-related proceedings under the *Family Law Act*, including the provision of advice to the court on ‘such matters relevant to the proceedings as the court thinks desirable.’³ These court appointees claim expertise in the social and behavioural sciences.⁴ Courts frequently take into account the evidence of family consultants, on a wide range of matters, including in the form of recommendations on what is in the best interests of the child and what orders should be made.⁵

This article will limit its scope to discussion of the use of family consultants when making ‘parenting orders’, which are orders of the court,⁶ as opposed to ‘parenting plans’, which are written agreements developed by parties in child-related disputes.⁷ The vast majority of the rules of evidence do not apply in such situations, unless ‘circumstances are exceptional’ and the court has considered certain matters.⁸ In light of this discretion and claims that they provide ‘neutral, conceptual and evidence-based commentary’ on child-related disputes,⁹ efforts should be made to ensure this evidence is appropriate in both substance and form.

Part 1 of the article outlines the knowledge required to make a determination of what is in the best interests of a child, which is the paramount consideration when making parenting orders.¹⁰ Rational Choice Theory provides a useful framework to achieve that objective.¹¹ This theory disaggregates the determination of what is in the best interests of the child into four stages. It is argued that the first stage, discovering the options available to the court,¹² requires knowledge of the facts of the case, including the intentions of parties. The second and third stages, determining possible outcomes for a child and the likelihood they will occur,¹³ require knowledge of the facts of the case and good predictive abilities.

² Melton et al, above n 1, 330.

³ *Family Law Act 1975* (Cth) (FLA) s 62G(2).

⁴ Margaret Harrison, *Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings* (Family Court of Australia, 2007) 51.

⁵ Donald M. Thomson and Susan E. Molloy, ‘Assessing the Best Interests of the Child’ (2001) 18 *The Australian Educational and Developmental Psychologist* 5, 12; *Fournier & Noelle* [2007] FamCA 875 (23 August 2007) [91]; *Peters & March* [2010] FamCA 151 (16 February 2010) [64]; *Tomas and Anor & Murray* [2011] FamCA 641 (17 August 2011) [78]-[96].

⁶ FLA ss 64B, 65D.

⁷ FLA s 63C. Many of the observations made in this thesis will also be relevant to other experts’ evidence. However, considering the difficulties of enforcing some of these recommendations upon other experts, without changing the rules of evidence, and some additional problems of bias with party-supplied experts, this paper focuses purely on family consultants.

⁸ FLA s 69ZT. The court must take into account ‘the importance of the evidence in proceedings’, ‘the nature of the subject matter of the proceedings’, ‘the probative value of the evidence’, and ‘the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to evidence’: FLA s 69ZT(3).

⁹ A Family Court publication describes family consultants’ evidence in this fashion: Harrison, above n 4, 51.

¹⁰ FLA s 60CA.

¹¹ Robert H. Mnookin, ‘Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy’ (1975) 39 *Law and Contemporary Problems* 225, 256-7; Jon Elster, ‘Solomonic Judgements: Against the Best Interests of the Child’ in Jon Elster (ed), *Solomonic Judgements: Studies in the Limitations of Rationality* (Cambridge University Press, 1982) 123, 134.

¹² Elster, above n 11, 134.

¹³ *Ibid.*

Meanwhile, the fourth stage, placing ‘value’ on these predicted outcomes,¹⁴ involves a subjective value judgment as to what is ‘best’. It is argued that any attempts to circumvent the complex and subjective questions that this fourth stage raises are bound to be unsuccessful.

Part 2 examines whether family consultants have abilities to assist the court in each stage of Rational Choice Theory. Family consultants have the ability to elicit information from people, perform fact-finding tasks, explain research data to the court, perform evaluations of people, relationships and environments, and make certain predictions, all of which may be useful in the first three stages of Rational Choice Theory. However, when family consultants provide an opinion in the fourth stage of Rational Choice Theory, that is, when they place value on predicted outcomes, or state what outcomes are ‘best’ for a child, they add nothing but another subjective opinion to the court.

In conclusion, Part 3 provides guidelines to improve, partly through refinement, the evidence that family consultants provide. These guidelines seek to ensure that the evidence of family consultants is as ‘neutral, conceptual and evidence-based’¹⁵ as possible, pays due regard to the legislation and reduces judicial confusion surrounding it. Most significantly, it is argued that family consultants should cease to give recommendations to the court on what orders should be made. Such recommendations require them to address the fourth stage of Rational Choice Theory, by placing value on outcomes. As a subjective value judgment, this falls beyond their expertise. Furthermore, the *Family Law Act* itself provides complex and controversial guidance on how to make these value judgments, which means these recommendations, if motivated by family consultants’ values, may conflict with legislative directions. They also risk institutionalising the value biases of these ‘experts’ within the court system. Guidelines are proposed to confine family consultants’ evidence to fact-finding, explaining research data, performing ‘evaluations’ of people, relationships and environments, and making predictions. Guidelines are also provided to improve these forms of evidence.

II KNOWLEDGE NEEDED TO DETERMINE A CHILD’S BEST INTERESTS

A *Rational Choice Theory and the Child’s ‘Best Interests’*

Rational Choice Theory disaggregates the ‘best interests question’ into four stages. The theory is used in numerous fields of study, and describes a ‘rational’ decision-making process, utilised when people have the opportunity to weigh the costs and benefits of a decision.¹⁶ Using this theory, Robert H. Mnookin argued that, to make a rational decision on what is in the best interests of the child, one must (i) discover the various options for the child, (ii) specify the likely outcomes for each option, (iii) assess the probability of these outcomes occurring, and (iv) place a value on alternative outcomes.¹⁷

¹⁴ Ibid.

¹⁵ Harrison, above n 4, 51.

¹⁶ John Scott, ‘Rational Choice Theory’ in G. Browning, A. Alcli, and F. Webster (eds), *Understanding Contemporary Society: Theories of the Present* (Sage Publications, 2000) 126, 126.

¹⁷ Mnookin, above n 11, 256-7.

The structure of Rational Choice Theory is useful for our purposes. Whilst Mnookin used this theory to argue that the ‘best interests standard’ is so indeterminate that it should be abandoned, this standard remains dominant worldwide.¹⁸ This theory has been used by numerous authors since, to critically evaluate the best interests question.¹⁹ It is useful for our purposes because, by examining the types of knowledge required in each of the stages, it can then be assessed whether actors have the requisite abilities to provide this knowledge.

The first stage of Rational Choice Theory, discovering the court’s options, requires considerable knowledge of the facts, including knowledge of people’s intentions. Under the *Family Law Act*, by which judges have discretion to make complex ‘parenting orders’ which may address ‘any aspect of the care, welfare, or development of the child’,²⁰ the ‘options’ available for a court seem endless. Considerable knowledge of the facts of a case is required to ascertain what options are available to the court. For instance, people’s work habits and people’s willingness to move locations will limit the orders available to the court. Knowledge of what parties are *actually* willing to do is critical at this stage. There are times when it is in a party’s interests to mislead the court into thinking they are *not* willing to do something.²¹ For example, in *MRR v GR* a mother initially misled the court by saying she was not willing to move locations to be with a child, in the hope that the court would not then order that she must move with the child to be near the father.²² Discovery of her intentions was important, as it opened up another ‘option’ to the court, being an order that the mother move with the child, to be near the father. In this way, knowledge of the facts, including the actual intentions of parties, is necessary to discover the options available to the court.

The next two stages of Rational Choice Theory, outlining possible outcomes and deciding the probability that those outcomes will occur, requires, firstly, considerable knowledge about the facts of the case, upon which to base predictions. One of the acknowledged problems of Rational Choice Theory is that it requires ‘considerable knowledge’ to make predictions of what will happen to a child.²³ Courts may make countless predictions about what will occur if particular orders are made, including when a child will achieve ‘developmental tasks’,²⁴ if a household is likely to provide a ‘set routine’,²⁵ and the likely effects of religious practices,²⁶ to name a few. Information that a court may require upon which to base such predictions includes knowledge that a person has a certain personality trait (e.g. narcissistic),²⁷ that a relationship falls into a certain category (e.g. according to Bowlby’s attachment styles),²⁸ or that an environment has certain characteristics (e.g.

¹⁸ Mnookin, above n 11, 230.

¹⁹ Elster, above n 11, 134; Thomson and Molloy, above n 5, 12.

²⁰ FLA s 64B(2)(i).

²¹ Patrick Parkinson, Judy Cashmore and Judi Single, ‘The Need for Reality Testing in Relocation Cases’ (2010) 44 *Family Law Quarterly* 1, 16-18.

²² *MRR v GR* (2010) 42 FamLR 531, 531.

²³ Mnookin, above n 11, 257.

²⁴ *Parker & Brown* [2010] FMCAfam 911 (23 March 2010) [78].

²⁵ *Ibid* [77].

²⁶ *Peter v Elspeth* [2009] FamCA 551 (25 June 2009) [16]; *Mendez v Mendez*, 527 So. 2d 820, 840 (Fla. Dist. Ct. App. 1987); Carolyn Wah, ‘Mental Health and Minority Religions: The Latest Weapon in Custody Battles’ 17 *International Journal of Law and Psychiatry* 331, 335.

²⁷ *Peters & March* [2010] FamCA 151 (16 February 2010) [134].

²⁸ *Hazan & Elias* [2011] FamCA 376 (24 May 2011) [106]; Bowlby, J., ‘Attachment and Loss:

according to Bronfenbrenner's 'Ecological Systems Theory').²⁹ This kind of detailed knowledge of the facts of a case is needed to enable courts to predict what will occur to a child in particular circumstances.

Such predictions, secondly, require good predictive abilities. Even if the decision-maker has total knowledge of the facts of the case, they then need to exercise their 'predictive abilities' to decide what outcomes are likely in the circumstances.³⁰

The last stage of Rational Choice Theory requires answers to extremely difficult questions relating to the 'value' of outcomes. Mnookin described the difficulties that this stage introduces:

[D]eciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be concerned primarily with happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic "productivity" of the child when he grows up? Are the primary values of life in warm, interpersonal relationships, or in discipline and self-sacrifice? Is stability and security more desirable than intellectual stimulation? These questions could be elaborated endlessly.³¹

As this quote makes clear, every time one states what is 'best' for a child, they are implicitly stating that one set of outcomes is more valuable to a child than another set of outcomes. Even if one had perfect predictive abilities, this would not by itself enable one to answer these extremely difficult and subjective questions, which this last stage of Rational Choice Theory poses.

B *Trying to 'Answer' or Circumvent this Last Stage*

Neither examination of the legislation, nor examination of society's values, provides a sufficient 'answer' to this last stage of Rational Choice Theory. By firstly examining society's values, it is clear that we live in a pluralist and secular society, where questions such as the importance of formal education, religion, self-esteem, self-discipline, autonomy, duty and other matters may provoke divisive opinions.³² Secondly, whilst there is considerable guidance on what is 'best' for a child in the *Family Law Act*,³³ it is hardly sufficient to address the list of questions that Mnookin provides, or other similar questions. Therefore, neither of these methods can solve the problems that this last stage of Rational Choice Theory presents.

Any philosophical attempt to circumvent the subjectivity of the questions involved in the last stage of Rational Choice Theory is also in vain. John Eekelaar promoted the idea of 'dynamic self-determinism' as a means of minimizing the problems this last stage

Retrospect and Prospect' (1982) 52 *American Journal of Orthopsychiatry* 664; Jude Cassidy and Philip R. Shaver (eds), *Handbook of Attachment: Theory Research and Clinical Applications* (The Guildford Press, 2nd ed, 2008).

²⁹ Urie Bronfenbrenner, *The Ecology of Human Development: Experiments by Nature and Design* (Harvard University Press, 1979) 17- 42.

³⁰ Mnookin, above n 11, 257.

³¹ Ibid 260.

³² David G. Myers, *Social Psychology* (McGraw Hill, 9th ed, 2008) 153-64.

³³ E.g. FLA s 60CC.

poses.³⁴ Using dynamic self-determinism, a child is exposed to a wide range of influences, and then forms its own 'goals', which are used to determine their parenting arrangements.³⁵ However, even Eekelaar admits that this concept is not able to exist without some 'imposition of a moral code'.³⁶ At times the values of parents and society must influence a child's parenting arrangements, as children's own 'goals' may not be in line with society's reasonable expectations.³⁷ Thus, Eekelaar does not provide a complete 'answer' to this final stage, as definitions of 'reasonable expectations' and 'morality' are still required. Another more significant problem for the use of dynamic self-determinism is that it has philosophical foundations that do not unite Australian society. The liberal theory that children are the right persons to decide their own 'goals' is unlikely to appeal to collectivist cultures, which are characterized by 'giving priority to the goals of one's groups'.³⁸ Indeed, any philosophical framework for deciding what is *best* for a child will have its own values, making it impossible to avoid the inherent subjective value judgments required when addressing the final stage of Rational Choice Theory.

III FAMILY CONSULTANTS' ABILITY TO IMPROVE COURTS' KNOWLEDGE

This Part determines what abilities family consultants have that enable them to provide the knowledge required by courts to determine a child's best interests. Family consultants claim expertise in the social and behavioural sciences, which rely heavily upon empirical research.³⁹ Psychology is currently defined as the 'scientific study of behaviour and mental processes'.⁴⁰ 'Social science' refers to 'those disciplines, or parts thereof, that purport to describe or explain social life'.⁴¹ Drawing on the framework set out in Part 1, the following types of evidence are examined, as means by which family consultants may attempt to assist the court: discovering options for the court, fact-finding, informing the court of relevant research, performing evaluations, making predictions and deciding how much value to attach to an order. As will be discussed in this Part, family consultants can validly contribute to each of these areas, with the exception of deciding how much value to attach to an order.

A *Discovering Options for the Court*

By eliciting information from people, family consultants have the ability to assist the court to determine what options are available to them. Timothy Tippins and Jeffrey Wittman argue that, by creating a clinical environment, mental health professionals, such as psychologists, may be the best people to 'maximise self-disclosure about issues that may be disputed'.⁴² By eliciting information from people, the facts, including people's

³⁴ John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' in Philip Aston, *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press, 1994) 42, 47-8.

³⁵ Ibid 51.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Myers, above n 32, 41.

³⁹ Harrison, above n 4, 51; Myers, above n 32, 1-10.

⁴⁰ Ronald Roesch, Stephen D. Hart, and James R.P. Ogloff, *Psychology and Law: The State of the Discipline* (Plenum Publishers, 1999) 2.

⁴¹ Malcolm Williams, *Science and Social Science: An Introduction* (Routledge, 2000) 7.

⁴² Tippins and Wittman, above n 1, 195.

actual intentions, may become clearer, enabling the court to better assess its options.⁴³ Indeed, Dessau J explains that family consultants' reports (family reports) often mention the various alternative arrangements that are available to the court.⁴⁴

1 *Fact-Finding*

Communications by a family consultant about out-of-court experiences may be valuable, as a form of 'fact-finding', which assists the court to gather the knowledge required to make predictions. Again, the ability of experts to elicit information from parties has led some authors to emphasise this fact-finding role as one of the most useful functions of experts.⁴⁵ This ability is particularly useful when dealing with children, as courts have noted that children are often uncomfortable giving evidence in a courtroom environment, particularly if that evidence negatively portrays a parent.⁴⁶ Indeed, many family reports devote a large amount of space to simply communicating directly what relevant people said and did in their presence, such as people's expressed attitudes in interviews,⁴⁷ how happy children report they currently are,⁴⁸ any allegations people have made against other people,⁴⁹ parents' reported feelings towards other parents,⁵⁰ and the child's stated wishes⁵¹ amongst other things. Such information may be helpful to the court when they try to predict outcomes for a child.

This fact-finding ability of experts does not mean that experts are more able than the court to decide the truth of disputed facts. Studies suggest that it is doubtful whether any profession, let alone psychologists or social scientists, are experts in lie-detecting.⁵² They are certainly not usually trained in this role. Nor are they trained to determine the truth of events on available facts. Information they provide may, however, *inform* the court in deciding the truth of disputed facts. For example, in one case a family consultant elicited information from a child, but described how the child spoke in a 'rote' and 'rehearsed' manner, which assisted the court in considering the truth of the child's statements.⁵³ Hence, whilst family consultants may inform the court's judgment on the truth of disputed facts, there is no reason to believe their abilities enable them to provide a better opinion of the truth of disputed facts than the court can make itself.

⁴³ Parkinson, Cashmore and Single, above n 21, 16-18.

⁴⁴ Linda Dessau, 'A Short Commentary on Timothy M. Tippins and Jeffrey P. Wittman's "Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance"' (2005) 43 *Family Court Review* 266, 267.

⁴⁵ Melton et al, above n 1, 331.

⁴⁶ Tippins and Wittman, above n 1, 196.

⁴⁷ *Marriage of Borzak* (1979) 5 Fam LR 571, 575.

⁴⁸ *Claringbold & James* [2011] FamCA 211 (18 February 2011) [54].

⁴⁹ Ibid [49].

⁵⁰ *Vinkov & Mertiglio (No 2)* [2010] FamCA 916 (12 October 2010) [82]-[87].

⁵¹ *Peters & March* [2010] FamCA 151 (16 February 2010) [120].

⁵² *SS & AH* [2010] FamCAFC 13 (5 February 2010) [85].

⁵³ Samantha Mann, Alvert Vrij and Ray Bull, 'Detecting True Lies: Police Officers' Ability to Detect Suspects' Lies' (2004) 89 *Journal of Applied Psychology* 137, 137-139.

⁵⁴ *Vinkov v Mertiglio (No. 2)* [2010] FamCA 916 (12 October 2010) [124], [156]-[159].

2 Informing the Court of Research Findings

Family consultants may assist the court to predict outcomes for a child by informing the court of research findings. There is a growing amount of research on the efficacy of different types of post-divorce parenting arrangements.⁵⁴ For example, a considerable amount of research suggests that ‘children of parents who exhibit an extreme degree of hostility post-divorce and during the divorce process do not usually benefit from continued contact between their parents post-divorce.’⁵⁵ Of course, the family consultant would need to explain what is meant by ‘benefit’, which in this case involves measures concerning the child’s ‘emotional distress, shown in anxiety, sadness, clinginess, psychosomatic and anti-social symptoms’.⁵⁶ Such research findings may persuade a court that an order for shared parenting is likely to result in a child suffering some of these effects in a case where there is considerable animosity between parents.

3 Evaluations

Expert evaluations of people, relationships and environments are another way family consultants may provide useful knowledge to the court, because they help provide information upon which to base predictions. Melton et al emphasised this role for experts in determining a child’s best interests.⁵⁷ Evaluations may assess:

... psychopathology, basic and discrete parenting skills and skills-deficits, intellectual/cognitive functioning, developmental status, developmental variables ... child temperament variables, substance abuse tendencies, attachment constructs (e.g. “primary psychological parent”), interpersonal style, criminality, domestic violence tendencies ... available social support, impulse control and family level constructs.⁵⁸

Such evaluations of people, relationships and environments would ideally be made against pre-determined and objective criteria. A vast amount of research is performed annually on such constructs, and psychologists and social scientists are trained to evaluate people accordingly.⁵⁹ These are likely to influence courts’ predictions. The court may, for instance, predict that a child is more likely to be exposed to violence, if they live with a person with domestic violence tendencies, or that a child is likely to excel academically, if the parent is intelligent and has a ‘child-focused’ parenting style. Therefore, these evaluations may assist courts when they make predictions about a child.

⁵⁴ Parkinson, Cashmore, and Single, above n 21; Joan Kelly and Robert Emery, ‘Children’s Adjustment Following Divorce: Risk and Resilience Perspectives’ (2003) 52 *Family Relations* 352; Jennifer McIntosh and Richard Chisholm, ‘Shared Care and Children’s Best Interests in Conflicted Separation: A Cautionary Tale from Current Research’ (2008) 20 *Australian Family Lawyer* 3.

⁵⁵ Krauss and Sales, above n 1, 872. Also see McIntosh and Chisholm, above n 54.

⁵⁶ McIntosh and Chisholm, above n 54, 5.

⁵⁷ Melton, above n 1, 330 - 331.

⁵⁸ Tippins and Wittman, above n 1, 196.

⁵⁹ For example, see *The Journal of Consulting and Clinical Psychology*. One of this journal’s goals is ‘the development, validity, and use of techniques of diagnosis and treatment of disordered behaviour’: Arthur M. Nezu, *Journal of Consulting and Clinical Psychology – Description* (30 June 2011) American Psychological Association <<http://www.apa.org/pubs/journals/ccp/index.aspx>> at 12 July 2012.

4 Actually Making Predictions

There is good reason to doubt the ability of family consultants to add to the court's knowledge by predicting outcomes themselves. Krauss and Sales argue that '[i]t is well-noted that psychologists as a group are particularly inaccurate in making future behavioural predictions and may even be more inaccurate than lay persons are'.⁶⁰ This is supported, for example, by the fact that 'clinical predictions of an individual's future dangerousness have been demonstrated to be inaccurate 67% of the time'.⁶¹ Additionally, the significant variation between different psychological and social scientific theories and opinions on the effects of different variables on child-related outcomes evidences a lack of certainty in this field.⁶² Courts should therefore be cautious in assuming that family consultants' predictions add to the court's knowledge, as it is doubtful that they are any better than those of courts themselves.

Nonetheless, if family consultants sufficiently justify their predictions, by drawing upon their expertise, these may provide useful knowledge to the court. For example, studies on John Bowlby's 'attachment styles' of parents with their children have repeatedly shown that these attachment styles are strong predictors of children's later attachment styles with friends and future partners.⁶³ Therefore a family consultant may within their expertise suggest it is likely that a child will develop a certain attachment style as he or she grows up if the child is placed with a parent with this attachment style. Such an empirically and rationally justified prediction may properly influence a court's opinion on what outcomes are likely to occur under certain arrangements.

5 Placing Value on Outcomes

By fleshing out the ramifications of certain outcomes, the evidence of family consultants may 'inform' the court of what value to attach to them. For example, studies that suggest a better education for most children leads to lower incarceration rates, lower truancy rates, and higher self-efficacy⁶⁴ may convince courts to attach more weight to a child's education when determining what is in their best interests. Such research does not *make* a value judgment for a court, but may influence how much value they attach to an outcome.

A family consultant does not, however, add anything more than another subjective opinion, based on their own values, when they attempt to address Rational Choice

⁶⁰ Krauss and Sales, above n 1, 866.

⁶¹ Ibid.

⁶² Elster, above n 11, 138. Theories include psychoanalytic, cognitive, cognitive-behavioural, child-developmental or humanistic theories: Robert N. Sallod, John P. Wilson, and Christopher F. Monte, *Beneath the Mask: An Introduction to Theories of Personality* (John Wiley & Sons Inc., 8th ed, 2008) 7-9. To demonstrate the diversity of opinion in this area, consider the argument by Judith Harris that parents have *no lasting effect on child outcomes*: J.W. Harris, 'Socialisation, Personality Development, and the Child's Environments: Comment on Vandell' (2000) 36 *Development Psychology* 711, 711.

⁶³ Bowlby, above n 28; Cassidy and Shaver, above n 28.

⁶⁴ Melissa K. Hunt, Derek R. Hopko, 'Predicting High School Truancy Among Students in the Appalachian South' (2009) 30 *Journal of Primary Prevention* 549, 549; Laurie Francis, Barry Weiss, Janet Senf, Kim Heist and Rie Hargraves, 'Does Literacy Education Improve Symptoms of Depression and Self-Efficacy in Individuals with Low Literacy and Depressive Symptoms? A Preliminary Investigation' (2007) 20 *Journal of the American Board of Family Medicine* 23, 23.

Theory's fourth stage, which relates to placing value on outcomes. Neither the scientific knowledge of behaviour and mental processes (psychology)⁶⁵ nor an ability to describe or explain social life (social science)⁶⁶ qualifies someone to 'answer' the fourth stage in Rational Choice Theory. Tippins and Wittman recognise this when they argue that the best interests standard is a 'legal and a socio-moral construct'.⁶⁷ Indeed, no empirical knowledge can determine an objectively 'right' answer to this stage, since it concerns subjective opinions of individuals. In the case of *Painter v Bannister*, the Iowa Supreme Court had to decide between placing a child in a household it predicted would provide 'a stable, dependable, conventional, middle-class, middle western background and opportunity for college education',⁶⁸ or a household with a 'bohemian' father, who was 'very much influenced by Zen Buddhism', and which the court predicted would allow 'freedom of conduct and thought with an opportunity to develop his individual talents'.⁶⁹ The court recognised the differences in these households derived from different 'philosophies of life'.⁷⁰ Family consultants possess no special training or expertise that would enable them to value one 'philosophy of life' over another. If a family consultant were to provide an opinion on what value should be attached to particular outcomes, they would simply be providing their own subjective opinion on what is best for a child.

IV CEASING TO MAKE RECOMMENDATIONS AND IMPROVING OTHER EVIDENCE

A *Ceasing to Make Recommendations*

It is argued that family consultants should cease to provide recommendations regarding what orders should be made or what arrangement will be 'best' for a child. This article assumes that the legislation requires parenting orders to be based solely upon a child's best interest. But if, in fact, the legislation requires some 'weighing' of interests, then this gives further reason to stop these recommendations because family consultants have no particular expertise in such 'weighing' of interests. Recommendations go beyond the expertise of family consultants, implicitly misrepresent their knowledge base, are likely to clash with legislative directions and risk institutionalising family consultants' value biases within the court system. The purported advantages of providing such recommendations, in spite of family consultants' lack of expertise,⁷¹ are not significant within the Australian context.

1 *The Significance of the Best Interests of the Child*

Whilst there is controversy about whether the best interests of the child are the *only* consideration when determining a parenting order, it is unnecessary to answer this question for the purposes of this article. Numerous commentators have noted the tendency of Australian courts to treat the best interests of the child as the only

⁶⁵ Roesch, Hart and Ogloff, above n 40, 2.

⁶⁶ Williams, above n 41, 7.

⁶⁷ Tippins and Wittman, above n 1, 215.

⁶⁸ *Painter v Bannister*, 140 N.W. 2d 152, 170 (Iowa Sup. Ct., 1966).

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Nicholas Bala, 'Tippins and Wittman Asked the Wrong Question: Evaluators May Not be "Experts", but They Can Express Best Interests Opinions' (2005) 43 *Family Court Review* 554, 557.

consideration, and one that ‘overrides all other relevant considerations or interests.’⁷² References to others’ interests, on this interpretation, are only relevant to the extent that they impact upon the child’s interests. There have been suggestions, however, that the High Court’s decision in *MRR v GR* involved a departure from this ‘strong’ conception of the best interests principle, at least in some circumstances.⁷³ If the legislation does, in fact, demand that the interests of a child must be ‘weighed’ against others’ interests, through some legal test, then family consultants would surely be incompetent to provide ‘recommendations’ to the court on what orders they should make, as their expertise is not in weighing these different interests through legal criteria. However, courts still, at least in the vast majority of cases, state that their decision has been determined by what is in a child’s best interests. Considering this practice, and that there are sufficient reasons to stop recommendations by family consultants even if courts do base their decisions solely upon a child’s best interests, this paper continues on the assumption that the best interests of the child determines parenting orders.

2 *Family Consultants Exceed the Boundaries of their Knowledge Base*

Providing recommendations necessarily involves addressing the fourth stage of Rational Choice Theory. In this respect, however, family consultants ‘exceed the boundaries of their knowledge base’ when they provide these recommendations to courts.⁷⁴ The inability to develop an objective ‘answer’, or to circumvent this stage, means that a subjective judgment is always being made when one decides what is ‘best’ for a child. As argued in Part 2, the fact that family consultants have no special knowledge in developing an answer to this stage of Rational Choice Theory means that their recommendations for what is ‘best’ for a child should be of no more use than any other subjective opinion.

(a) *Misrepresenting their Knowledge Base*

Highlighting the inappropriateness of these recommendations is the fact that family consultants ‘implicitly misrepresent the limits of [their] knowledge base’,⁷⁵ when they give such recommendations. Indeed, Carolyn Wah expressed concern that such ‘value-laden testimony’ is given credence only because it is made by an ‘expert’.⁷⁶ The implicit misrepresentation derives from the fact that these experts are providing such subjectively-based recommendations within their professional capacity. The fact that judges often note family consultants’ recommendations in their reasons is testament to the fact that they are treated as being more worthy than any other subjective opinion of what is best for a child.⁷⁷

⁷² Jonathan Crowe and Lisa Toohey, ‘From Good Intentions to Ethical Outcomes: The Paramountcy of Children’s Interests in the *Family Law Act*’ (2009) *Melbourne University Law Review* 391, 395; Richard Chisholm, ‘The Paramount Consideration’: Children’s Interests in Family Law’ (2002) 16 *Australian Journal of Family Law* 87, 121.

⁷³ Anthony Dickey Q.C., ‘Reflections on *MRR v GR*’ (2010) 84 *Australian Law Journal* 296, 296. However, Dickey goes on to argue that ‘practicalities’ have always undermined the principle that the ‘best interests of the child’ is the overriding consideration.

⁷⁴ Tippins and Wittman, above n 1, 214.

⁷⁵ Ibid.

⁷⁶ Wah, above n 26, 335.

⁷⁷ *Peters & March* [2010] FamCA 151 (16 February 2010) [134], [193]; *Fournier & Noelle* [2007] FamCA 875 (23 August 2007) [91]; *Tomas and Anor & Murray* [2011] FamCA 641 (17 August 2011) [78]–[96].

(b) *Conflicts with the Legislative Guidance*

Further adding to the inappropriateness of recommendations being made by family consultants is the fact that the values underlying their recommendations may conflict with legislative directions. The *Family Law Act* provides significant guidance on what is 'valuable' to a child. Section 60CC is entitled '[h]ow a court determines what is in a child's best interests', and lists two 'primary' and thirteen 'additional' considerations, which the court *must* consider. There is also a 'presumption' in favour of 'shared parental responsibility',⁷⁸ which has been interpreted as displaying a 'legislative intent' in favour of 'substantial involvement of both parents in their children's lives'.⁷⁹ Adding to the confusion is the constitutional restriction on taking into account matters relating to religion, unless the religious practices involve a high degree of 'harm' to children.⁸⁰ As Patrick Parkinson argues, the legislation involves deliberate attempts to influence the orders that courts make, and 'the judicial role requires deference to community values as expressed in the enactments of parliament even when these differ from the judge's own values and sympathies.'⁸¹ Family consultants, not having legal expertise, may unknowingly place their values ahead of the aims of the legislation and make recommendations that may conflict with the orders that the legislative provisions support.

The potential for recommendations to conflict with the legislation is particularly acute in Australia, due to the complexity of the legislation. The Chief Justice of the Family Court, Diana Bryant CJ, stated that the parenting provisions of the *Family Law Act* 'have been described as labyrinthine.'⁸² Both Richard Chisholm, a former judge, and Zoe Rathus have also criticised the complexity of the Act.⁸³ A particularly complex 'primary consideration' emphasises the 'benefit' to a child of having a meaningful relationship with both parents.⁸⁴ Courts have, overwhelmingly, interpreted this in an 'evaluative' manner, whereby the court has to establish whether there is some 'benefit' that would be achieved by both parents having meaningful relationships with the child.⁸⁵ Once it is established that there is *some* benefit to the child in having a meaningful relationship with both parents, this benefit is given more weight than other considerations because it is a primary consideration.⁸⁶ It is unlikely that an expert, without legal training, would go through this same process when deciding what is best for a child. Nor would they be likely to go through the process of 'presuming' that equal shared parental responsibility is

⁷⁸ FLA s 61DA(1).

⁷⁹ *Goode and Goode* [2006] FamCA 1346 (15 December 2006) [72].

⁸⁰ See Constitution s 116; *In the Marriage of Paisio (No. 2)* (1978) Fam LR 283, 284; Louise Thornwaite, 'Separatist Religious Sects, The Family Law Act and Shared Parenting: An Examination of Cases Involving the Exclusive Brethren' (2011) 25 *Australian Journal of Family Law* 54, 67-68.

⁸¹ Patrick Parkinson, 'The Values of Parliament and the Best Interests of Children – A Response to Professor Chisholm' 21 *Australian Journal of Family Law* 213, 213.

⁸² Diana Bryant, 'Foreword' in Robert Glade-Wright, *The Family Law Book* (Family Law Book Pty Ltd., 2009) i, i.

⁸³ Richard Chisholm, 'Simplifying the Family Law Act: Saying Less, and Saying it Better' (2011) 21 *Australian Family Lawyer* 11, 11; Zoe Rathus, 'How Judicial Officers are Applying New Part VII of the Family Law Act' (2008) 20 *Australian Family Lawyer* 5, 5.

⁸⁴ FLA s 60CC(2)(a).

⁸⁵ *McCall & Clarke* [2009] FamCA 92 (29 May 2009) [117]; *Cave v Cave* [2007] FamCA 860 (23 August 2007) [101]; *Champess v Hanson* [2009] FamCAFC (3 June 2009) [103].

⁸⁶ *Marsden v Winch (No 3)* [2007] FamCA 1364 (21 November 2007) [78].

in a child's best interests,⁸⁷ considering all the s 60CC considerations, or considering the constitutional limitation on the consideration of certain religious matters.⁸⁸ However, if they do not undertake such a process, their recommendations on what is 'best' for a child are likely to differ from those intended by the legislation. Hence, the complexity of the legislation makes it particularly likely that its directions will conflict with recommendations by family consultants.

The level of opposition to certain legislative provisions, especially within expert communities, further increases the likelihood that these recommendations will conflict with the legislation. In particular, the emphasis on shared parental responsibility⁸⁹ and on the benefit of having a meaningful relationship with both parents,⁹⁰ has provoked considerable acrimony.⁹¹ Both Zoe Rathus and Betty Batagol have strongly criticised the legislative presumption in favour of shared parental responsibility as 'opposing' research.⁹² Additionally, the emphasis on the 'benefits' flowing from having a meaningful relationship with both parents opposes the recommendations of high profile psychologists. For instance, Joseph Goldstein, Anna Freud and Albert Solnit argued that, usually, a court should simply choose the parent who is the 'psychological parent' and give sole custody to them.⁹³ By emphasising the role of both parents in a child's upbringing, the legislation opposes this approach. Recommendations from experts who espouse these views are, therefore, likely to conflict with the orders that the values implicit in the legislation support. Therefore, the level of opposition to the legislation increases the likelihood that recommendations by family consultants will conflict with the legislation.

(c) Institutionalising Expert Biases

A final and related disadvantage of recommendations is that they risk institutionalising the biases of expert communities within the court system. One likely bias is that in favour of 'normality'.⁹⁴ Concern that psychologists impose their own ideas of 'normality' upon society has been voiced by numerous commentators.⁹⁵ The emphasis on normality has, in the past, led to the labelling of homosexuality as a 'sociopathic personality disturbance'.⁹⁶

⁸⁷ FLA s 61DA(1).

⁸⁸ Constitution s 116.

⁸⁹ FLA s 61DA.

⁹⁰ FLA s 60CC(2)(a).

⁹¹ See Zoe Rathus, 'Social Science or 'Lego-Science'? Presumptions, Politics and Parenting and the New Family Law' (2010) 10 *Queensland University of Technology Law and Justice Journal* 164, 179; Betty Batagol, 'A Rebuttable Presumption of Joint Custody: Research vs Ideology in the Battle over our Children' (2003) 28 *Alternative Law Journal* 230; Gavin Howard, 'Shared Parenting at Work – the Reality' (2009) 20 *Australian Family Lawyer* 37.

⁹² Zoe Rathus, above n 91, 165; Batagol, above n 91, 231.

⁹³ Joseph Goldstein, Anna Freud and Albert Solnit, *Beyond the Best Interests of the Child* (The Free Press, 1972) 51-3.

⁹⁴ Lawrence H. Diller, *The Last Normal Child* (Praeger Publishers, 2006) 3; Allan V. Horwitz and Jerome C. Wakefield, *The Loss of Sadness: How Psychiatry Transformed Normal Sorrow into Depressive Disorder* (Oxford University Press, 2007); Christopher Lane, *Shyness: How Normal Behaviour Became a Sickness* (Yale University Press, 2007).

⁹⁵ Ibid.

⁹⁶ John Z. Sadler, 'Introduction' in John Z. Sadler (ed), *Descriptions and Prescriptions: Values, Mental Disorders, and the DSMs* (John Hopkins University Press, 2002) 3, 4.

Some claim it has also led to the gradual expansion of classified disorders.⁹⁷ Indeed, a bias in favour of ‘normality’ has been witnessed in cases in the United States on issues of religion. In the case of *Mendez v Mendez*, in the United States, a psychologist gave the following evidence, ‘[L]iving in a society, she needs to adapt to the mainstream of culture ... I believe that being raised as a Jehovah’s Witness would not be in the best interests of the child, given the fact that the principles, the way I understand them, *do not fit in the western way of life in this society*.’⁹⁸ As Wah argues, the values of this expert are clear: it is desirable to be part of the mainstream and undesirable to deviate from the norm.⁹⁹ Whilst such blatantly biased statements may be rare, the emphasis on normality within expert communities makes it likely that such thought processes may underline their recommendations. There are also conflicting concerns about bias within expert communities with respect to ‘gender’. Some theorists suggest that experts are likely to accept the ‘nurture assumption’, by which children are best placed with women, and others suggest that experts are more likely to promote ‘shared parenting’.¹⁰⁰ The provision of recommendations engenders the risk that these biases may become institutionalised within the court system.

Whilst biases also exist within the judicial community, such biases are less concerning because they should be informed by the legislation and they do not appear in the guise of expert opinion. The examples given above regarding religion, and biases in favour of shared parenting, are matters about which the legislation provides guidance.¹⁰¹ Therefore, the ‘bias’ that judges have towards a particular result should be influenced by this legislation. Even so, the legislation clearly does not provide answers for all the value judgments necessary when making a determination for what is best for a child. In such situations judges should clearly state in their reasons what has motivated their decision. In doing so, judges do not misleadingly present their reasons in the guise of ‘expert opinion’. In this way, judicial biases are less concerning than family consultants’ biases, as judge’s values should be informed, at least partly, by the legislation and they are not misrepresented as expert opinions.

(d) *Purported Advantages of Family Consultant Recommendations*

One purported advantage of the recommendations of experts, that they promote negotiated outcomes, is not likely to be significant within the Australian context. Nicholas Bala, whilst accepting that experts’ recommendations do exceed the boundaries of their expertise, argues that these recommendations, when performed by independent court-appointed experts (such as family consultants), may ‘help procure a settlement’.¹⁰² Bala argues that parties may accept this evaluation and voluntarily turn them into orders, thus

⁹⁷ Lane, above n 94.

⁹⁸ *Mendez v Mendez*, 527 So. 2d 820 (Fla. Dist. Ct. App. 1987), see Record at 9, (No. 84-34049) (emphasis added).

⁹⁹ Wah, above n 26, 335.

¹⁰⁰ Sheldene K. Simola, ‘Differences Among Sexist, Nonsexist, and Feminist Therapies’ (1992) 23 *Professional Psychology: Research and Practice* 397; Martha Fineman, ‘Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision Making’ (1988) 101 *Harvard Law Review* 727, 70.

¹⁰¹ *Constitution* s 116; *FLA* s 61DA.

¹⁰² Nicholas Bala, ‘Tippins and Wittman Asked the Wrong Question: Evaluators May Not be “Experts”, but They Can Express Best Interests Opinions’ (2005) 43 *Family Court Review* 554, 557.

reducing court costs and delay.¹⁰³ However, this is unlikely to be significant in the Australian context. Firstly, unless certain exceptions apply, parties are already required to undergo family dispute resolution before proceeding to the court.¹⁰⁴ Secondly, family consultants themselves have responsibilities to assist parties in resolving disputes¹⁰⁵ and in ‘assisting and advising people involved in proceedings’.¹⁰⁶ Considering these other ways to promote negotiated outcomes, recommendations by family consultants are unlikely to significantly increase such outcomes.

Meanwhile, the argument that an absence of recommendations will result in judges having less material upon which to base their decisions¹⁰⁷ is overstated and not necessarily undesirable. Another reason Bala argues in favour of court-appointed experts providing recommendations is that if too high a bar is set for expert evidence it will simply leave the court with less evidence, leaving a greater role for the values and opinions of judges.¹⁰⁸ However, this article will argue that there is still a significant amount of evidence that may satisfactorily be provided by family consultants. Moreover, the fact that less evidence is available is not necessarily a bad thing. Rather, it needs to be decided whether it is desirable that the evidence is provided at all. Considering that such recommendations are beyond family consultants’ expertise and implicitly misrepresent the boundaries of their knowledge base, are likely to conflict with the legislation’s values, and institutionalise experts’ biases within the court system, this paper has argued that they should not be provided.

B Other Forms of Evidence

It is argued here that these same disadvantages do not apply to evidence provided by family consultants on facts discovered from out-of-court experiences, explanations of research findings, results of evaluations and predicted outcomes by family consultants. These forms of evidence should continue to be provided by family consultants. It should be noted that guidelines are provided to improve these kinds of evidence, including through the provision of detailed judicial directions to family consultants, the provision of clear and conceptual explanations of evidence, the provision of statements by family consultants on the relative confidence they hold in their opinions and through the standardisation of procedures.

1 *This Evidence does not Suffer from the Same Weaknesses as Recommendations*

Unlike recommendations, evidence of out-of-court experiences, explanations of research findings, evaluations and predictions do not *necessarily* go beyond family consultants’ expertise. As argued in Part 2, these forms of evidence are areas in which family

¹⁰³ Ibid.

¹⁰⁴ The exceptions regard situations involving child abuse or family violence, where a family dispute practitioner thinks it would ‘not be appropriate’, or where parties have already come to an agreement as to parenting arrangements: FLA 60I.

¹⁰⁵ FLA s 11A(c).

¹⁰⁶ FLA s 11A(a).

¹⁰⁷ Bala, above n 102, 565; Lorraine Martin, ‘To Recommend or not to Recommend: That is Not the Question, A Response to Tippins and Wittman’s Article “Empirical and Ethical Problems with Custody Recommendations: a call for Clinical Humility and Judicial Vigilance”’ (2005) 43 *Family Court Review* 246, 250.

¹⁰⁸ Bala, above n 102, 562.

consultants' expertise may assist courts. Unlike recommendations, these forms of evidence do not address the last stage of Rational Choice Theory, which would necessarily place this kind of evidence beyond their expertise.

Nor does this evidence suffer from the same likelihood of conflict with legislative directions as recommendations do. These forms of evidence, when brought together, are designed to enable predictions to be made. A court has a duty to make the best predictions it can so that it may properly make a determination as to what is in the best interests of a child. The legislation does not make predictions for the court that are unable to be rebutted by the type of evidence family consultants may supply.¹⁰⁹ Rather, the legislation is primarily involved in deciding how much value should be attached to outcomes and ensuring the court 'considers' certain matters. For example, there is an emphasis on the 'benefit' of having a meaningful relationship with both parents under the *Family Law Act*,¹¹⁰ so that the court must have special regard for any such 'benefit'. However, the legislation does not prevent the court making a prediction that a child may experience numerous 'positive' outcomes from having close contact with only one parent. Indeed, it does not prevent, or conclusively make, any prediction about what will happen to a child in certain circumstances. This means a prediction, without a statement about the value of the outcome, should not 'contradict' the legislation. Evidence that assists the court in making predictions does not therefore suffer from the same likely conflict with the legislation as recommendations do.

Providing these types of evidence is also not subject to the same risk of institutionalising biases within the court system as is the case with recommendations. The other types of evidence discussed regard objective facts and do not involve making value judgments. For example, predicting that a parent will be violent to a child does not, by itself, make a value judgment as to the importance of this. Since such predictions do not themselves place value on outcomes, they do not engender the same risk of bias stemming from value judgments. This is not to say that other types of bias may not emerge in other evidence given by family consultants. Rather, it is argued that bias may emerge in such evidence and appropriate steps should be taken to address this.

2 Improving the Other Forms of Evidence

Detailed judicial directions may be used to effectively combat anthropic bias arising in these other forms of evidence. Anthropic bias occurs when 'evidence is biased by observation effects'.¹¹¹ Such bias may occur through certain facts being presented without revealing other facts, only performing evaluations on certain people, only presenting certain research findings or only making certain predictions known to the court. An example of anthropic bias is where a family consultant inquires into whether Parent A, but not Parent B, was ever violent towards a child. Courts are still likely to consider it desirable to direct family consultants to report on 'any other matter which the family consultant considers relevant', so as to allow family consultants to note anything the

¹⁰⁹ Whilst there is a 'presumption' under s 61DA(1) of the *Family Law Act*, this is a rebuttable presumption, so evidence can be brought to contradict it.

¹¹⁰ FLA s 60CC(2)(a).

¹¹¹ Nick Bostrom, *Anthropic Bias: Observation Selection Effects in Science and Philosophy* (Routledge, 2001) xiii.

judge may have overlooked.¹¹² Nonetheless, by providing detailed directions to family consultants on what matters family consultants should inquire into, on what areas of research are likely to be useful, what evaluations should be performed, and what predictions may be useful, judges may reduce any anthropic bias by ensuring that certain matters are not ignored.

Clear and conceptual explanations of this evidence are also required, particularly regarding research findings, evaluations and the bases of predictions, in order to reduce judicial confusion surrounding these areas and to allow the judiciary to properly attach weight to evidence. There is a long history of misunderstanding of psychological and other scientific concepts by the judiciary, at times reported by judges themselves.¹¹³ Such misunderstandings are likely to occur without coherent and conceptual explanations of evidence. For instance, the difference between ‘authoritative’ and ‘authoritarian’ parents is highly significant in psychology, but will mean little to judges without a proper explanation of these concepts.¹¹⁴ Transparent and conceptual descriptions of the meaning of research findings, of what evaluations actually measure and of the bases for predictions should be provided to reduce any such confusion. Such transparency also has the advantage of allowing evidence to be critically analysed so that judges may determine the appropriate weight to attach to them.

To further reduce judicial confusion regarding evaluations, there should be some standardisation of procedures used. This would not require that the same evaluations are used in every case, but that evaluations come from a normal set of credible procedures. In the case of *Peters & March*, the court was placed in the awkward position of deciding what weight to attach to a rather novel evaluation, a ‘family sculpture exercise’, where the child drew a picture of their heart and how close family members were to it.¹¹⁵ Considering judges’ lack of knowledge of psychological and experimental constructs,¹¹⁶ it is undesirable that they should assess what weight to attach to this novel experiment. Standardised procedures would enable judges to become more familiar with the set of evaluations and their significance, making it easier for them to know what significance to attach to such evaluations.

Lastly, family consultants should always provide evidence of the relative confidence they have in their evaluations and predictions. In the case of *Parker & Brown* the family consultant admitted that some predictions she made were relatively weak, partly because the tests she administered had certain weaknesses in them.¹¹⁷ By expressing her lack of confidence in such predictions, the consultant better enabled the court to attach weight to them.

¹¹² *Peters & March* [2010] FamCA 151 (16 February 2010) [83].

¹¹³ Andreas Kapardis, *Psychology and Law: A Critical Introduction* (Cambridge University Press, 3rd ed, 2010) 239; Rosemary Sheehan, *Magistrates’ Decision-Making in Child Protection Cases* (Ashgate, 2001) 92; Gatowski, S. I. et al, ‘Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert* world’ (2001) 25 *Law and Human Behavior* 433, 440.

¹¹⁴ Bowlby, above n 28; Cassidy and Shaver, above n 28.

¹¹⁵ *Peters & March* [2010] FamCA 151 [193].

¹¹⁶ Sheehan, above n 113, 92.

¹¹⁷ *Parker v Brown* [2010] FMCAfam 911 (23 March 2010), [76].

V CONCLUSIONS

The structure of Rational Choice Theory may be used to assess what forms of knowledge are required to make a decision in a child's best interests, and to assess the abilities of family consultants to provide this knowledge. The first three stages of Rational Choice Theory, discovering the court's options, determining possible outcomes and determining the probability they will occur raise many difficult questions, which family consultants may, nonetheless, assist in answering. Meanwhile, the fourth stage involves a subjective value judgment as to what is best, and is not something family consultants have any special ability in answering.

Guidelines for courts and family consultants may help improve and refine family consultants' evidence. The guidelines in this article seek to ensure that the evidence is as neutral, conceptual and evidence-based as possible, that judicial confusion surrounding it is minimised and that due regard is paid to the role of the legislation. Family consultants should cease to provide recommendations to the court on what orders should be made. Such recommendations are beyond their expertise, implicitly misrepresent the limits of their knowledge, are likely to conflict with legislative directions and threaten to institutionalise the values of expert communities within the court system. Evidence should be limited to fact-finding, explaining research results to the court, performing evaluations and making predictions. Such evidence can be improved by various means, including through the provision of detailed judicial directions, provision of clear and conceptual explanations, standardisation of procedures and expressions of relative confidence in opinions. These guidelines should ensure that experts contribute to the functioning of the court, in a manner befitting their expertise, while showing proper regard to the role of the court in giving effect to the legislation.

POLITICAL PROTECTIONS OF FUNDAMENTAL RIGHTS AS A MEANS OF MITIGATING THE WEAKNESS OF LEGAL PROTECTIONS

LARA PRATT*

The purpose of this paper is to highlight the important role of political protections of fundamental rights. The paper acknowledges that legal protections as a way of protecting rights against legislative encroachment, have definite strengths – in particular the court provides an determination as to the rights-compatibility of challenged legislation (whatever the consequence of such a determination may be), it offers authoritative interpretations of rights and provides a forum in which victims of (alleged) rights violations can challenge the legislation. However, at the same time, this paper points out that these strengths necessarily bring with them certain weaknesses – the political nature of rights-discourse, the focus on compatibility as a standard of protection and, perhaps most controversially, the non-democratic nature of the courts. This paper will draw on the experiences of various jurisdictions to point out how political protections play an important role in the protection of fundamental rights and, if properly designed, can operate as part of the law-making process where legal protections are least able to engage. If viewed as an inherent part of an overall commitment to the protection of rights – not as merely supplementary mechanisms developed on an ad hoc basis to aid executives and legislatures in avoiding judicial criticism – political protections can be used to retain the strengths of legal protections whilst operating to mitigate the impact (real or perceived) of the weaknesses associated with judicial review models of rights protection.

The protection of fundamental rights is a major concern of most modern legal systems. As a working explanation, fundamental rights are representative of basic, core interests which are viewed as being so important that they should not be infringed except in limited, clearly defined circumstances. They are essentially, and in the first instance, moral claims against the state and delineate the extent of legitimate

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law-making power.¹ A distinction must be drawn, however, between the *legitimate* extent of law-making power to limit rights, and the extent of any *legal* limits of those law-makers. The extent (if at all) to which rights will serve as a limit on the legal authority of law-makers depends on the way in which rights are protected within the particular jurisdiction, and it is those forms of rights protections which are of interest here.²

The decision to adopt the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (HRPSA) suggests a concern that the Federal Legislature ought not unduly limit fundamental rights. Yet at the same time, the HRPSA falls short of imposing a formalised 'legal' protection which would provide judicial oversight or review legislation as to its rights-compatibility. Instead, the mechanisms introduced are purely 'political protections' – with the legislature and executive tasked with scrutinising and certifying the rights-compatibility of legislation. This paper suggests that there is value in such political protections, but it is suggested that over-emphasising *either* legal or political protections is to leave the job half done.

The common approach to reviewing fundamental rights protections is to focus on the legal protections, and this has left political protections as 'secondary' or 'supplementary'. However, the emphasis on legal protections is only one part of the picture, and while the constitutional, legislative or (in Australia) common law nature of legal protections may indeed form the starting point, each of these forms of legal protection have inherent weaknesses – weaknesses which the strengths of political protections can help mitigate.

When a state decides to adopt a particular form of legal protection, either through the introduction of a new instrument or in the context of review of the efficacy of existing protections, the ultimate decision about which form of rights protection to adopt is not necessarily a reflection of an academic analysis of which instruments would provide the strongest and most robust protection. The form and substance of a 'new' legal protection will be influenced by a range of factors, importantly, but not limited to, the sentiments of the government of the day, existing constitutional structures and the ability of those proposing change to garner sufficient popular and political support for proposed reforms.³ These factors, along with criticism of the potential weaknesses of

¹ Clearly, rights can extend beyond 'as against the state' and be held as against non-state actors. However, that is a topic for another day.

² This paper is focused on the instruments and formal protections which regulate the interaction of primary legislation with fundamental rights. It does not extend to other forms of legal protections, such as anti-discrimination statutes which seek to protect against discriminatory conduct or administrative law mechanisms to protect against rights-encroachment by executive measures.

³ For an excellent consideration as to the rejection of a legislative bill of rights in Australia in 2010 see David Erdos, 'The Rudd Government's Rejection of an Australian Bill of Rights: a Stunted Case of Aversive Constitutionalism?' (2012) 65(2) *Parliamentary Affairs* 359. Similarly, the Canadian experience, and the way that political pressures from the provinces influenced the ultimate form of the *Canadian Charter of Rights* is discussed in James B. Kelly, 'Toward the Charter: Canadians and the Demand for a National Bill of Rights' (2005) 38(03) *Canadian Journal of Political Science/Revue Canadienne de Science Politique* 771; Walter S. Tarnopolsky, 'The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms' (1981) 44(3) *Law and Contemporary Problems* 169.

legal protections, are hurdles to the introduction of legal protections – hurdles which in Australia have proved to be insurmountable.⁴

Part 1 of this paper begins by defining the relevant terminology – both with regard to bills of rights and the various forms of protection addressed in this paper. Part 2 goes on to acknowledge the potential strengths of legal protection of rights and, more importantly, Part 3 points to the inherent weaknesses that come along with those strengths. Although these weaknesses may be differently realised, depending on the specific form of legal protection, they are weaknesses which are necessarily associated with granting the courts authority to review the rights-compatibility of legislation. Having identified the weaknesses of legal protections, Part 4 of the paper will then turn its focus to political protections. Although ‘legislative bills of rights’ have engaged with both legal and political protections, there has been a tendency for political protections to be somewhat *ad hoc* responses to the (real or predicted) impact of legal protections. Rarely have they been contemplated as being inherently connected to best achieving the possibilities of the legal protections. This paper suggests that because of the inherent weaknesses in legal protections, political protections ought to be more than merely *ad hoc* and, instead, a coherent approach to the interaction of legal/political protections – discussed in Part 5 – can do the most effective job of maximising the strengths of political protections so as to mitigate the weaknesses of legal protections.

One comment before proceeding: the jurisdictions referred to in this paper have been chosen to demonstrate how political protections interact with legal protections, regardless of their form. They are by no means intended to be definitive of each form, nor do they represent an ‘ideal’. A more comprehensive analysis of each (and a wider range of examples) would, of course, be ideal, but in the limits available they each include interesting features within their political and/or legal protections which are helpful in demonstrating the way in which political protections can serve to mitigate the weaknesses of legal protections.

I DEFINITIONS AND TERMINOLOGY

The ‘bill’ or ‘charter’ of rights has become the central focus of discussions about how best to protect rights.⁵ Erdos has explained a bill of rights as ‘an instrument which sets out a broad set of fundamental human or civil rights and grants these rights an overarching status within the national legal order.’⁶ This definition of the term doesn’t specify a particular legal status and thus a bill of rights simply meets the dual criteria of establishing a catalogue of protected rights, and the instrument identifies a special legal status for those protected rights. The HRPSA, for example, falls short of being categorised as a ‘bill of rights’ as it does not grant rights a legal status.

⁴ Although supporters of a national bill of rights for Australia do not think that the *HRPSA* is the end of the story for rights protection initiatives in Australia. See, eg, George Williams, ‘The Future of the Australian bill of Rights Debate’ (2010) 39 *University of New South Wales Faculty of Law Research Series* <<http://www.austlii.edu.au/au/journals/UNSWLRS/2010/39.html>>

⁵ The terminology is often difficult to follow – both ‘bill of rights’ and ‘charter of rights’ (as well as other terms like ‘Human Rights Act’) are used to describe instruments of various legal status and reflecting different forms of rights-protection.

⁶ David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford University Press, 2010) 11.

The adoption of a bill of rights represents a commitment to a particular form of rights protection within a jurisdiction and provides the touchstone for engagement with rights. Certainly other forms of protections can, and often do, exist within a jurisdiction, notwithstanding the existence (or lack) of a bill of rights.⁷ However, the introduction of a bill of rights signals a coherent approach in the protection of rights within a jurisdiction and represents a centralised standard against which the actions of legislatures (and other actors) can be measured.

Legal protections are those which involve a judicial consideration of the rights-compatibility of legislation. Legal protections may be viewed as operating along a spectrum of protection. At one end of the spectrum is what Mark Tushnet has termed 'strong-form' judicial review⁸ – where courts are given the 'final word' on the rights-compatibility of legislation, and legislation which does not meet the standard will be invalid. The best known example of this form of protection is associated with the US *Bill of Rights*.⁹ This form of protection is also found with regard to those (admittedly few) rights within the *Australian Constitution*.¹⁰

'Weak-form' judicial review gives the court a role in identifying rights-compatibility but the 'final word' as to the validity of legislation is reserved to the legislature. This paper further distinguishes between the two main types of 'weak-form' judicial review based on the legal status of the relevant instrument – constitutional or legislative.¹¹ Weak-form judicial review (constitutional) allows for courts to find rights-incompatible legislation invalid but also allows reserves to the legislature to specifically override the judicial decision and re-enact the legislation despite the judicially identified incompatibility. This is the form of protection associated with the *Canadian Charter of Rights and Freedoms* (Canadian Charter)¹² with the s 33 'notwithstanding clause'.

Alternatively, weak-form judicial review (legislative) is the form of protection found, for example, in the UK's *Human Rights Act* (HRA),¹³ the Victorian *Charter of Rights and Responsibilities*¹⁴ and New Zealand's *Bill of Rights Act*.¹⁵ A strong interpretative obligation is imposed on the courts to interpret legislation in a rights-compatible

⁷ Andrew C. Banfield and Rainer Knopff, 'Legislative Versus Judicial Checks and Balances: Comparing Rights Policies Across Regimes' (2009) 44(1) *Australian Journal of Political Science* 13, 17-9.

⁸ See, eg, Mark Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 2781; Mark Tushnet, 'The Rise of Weak-form Judicial Review' (2010) *ANU College of Law Seminars* <http://law.anu.edu.au/news/2010_College_Seminars/Tushnet_Paper.pdf>.

⁹ *United States Constitution*, amend I – X ('*US Bill of Rights*')

¹⁰ For discussion of Australia's constitutional rights see, eg, D.A. Smallbones, 'Recent Suggestions of an Implied Bill of Rights in the Constitution, Considered as part of a General Trend in Constitutional Interpretation' (1993) 21 *Federal Law Review* 254. Also discussed in Paul Kildea, 'The Bill of Rights Debate in Australian Political Culture' (2003) 9(1) *Australian Journal of Human Rights* 7; Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27(1) *Sydney Law Review* 29.

¹¹ The terms 'judicial review' and 'constitutional review' are often used as interchangeable, referring to courts holding legislatures (and executives) to account to the basic constitutional standards of the jurisdiction. Given that this thesis specifically engages with non-constitutional instruments, judicial review is preferred.

¹² *Canada Act 1982* (UK) c11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

¹³ *Human Rights Act 1998* (UK) c 42 ('*HRA*').

¹⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁵ *New Zealand Bill of Rights Act 1990* (NZ)

manner. While the court can declare that legislation is unable to be interpreted in a manner compatible with rights, the legislation will remain valid despite the incompatibility.

At the far end of the spectrum is the fourth form of legal protection – that found in Australia – which are common law rights and the principles of interpretation that consist of rebuttable presumptions regarding the legislature's intent not to enact rights-incompatible legislation. Generally not associated with a bill of rights, these principles are a comparably weak form of judicial review and 'may perhaps not deserve the name of [judicial] review at all.'¹⁶

On the other hand, what this paper describes as 'political protections' are those that place the obligation for fundamental rights protection on the legislature and/or executive – the political branches of government. The nature of political protections is that they are primarily procedural requirements to 'give consideration to' or 'make statements regarding' rights-quality of proposed legislation. These political protections fall short of an obligation not to breach fundamental rights and, to a large extent, allow legislatures the authority to pass or not to pass rights-infringing legislation (albeit where there is a constitutional bill of rights this falls outside the legislature's authority) and to devote attention only to the potential rights-consequences of proposed legislation.¹⁷ When considered in the absence of formalised legal protections, as is the case in Australia (where legal protections are not associated with a centralised bill of rights), there is greater need to ensure that the potential strengths of political protections are maximised.

There are two main forms of political protections against the legislative encroachment of rights that should be considered in this context: firstly, the requirement that the executive certify a Bill as to its rights-compatibility; and secondly, the creation of legislative scrutiny committees which examine Bills as to their compatibility with rights or, more generally, bring attention to the ways in which the Bill may impact on fundamental rights if it were to become law.¹⁸

II STRENGTHS OF LEGAL PROTECTION

Although it is the weaknesses of legal protections that give rise to a role for political protections, it is necessary to acknowledge the strengths associated with legal

¹⁶ Mark Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 2781; Mark Tushnet, 'The Rise of Weak-form Judicial Review' (2010) *ANU College of Law Seminars* <http://law.anu.edu.au/news/2010_College_Seminars/Tushnet_Paper.pdf>, 7.

¹⁷ The presence of particular types of legal protection within a jurisdiction may, of course, place the passage of rights-violating legislation outside of the authority of the legislature and in some cases the political protection is a mechanism to assist the legislature and executive in meeting their constitutional obligations.

¹⁸ There are other forms of political protection available. For example, the introduction of commissions tasked with reporting of the effectiveness of rights-protection within a jurisdiction, the development of education programmes or the creation of specialised agencies responsible for advising on rights-based issues. See, eg, Rhonda Evans Case, 'Friends or Foes? The Commonwealth and the Human Rights and Equal Opportunity Commission in the Courts' (2009) 44(1) *Australian Journal of Political Science* 57, 58 - 9.

protections, as it is those strengths which jurisdictions attempt to harness when they adopt a bill of rights. There are three core strengths associated with legal protections:

- (i) The availability of a mechanism when a court determines that legislation is incompatible with fundamental rights.
- (ii) The empowerment of the court to provide an authoritative interpretation of contested and controversial rights.
- (iii) The creation of a forum (the court) to which individuals whose rights have been violated can have recourse.

Invalidity of legislation is the consequence of a judicial determination of incompatibility under both strong-form judicial review and weak-form judicial review (constitutional).¹⁹ It is ostensibly the strongest form of protection against legislative encroachment against rights. While weak-form judicial review (constitutional) does include an 'exception' to this general rule in the event of legislative use of a 'notwithstanding clause' (specifically, the Canadian model), the strong statement that the legislation is *constitutionally* illegitimate creates a bulwark against legislative encroachment.

Invalidity of legislation is designed to protect against the 'tyranny of the majority', that is, to secure particular fundamental rights from encroachment regardless of the majority will. There is a tendency to imply from the phrase 'tyranny of the majority' that the 'self-interested majority' will *intentionally* marginalise rights of minority groups where it is perceived to be in its own interest to do so.²⁰ This perception is not particularly helpful when considering the strengths of judicial review as it suggests that democracies (via representative legislatures) simply cannot be trusted to protect rights. The suggestion is that legislatures are inherently untrustworthy and must be subject to review from the more enlightened judiciary. One of the dangers of this argument is that it tends towards relying on a sympathetic judiciary – something which leans dangerously towards judicial activism rather than the objective judicial analysis that the constitutional protection is intended to offer.²¹ A more useful conception of how judicial review offers strong protection is if the legislature is perceived as being *unable* to guarantee rights – whether due to lack of information, expertise or political will. Judicial review, therefore, ought to be considered as a 'safety mechanism.' This is explained by Aileen Kavanagh, who states:

¹⁹ The 'exception' to this general rule in the event of legislative use of a 'notwithstanding clause' is found in weak-form judicial review (constitutional) explained below. It should be noted that the utilisation of s 33 of the *Canadian Charter* prevents the relevant legislation from being considered by the court with regard to fundamental rights compatibility. That is, there is no consequence to a judicial determination of rights-incompatibility because the court lacks the jurisdiction to make such a determination.

²⁰ Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 221.

²¹ For consideration of how judicial activism (real or perceived) influences the rights debate see eg. James Allan, 'Do the Right Thing' Judging? The High Court of Australia in *Al-Kateb*' (2005) 24 *University of Queensland Law Journal* 1; Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian Charter of Human Rights and Responsibilities: Drawing the Line between Judicial Interpretation and Judicial Law-making' (2007) 33(1) *Monash University Law Review* 9.

Even if we accept people's capacity to make the right decisions when they act politically, we are still faced with the prospect that they might not always do so. They may make the wrong decision, either because they give preference to their own self-interest over the common good, or because they fail to consider the long-term effects of their decision or the effect it might possibly have on others...We can believe that people should be treated as responsible moral agents, and still provide safety mechanisms.²²

Thus the forms of judicial review that constitutional bills of rights create are a safeguard for rights and they step in to invalidate legislation only where the legislature has 'got it wrong'.

In weak-form (legislative) systems, the courts lack the authority to find rights-incompatible legislation invalid. Derived from a legislative instrument rather than a constitutional bill of rights, weak-form (legislative) protections result in courts in these jurisdictions not being able to offer the same 'barrier' against rights-incompatible legislation. Instead, courts may make a 'declaration of incompatibility' (in the language of the UK's HRA), which operates as a more-or-less political pressure on the legislature of the day to amend such rights-incompatible legislation.

The core protection under a legislative bill of rights is the interpretative mandate given to the courts which requires them first to seek to interpret the legislation in a manner which is compatible with fundamental rights. While this mandate is not unlimited – the availability of a 'declaration of incompatibility' is an acknowledgement that some legislation will not be able to be interpreted in a rights-favourable manner²³ – the judiciary is potentially able to go beyond both the words of the statute and consideration of legislative intent in determining a rights-compatible interpretation of the legislation.²⁴ Additionally, unlike those jurisdictions where the courts' involvement in rights protection is primarily via the principles of interpretation, weak-form judicial review (legislative) confers the interpretative obligation even in the absence of ambiguity as to the meaning of the statutory provisions.

The legal protection offered by weak-form judicial review (legislative) is, nevertheless, limited. In those cases where legislation *is* incompatible with fundamental rights to the extent that no rights-compatible interpretation is possible, the legal protection has reached its limit. Where principles of interpretation are the primary legal protection it would be misleading to suggest that the *protection* is of the same standard as under weak-form judicial review. Any comment on its incompatibility is confined to the *obiter dicta*. Additionally, in the absence of an interpretative *mandate*, the court may only rely on rebuttable presumptions of interpretation. Thus, clear intention of the legislature or the lack of ambiguity in the

²² Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24(2) *Oxford University Commonwealth Law Journal* 259, 476 - 77.

²³ The political, or intended political, consequences of a declaration of incompatibility or similar judicial statement that it is not possible to interpret the legislation in a rights compatible manner are not considered in detail in this article, but can be considered a form of political protection arising from the legal protection.

²⁴ The scope of the interpretative mandate will vary between jurisdictions. In the ACT and Victoria, for example, the mandate is not as broad as in the UK and the courts seek a rights-favourable interpretation of the legislation that is consistent with the legislative purpose.

language of the statute restrict the relevance of fundamental rights to the interpretative process and consequently limit the standard of protection offered.

The second strength of legal protections derives from the judiciary being the most appropriate branch of government to make authoritative statements as to the meaning of fundamental rights within a particular jurisdiction, regardless of whether such a determination is popular.²⁵ While it is appropriate (and desirable) for a legislature to involve itself in debates about rights, the court is more appropriate in offering an authoritative statement as to the meaning of those rights – regardless of whether the rights serve as a constitutional limitation on the power of the legislature or as an interpretative tool of the courts. More than this, as Alon Harel explains, it is entirely *inappropriate* to expect the ‘public’ (by way of the legislature) to provide that answer: ‘Any plausible theory of rights needs to acknowledge a gap between what rights the public believes we have and what rights we have.’²⁶

The availability of an authoritative judicial statement about rights allows for the resolution of disputes about rights, by those with expertise, in circumstance where such a dispute has an immediate impact on individual rights. The introduction of legal protections secures rights as *legal* rather than exclusively *political* issues. This goes beyond merely immunising decisions regarding the meaning of rights against political pressures. Not only is the legislature limited in its ability to protect rights due to political pressures but ‘the public’ (and by implication, the legislature) is incapable of offering an authoritative interpretation of rights. This is not the result of political pressures *per se* but the result of the diverse – and often ill informed²⁷ – opinions about the meaning of rights. This does not imply that the courts will necessarily produce a decision that is uncontroversial.

The third strength associated with bills of rights is that by creating a legal protection, the court is secured as a forum in which individuals may challenge legislative acts as to their compatibility with fundamental rights. Mac Darrow and Philip Alston point to legal protections as empowering disadvantaged groups:

Entrenchment of bills of rights can contribute significantly to the empowerment of disadvantaged groups, providing a judicial forum in which they can be heard and seek redress, in circumstances where the political process could not have been successfully mobilised to assist them.²⁸

In this way, the strength is not merely the *outcome* of a case which may identify the presence of incompatibilities between legislation and protected rights. The strength of judicial review is also in the *process*. The court has the task of specifically considering whether any limitation of rights is reasonable in response to a specific complaint from someone who alleges their rights have been violated.²⁹

²⁵ Michael J Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts' (2003) 38 *Wake Forest Law Review* 635.

²⁶ Alon Harel, 'Rights-Based Judicial Review: A Democratic Justification' (2003) 22(4) *Law and Philosophy* 247, 259.

²⁷ *Ibid.*

²⁸ Philip Alston and Mac Darrow, 'Bills of Rights in Comparative Perspective' in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Clarendon Press, 1999), 493.

²⁹ A. Wayne MacKay, 'The Legislature, the Executive and the Courts: The Delicate Balance of

This strength is further emphasised if the issue of unequal access to the political system is considered. Most individuals have only limited access to the political process outside of periodic elections. Between these elections, legislatures are influenced by various interest groups seeking to present particular views of the common good.³⁰ When viewed against this backdrop of an imperfect political system, legal protections may be conceived of not only as a general protection of fundamental rights of minorities, but as actually *enhancing* the democratic credentials of a jurisdiction – securing the rights of ordinary people against the interests of those with influence.

III WEAKNESS OF LEGAL PROTECTIONS

If the above strengths point to a rather rosy picture of legal protections, it must be remembered that with every rose come thorns. Legal protections come with various weaknesses that threaten the legitimacy of the protections and lead to questions as to whether the benefits are worth the costs. The weaknesses can also be divided into three broad categories:

- (i) The politicisation of the judiciary;
- (ii) The limitations of the judiciary as a mechanism for the *protection* of rights; and
- (iii) The undemocratic nature of the courts.

The inclusion of fundamental rights within the purview of the courts shifts the consideration of highly controversial issues, once the subject of enthusiastic public and political debate, out of the legislative sphere and into the judicial. Defining rights is an ongoing task and the meaning of particular rights, the appropriate balance between rights and determinations as to whether or not legislative action constitutes an undue limitation of rights are all ‘works in progress’.³¹ As John D. Whyte has stated: ‘[W]hat were once political problems have been transformed into legal problems.’³² While the availability of an authoritative ‘legal’ answer on these questions may be useful when faced with a particular problem, it is at least controversial to say that the courts are best placed to resolve what are highly political debates. Thus, what was identified in Part 2 as a ‘strength’ of the legal protections, comes at the cost of shifting debate about controversial topics into the courts.

In Canada, for example, the Supreme Court has been faced with highly controversial political and social issues, including whether prohibitions on assisted suicide of a terminally ill person violate *Canadian Charter* provisions,³³ and whether the

³⁰ Power or Who is Running this Country Anyway? (2001) 24 *Dalhousie Law Journal* 37, 43 – 5. Darrow and Alston, above n 29, 500-501.

³¹ See eg, the description of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* as a ‘living instrument’, the rights within it to be interpreted in light of changing conditions of the day. *Tyrer v. United Kingdom*, (Appl No.5856/72) Judgment of 25 April 1978, Series A no. 26, para 31.

³² John D Whyte, ‘On Not Standing for Notwithstanding’ (1990) 28 *Alberta Law Review* 347, 351.

³³ *Rodriguez v. British Columbia (A.G.)* [1993] 3 SCR 519. In this case, a patient with Lou

regulation of abortion is a legitimate limitation of *Canadian Charter* rights.³⁴ Issues such as these become 'legalised'. The court, faced with rights-based questions, is obliged to provide answers to the questions before it, but given the political nature of these issues the question arises whether the court is the appropriate institution to be deciding some of these matters which have such inherently political implications.³⁵ Jeremy Kirk explains this point as follows:

Some matters covered by rights are not in areas of judicial expertise. The justifiability of laws infringing constitutional rights may depend on the existence, causes, nature and effects of social, economic, scientific or other phenomena.³⁶

Even where the legislature retains the ability to do so, legislative rejection of judicial decisions is not undertaken lightly.³⁷ Weak-form judicial review seeks to retain the strengths associated with judicial decision-making as a legal protection of fundamental rights, whilst avoiding some of the criticisms levelled at strong-form judicial review by recognising that some issues may be better addressed via political (legislative) debate. It is important to note, however, that weak-form judicial review jurisdictions ultimately rely on a *political* rather than *legal* protection – the presumption is that the political mechanisms will act to deter legislatures from acting in a manner incompatible with rights and rejection of the judicial decision will be *politically* unpalatable except in extraordinary situations.

The second weakness associated with legal protections, deriving from the shifting of rights discourse from the political to the legal sphere, is the merging of the standards of 'rights-protection' and 'rights-compatibility'. The judicial determination of 'compatibility' grants the aura of legitimacy to legislative programs – potentially shielding them from further political debate or scrutiny – regardless of whether or not alternative programs would *better* protect rights, as opposed to merely not violating rights.³⁸

It is certainly not to be suggested that the judiciary *should* be making decisions as to what is the best possible standard of protection. Instead, this 'weakness' is an acknowledgement of the limited role of the judiciary within a legal system and a suggestion that legal protections *on their own* can offer only particular types of protection relating to a standard of compatible/incompatible. This in itself is limiting if the goal of introducing a bill of rights is to better protect rights within the

Gherig's disease unsuccessfully challenged the *Criminal Code of Canada* on the basis of violating the right to life, liberty and security of person (s 7), freedom from cruel and unusual treatment (s 12) and equality of treatment under the law (s 15).

³⁴ *R v Morgentaler* [1988] 1 SCR 30. In this case, the prohibition of regulation of abortion under the *Criminal Code of Canada* was found to be an unconstitutional violation of the s 7 right to security of the person. Although the regulation of abortion was potentially a legitimate limitation of the right, the majority of the Court found that it was disproportionate to the policy objectives and therefore not covered by s 1.

³⁵ Lord McCluskey, 'Parliament and the Judges - A Constitutional Challenge' Lecture on 8th July 1996 at the Saddlers Hall. Cited in Michael Zander, *A Bill of Rights* (Sweet and Maxwell, 4th ed, 1997) 104.

³⁶ Jeremy Kirk, 'Rights, Restraint and Reasons for Restraint' (2001) 23 *Sydney Law Review* 19, 25.

³⁷ Francis Bennion, 'Human Rights: A Threat to Law?' (2003) 26(2) *University of New South Wales Law Journal* 418.

³⁸ See for analysis of the Canadian experience, Michael Mandel, *The Charter of Rights and the legalization of politics in Canada* (Wall & Thompson, 1989) 61-3.

jurisdiction. By emphasising the judicial role as ‘protector of rights’ there is the possibility that a bipolar view of rights (infringed or not infringed) will become the norm. Judicial interpretations of rights therefore have the potential to replace legitimate political debate – as Michael Mandel calls it, the ‘depoliticisation’ of politics.³⁹ Rather than merely one choice among a range of possible (rights-compatible) policies, the successfully upheld legislation becomes shielded from political challenges due to a *de facto* ‘seal of approval’ as to its rights-credentials from the court. In this sense, legal protections risk merging ‘legal’ or ‘rights-compatible’ with ‘good’ policy and may in fact stifle legislative consideration of rights beyond the compatibility of legislation.⁴⁰

In addition, the weakness of legal protections can be further evidenced given the judiciary can (generally) only consider questions as to compatibility of legislation with fundamental rights *after* there has been an alleged infringement of rights⁴¹ and in response to a complaint from an alleged victim. Thus judicial-based protection models are limited in their ability to *prevent* rights-violation and instead respond to past violations. This responsive rather than proactive approach to the protection of rights may additionally be exaggerated by the processes of appeals leading to the final decision, meaning the time-delay between violation and remedy may be lengthy.⁴² Again, this is not a suggestion that the judiciary *should* engage in pre-enactment or pre-entry-into-force scrutiny of legislation – that brings its own set of challenges. It is merely a comment that an assessment of the use of the courts to protect rights must recognise the limitations of the institution being given such responsibility.

The final critique of legal protections is based on a traditional understanding of the roles of the legislature and the judiciary. Arguments have been presented above which suggest one of the strengths of judicial review is that it enhances participation by creating a forum to give voice to those excluded from the political process (either due to membership in a minority or the lack of influence with those in power). It is somewhat ironic that democratic arguments also lie at the heart of judicial review’s greatest weakness – the elevation of the judiciary above the elected legislature. This democratic weakness of legal protections – the price of the ‘guarantee’ legal protections seek to provide – may be exacerbated where the previously mentioned weaknesses are realised. The argument that bills of rights are necessarily undemocratic is hardly revolutionary.⁴³ The democratic challenge to legal protections

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ In some jurisdictions, there is some allowance for the referral of questions to a constitutional (or similar) court prior to the enactment of legislation.

⁴² Much of the commentary on undue delay and the lengthy process of rights litigation is in regards to the European Court of Human Rights which requires that all local remedies be exhausted before recourse is made to the European Court mechanisms. The problem of the length of time – extending to several years – that it took victims of rights-infringements to navigate domestic human rights remedies became a concern because the increased case load of the European Court (as citizens became more aware of their rights and the availability of European remedies) led to additional delays. Thus while the commentary is focused on reform of the processes of the European Court, it necessarily considers the lengthy processes involved in ‘start to finish’ rights litigation in domestic jurisdictions. See for discussion and examples Costas Paraskeva, ‘Reforming the European Court of Human Rights: An Ongoing Challenge’ (2007) 76(2/3) *Nordic Journal of International Law* 185.

⁴³ See eg Jeffrey Goldsworthy, ‘Judicial Review, Legislative Override, and Democracy’ in Tom

suggests that in requiring the judiciary to make political decisions (as has been discussed above), the neutrality of the court is undermined. This is not ‘activism’ in the ordinary sense. The suggestion is that courts under judicial review are both empowered and required to go beyond the ordinary, limited authority of the judiciary in order to make rights-based decisions. The result is a marginalisation of the democratic rights of the electorate in favour of those other rights protected as fundamental by the specific rights instrument. This is what Alexander Bickel called the ‘counter-majoritarian difficulty.’⁴⁴

Courts are limited in their ability to consider the wide range of potential perspectives about rights, and the reasonableness or necessity of the impact of legislation on those rights.⁴⁵ Mandel suggests that in practice courts are faced with considering the arguments of whichever interest group brings the constitutional challenge.⁴⁶ Even supporters of bills of rights acknowledge that ‘constitutional litigation [is] an important tool used by interest groups to advance their political ends.’⁴⁷ Mandel suggests that far from facilitating a more effective and inclusive democracy, judicial review accentuates particular interests – interests of ‘minorities’ with a particular perspective about rights – on issues which are more appropriately debated in public and parliament than judicially determined under the guise of rights protection.⁴⁸ Similarly, David Kennedy points to the potential risks of formalising rights as individual legal entitlements to be pursued through the courts which has the potential of ‘[making] other forms of collective emancipatory politics less available.’⁴⁹

Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 263; Leighton McDonald, ‘Rights, ‘Dialogue’ and Democratic Objections to Judicial Review’ (2004) 32 *Federal Law Review* 1

⁴⁴ See, eg, John Moeller, ‘Alexander M. Bickel : Toward a Theory of Politics’ (1985) 47(1) *Journal of Politics* 113.

⁴⁵ There have been mechanisms introduced to try to mitigate this effect, and to provide courts with wider perspectives than limiting the considerations in understanding rights issues to the adversarial ‘victim’/‘government’. For example, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) is given authority under s. 40 of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) to intervene in proceedings in which a *Charter* issue arises. This type of mechanism is beyond the scope of this paper, but is an interesting way of providing an *additional* and rights-focused point of view within the scope of legal protections. A list of cases in which the VEOHRC has intervened as well as the submissions made to the court can be found at:

<<http://www.victorianhumanrightscommission.com>>. Outside the context of a formalised bill of rights, the Australian Human Rights Commission (formally Human Rights and Equal Opportunities Commission) has a similar intervention mandate. See for discussion Rhonda Evans Case, ‘Friends or Foes? The Commonwealth and the Human Rights and Equal Opportunity Commission in the Courts’ (2009) 44(1) *Australian Journal of Political Science* 57.

⁴⁶ Michael Mandel, *The Charter of Rights and the legalization of politics in Canada* (Wall & Thompson, 1989) 61-3.

⁴⁷ Robert J Sharpe, ‘The Impact of a Bill of Rights on the Role of the Judiciary: A Canadian Perspective’ in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Clarendon Press, 1999) 431, 431.

⁴⁸ Michael Mandel, *The Charter of Rights and the legalization of politics in Canada* (Wall & Thompson, 1989) 61-3.

⁴⁹ Kennedy’s comments should be put in the context of his overall aim to highlight to potential difficulties associated with the human rights movement and to encourage ‘a more open conversation’ about the future of the rights movement rather than as a criticism of judicial review in the same vein as Mandel. David Kennedy, ‘The International Human Rights Movement: Part of the Problem?’ (2002) *Harvard Human Rights Journal* 101, 123.

In the same vein, Jeremy Waldron has emphasised ‘the importance of democratic participation.’⁵⁰ The ‘judicial supremacy’⁵¹ created by a bill of rights (whether constitutional or legislative), implies that the legislature (and by implication ‘the majority’) cannot be trusted with decisions that involve rights. Rather than political power, the right to participate has been diluted from having a say (via elections) to merely having a voice in the process (through appeal to the courts). While elections and the political process remain in place, they are subject to oversight by the courts.⁵²

The potentially limiting nature of the judicial role is perhaps overstated here, but deliberately so. While the introduction of a bill of rights *may* shift political discourse on rights to the courts, it also *may not*.⁵³ The important point is that balance between legal-decision making on questions of rights and robust, multi-faceted debate in the political arena about what rights mean and how to protect them is not guaranteed by the judicial mechanism alone and is indeed put at risk. Without complementary measures, judicial review risks being merely a tool for interest groups with the resources to access and effectively argue their case. Combined with the limitations of the court to take into account all of the competing interests and factors in deciding whether a limitation constitutes a breach of protected fundamental rights, the ability of judicial review to protect rights in a manner which can be said to reflect the values of the society in which it is located is limited. It is useful to consider these concerns about the limits of judicial review as an indication of why the lack of democratic mandate may be considered a weakness of judicial review. This is not merely because of a ‘majoritarian’ argument but because of the nature of rights discourse.

However, it is a weakness that need not be taken to undermine the potential value of judicial review. That is, those jurisdictions that have opted for a specific rights instrument giving rise to judicial review have acknowledged that this shifting of rights protection out of the legislative sphere is a cost they are willing to tolerate (to an extent) because of the benefits associated with legal protections.

However, while Mandel and Waldron question the overall legitimacy of judicial review as a form of rights-protection within a democratic polity, this is not a universally held position. At the very least, the predominance of constitutional bills of rights within legal systems suggests that there is substantial *practical* recognition that judicial review is a legitimate mechanism by which rights can be protected – or at least that the strengths of the protection outweigh the costs. There are, broadly speaking, two broad explanations as to the wide-spread implementation of legal protections and some form of judicial review within modern legal systems which also feature a commitment to democratic governance. The first position concludes that judicial review is undemocratic, but holds both that it is desirable and that these desirable qualities (often) result in popular support. Consequently, judicial review is

⁵⁰ Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13(1) *Oxford Journal of Legal Studies* 18, 42.

⁵¹ This term is used frequently in the literature, See, eg: The Hon. Joseph L. Call, 'Judicial Review vs Judicial Supremacy' (1958) 62 *Dickinson Law Review* 71; James B. Kelly and Michael Murphy, 'Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence' (2001) 16 *Canadian Journal of Law and Society* 3.

⁵² Ibid.

⁵³ Ibid.

legitimate *despite* its undemocratic nature. The second position is that judicial review is not undemocratic at all:

If judicial decision [can] be shown to be based on desirable qualities normally absent from democratic politics, then judicial review [is] defensible despite its undemocratic character. Furthermore, adherence to certain techniques, be they of avoidance or neutrality, would facilitate public acceptance of judicial actions. In short, principle and technique, properly employed, would result in a powerful and politically acceptable [constitutional court].⁵⁴

Even if one accepts that judicial review is a legitimate and valuable part of democratic governance, it is a weakness of the form of protection that it necessarily prioritises the perspective of unelected, unrepresentative judges with regard to the 'legal' meaning of rights and their appropriate limitation.⁵⁵

IV POLITICAL PROTECTIONS

Despite the weaknesses of legal protections, bills of rights of various legal statuses have *in fact* been adopted by most jurisdictions. In effect this is enshrining the access-based view of the right to participate within each jurisdiction. The question then arises: Is it possible to achieve the strengths of legal protections without the costs? The answer – to an extent – lies in political protections. Recognition of this can be seen in the development of legislative bills of rights such as the UK's HRA which includes both weak-form judicial review (legislative) legal protections and associated political protections. However, more broadly speaking, political protections have an important role *regardless* of which form of legal protection is found in a particular jurisdiction and ought to be considered as important in interacting with legal protections so as to mitigate or decrease the potential realisation of the weaknesses.

When viewed in isolation, political protections have weaknesses of their own. Notably, political protections provide no conclusive remedy where rights are breached and they rely on imperfect political processes and politicians lacking in expertise about rights to offer the 'guarantee' of rights. They rely on political processes which, as raised above, do not always prioritise the rights of the minorities and in which individual victims of rights violations may never be able to have their voice heard. Even with the best intentions, politics is subject to pressures and influences to which the courts are not, and thus it does not offer the same independent oversight that judicial review can.⁵⁶

⁵⁴ William Haltom and Mark Silverstein, 'The Scholarly Tradition Revisited: Alexander Bickel, Herbert Weschler and the Legitimacy of Judicial Review' (1987) 4 *Constitutional Commentary* 25, 40.

⁵⁵ There are extensive theoretical discussions as to the relationship between rights and democracy. For a concise discussion see Denise Meyerson, *Jurisprudence* (Oxford University Press, 2010).

⁵⁶ For a more extensive discussion including practical examples of how political protections in Australia (prior to the *HRPSA*) outside the context of legal protections have faltered in securing rights see Edward Santow, Gilbert + Tobin Centre of Public Law, Submission No 20 to Senate Legal and Constitutional Affairs Committee, *Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions]* and *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 [Provisions]*, July 2010 available at <http://www.humanrightsconsultation.gov.au/PublicHearings/Documents/Edward_Santow_Submission.pdf> in particular pp 36 – 9.

However, the weaknesses of political protections alone have been extensively discussed by others,⁵⁷ particularly in light of the decision in Australia *not* to introduce a bill of rights and to instead focus on political protections in the form of a re-vamped scrutiny committee and the requirement of executive certification of bills. As will be seen, the strengths of political protections roughly align with the weaknesses of legal protections and thus, when appropriately designed, may provide a mechanism by which the weaknesses of legal protections are mitigated. The strengths associated with the use of political mechanisms for the protection of fundamental rights revolve around the benefits of considering fundamental rights within the democratic law-making process. There are several ways in which political protections may contribute to the protection of fundamental rights.

Tom Campbell, who argues for what he calls a 'democratic bill of rights' – a political mechanism designed to protect fundamental rights but without allowing for judicial enforcement⁵⁸ – explains this. He states:

The aim [of a democratic bill of rights] would be to retain responsibility for the detailed formulation of human rights with elected governments, but put pressure on these governments to resist their inherent tendency to negate the very norms that justify democracy as a system of government...It is desirable to adopt democratic bills of rights as a basis for the stimulation and assessment of legislative and policy proposals that promote human rights.⁵⁹

This explains the two core strengths associated with political protections: the appropriateness of involving elected representatives in the inherently political debates about the meaning of rights within a jurisdiction and the development of a 'culture of fundamental rights,' which increasingly encourages an institutional (legislative and executive) tendency towards rights-compatible legislative and policy options. By ensuring that the human rights deliberations of the executive and (particularly) the legislative committees are publicised, the political protections have the added strength of encouraging the participation of the population in the decision-making process. An additional strength, and an intended effect of the improved quality of legislation derived from greater executive and legislative consideration, is that rights-protection under political protections is preventive rather than reactive.

⁵⁷ See, eg, Fergal Davis, Submission No 26 to Senate Legal and Constitutional Affairs Committee, *Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 [Provisions]*, July 2010 available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/human_rights_bills_43/submissions.htm> in particular pp 1-4. See also Andrew Byrnes, 'The protection of human rights in NSW through the Parliamentary process - a review of the recent performance of the NSW Parliament's Legislation Review Committee' (2009) 43 *University of New South Wales Faculty of Law Research Series* available at <<http://www.austlii.edu.au/au/journals/UNSWLRS/2009/43.html>>; Santow, above n 57; the extensive submissions available at *National Human Rights Consultation* <<http://www.humanrightsconsultation.gov.au/>>.

⁵⁸ Campbell acknowledges that there may be judicial enforcement of a democratic bill of rights on procedural matters. Tom Campbell, 'Human Rights Strategies: An Australian Alternative' in Tom Campbell, Jeffrey Denys Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 319, 332-33.

⁵⁹ Ibid.

Mechanisms which put in place procedures which rely on the elected (political) branches of government recognise the highly controversial nature of questions of fundamental rights and the likelihood that legislative initiatives will involve questions not of the 'compatible/incompatible' kind but rather competing interpretations of fundamental rights. Because of the inherently political nature of debates about fundamental rights, it follows that the political institutions are well placed to engage in the task of balancing these rights. Political protections develop 'opportunities and obligations for political rights review'⁶⁰ that ensure that members of the executive and the legislature engage in this task. The most basic arguments regarding the democratic strength of political protections must be the association of decision-making and law-making with the representative (democratic) legislature. Political protections specifically allow for 'majority' decision-making (or at least decision-making via representative democratic institutions) to retain primacy.⁶¹

However, the 'democratic' strength of political protections is not merely a product of ensuring that rights are considered by law-makers as a regular part of the law-making process. Fundamental rights are inherently controversial and political protections are intended to encourage the consideration of a range of perspectives about rights, the rights-implications of legislation and how competing rights ought to be balanced as well as the line between legitimate and illegitimate limitations on rights.⁶²

Whereas legal protections face criticism of *limiting* the range of perspectives with which those making the decisions are presented, political protections allow for greater participation and, consequently, the expression of a wider range of perspectives. This may range from encouraging direct submissions as part of the committee process to the less direct but potentially more important expression of approval/disapproval at the ballot box.⁶³

The task of the political branches (with regard to the protection of fundamental rights) should be viewed as protecting rights within the society which they represent and govern. Because political protections tend to require explicit statements about the rights-compatibility of proposals prior to legislative assent/rejection, and because the legislature is ultimately answerable to the electorate, political protections encourage the legislature to make every effort to ensure that its approach to fundamental rights reflects the values of the community it represents. Political protections seek to capitalise on a popular distaste for the violation of fundamental rights as well as

⁶⁰ Janet L. Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' (2006) 4(1) *International Journal of Constitutional Law* 1, 3.

⁶¹ Campbell, above n 59, 332-33.

⁶² For extensive debate and discussion of the role of political protections, see: Senate of the Parliament of Australia, *Submissions received by the Legal and Constitutional Affairs Committee for the Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 [Provisions]* (10 February 2011) <http://www.aph.gov.au/senate/committee/legcon_ctte/human_rights_bills_43/submissions.htm>.

⁶³ George Winterton, 'An Australian Rights Council' in Tom Campbell, Jeffrey Denys Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 305, 306.

relying on politicians having a vested interest – via the ballot box – in the legislation they support.⁶⁴

Executive certification models of rights-protection generally require that Ministers take *personal* responsibility for the rights-compatibility of Bills. The protection encourages the executive to engage in meaningful pre-legislative scrutiny of proposals so as to avoid the political consequences of ill-informed or incorrect claims about the rights-compatibility of Bills. Executive statements, therefore, act as a way of introducing rights-based issues into Parliament and, by implication, into the public awareness. Ministers whose statements of compatibility are questionable can face damaging (or embarrassing) questions.⁶⁵

In addition, an executive that does not adequately justify their legislative proposals within a framework of fundamental rights compatibility may face a legislature unwilling to enact those Bills into law.⁶⁶ This is why there were calls for the HRPSA to include a requirement of a thorough explanation of the basis on which the executive statement was made – so as to discourage the executive statement becoming merely a rote statement.⁶⁷ Of course, where the legislature is dominated by those with close political alliances with the executive (as is often the case in Westminster systems) this may inhibit the efficacy of executive certification as a means of preventing rights-incompatible legislation from being passed or for the statement alone being sufficient to generate meaningful debate about rights within the legislature.⁶⁸

By contrast, scrutiny committees within the legislature are comprised of representatives with potentially diverse political views. Therefore, there is little or no *individual* political responsibility and greater attention is devoted to the scrutiny of the legislation generally. The impact of unpopular interpretations of rights, or of support for rights-infringing legislation, is less direct and less clear. Legislative committee-based scrutiny seeks to increase the likelihood that legislation *will be* compatible with fundamental rights, not merely that it will be *perceived* as compatible, based, for example, on an executive statement to that effect. Committee-based scrutiny additionally ensures that the considerations which influenced the ‘balancing’ of rights and led to an executive declaration of rights-compatibility are not ‘hidden’ – that they are able to be questioned and challenged and that the community’s opinions, via its legislative representatives, are genuinely represented in the debate about fundamental rights.

⁶⁴ David Kinley, 'Parliamentary Scrutiny: Duty Neglected?' in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Clarendon Press, 1999) 158, 160.

⁶⁵ Michael Ryle, 'Pre-legislative Scrutiny: A Prophylactic Approach to Protection of Human Rights' (1994) (2) *Public Law* 192.

⁶⁶ Ibid.

⁶⁷ See especially Julie Debeljak, Submission No 25 to Senate Legal and Constitutional Affairs Committee, *Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 [Provisions]*, 9 July 2010 available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/human_rights_bills_43/submissions.htm>.

⁶⁸ See, eg, the discussions in the UK Parliament following the executive statements in of the anti-terrorism legislation. Discussed in David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (2002) *Public Law* 323, 341.

The second strength associated with protecting rights via the political branches of government is that it encourages greater discourse about fundamental rights within the political processes generally and as part of the law-making process specifically. This strength relates to the perception of the protection of rights as an evolving and ongoing process which ought to be discussed more openly and frequently. Rights are controversial and the requirement that the executive and legislature engage with rights as part of the ordinary law-making process encourages both increased awareness about rights and greater debate about their meaning and the extent of 'reasonable' limitations. Further, by making the debates about rights within the political branches accessible (for example, via publication of executive statements and allowing for submissions to the legislative committees) political protections facilitate a 'culture' of fundamental rights in the broader sense amongst the population at large.

Firstly, political protections should be seen as having a function of raising awareness about rights – and the rights-implications of legislative programs – within the political institutions. Regularising political scrutiny has the effect, as George Williams observes, of 'build[ing] Parliamentarians into the rights protection process, contributing to a greater understanding of rights issues by politicians.'⁶⁹ Rights are, according to Jeremy Webber, 'injected...into the very process of legislative drafting and enactment.'⁷⁰ The 'culture of fundamental rights' is facilitated as representatives become increasingly aware of fundamental rights concerns and are confident in voicing these concerns and challenging claims of compatibility.

Some wariness must be expressed at these big claims. Political protections should not be seen as an immediate cure for deficits in the rights-quality of legislation. Formalised political protections cannot *impose* a 'culture of fundamental rights' or force robust assessment and publication of rights implications of Bills.⁷¹ Instead, political protections form part of a long-term commitment to the protection of fundamental rights. They merely put in place the framework for regularised consideration of fundamental rights by the legislature and encourage increasingly robust rights-based scrutiny of proposals put forward by the executive. As Michael Ryle explains:

Over the years such processes would lead to the establishment of a better understanding of what [human rights standards require] in respect of legislation affecting human rights. This in its turn should result in better legislation.⁷²

⁶⁹ George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (University of New South Wales Press Ltd, 2004), 84-5.

⁷⁰ Jeremy Webber, 'A Modest (but robust) Defence of Statutory Bills of Rights' in Tom Campbell, Jeffrey Denys Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 266.

⁷¹ As an example, see the technical interpretation of the *HRPSA* which saw the Federal Government responsible for the *HRPSA* decide not to include a statement of compatibility within the legislation for offshore processing of asylum seekers – an issue with undeniable human rights implications – on the basis that the Bill was introduced prior to the entry into force of the *HRPSA* and the August 2012 Bill was merely amending the original Bill rather than introducing a new instrument. See eg, Chris Merrit 'Government accused of skirting own rights legislation' *The Australian* (online) 24 August 2012, <<http://www.theaustralian.com.au/business/legal-affairs/government-accused-of-skirting-own-rights-legislation/story-e6frg97x-1226457002654>>.

⁷² Ryle, above n 66, 195.

Similarly, Janet Hiebert suggests that systematic scrutiny of Bills by the legislature both promotes and is a product of a developing 'culture' of fundamental rights within the legal system. She points out that this culture is facilitated by the dividing of responsibility among various institutions of government. Further, she says that political protections which recognise responsibility for rights on the part of both the legislature and the executive 'anticipate discussion, debate, and reflection on the merits of these institutional perspectives.'⁷³

The second way in which political protections are able to facilitate a 'culture of fundamental rights' refers to the increasing awareness of individuals as to their rights and their ability (and willingness) to place pressure on their representatives with regard to these rights. That is, they seek to enhance the fundamental rights culture of the community at large (not merely within the law-making institutions) and to encourage greater awareness amongst citizens about their rights and the importance of rights within the jurisdiction. A centralised bill or charter of rights, regardless of legal status, has been said to go some way to achieving this function,⁷⁴ by providing a clear centralised statement of the rights and freedoms considered fundamental within the jurisdiction. However, while the creation of a charter of rights may inform citizens of their rights, it is merely a starting point. By requiring that publicised debates or statements about rights are a *regular* part of the law-making process, political protections seek continually to inform individuals about the role rights have within the jurisdiction generally, and how those rights have informed specific legislative programs.

Beyond merely expressing approval or disapproval of the approach of parliamentary members to fundamental rights at the ballot box, political protections facilitate the involvement of citizens in the law-making process. In the context of the Australian debates regarding the appropriate form of rights protection, George Williams, for example, points to the way in which an inclusive scrutiny process – one that allows public submissions to a scrutiny committee and ensures its deliberations are accessible and publicised – may increase the understanding of fundamental rights among the Australian people at large.⁷⁵ Genuine improvement in public awareness about fundamental rights issues derives, as David Feldman points out, from the increased transparency of the legislative process in general, and increased transparency about the consideration of rights in relation to that process specifically.⁷⁶ This in turn increases the likelihood that a more rights-aware citizenry will place ballot-box pressure on a rights-infringing legislature.

It seems logical to suggest that the protection of rights is best achieved by *preventing* the legislative encroachment of fundamental rights in the first instance.⁷⁷ The intended

⁷³ It should be noted that Hiebert is discussing political protections which exist concurrent with legal protections. Janet Hiebert, 'Resisting Judicial Dominance in Interpreting Rights' (2004) 82 *Texas Law Review* 1963, 1977.

⁷⁴ See, eg, the preamble to the *EU Charter* which refers to the *Charter* as 'contributing to a strengthening of the culture of rights and responsibilities to be enjoyed by the present and future citizens of the European Union'.

⁷⁵ George Williams, *A Bill of Rights for Australia* (UNSW Press, 2000) 46.

⁷⁶ David Feldman, 'Parliamentary scrutiny of legislation and human rights' (2002) *Public Law* 323; David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25(2) *Statute Law Rev* 91.

⁷⁷ Michael Ryle, 'Pre-legislative Scrutiny: A Prophylactic Approach to Protection of Human

consequence of political protections is to improve the quality of legislation with respect to fundamental rights. Subjecting legislative proposals to executive scrutiny prior to presentation to the legislature, and Bills to committee-based legislative scrutiny, is intended to reduce the likelihood that the legislation that is passed will encroach on protected rights. This strength of political protections is further emphasised when contrasted with the nature of the protection offered by the courts, which focuses on remedying breaches and may take many years of applications and appeals before decisions are made. According to Ryle:

[F]rom the point of view of the citizens whose human rights are threatened, it is much better to prevent any infringement of those rights being included in legislation in the first place, rather than their having to wait for redress from the courts, perhaps many years later.⁷⁸

There is an alternative to political protections as a preventative mechanism for the protection of fundamental rights. This is the availability of referral of bills to a judicial body for a determination as to constitutional (rights) compatibility. Both Canada and the EU allow for governments (or, in the case of the EU, the non-judicial institutions) to ask the court questions relating to the interpretation of legal provisions or to the constitutionality of particular proposals.⁷⁹ Other jurisdictions have similar 'preventative' measures which include a judicial mechanism within the context of legislative enactment – most notably the *Conseil Constitutionnel* in France.⁸⁰

Rainer Knopff and F L Morton have discussed both the usefulness and dangers of relying on the reference procedure as a means of protecting rights at the stage prior to the enactment of legislation.⁸¹ In particular, reference to the courts may be used to avoid responsibility for politically controversial decisions. Despite the availability of a wide range of potential legislative measures, a court is limited to a decision of compatibility or incompatibility. A decision by the court that a proposal is compatible with fundamental rights does not necessarily imply that the proposal is necessarily the most appropriate action to take. Yet judicial approval can, and has, been used to justify particular policy choices and to stifle further debate.⁸²

Further, judicial review which occurs prior to the enactment of legislation effectively involves challenges to Bills by political opponents (rather than victims of alleged rights-breaches, as is ordinarily the case for judicial review of enacted legislation). As Morton in relation to the French experience with the *Conseil Constitutionnel* points out, this can serve to emphasise the unaccountable, unrepresentative nature of the

Rights' (1994) (2) *Public Law* 192.

⁷⁸ Ibid.

⁷⁹ This is not available in relation to every legislative proposal. In the EU, for example, the ECJ can be asked for an opinion as to whether an international agreement is compatible with the Treaties. *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1993) ('TFEU'), art 218(11).

⁸⁰ F. L. Morton, 'Judicial Review in France: A Comparative Analysis' (1988) 36(1) *American Journal of Comparative Law* 89.

⁸¹ Rainer Knopff and F. L. Morton, *Charter Politics* (Nelson Canada, 1992), 186-188. See also F. L. Morton, 'The Political Impact of the Canadian Charter of Rights and Freedoms' (1987) 20(01) *Canadian Journal of Political Science/Revue Canadienne de Science Politique* 31, 47.

⁸² Ibid.

judiciary – particularly when judicial decisions seem consistently to favour minority political challenges to majority policies or approaches to rights.⁸³

Additionally, delays necessarily associated with referring an issue to the courts make frequent use of the procedure impractical and a hindrance to the effective governance of the jurisdiction.⁸⁴ Political protections seek to utilise existing procedures without imposing significant delays on the decision-making processes. That is, they are intended to be a part of the law-making process, as opposed to restricting the ability of the executive/legislative branches to undertake the task of governing. While delays associated with the pre-emptive involvement of the judiciary necessarily delay the entry into force of challenged legislation, there is perhaps also a greater concern. These delays may be strategically used by political opponents to avoid debate on politically controversial issues, thus utilising the judicial process for political purposes.⁸⁵

While reference procedures potentially have a role to play in the protection of fundamental rights in some jurisdictions, they cannot be seen as a replacement for robust political scrutiny of legislation. Political protections seek to protect fundamental rights within the context of the ordinary governmental functions – they are intended to enhance the political process and to ensure that the discussion of rights is not limited to a discussion only about the rights compatibility (or incompatibility) of legislation.

V INTERACTIONS OF LEGAL AND POLITICAL PROTECTIONS

Political protections can, and should, be used to complement legal protections – regardless of what form the legal protections take. The strengths of political protections align well with the weaknesses of legal protections. Political institutions are the appropriate place for complex debates as to how to balance competing rights, and to make decisions as to how to protect rights, rather than merely to decide whether legislation is compatible with rights. The members of the legislature and the executive are elected and have a democratic legitimacy that the courts lack. They are therefore better placed to consider a wide range of opinions about rights in the context of scrutinising proposed legislation. Finally, the requirement of executive certification places rights at the very beginning of the legislative process, encouraging a pro-active approach to the protection of rights, or at the very least minimising the likelihood that rights-infringing legislation will accidentally be passed. Whilst political protections have the potential to respond to the weaknesses of legal protections, it is not merely the presence of a political mechanism that will promote the regular occurrence of such discourse. There are certain features of the political mechanisms considered that can be drawn on to maximise the potential of the political mechanism to mitigate the

⁸³ Morton, however, tempers this criticism by acknowledging that such divides between political and judicial positions about rights is generally a temporary matter in France. While there may indeed have been significant divides between majority (as represented by the government) positions and those of the *Conseil Constitutionnel* in particular periods of history, this should not be taken to suggest that there is *always* such discrepancy. Morton, above n 81, 98.

⁸⁴ Knopff and Morton, above n 82, 30-3.

⁸⁵ Knopff and Morton provide a good overview of the use of the reference procedure and the potential pitfalls of relying on such a mechanism. Knopff and Morton, above n 82, 30-3.

limitations of the legal protections. It is helpful here to point to examples of existing mechanisms so as to demonstrate that it is necessary to give as much consideration to the form and structure of a political protection that exists to complement a legal protection as it is to the legal protection itself.

A *Executive Certification Model of Political Protection*

The executive certification model of political protection has several benefits in terms of interacting with legal protections so as to mitigate the weaknesses of legal protections. Firstly, it places the protection of rights at the very beginning of the legislative process, thus seeking to *prevent* the passage of rights-infringing legislation, as opposed to merely responding to it. Secondly, it has the potential to generate personal, political accountability of the proposing Minister, in particular where the judiciary has the authority to make a clear statement of incompatibility (whether or not that results in invalid legislation). Thirdly, it can provide the impetus for greater legislative debate about rights.

Nevertheless, the experiences of Canada and the UK raise some concerns about relying exclusively or primarily on the executive certification model. In these jurisdictions, the executive statement has been the focus of formalised protections associated with a legislative instrument leading to a formalised procedure. Other, supplementary political protections have arisen in order to respond to the inability of executive certification alone to generate genuine discourse about rights. In particular, executive statements alone lack the ability to shift the discourse from 'compatible/incompatible' to a broader consideration of 'right-protection'. In Canada, the *Department of Justice Act* (DJA)⁸⁶ political protection requires that the Minister for Justice consider Bills and report any rights-inconsistencies to the Parliament. As a political mechanism to mitigate the potential weaknesses of the weak-form judicial review (constitutional), the DJA has some flaws. Under the DJA, scrutiny of the proposal prior to the Bill being submitted is conducted 'behind closed doors' and there is no requirement to state how the conclusions were reached. This separates the primary rights-consideration of rights from public, and even legislative, discourse.⁸⁷ It is limiting the discourse in a different way from the narrow range of perspectives heard in the judicial forum – there may or may not be a wide range of perspectives considered but the extent to which different perspectives are considered is simply not known except to those involved in the process.⁸⁸ This can hardly be said to overcome or even mitigate the weaknesses of the legal protections mentioned above.

In addition, the political pressure is general in nature, the Minister of Justice has sole responsibility for certification, and in most cases, his or her certification of compatibility is assumed through silence. The reason is that the DJA only requires a statement where the Minister of Justice is unable to commit to the rights-compatibility

⁸⁶ *Department of Justice Act*, RSC 1985, c.J-2 (as amended 12 December 2006)

⁸⁷ For discussion, see the work of Janet Hiebert on this matter. See, eg, Janet Hiebert, 'A Hybrid-Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia's Model of Parliamentary Scrutiny' (1998) 26(1) *Federal Law Review* 1; Janet Hiebert, 'Resisting Judicial Dominance in Interpreting Rights' (2004) 82 *Texas Law Review* 1963; Janet Hiebert, 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review' (2005) 35(2) *British Journal of Political Science* 235.

⁸⁸ Patrick J. Monahan and Marie Finklestein, 'Charter of Rights and Public Policy in Canada' (1992) 30 *Osgoode Hall Law Journal* 501, 510.

of a Bill. While this may allow development of a greater body of knowledge about rights within the Department of Justice itself,⁸⁹ thus increasing the rights-expertise of those involved in the drafting process, the centralisation of certification serves to undermine some of the benefits ordinarily associated with political protections. This is because there is a lesser degree of political pressure on individual members of the executive. One of the key ways in which pressure is generated via the interaction of legal and political mechanisms is that those responsible for rights-infringing legislation are answerable to the electorate. Where an individual makes a statement that is later found to be incorrect (for example via a judicial declaration of incompatibility or where the legislation is found to be invalid) or where fundamental rights concerns are raised after a breach of rights appears to have occurred, there is, in the first instance, a degree of individual accountability, either to parliament or the public, imposed on the individual proposing the law and making the statement. In the second instance, that accountability is attributed to the executive as a whole.

By contrast, where the responsibility for the proposal and the ‘statement of compatibility’ is divided between the original Minister and a centralised process of certification, such as by the Minister of Justice (as in Canada), it is unclear on whom political responsibility for the later-identified incompatibility would lie. The protection would seem to rely on a coherent, party-based executive to which collective accountability could be attributed. While this would, in principle, work in (for example) Australia and the UK, which have traditionally had the executive formed from a majority party in the legislature, the formation of coalition governments in both suggests that this form of mechanism relies on an increasingly unreliable status quo rather than prompting political pressure at large.

Finally, the executive focus on a ‘compatibility’ certification fails to overcome the compatibility/incompatibility dichotomy associated with legal protections. This focus on compatibility rather than protection may in fact be emphasised by an executive approach to certification which decides if ‘the Bill would stand up to a [bill of rights]-based challenge’ in the courts as the standard for identifying compatibility.⁹⁰

One feature of the UK’s HRA political protection which may increase the likelihood of wider consideration than merely ‘compatibility’ is the need to make a compatibility statement to Parliament with respect to *every* Bill. This may be either in the form of a s 19(1)(a) statement of compatibility, or a s 19(1)(b) statement that the Minister is unable to make such a statement of compatibility. This requirement ensures that the issue of fundamental rights is specifically raised within the legislative branch with respect to *every* Bill. This regular acknowledgement of rights issues increases the likelihood that the legislature will challenge – or at least question – the executive’s claim to rights-compatibility. This has the potential to broaden the scope of human rights issues raised within the legislature and to encourage greater legislative consideration of the ways in which the Bill may interact with rights (perhaps even beyond those considered by the executive). While the language of compatibility

⁸⁹

Ibid.

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Michael Mandel, *The Charter of Rights and the legalization of politics in Canada* (Wall & Thompson, 1989) 61-63. This is also the standard used in generating the UK statements of compatibility. See, eg, Home Office, *The Human Rights Act 1998 Guidance for Departments* (February 2000) <<http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/hract/guidance.htm>>.

remains, the availability of a challenge to that claim may lead to a more comprehensive consideration of rights-implications.

In addition, where a 's 19(1)(b) statement' is used, there is the potential that political pressure may be (and is intended to be) generated against the passage of rights-questionable legislation. While this still retains the dichotomy of 'compatible/incompatible', rather than relying on an *ex post facto* determination of incompatibility by a court, s 19(1)(b) statements acknowledge the possibility of incompatibility at this early stage, reflecting the diversity of positions and the controversial nature of discussions about rights. Rather than facing political consequences for failing to adequately identify the incompatibility, the Minister may face pressure – whether criticism or question – for his or her intention to pass legislation which potentially (or in some cases, deliberately) encroaches on individual rights.

Thus the requirement that every Bill has a relevant s 19 statement – whether positive (s 19(1)(a)) or wavering (s 19(1)(b)) – under the HRA encourages Ministers to formulate Bills which have the lowest political 'cost'. The intention is that Ministers will be more likely to formulate Bills which are compatible with Convention rights and, within the scope of the 'compatibility' standard used by the HRA, to extend the discourse about the meaning of rights and their appropriate limitations. Additionally, given that rights-incompatible legislation is permissible under this legislative bill of rights, Ministers are discouraged from taking advantage of that and are expected to propose such legislation only where a strong argument can be made that the encroachment is legitimate. The presentation of s 19 statements as part of the legislative process is designed to ensure that the claim as to compatibility is more openly made, with the intention that it may be thoroughly questioned in Parliament. This, in turn, increases the potential for rights-implications to be raised in the context of questioning how the determination of compatibility has been made.

An interesting development in political protection can be seen in the executive certification model adopted by the European Union (EU). Although there are challenges unique to the EU (especially the lack of electoral pressure on the unelected Commission as the 'executive'), the Commission procedures have sought to overcome other criticisms usually associated with the executive model. For example, the Commission rights-certification procedures include a requirement that where there are specific rights which may be affected by the proposed legislation, the certification (termed the 'recital') must be extended to specifically acknowledge that those rights have been given consideration. Further, the explanatory memorandum attached to the proposal is required to provide, as a matter of procedure, the considerations taken into account when drafting the recital. The intention of the publications is specifically to improve awareness and to ensure that the Commission's conclusions are open to both public and legislative scrutiny.⁹¹ Despite recommendations during the consultation process,⁹² the HRPSA in Australia did not explicitly include the requirement of reasons or justification for the 'assessment' of rights-compatibility in the executive statement. However, in the Explanatory Memorandum accompanying the Bill, the

⁹¹ European Commission, *Application of the Charter of Fundamental Rights of the European Union* (Communication) SEC(2001) 380/3; European Union Committee (UK), *Human Rights Proofing EU Legislation*, House of Lords Paper No 67, Session 2005-6 (2005).

⁹² See Debeljak, above n 68.

then Attorney General Robert McClelland said that the statements of compatibility are 'intended to be succinct assessments aimed at informing Parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights.'⁹³ The extent of this analysis is yet to be seen.

What is apparent is that the executive scrutiny model alone is limited in its ability to mitigate the weaknesses of legal protections and, in some instances, risks emphasising them by relying on the same standards of 'compatible/incompatible' as the courts. At best, an executive statement of compatibility is an indirect way of shifting considerations from 'compatibility' to the 'rights-quality' of legislation. There is no guarantee that it will do so. The development of broader scrutiny within political protections is thus important if the weaknesses of legal protections are to be addressed.

B *Legislative Scrutiny Processes*

Increasingly, political protections have included legislative scrutiny procedures which have particular benefits in terms of addressing the weaknesses of legal protections. Viewed autonomously, political scrutiny processes within the legislature are relatively weak protections. However, legislative scrutiny processes ought to be seen as supplementing the executive certification model because, when viewed in this manner, the two forms of political protection interact to offer a more comprehensive political mechanism which operates to mitigate some of the weaknesses associated with the legal protections.

Whereas an executive statement, in particular when viewed in conjunction with the possibility of a judicial safeguard, acts as a deterrent for the executive to propose legislation which is incompatible with rights, scrutiny processes may raise concerns about the accuracy of that statement and bring to attention any rights-concerns. It is only with the support of the legislature as a whole (or at least a majority within the legislature) that the scrutiny committee's findings can have a direct impact on whether rights-infringing legislation is passed. The likelihood of that occurring depends on the extent of the control that the executive exercises over the legislature. However, legislative scrutiny committees play a very important role in the overall mitigation of the weaknesses of legal protections. This is because, if the committee is given a sufficient mandate (via its authorising instrument), it is able to facilitate a degree of both direct and indirect (via representatives) democratic participation and the consideration of a range of identifiable rights-issues (as opposed only to rights-compatibility).

In Australia, legislative scrutiny of Bills as to their compatibility with rights has been the primary form of political protection, in the absence of a specific rights instrument.⁹⁴ The HRPSA retains this prominent role for legislative scrutiny at ss 4-7.

⁹³ Explanatory Memoranda, *Human Rights (Parliamentary Scrutiny) Bill 2010*, 4.

⁹⁴ See, eg, George Winterton, 'An Australian Rights Council' in Tom Campbell, Jeffrey Denys Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 305; Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes' (2005) 29(3) *Melbourne University Law Review* 665; Cheryl Saunders, 'Protecting Rights in Common Law Constitutional Systems;

The HRPSA creates an Australian Joint Committee on Human Rights (Australian JCHR) which includes members of both Houses of Parliament (not only the Senate, as was the case for pre-HRPSA scrutiny). Submissions to and recommendations by the Senate Law and Constitutional Affairs Committee during the scrutiny process of the HRPSA point out that, particularly in light of the absence of comprehensive legal protections, the need for robust political scrutiny is substantially increased to better facilitate review in line with the expected standards.⁹⁵ In the absence of a complementary legal protection, it is unclear what standard of 'compatibility' or even 'protection' a scrutiny committee will or can use. There is a risk that when scrutiny committees become the dominant form of protection, the lack of clear guidance as to the expected standards will lead to mere 'consideration' of rights, rather than protection.

In Australia, the creation of the Australian JCHR has been a deliberate move as part of the 2011 reforms. Whereas previously the Senate Standing Committee on the Scrutiny of Bills (SSCSB) had responsibility for rights-based scrutiny, the Australian JCHR is specifically tasked with scrutinising bills as to compatibility with rights. Similarly, specialised rights-based committees have been established in the UK and Canada. This specialisation has certain benefits including allowing for greater focus on the rights-issues within the limited time frames in which the scrutiny process is undertaken.

Another benefit of scrutiny committees is their ability to examine Bills beyond simply the requirement of 'compatibility' and consequently to raise legislative awareness about the rights-implications of Bills.⁹⁶ This increases the likelihood that the rights-quality of legislation rather than only its rights-compatibility will be considered and potentially improved. Although the 'compatibility' standard derived from the legal protection remains a guiding factor, scrutiny committees are not limited to that standard.

One feature of political protections that focus on the legislature is that they are able to facilitate a greater scope of participation via calls for submissions from interested or expert parties.⁹⁷ While there are limitations to this associated with cost and efficiency, access to such committees, even in a limited manner, opens the door to greater access and participation beyond what legal protections can facilitate. The EU Commission has incorporated this into its executive processes by allowing access at the consultation stage. This is specifically designed to better facilitate citizen access to decisions about rights and to ensure that the impact-assessment of legislative proposals takes into account a wide range of potential rights-implications.

a Framework for a Comparative Study' (2002) 33(3/4) *Victoria University of Wellington Law Review* 507.

⁹⁵ See, eg, Santow, above n 57.

⁹⁶ The role of the JCHR has been discussed extensively. See, eg, Anthony Lester QC, 'The Magnetism of the Human Rights Act 1998' (2002) 33(3/4) *Victoria University of Wellington Law Review* 477; Anthony Lester, 'Parliamentary Scrutiny of Legislation under the Human Rights Act 1998' (2002) 33(1) *Victoria University of Wellington Law Review* 1; Janet L. Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' (2006) 4(1) *International Journal of Constitutional Law* 1; David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25(2) *Statute Law Review* 91.

⁹⁷ Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes' (2005) 29(3) *Melbourne University Law Review* 665.

The necessity of supplementing executive certification with committee scrutiny can be seen in the experiences of Canada and the increasing role of the SSCHR. In Canada, the lack of openness and answerability of the executive under the DJA mechanism⁹⁸ keeps the mechanism as a 'secondary' or 'subsidiary' protection rather than genuinely operating to complement and overcome the weaknesses of weak-form judicial review (constitutional) in Canada. Consequently, in order to better achieve those features of political protections which facilitate a 'culture of fundamental rights' by promoting democratic participation and expanding consideration beyond that of compatibility – and indeed in Canada's SSCHR, extending to consideration of rights not contained within the *Canadian Charter* – it became necessary to develop additional, committee protections distinct from the formalised procedures in the DJA.

V CONCLUSIONS

While this has been a brief introduction to the issues relating to the interaction of legal and political protections of rights, it should already be clear why political protections warrant a more robust consideration within the context of the bill of rights debate. Whatever the legal protection adopted by a jurisdiction, the form and nature of the legal protection will contain inherent weaknesses. Whether this is an ostensibly 'weaker' legal protection due to the lack of a bill of rights or a 'strong' barrier against legislative encroachment of rights in strong-form judicial review, the legal protection will have particular features which may be seen as 'weaknesses'. Political protections have the *potential* to mitigate the effects of these weaknesses, when designed appropriately and formulated as a fundamental part of rights-protection, as opposed to an *ad hoc* mechanism designed to facilitate better compliance with (potential) judicial decisions about rights. If the aim of both political and legal protections, beyond simply 'protecting rights against legislative encroachment', is considered to be protection within a framework of democratic discourse – to create a 'culture' of fundamental rights' – it is suggested that the requirements for weakness-mitigating political protection remain similar even though the form of legal protection may differ. The political protection must:

- (i) require that rights-certification of *every* Bill is undertaken (for example, via an executive statement) and that certification should include or be accompanied by an explanation as to how the rights-compatibility was determined (*or* highlight any specific rights-incompatibility/rights-based concerns that prevent certification);
- (ii) ensure that the legislature and, wherever possible, the public, can participate in the scrutiny of legislation so as to ensure that the widest possible range of perspectives is considered prior to the passage of legislation;

⁹⁸ See, eg, Janet Hiebert, 'Resisting Judicial Dominance in Interpreting Rights' (2004) 82 *Texas Law Review* 1963; Janet Hiebert, 'A Hybrid-Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia's Model of Parliamentary Scrutiny' (1998) 26(1) *Federal Law Review* 1.

- (iii) encourage scrutiny of legislation beyond 'compatibility' with rights and bring to light the rights-implications of legislation; and
- (iv) be capable of generating political pressure to discourage those proposing and passing legislation from infringing on rights.

These characteristics of political protections can never entirely overcome the weaknesses of legal protections – political protections ultimately rely on sufficient democratic pressure within the jurisdiction to generate criticism of those politicians who breach rights. Further, since some objections to legal protections stem from deep-seated philosophical and political beliefs about the appropriate roles of the judiciary and the legislature, these weaknesses will never be overcome in the eyes of some observers (short of altogether removing the possibility of rights-based judicial review). On the other hand, by facilitating engagement with rights at the earliest stages, and continuing throughout the law-making process, the dominance of the judiciary as the 'protector of rights' can be reduced, while its role as a 'guardian of rights' – a last resort for when the weakness of the political protections become apparent and rights-infringing legislation unintentionally makes it through the process – is maintained.

The adoption (or rejection) of a bill of rights – whatever its legal status – is a significant step for any jurisdiction. However, regardless of the form of legal protection present in a legal system, political protections ought to play a substantial role. Where legal protections are of ostensibly the 'strong' kind, the weaknesses of the legal mechanism are similarly emphasised. Therefore robust political protections are necessary to fulfil a role relating to expanding the breadth of rights-discourse, improving the quality of legislation and minimising the potential for political issues to be shifted from the political to the legal arena. While political protections alone cannot act as a bulwark against infringements, they push rights into the forefront of political debate where legal protections are 'weak', 'unclear' or otherwise lacking in strength, thereby discouraging (or at least holding law-makers answerable for) legislative encroachments that may otherwise have slipped through the cracks.

CASE NOTE

GODDARD ELLIOTT V FRITSCH [2012] VSC 87

LISE BARRY*

This year in the Victorian Supreme Court, Justice Kevin Bell handed down the decision in *Goddard Elliott v Fritsch*.¹ This is a case that establishes the existence of ‘capacity negligence’ – a newly defined category of professional negligence.² The case serves as a warning to lawyers to make careful, ongoing assessments of their clients’ decision-making capacity.

Mr Fritsch was sued for outstanding legal fees following a Family Court settlement that Mr Fritsch claimed he would never have agreed to had he been in good health at the time. He countersued, arguing that his lawyers and an accountant had been negligent in their preparation of his case, and negligent in accepting and acting on instructions he lacked the capacity to give. He settled with barristers Mr Ackman and Mr Rosen and with the accountant Mr Ferguson, but not with his solicitors, Goddard Elliott.

Paul Fritsch was a Vietnam veteran embroiled in a complicated dispute over the property settlement resulting from his divorce. The family law proceedings were characterised by repeated requests for discovery from his wife who was suspicious that her husband was hiding assets behind a series of trusts and family business arrangements. Mr Goddard, a family law specialist, described the case as ‘one of the nastiest cases that [he] ever had’.³ The case was in preparation and pre-trial mediation over a period of two years, during which Mr Fritsch’s mental health was poor and increasingly in decline the closer the matter came to hearing.

Mr Fritsch’s solicitor, Andrew Goddard, was keen for the matter to settle. He was particularly concerned about a letter Mr Fritsch had received from his accountant that Fritsch had failed to disclose on discovery but which was subsequently found by the

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¹ [2012] VSC 87.

² See also Paul Duggan, *Is your enemy’s enemy your friend? Proportionate liability cases and the Rule in Jones v Dunkel* (2012) <<http://pauldugganbarrister.com/2012/04/25/is-your-enemys-enemy-your-friend-proportionate-liability-cases-and-the-rule-in-jones-v-dunkel-3/>>; Paul Duggan, *Leading evidence from beyond the grave* (2012) at <http://pauldugganbarrister.com/2012/04/09/leading-evidence-from-beyond-the-grave/> at 15 June 2012.

³ *Goddard Elliott v Fritsch* [2012] VSC 87 [132] (Bell J).

wife.⁴ However, the matter did not settle at mediation in December 2003 and, despite two years of preparation, the matter was still not ready to go to trial on the date it was listed for hearing in September 2004. Last minute forensic accounting advice was received and negotiations finally led to a settlement on the first day of the adjourned hearing. The settlement was described as being on terms that were ‘overly generous to the wife’ with the calculated loss of opportunity to Mr Fritsch being \$900,000.⁵ Mr Fritsch succeeded in establishing preparation negligence and capacity negligence. The loss was attributed to the capacity negligence on the basis that the lawyers ought to have known that Mr Fritsch lacked the capacity to give instructions to settle.

It was not disputed that Andrew Goddard knew that Paul Fritsch suffered from mental health problems. Mr Fritsch’s ex-wife had mentioned his depression in her first affidavit in 2002 and Goddard Elliott had requested an expert’s report on his condition as part of the family law proceedings. This request was supported by a letter from Mr Goddard outlining Paul’s difficulty in giving instructions, especially under pressure. Doctor Sturrock’s report of June 2003 diagnosed a ‘major depressive illness’ and was updated in 2004 at the request of Mr Goddard.

By May 2004, Paul Fritsch was being treated by a psychiatrist, Dr Velakoulis, who diagnosed him in July as suffering from ‘a major depressive illness with chronic post-traumatic stress disorder’. Whilst the family law dispute was conducted over a two year period, it was the days and weeks leading up to the initial trial date of 13 September 2004, and settlement on 16 September, that were particularly important in relation to Mr Fritsch’s mental health. Both Paul’s solicitor, Mr Goddard, and one of the barristers, Mr Ackman, had serious concerns about Fritsch’s mental health problems, which included thoughts of suicide. Mr Rosen, the barrister, was alone in stating that he saw nothing in Fritsch’s behaviour to give him cause for concern; however his evidence on the matter was rejected by Justice Bell. In a report provided to Mr Goddard at Mr Ackman’s insistence just a few days prior to settlement, Dr Velakoulis stated that Paul Fritsch’s ‘current depressive illness and his Post-Traumatic Stress Disorder seemed to be impacting ... on his ability to attend to information, to concentrate, to ‘digest’ concepts and come to conclusions efficiently. As such, this needs to be considered during his court appearances.’⁶

Dr Velakoulis’ opinion of Mr Fritsch’s decision-making capacity was not conclusive and Mr Ackman was sufficiently concerned about Mr Fritsch that he sought an ethics advice from the Victorian Bar on the issue. Significantly, neither lawyer appeared to characterise Mr Fritsch as lacking decision making capacity at the time. Mr Ackman’s letter to the Ethics Committee stated Paul Fritsch ‘had significant psychiatric problems ... but apparently he is able to provide instructions.’⁷ However, in an apparent contradiction of this, he went on to state that even if Mr Fritsch accepted advice of counsel ‘it is with extreme reluctance and without any apparent cognitive understanding of why he is so agreeing.’⁸ In a later clarification, Mr Ackman stated:

⁴ Ibid [172] (Bell J).

⁵ Ibid [1103] (Bell J).

⁶ Ibid [722] (Bell J).

⁷ Ibid [336] (Bell J).

⁸ Ibid [337] (Bell J).

Whereas the client may be literally capable of giving instructions according to his psychiatrist, Counsel is in no way satisfied that he comprehends or appreciates the decisions he must make ... [W]hen he gives instructions it is impossible to have confidence that he understands the import and/or effect of these instructions.⁹

The advice received read in part: '[T]he Committee notes the information that the medical reports indicate that the client is capable of giving instructions and ... considers that this request does not raise an ethical issue.'¹⁰ Mr Ackman understood their advice to be that Counsel would be protected so long as they received written instructions from Paul Fritsch 'that he understood and comprehended the advice given.'¹¹ Mr Ackman concluded in a subsequent file note that 'the husband had understood the nature of the settlement and for a number of personal reasons had agreed to the settlement despite the fact that the settlement was unable to be recommended to him by Counsel.'¹²

Justice Bell did not comment directly on the advice of the Bar Association but his clear decision was that where lawyers are in any doubt about the decision making capacity of their client, they must bring the matter to the Court for a ruling. In this situation it was not sufficient for the lawyers to rely on the advice of the treating psychiatrist (which was somewhat equivocal in this case), nor on the advice of the Bar Committee, or their own observations given that they seemed to disagree on this point. Justice Bell indicated that the appropriate course in a situation where there is doubt as to the client's capacity is to bring the matter to the attention of the Court and seek a ruling.¹³ In this instance, this would most likely have led to an adjournment to seek a capacity assessment and expert evidence on the matter. In a strongly worded judgment, Justice Bell opined that the decision as to capacity is 'not with the lawyers, not with the doctors, not with the client or party but with the court.'¹⁴

As noted by Justice Bell 'there appears to be no reported case in which a court has held it be a breach of a lawyer's duty of care to take and act on instructions from a client who the lawyer knew or should have known lacked the mental capacity to give instructions.'¹⁵ Justice Bell found that lawyers do owe a duty to their clients to assess their capacity to give instructions, characterising this as 'an aspect of the general duty of care which a lawyer owes to their client, for it is always to be expected of a lawyer exercising ordinary skill and competence that they are reasonably satisfied of the client's mental capacity to instruct.'¹⁶

Whilst Justice Bell found that this duty of care was actionable in negligence, he was a little more circumspect in relation to whether this duty is also of a fiduciary nature. Justice Bell opined:

[I]t might be thought the fiduciary obligations of a lawyer extend to not coercing a client to settle and to not knowingly or recklessly taking settlement instructions from a client lacking mental capacity. That view would dovetail with the obligations on the

⁹ Ibid [342] (Bell J).

¹⁰ Ibid [343] (Bell J).

¹¹ Ibid [373] (Bell J).

¹² Ibid [376] (Bell J).

¹³ *Till v Nominal Defendant* [2010] QSC 121.

¹⁴ *Goddard Elliott v Fritsch* [2012] VSC 87 [562] (Bell J).

¹⁵ Ibid [418] (Bell J).

¹⁶ Ibid (Bell J).

part of a lawyer to bring justified concerns about a client's mental capacity to the attention of the court and not to continue to act for a client lacking capacity without a next friend being appointed.¹⁷

The application of the advocates' immunity however, did not turn on whether it was characterised as a fiduciary duty or an aspect of the duty of care, but on the substance of the wrong – the capacity negligence.

Justice Bell applied the issue-specific approach to capacity decisions approved in *Masterman-Lister*,¹⁸ and adopted in Australian cases,¹⁹ whereby 'the focus should be on the capacity of the client to understand they have a legal problem, to seek legal assistance about the problem, to give clear instructions to their lawyers and to understand and act on the advice which they are given.'

As officers of the court, it is the instructing solicitors who carry 'primary responsibility for satisfying themselves as to their client's ability to instruct them and to understand their advice ...'²⁰ The court has inherent jurisdiction to enquire into the capacity of those appearing before it. In the Family Court of Australia where the litigation guardian is known as a case guardian, the rule of incapacity and powers of appointment are to be found in rule 6.08(1) of the *Family Law Rules 2004* (Cth).

The required standard of capacity was set out by the High Court in *Gibbons v Wright*.²¹

The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation.

Justice Bell observed that the decision to deprive someone of the right to settle 'represents an interference with their civil rights and their personal autonomy in the conduct of litigation.'²² However, he went on to state that whilst '[i]t is legitimate for a lawyer to apply considerable pressure on a client to settle a proceeding when it is in the client's best interests to do so',²³ his honour continued: '[i]t is likewise an invasion of that right and that autonomy to fail to recognise when a party is mentally ill and therefore lacks the capacity to make proper litigious decisions on their own behalf.'²⁴

Justice Bell referred to the 'honourable candour' with which Andrew Goddard gave evidence, but noted that 'he was more concerned with Paul's distress than he was with his capacity', being extremely concerned as his lawyer and 'friend' about Mr Fritsch's suicide risk. However, Andrew Goddard chose not to give evidence on the question of how he accounted for his client's mental condition in the running of the case. On that basis, Justice Bell found he could not accept Goddard's evidence that Paul Fritsch had

¹⁷ Ibid [542] (Bell J).

¹⁸ [2003] 1 WLR 1511.

¹⁹ *City of Swan* [2010] WASC 204 [72] (Murphy JA); *Owners of Strata Plan No 23007* (2006) 153 FCR 398, 412 [58] (Edmonds J).

²⁰ *Borchert v Terry* [2009] WASC322 (6 November 2009) [69] (Martin J).

²¹ (1954) 91 CLR 423.

²² *Goddard Elliott v Fritsch* [2012] VSC 87 [560] (Bell J).

²³ Ibid [561] (Bell J).

²⁴ Ibid [560] (Bell J).

capacity to provide settlement instructions on 16 September 2004. This aspect of the judgment confirms that lawyers with concerns about their client's capacity should make detailed notes on their observations and particulars of client consultations at the time.²⁵

Applying the finality principle of the High Court in *Giannarelli*²⁶ and *D'Orta-Ekenaike*,²⁷ Justice Bell rather reluctantly found that the actions within the final settlement were covered by advocates' immunity. It was submitted for Paul Fritsch that the case fell outside of the immunity because the matter was settled outside of court. However, Justice Bell concluded that the orders of the court in this instance involved a consideration of the merits by the trial judge. He ruled that where 'there is personal participation by the judge in the merits of the orders ... they represent a final determination of the proceeding for the purposes of the application of the immunity.'²⁸

Justice Bell examined two possible approaches in relation to the immunity being applied to capacity negligence. On one view, 'the negligence might be seen as intimately connected with the relationship between lawyer and client rather than as being intimately connected with the lawyer's subsequent conduct of the case in court.'²⁹ In this case, the immunity would not apply. However Justice Bell's approach was to characterise the 'intimately connected' test enunciated in *D'Orta-Ekenaike* as a very broad one.³⁰ Citing *Symonds v Vass*³¹ with approval, he held that 'work done out of court which leads to a decision affecting the conduct of the case in court is work that is intimately connected with the conduct of a case in court' and is therefore covered by the immunity. So while taking instructions and acting on them to the client's detriment might be characterised as an aspect of the client-lawyer relationship, Justice Bell was also forced to conclude that it was *also* work done that was 'intimately connected with' the conduct of the case in court. Justice Bell provides a glimmer of hope for those hoping that the Australian High Court might one day abolish the immunity stating he found it:

[h]ard to see what damage would be done to public confidence in the legal system by allowing a person lacking mental capacity to sue their lawyer for damages in respect of substantial losses caused by the lawyer's negligence in taking instructions from the person to settle a case, even given that court-approved orders were made.³²

However, he felt forced to conclude, albeit reluctantly, that the capacity negligence in this instance was covered by the immunity, an aspect he found 'deeply troubling.'³³ The unhappy result was that despite the finding that the firm was negligent, not only was Paul Fritsch unable to receive any remedy for his loss, but he was also liable for

²⁵ See, eg, Law Society of New South Wales, *When a Client's Capacity is in Doubt* (2009) <<http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/023880.pdf>>.

²⁶ *Giannarelli v Wraith* (1988) 165 CLR 543.

²⁷ *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR1.

²⁸ *Goddard Elliott v Fritsch* [2012] VSC 87 [813] (Bell J).

²⁹ *Ibid* [830] (Bell J).

³⁰ *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR1.

³¹ [2009] NSWCA 139 (Ipp JA).

³² *Goddard Elliott v Fritsch* [2012] VSC 87 [822] (Bell J).

³³ *Ibid* [835] (Bell J).

outstanding legal fees to the tune of \$68,711.61. Unsurprisingly, this decision was followed by a raft of criticism in the media.³⁴

Lawyers who wish to avoid claims of capacity negligence will need to pay close attention to their role in making ongoing assessments of their clients' decision-making capacity. It is easy for lawyers facing the daily grind of their work to overlook how stressful an impending court case can be for their clients. As this case demonstrates, a client may possess decision-making capacity at the time they provide their initial instructions, yet lack capacity when it comes time to settle or give evidence. Professional assessment of decision-making capacity will not provide a substitute for a lawyer's decision on the issue and any serious doubts should result in an application to the Court for a capacity ruling before lawyers proceed to act on instructions.

³⁴ ABC Radio National, 'Goddard Elliott v Paul Fritsch', *The Law Report*, 27 March 2012 (Damien Carrick and Linda Haller) <<http://www.abc.net.au/radionational/programs/lawreport/goddard-elliott-v-paul-fritsch/3914880#transcript>>; 3AW 693 News Talk, 'Lawyers a Uniquely Protected Species', 15 March 2012 (Derryn Hinch) <<http://www.3aw.com.au/blogs/blog-with-derryn-hinch/time-to-scrap-advocates-immunity/20120315-1v7n2.html>>; Bar Talk, 'Disputes Quelled', *Justinian* (online), 3 May 2012 <<http://www.justinian.com.au/home/disputes-quelled.html>>; Norrie Ross, 'Ancient Law Lets Negligent Firm Dodge \$975K Payment', *Herald Sun* (Melbourne), 14 March 2012; Leonie Wood, 'Judge Questions Barrister's Immunity', *The Age* (Melbourne), 15 March 2012.

CASE NOTE

PUBLIC SERVICE ASSOCIATION OF SOUTH AUSTRALIA INC v INDUSTRIAL RELATIONS COMMISSION OF SOUTH AUSTRALIA [2012] HCA 25

NICHOLAS LENNINGS*

The *Second PSA Case*¹ is now one of a number of decisions limiting the capacity of State legislatures to encroach upon the supervisory jurisdiction of the State Supreme Courts. The decision draws heavily on the seminal case of *Kirk v Industrial Court (NSW)*,² and continues the line of authority that treats attempts by the State legislature to limit review of jurisdictional error with substantial caution, if not outright acrimony.³

The *Second PSA Case* concerns two central questions: first, to what extent, if any, can jurisdictional error be precluded from review; and second, whether a superior court can issue mandamus to correct the decision of the subordinate court or tribunal.

I HISTORY OF THE PROCEEDINGS

A *The Commission and the Full Commission*

The Public Service Association of South Australia (PSA) notified the Industrial Relations Commission of South Australia (Commission) of disputes between the PSA and the Chief Executive of the Department of Premier and Cabinet of South Australia (Chief Executive). In sum, the ‘dispute’ arose from an announcement by the Treasurer in the budget speech that the government would be seeking to reduce the number of public service employees and to reduce recreation leave loading and long service leave entitlements.⁴ The Chief Executive denied that the announcements gave rise to a ‘dispute’ as defined under the *Fair Work Act 1994* (SA),⁵ on the basis that the Treasurer, as a Minister for the Crown, was not an employer – that function being

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The author wishes to express his gratitude to Dr Margaret RLL Kelly, of the Macquarie Law School, for her comments on an earlier draft. Any errors remain those of the author.

¹ [2012] HCA 25.

² (2010) 239 CLR 531.

³ See John Basten, ‘The supervisory jurisdiction of the Supreme Courts’ (2011) 85 *Australian Law Journal* 273, 284.

⁴ *The Public Sector Association of SA Incorporated v Chief Executive Department of the Premier and Cabinet* [2010] SAIRComm 11.

⁵ A reference to a section of an Act hereinafter is a reference to a section of the *Fair Work Act 1994* (SA).

performed by the Chief Executive, who had not made any such announcement.⁶ The Commission, at first instance, in accepting that argument, denied that it had jurisdiction to hear the matter. This was upheld on appeal by the Full Commission.⁷

B *The Full Court of the South Australian Supreme Court*

The PSA appealed the decision of the Full Commission to the Full Court of the Supreme Court of South Australia (SASC). An appeal to that court is, per s 206(1), subject to a privative clause that provides that ‘a determination of the Commission is final and may only be challenged, appealed against or reviewed as provided by this Act’. Section 206(2) limits the scope of the privative clause insofar as an appeal to the SASC lies where there has been ‘an excess or want of jurisdiction’. The PSA submitted that the Full Commission had erred in finding that there was no dispute before it.⁸ In essence, the SASC was moved to rule against the decision in *Public Service Association of South Australia v Federated Clerks’ Union of Australia, South Australian Branch*,⁹ which considered a privative provision in similar terms to s 206, namely, s 95 of the *Industrial Conciliation and Arbitration Act 1972* (SA). The PSA sought orders in the nature of mandamus, thereby correcting the decision of the Commission below pursuant to r 199(2)(b) of the *Supreme Court Civil Rules 2006* (SA) (*Rules*) to hear the appeal. The SASC declined to do so.¹⁰

In applying the *First PSA Case*, Doyle CJ noted that in terms of the phrase ‘excess or want of jurisdiction’, a distinction is drawn between a wrongful failure to exercise jurisdiction (after hearing and determining the appeal) on the one hand, and failing to consider the application prior to refusing leave and dismissing the appeal on the other.¹¹ The former, according to the *First PSA Case*, may be a jurisdictional error, but it is not a decision made in excess of jurisdiction. The latter is tantamount to acting without jurisdiction and therefore in excess of it.¹² The SASC found that the present case fits within the first, namely, a wrong conclusion as to jurisdiction may be an error on the basis that the tribunal wrongfully failed to exercise jurisdiction, but it was not an act that was in excess of jurisdiction.¹³ The SASC dismissed the appeal. It found that, as the Commission was not in excess of its jurisdiction, neither did the SASC have jurisdiction to determine the appeal per s 206.¹⁴ The appellant PSA appealed to the High Court. The Commission entered a submitting appearance. The second respondent, South Australia, was the primary respondent to the appeal. The Commonwealth, Queensland, Tasmania, Victoria and Western Australia intervened. The High Court found unanimously for the appellant PSA.

⁶ *The Public Sector Association of SA Incorporated v Chief Executive Department of the Premier and Cabinet* [2010] SAIRComm 11, [23]-[26].

⁷ *Ibid* [28], [31].

⁸ *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223, [5]-[6] (Doyle CJ).

⁹ (1991) 173 CLR 132.

¹⁰ *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223, [6] (Doyle CJ).

¹¹ (1991) 173 CLR 132, 142-144.

¹² *Ibid* 144-145.

¹³ *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223, [16]-[17].

¹⁴ *Ibid* [17]-[18].

II *KIRK* AND PRIVATIVE CLAUSES

It is necessary at this point to canvass briefly the decision in *Kirk* regarding the effect of privative clauses, as the position taken towards such provisions by the High Court has evolved. In general terms, a privative clause is designed to limit the supervisory jurisdiction, exercised by way of judicial review, of a superior court of record, namely the Supreme Court of any Australian State. The very purpose of such a clause is to deny reviewability by an appellate court, and, to some extent, they have been successful. The leading interpretative decision on privative clauses by the High Court was *R v Hickman; Ex parte Fox* where Dixon J noted that such clauses would be valid where the decision of the relevant body is ‘a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body’.¹⁵ Clearly, not all errors going to jurisdiction would fit within those criteria. Doubt was cast on the *Hickman* principle over time,¹⁶ and finally undermined in *Plaintiff S157/2002 v Commonwealth*, whereby the High Court held that administrative decisions, purportedly protected by way of privative clauses, would nevertheless be vitiable if the decision was affected by jurisdictional error, because it would be ‘in law, no decision at all’.¹⁷

Until recently, the protection afforded by the *Hickman* principle continued to be applied in the State Courts.¹⁸ *Kirk* finally made an end to that line of authority.¹⁹ Prosecutions made under occupational health and safety legislation, manifest in different forms in all States and Territories (and the Commonwealth),²⁰ very rarely reach the High Court. *Kirk* was one of those rare decisions. In that case, by way of brief overview, Mr Kirk and the company of which he was a director were prosecuted for the death at work of a manager who ran a farm owned by the company. Mr Kirk was convicted under ss 15 and 16 of the *Occupational Health and Safety Act 1983* (NSW) (*OHS Act*). Mr Kirk appealed his conviction to the High Court. He complained that his conviction was entered on the basis of a jurisdictional error as the offences had not been sufficiently particularised, thereby inhibiting his ability to meet the defence offered under s 53 of the *OHS Act*. He also complained that his call to give evidence in the proceedings as a prosecution witness was in breach of the rules of evidence that were to be applied by the Commission sitting in Court Session. That proposition was, prima facie, stymied by the presence of an ‘all inclusive’ privative clause in s 179 of the *Industrial Relations Act 1996* (NSW) (*IR Act*) in the following terms: ‘a decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal’. The respondent prosecutor relied on that provision to deny jurisdiction to the NSW

¹⁵ *R v Hickman; Ex parte Fox* (1945) 70 CLR 598, 615 (*‘Hickman’*). This later became known as the “*Hickman* principle”.

¹⁶ See Joshua Knackstedt, ‘Judicial review and *Kirk v Industrial Court* (NSW)’ (2011) 18 *Australian Journal of Administrative Law* 203, 208 ff.

¹⁷ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 547, [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

¹⁸ See, eg, *Mitchforce v Industrial Relations Commission* (2003) 57 NSWLR 212; *Commissioner of Police for New South Wales v Industrial Relations Commission of New South Wales & Raymond Sewell* (2009) 185 IR 458.

¹⁹ See also *Fish v Solution 6 Holdings Limited* (2006) 225 CLR 180, [33] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).

²⁰ It is noted that the occupational health and safety legislative space is gradually being filled by harmonised legislation in the form of the Model Work Health and Safety laws.

Court of Appeal. Mr Kirk argued that the provision was invalid insofar as it extended to jurisdictional error and, therefore, the Supreme Court of NSW could make orders in the nature of certiorari quashing the conviction. The High Court accepted this argument and found that such a clause could not extend to protect error of a jurisdictional nature by removing the supervisory jurisdiction of the Supreme Court.²¹

There are some differences in the substrata between the decision in *Kirk* and the *Second PSA Case*. First, the order considered in *Kirk* was in the nature of certiorari, whereas in the *Second PSA Case*, the order contended for was mandamus. Second, the impugned privative clause in *Kirk* designed to remove, in its entirety, the supervisory jurisdiction of the superior court. That was not so in the *Second PSA Case*, which permitted review for decisions ‘in excess or want of jurisdiction’. These differences were noted by Doyle CJ and led to his Honour’s conclusion that the SASC was not entitled to find that *Kirk* had overruled the *First PSA Case* on point in this respect.²² These two differences were considered by the High Court in the *Second PSA Case* and, in particular, whether the decision in *Kirk* was in contradiction to the decision in the *First PSA Case*.

III JURISDICTIONAL ERROR

Determination of the *Second PSA Case* rested upon the question of whether the SASC had jurisdiction to entertain the appeal from the Full Commission after the Commission had denied itself jurisdiction for a lack of industrial dispute. Section 206, referred to above, purported to limit the review of decisions of the Commission and the Full Commission by the SASC unless such a decision was infected by an ‘excess or want of jurisdiction’. Certain jurisdictional error falling outside that definition could not be the subject of review. The previous decision of the High Court in the *First PSA Case* supported this notion. The majority in that case determined that whilst an act in excess of jurisdiction would not preclude judicial review, ‘[excess or want of jurisdiction] appears to permit erroneous assumptions of jurisdiction to be checked by judicial review, but not erroneous refusals to exercise jurisdiction’.²³ That statement stands for two propositions: first, that judicial review is confined to errors made for ‘excess or want of jurisdiction’, and second, that erroneous refusals to exercise jurisdiction are beyond the scope of review on the basis that such refusals are not in ‘excess or want of jurisdiction’. Although submitted by the PSA at first instance, the SASC declined to find that the *First PSA Case* was reversed by *Kirk*, primarily on the basis that such a step could only be taken by the High Court.²⁴ The High Court has now done so unequivocally albeit, at times, for different reasons.

²¹ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580-581 [96]-[100].

²² *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223, [5]-[6] (Doyle CJ), citing, inter alia, *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, [39] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

²³ *Public Service Association of South Australia v Federated Clerks’ Union of Australia, South Australian Branch* (1991) 173 CLR 132, 142 (Brennan J).

²⁴ *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223, [6] (Doyle CJ).

IV THE SUPERVISORY JURISDICTION

It is apposite to commence this discussion by reference to the context in which the *First PSA Case* was decided, that is, without the benefit of the High Court's jurisprudence in *Kirk*. In *Kirk*, the High Court propounded three facets of the status of the State Supreme Courts by reference to the *Constitution*. Firstly, the Legislature cannot alter 'the constitution or character of its Supreme Court [so] that it ceases to meet the constitutional description' of a 'Supreme Court of a State' found in Chapter III of the *Constitution*.²⁵ Secondly, the supervisory role of the Supreme Court is manifest by its ability to grant prerogative writs, including certiorari and mandamus, for jurisdictional error.²⁶ Finally, the High Court is the ultimate superintendant of the supervisory jurisdiction of the State Supreme Courts through the common law of Australia and to deny a State Supreme Court its supervisory jurisdiction would leave 'islands of power immune from supervision and restraint', contra s 71 of the *Constitution*.²⁷ The High Court concluded in *Kirk* that 'legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power'.²⁸

The respondent, South Australia, in the *Second PSA Case* contended that the State Supreme Court's supervisory jurisdiction did not extend to a court's wrongful refusal to exercise its jurisdiction. South Australia sought to limit the powers of review held by the State Supreme Courts, and ultimately the High Court, to certain types of jurisdictional error on two bases per the advice of the Privy Council in *Colonial Bank of Australasia v Willan*:²⁹ first, by limiting the definition of 'excess or want of jurisdiction' to circumstances where there was a 'manifest defect of jurisdiction; and second, by suggesting that mandamus was, per the *First PSA Case*, an adjunct to certiorari, and did not fall within the scope of the supervisory jurisdiction. Both contentions were rejected in the *Second PSA Case*.

A Manifest Defect of Jurisdiction

The High Court noted that the delineation of judicial review was not based on the type of jurisdictional error (that is, whether it was 'manifest') but rather by reference to the distinction between jurisdictional error and non-jurisdictional error.³⁰ It also noted that 'manifest' in the context of *Willan* did not in fact support the argument of the respondents; it referred to error 'on the face of the record', rather than some quality or type of jurisdictional error.³¹ In that sense, 'legislation like s 206 which precludes judicial review for one type of jurisdictional error while leaving it open for another type of jurisdictional error is not the permitted type of legislation'.³² As identified in *Kirk*, not all legislation inhibiting judicial review is invalid. For example, errors of

²⁵ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580 [96].

²⁶ *Ibid* 580 [98].

²⁷ *Ibid* 581 [99].

²⁸ *Ibid* 581 [100].

²⁹ (1974) LR 5 PC 417.

³⁰ *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* [2012] HCA 25, [230] (French CJ), [66] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), [72], [78] (Heydon J).

³¹ *Ibid* [29] (French CJ), [61]-[63] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), [75]-[76] (Heydon J).

³² *Ibid* [78] (Heydon J).

law or fact (but not jurisdictional fact) may be precluded by way of a privative clause. What demarcates the boundary between what can or cannot be protected by a privative clause is the characterisation of the error as being one of ‘jurisdictional error’. If the privative clause denies review for errors of a non-jurisdictional nature, the clause will not be beyond power.³³

B *Mandamus as adjunct to certiorari*

As noted above, the SASC refused the application on the grounds that it did not have jurisdiction to hear the appeal. What the PSA sought from the SASC (although this does not appear in terms in the decision of that court – instead it refers to a request in the nature of certiorari)³⁴ was an order in the nature of mandamus compelling the Commission as to jurisdiction. It was put to the High Court by South Australia and the interveners that merely because certiorari may be granted by a superior court exercising its supervisory jurisdiction, it does not follow that mandamus ought to be accorded a similar status. Rather, the respondents submitted that mandamus was an ‘adjunct’ to certiorari.³⁵

The respondents relied upon the *First PSA Case* and, in particular, the decision of Brennan J (as his Honour was then). In that case, his Honour noted:

But the order in the nature of a mandamus to hear and determine afresh the application for leave to appeal commands the exercise of a jurisdiction which the Full Commission undoubtedly possesses though it has constructively failed to exercise it. That order is not, in my view, founded on an excess or want of jurisdiction. Certiorari is required to quash an order made ultra vires; *mandamus issues as an adjunct to compel the making of an intra vires order* [emphasis added].³⁶

Victoria, as intervener, submitted that the reference in *Kirk* at 581 to mandamus was in support of the proposition that mandamus was incidental to an award of certiorari. The joint judgment (and Heydon J) rejected this argument, concurring that mandamus is not an adjunct at all, but a pivotal component of a Chapter III court exercising its supervisory jurisdiction.³⁷ Heydon J noted that ‘...the Court [in *Kirk*] treated mandamus as a remedy of equal significance to certiorari and prohibition in its capacity to carry out the supervisory role of the Supreme Courts’.³⁸ In addition, his Honour held that if such a distinction was drawn, this would effectively limit the supervisory jurisdiction to decisions of a certain class and would thereby leave intact the ‘islands of power’ prohibited by *Kirk*.³⁹

³³ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³⁴ *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223, [3].

³⁵ *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* [2012] HCA 25, [62] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³⁶ *Public Service Association of South Australia v Federated Clerks’ Union of Australia, South Australian Branch* (1991) 173 CLR 132, 145 (Brennan J) (emphasis added).

³⁷ *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* [2012] HCA 25, [60]-[62] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), [73], [80] (Heydon J).

³⁸ *Ibid* [74] (Heydon J).

³⁹ *Ibid*.

V WRONGFUL REFUSALS OF JURISDICTION AND SECTION 206

The High Court found that the decision of the Commission that there was no industrial dispute was a jurisdictional fact insofar as ‘it was a matter which the Commission had jurisdiction to decide as an essential preliminary to the exercise of its substantive jurisdiction’.⁴⁰ It was not a matter of discretion. It was incumbent on the Commission to make a correct decision as to its jurisdiction.⁴¹ It could not, for example, decline to exercise its jurisdiction because the terms of the Act suggested that it had a duty to exercise it.⁴² In that circumstance, and without drawing any ultimate conclusions as to the existence of an industrial dispute in this case, the High Court found that the SASC did have the jurisdiction to hear and determine the appeal from the Commission, namely, whether there was an industrial dispute, and issue an order in the nature of mandamus if appropriate.⁴³ However, their Honours adopted distinct approaches to the manner in which s 206 should be handled.

The Chief Justice and the plurality, contra to the High Court’s earlier decision in the *First PSA Case*, and based on the decision in *Kirk*, rejected the argument that jurisdictional error did not extend to ‘erroneous refusals to exercise jurisdiction’. The Chief Justice⁴⁴ in particular affirmed an earlier decision of the SASC in *R v Industrial Commission of South Australia; Ex parte Minda Home Incorporated*.⁴⁵ In that case, the SASC construed the term ‘excess or want of jurisdiction’ to include all errors of jurisdiction that could be relieved by prerogative writ.⁴⁶ This interpretation had been rejected previously by the High Court in the *First PSA Case*.⁴⁷

The Chief Justice held that, specifically, an erroneous refusal of jurisdiction was an error for ‘excess or want of jurisdiction’⁴⁸ but, curiously, given his Honour’s remarks in what appear to be absolute terms that jurisdictional error cannot be protected against, left open the question that s 206 may not cover every form of jurisdictional error.⁴⁹ Otherwise, his Honour stated that the privative provision should be read down, allowing the review of jurisdictional error by State Supreme Courts but maintaining protection for errors made within jurisdiction.⁵⁰ This approach is consistent with that in *Plaintiff S157*. In that case, a ‘decision’ excluded from review was, in accordance

⁴⁰ Ibid [31] (French CJ).

⁴¹ The joint judgment relied on the decision of Latham CJ in *R v Blakeley; Ex parte Association of Architects of Australia* (1950) 82 CLR 54, 75 where his Honour the Chief Justice noted that “If an authority with limited jurisdiction has no power to make a conclusive decision as to the existence or non-existence of a collateral matter upon which jurisdiction depends, and makes a wrong decision either way, the mistake will be corrected by mandamus... if he wrongly decides that he has no jurisdiction...”.

⁴² Ibid [92] (Heydon J).

⁴³ Ibid [31] (French CJ), citing *R v Blakeley; Ex parte Association of Architects of Australia* (1950) 82 CLR 54, 75 (Latham CJ).

⁴⁴ *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* [2012] HCA 25, [31] (French CJ). Similar reasoning is adopted by the plurality at [65].

⁴⁵ (1975) 11 SASR 333 (*‘Minda Home’*).

⁴⁶ Ibid 337 (Bray CJ).

⁴⁷ (1991) 173 CLR 132, 142-143 (Brennan J), 151-152 (Deane J), 165 (McHugh J).

⁴⁸ Ibid [34] (French CJ).

⁴⁹ Ibid [35] (French CJ).

⁵⁰ Ibid.

with previous authority, taken not to extend to decisions made on the basis of jurisdictional error, which are ‘regarded, in law, as no decision at all’.⁵¹

The joint judgment went one step further and complied with the principles of federal statutory interpretation laid down by Isaacs J in *Federal Commission of Taxation v Munro*, wherein his Honour stated:

There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail.⁵²

The plurality found that ‘excess or want of jurisdiction’ is apt to include jurisdictional error rather than merely some species of jurisdictional error.⁵³ The plurality’s conclusion is substantively similar to that of the Chief Justice, but in more emphatic terms.

Heydon J departed from the reasons of the Chief Justice and the joint judgment on this point. His Honour opined that the text of s 206 was not capable of being read to include a failure to exercise jurisdiction⁵⁴ and rejected the interpretation, adopted in *Minda Home*, that the phrase ‘excess or want of jurisdiction’ could be read to include all errors going to jurisdiction.⁵⁵ In dissent on this point, his Honour held that the privative provision was invalid insofar as it purported to limit review by the Supreme Court for errors going to jurisdiction.⁵⁶

VI EXTENT OF REVIEWABILITY

Heydon J also considered the arguments of the interveners. Victoria submitted contra to the position of South Australia that the constitutional protection for judicial review espoused in *Kirk*⁵⁷ was limited to decisions from courts, and not tribunals or administrative bodies. Little authority was given for the submission. It would appear that the submission arose out of a convenient and literal reading of *Kirk*. In *Kirk*, the High Court was confronted with a decision of the Industrial Court of NSW that was appealed to the NSW Court of Appeal, and gave its reasons accordingly. It was not necessary for it to consider whether the protection extended to the review of decisions of tribunals.

Such authority now, unambiguously, exists by way of the reasons of Heydon J. His Honour noted that ‘the application of *Kirk*’s case beyond courts is rational, for it can be hard to distinguish between adjudicative bodies which are courts and those which are not, particularly in the case of non-federal bodies, for State constitutions do not

⁵¹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

⁵² (1926) 38 CLR 153, 180.

⁵³ *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* [2012] HCA 25, [65] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁵⁴ *Ibid* [87]-[88] (Heydon J).

⁵⁵ *Ibid* [88].

⁵⁶ *Ibid* [88] (Heydon J).

⁵⁷ (2010) 239 CLR 531, 581 [99].

embody any strict separation of powers'.⁵⁸ This is consistent with subsequent jurisprudence on this point. In *South Australia v Totani*, a decision applying the principles of *Kirk*, the High Court held that the legislative power of any State would not extend to limiting judicial review of decisions infected by jurisdictional error of the State, its Ministers or authorities by the superior court of record.⁵⁹

VII CONSIDERATION

The decision in the *Second PSA Case* reaffirms the High Court's position towards privative clauses and the usurpation of the supervisory jurisdiction; simply, it will not tolerate it. That this now applies to State privative clauses is incontrovertible. Admittedly, the decision is hardly surprising. The High Court has been leaning this way for some time.⁶⁰

Logically, in the *Second PSA Case*, the High Court upheld that Parliament cannot impinge upon a superior court's power to review decisions of courts, tribunals and administrative bodies that are infected by jurisdictional error. Now, privative clauses that previously acted to protect against the review of decisions made by those bodies are invalid. Whilst inherently correct, it places great importance upon the determination of what is an error going to jurisdiction. Unfortunately, that determination is far from clear. In *Kirk*, the High Court recognised that the boundaries of jurisdictional error are not closed.⁶¹ Indeed, the borders may be said to be expanding. That uncertainty may be problematic. For decisions that are patently beyond jurisdiction, such as where the relevant official has no power to make a particular order and does so, it cannot rationally be said that a decision of that kind should be protected. More difficult, perhaps, are decisions that may later be impugned for denial of procedural fairness, for example, which may not be readily apparent. Denial of procedural fairness, unless specifically exempted (for tribunals and administrators),⁶² is an error going to jurisdiction.⁶³ This lack of clarity could give rise to probing appeals to appellate courts on what may otherwise be futile grounds.

The effect on the decision maker may also be marked. For decision makers who are judges, this lack of clarity ought not be a problem; it goes without saying that the judiciary will keep pace with the development of the law and be abreast of its vagaries. Tribunal members and administrators may not be so fortunate. Often, such officers are not legally trained. Whilst it is not suggested that decisions made without jurisdiction should be protected from review, if the borders of jurisdictional error are not closed, it may leave non-legal decision makers in the precarious position of trying to distil complex legal principle that is transient. In situations of high volume, it is likely that such decision makers will become reactive to appeals, rather than

⁵⁸ *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* [2012] HCA 25, [82] (Heydon J). His Honour relied, inter alia, on *Wainhou v New South Wales* (2011) 243 CLR 181, 95 (French CJ) in coming to that inevitable conclusion.

⁵⁹ (2010) 242 CLR 1, 27 (French CJ).

⁶⁰ See, eg, *Fish Solution 6 Holdings Limited* (2006) 225 CLR 180.

⁶¹ (2010) 239 CLR 531, 581 [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁶² *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

⁶³ *South Australia v Totani* (2010) 242 CLR 1; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; Basten, above n 3, 288; Leighton McDonald, 'The entrenched minimum provision of judicial review and the rule of law' (2010) 21 *Public Law Review* 14, 17.

proactively applying the law correctly. In turn, this could increase the cost and time of applications as legal practitioners test the boundaries of jurisdictional error in the appellate sphere. This is further complicated by the difficulty in demarcating what is jurisdictional error and what is an error made within jurisdiction.⁶⁴

What is also worthy of note is the comment of Heydon J that ‘it can be hard to distinguish between adjudicative bodies which are courts and those which are not’.⁶⁵ There has long been a distinction between an error of jurisdiction committed by a court and an error committed by an administrative body such as an administrative tribunal.⁶⁶ Care must be exercised in adhering to the intention of his Honour’s remarks. By treating a tribunal as a court, it places a more onerous burden on the tribunal to apply the law as if the member were a judicial officer. In many cases tribunal members are judicial officers or eminent legal professionals, making that comment, practically speaking, largely uncontroversial. Caution may be needed however to avoid that comment being extended to tribunals constituted by non-legal professionals. It would be improper to hold such persons to a judicial standard. As noted by Basten JA, writing extra-judicially, ‘it is unhelpful to seek to state the bases for judicial review in terms which do not take account of the function being exercised by the initial decision maker’.⁶⁷ Decisions of such tribunals should be reviewed according to the magnitude and importance of the decision made, and should take into account the status and resources of the decision-maker.

The *Second PSA Case* also clarifies the applicability of the decision in *Kirk* in relation to the remedies that may be given for jurisdictional error. In summary, an appellate court is entitled to employ not only certiorari to correct the erroneous decisions of courts below, but also mandamus. The decision of the High Court in the *First PSA Case* has been overturned and mandamus reinstated as an equal partner in the arsenal of judicial review.

⁶⁴ See Basten, above n 3, 287.

⁶⁵ *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* [2012] HCA 25, [82] (Heydon J).

⁶⁶ *Craig v South Australia* (1995) 184 CLR 163, 177-178.

⁶⁷ Basten, above n 3, 297.

CASE NOTE

**NATIONAL FEDERATION OF INDEPENDENT BUSINESS V SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES SUPREME COURT OF THE UNITED
STATES OF AMERICA
28 JUNE 2012, 567 US ___, 132 S Ct 2566, 183 L Ed 450 (2012)**

HARRY MELKONIAN*

To resolve conflicting decisions among the United States Court of Appeals for the Eleventh, Sixth, Fourth and District of Columbia judicial districts concerning the validity of recently enacted Federal legislation relating to health care,¹ the United States Supreme Court on 28 June 2012 upheld key provisions of the Patient Protection and Affordable Care Act of 2010² (the Affordable Care Act or ACA). In the popular press, this law was known as Obamacare – a national healthcare plan for the United States. But the reality is something far more complex: a 150-page decision that reflects a deeply divided court and a complex law in which key provisions have been upheld on the narrowest of grounds, and with one central provision declared unconstitutional. Of the nine sitting justices, it is fair to say that the only member of the Court satisfied with all aspects of the decision was Chief Justice Roberts, who was the author of the majority position on key issues and was the only member of the court aligned with a majority on all of the matters decided.

The ACA dramatically alters the health care landscape in the US while preserving the primary reliance on the private sector for funding medical services. Prior to its enactment, health care in the US was provided by a complex arrangement of Federal and State governments, private insurance companies and individuals. In a nutshell: the Federal government funds Medicare which provides comprehensive health care benefits to Americans 65 years and older. Medicaid is a complex Federal-State arrangement, dating back to the Nixon Administration, by which the Federal and State Governments fund, and the States administer, health care for disadvantaged children and families with children. It does not provide benefits for unattached indigent adults. The majority of Americans, approximately 170 million in 2009, obtain health cover through private insurance plans either provided by employers or through private purchase.³ While Medicare, Medicaid, and private cover provided health care benefits

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¹ *Florida v United States HHS*, 648 F.3d 1235 (11th Cor Fl 2011); *Thomas Moore Law Center v Obama*, 651 F 3d 529 (6th Cir 2011); *Liberty University, Inc v Geithner*, 671 F 3d 391 (4th Cir 2011); *Seven-Sky v Holder*, 661 F 3d 1 (DC Cir 2011).

² *The Patient Protection and Affordable Care Act*, Pub. L. 111 – 148, 124 Stat. 119 – 124 (2010).

³ *National Federation of Independent Business v Kathleen Sebelius, Secretary of Health and Human Services*, 132 S Ct 2566, 2610 – 2611 (Ginsberg, J) (*'National Federation v Sebelius'*).

to a large majority of citizens, there were many millions of people, perhaps as high as 50 million, who did not have health insurance because they were either not eligible for government benefits or could not afford private cover.⁴

Health care in the United States is very costly. For example, in 2010 the average American incurred \$7000 in medical expenses.⁵ Health care is a major component of the American economy, costing \$2.5 trillion in 2009.⁶ By way of example, the cost of treating a heart attack for the first three months exceeded \$20,000.⁷ On the other hand, the health care that can be delivered is frequently exceptional and the American commitment to medical research is unparalleled in the world. For example, spending on medical research amounted to about \$140 billion in 2009⁸ which, on a per capita basis, works out to more than three times what Australia spends and more than ten times what is spent in Germany.⁹

As medical costs continue to increase, there has been an interest among some Americans for government funded health care. The first comprehensive response came from the State of Massachusetts, which enacted a mandatory health insurance plan for residents.¹⁰ Under the Massachusetts plan, sometimes derisively known as 'Romneycare' after Governor Mitt Romney (2003-2007) who signed the plan into law, all residents of Massachusetts must have private health insurance or, in the alternative, pay a tax to the State to help cover health costs for the uninsured. As to persons who cannot afford minimal health cover, the State provides the funding. The result has been that 98% of Massachusetts residents appear to have been protected by a health care plan.¹¹ While significantly more comprehensive, the controversial individual mandate to purchase health insurance in the Federal ACA is very similar to the mandate contained in the Massachusetts legislation.

Under the ACA individual mandate, individuals under 65 years of age must purchase private health insurance unless they cannot afford it.¹² If they cannot afford health insurance, they will be covered by a greatly expanded Medicaid program which will be 90% federally funded.¹³ If individuals can afford health insurance and choose not to purchase it, they will pay a penalty on their income taxes.¹⁴ Under the expanded Medicaid program, the States are compelled to participate or risk losing all Medicaid reimbursements – including reimbursements for persons traditionally covered under

⁴ Ibid.

⁵ Ibid.

⁶ Ibid 2609.

⁷ Ibid 2610.

⁸ Research America, *2010 US Investment in Health Research*

<www.researchamerica.org/uploads/healthdollar10pdf> at 25 Sep 2012.

⁹ Research Australia, *Trends in Health and Medical Research Funding* (April 2009)

<<http://researchaustralia.org/publications/trends-statistics.html>> at 25 Sep 2012.

¹⁰ *Massachusetts Health Care Insurance Reform Law*, Massachusetts General Laws, Chapter 111M, section 2 (West 2011).

¹¹ Jerry Geisel, 'Massachusetts' Insured Rate Hits 98.1%: Analysis', *Business Insurance*, 14 December 2010 <http://www.businessinsurance.com/article/20101214/BENEFIT>> at 1 Sep 2102.

¹² 26 USC 5000A.

¹³ 42 USC 1396c, d.

¹⁴ 26 USC 5000A(b)(1).

Medicaid such as children.¹⁵ In response, a number of States challenged the constitutionality of the ACA.¹⁶

The constitutional challenges focused on the scope of federal rights of regulation. Like Australia, the Federal Government of the US is one of enumerated powers – Congress may only legislate as authorised in Article 1 of the Constitution. As stated by the Chief Justice:

If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.¹⁷

The specific issues regarding the constitutionality of the ACA involved the fundamental question of whether the legislation was encompassed by the Article 1 powers of Congress. Specifically, the two major questions for resolution were: (1) Does the Federal Government have the power to impose a penalty on citizens who refuse to purchase health insurance? (2) Does the Federal Government have the right to withhold all Medicaid reimbursements from States that do not participate in the expanded Medicaid program? The ultimate answer of the Supreme Court in this decision was ‘yes’ to question one and ‘no’ to question two.

The current Supreme Court is divided roughly between justices who are commonly perceived as conservative or liberal, with Justice Anthony Kennedy floating between the two wings depending on the issue. The conservative Justices include Chief Justice Roberts and Associate Justices Scalia, Thomas and Alito, while the liberal wing counts Associate Justices Ginsburg, Breyer, Sotomayor and Kagan. However, in this decision, Justice Kennedy was firmly aligned with the conservative wing and it was the Chief Justice who crafted the 5-4 majority.

The linchpin of the ACA was the *individual mandate* – the portion of the law that imposed a financial penalty on Americans who failed to purchase health insurance even though they could afford the cover. Without the financial penalty, healthy individuals could decline to purchase insurance until such time as they became ill because the ACA also guaranteed insurance for those with pre-existing ailments. The underlying concept was that through the financial penalty, Americans who refused to buy private health cover would still be compelled to help share the cost of health insurance.¹⁸ This penalty is referred to as the ‘shared responsibility payment’ in the legislation.¹⁹ The mandate was also the most controversial part of the ACA. It drew a great deal of attention in the early campaigns of presidential aspirants in the 2012 election, with the President supporting the legislation and the Republican opponents generally lambasting it. Even the ultimate Republican nominee, Governor Romney, who had enthusiastically supported the 2006 program in Massachusetts, attempted to distinguish the Massachusetts individual mandate from the ACA.²⁰ From a

¹⁵ 42 USC 1396c.

¹⁶ For example, twenty-five States joined in the Florida litigation. See *Florida v United States HHS*, 648 F 3d 1235 (11th Cir 2011).

¹⁷ *National Federation v Sebelius*, 132 S Ct 2566, 2577 (2012).

¹⁸ *National Federation v Sebelius*, 132 S Ct 2566, 2585 (2012).

¹⁹ 26 USC 5000A(b)(1).

²⁰ While the success or failure of this political ‘two-step’ is a matter for American voters, the controversy concerning the individual mandate is without question.

constitutional standpoint, the issue was clear: does the Constitution authorise the Federal Government to penalise citizens for refusing to purchase private health insurance? Would such a holding open the door to Congress legislating on almost anything and thereby eviscerating the doctrine of enumerated powers?

In defence of the ACA, the Federal Government relied on three constitutional grants of power:

The Commerce Clause²¹

The Necessary and Proper Clause²²

The Taxation Power²³

The primary argument relied on by the Government and the issue which occupied the bulk of the opinions of the Court was the Commerce Clause issue.²⁴ The Commerce Clause authorises Congress to 'regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.'²⁵ The Commerce Clause has been routinely utilised by the Supreme Court since the mid-20th century to validate the ever-expanding role of the Federal Government.²⁶ Indeed, in her dissent, Justice Ginsburg cited Commerce Clause cases for the proposition that, even if an activity is purely local and does not involve commerce, it is subject to Federal legislation if in the aggregate the activity exerts a substantial effect on interstate commerce.²⁷

In the 1960s, the Commerce Clause provided the constitutional engine to permit some of the major civil rights legislation to pass muster. Writing for the majority, Chief Justice Roberts warned that expansion of the Commerce Clause power to authorise the individual mandate would justify a 'mandatory purchase to solve almost any problem.'²⁸ However, in support of Commerce Clause authority for the ACA, Justice Ginsburg wrote in dissent that '[s]ince 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm.'²⁹ In response to the proponents of Commerce Clause arguments, Justice Scalia expressed his fear that, if the commerce power was found to empower the ACA, the result would be that the Commerce Clause would 'make mere breathing in and out the basis for federal prescription and ... extend federal power to virtually all human activity.'³⁰ Apart from the breathing hyperbole, the Ginsburg group (Sotomayor, Breyer and Kagan JJ) probably would agree that the Commerce Clause power in 21st Century is exceedingly broad and is dependent upon practical considerations, including actual experience.'³¹ However, neither the Ginsburg nor Scalia arguments

²¹ US Constitution, Article 1, Section 8, clause 3.

²² Article 1, Section 8, clause 18.

²³ Article 1, Section 8, clause 1.

²⁴ The opinions were authored by Chief Justice Roberts and Justices Ginsburg, Scalia and Thomas. All of them devoted the greatest attention to the Commerce Clause issue.

²⁵ Article 1, Section 8, clause 3.

²⁶ One of the seminal decisions cited by the Court was *Wickard v Filburn*, 317 US 111, 63 S Ct 82, 87 L Ed 122 (1942) in which the Court upheld the Commerce Clause as permitting the Federal Government to regulate the amount of wheat grown by farmers for their personal use on the grounds that, in the aggregate, the wheat used by farming households would have an impact on the national wheat market.

²⁷ *National Federation v Sebelius*, 132 S Ct 2566, 2616 (2012).

²⁸ Ibid 2588.

²⁹ Ibid 2609.

³⁰ Ibid 2643.

³¹ Ibid 2616.

could muster more than four votes. The deciding voice was that of the Chief Justice who, writing for the majority, said that the Commerce Clause regulates economic activity rather than economic inactivity. In the case of the ACA, the penalty was to be imposed on individuals who choose not to purchase health insurance which, to the Chief Justice, amounted to inactivity:

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product on the ground that their failure to do so affects interstate commerce.³²

The Chief Justice further stated:

The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions [purchase healthcare]. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.³³

Joined by Justices Scalia, Kennedy, Thomas and Alito, the Chief Justice refused to extend the commerce power to the ACA. The significance of this restraint on Commerce Clause power should not be under-estimated and it is not at all surprising that this holding elicited such an impassioned response from the dissenters.³⁴ The majority has imposed an outer boundary on the commerce power – a boundary that may have more implications than the validity of the ACA. Future Presidents and Congresses will need to be considerably more scrupulous about extending federal regulatory control based on the commerce power than their predecessors, who may have simply assumed that if an activity touches interstate commerce, Commerce Clause power will exist.

The Government's second argument for upholding the individual mandate was predicated on the Necessary and Proper Clause, which authorises Congress to 'make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers.'³⁵ The Chief Justice observed that the Necessary and Proper Clause only authorises legislation that furthers the aims of one of the enumerated powers and does not license any substantive power beyond those specifically enumerated in the Constitution.³⁶ Having rejected the Commerce Clause substantive power, the Chief Justice rather summarily dismissed the Necessary and Proper Clause argument on the grounds that, even if the individual mandate was necessary to the effectiveness of the ACA, such an expansion of federal power was 'not a "proper" means for making those reforms effective.'³⁷ He was joined in this position by Justices Kennedy, Scalia, Thomas and Alito.³⁸ Dissent was provided by Justice Ginsburg, who was joined by

³² Ibid 2587.

³³ Ibid 2591. For this reason, the Massachusetts legislation did not present constitutional questions.

³⁴ Ibid. Within the restrained language of Supreme Court Justices, Justice Ginsburg's reference to the Chief Justice's interpretation of the Commerce Clause as 'newly minted', 'novel' and warranting 'disapprobation' amounts to rather strong language.

³⁵ Article I, Section 8, clause 18. The Necessary and Proper Clause is analogous to Section 51(xxxix) of the *Commonwealth of Australia Constitution Act*.

³⁶ *National Federation v Sebelius*, 132 S Ct 2566, 2591.

³⁷ Ibid 2592.

³⁸ Ibid 2646-2647.

Justices Breyer, Sotomayor and Kagan.³⁹ At this point, the ACA appeared doomed. However, one Government argument was still standing – the power to tax.

Under Article I, Section 8, clause 1 of the Constitution, as amended, Congress has the power to ‘lay and collect Taxes.’ However, the ACA was not written in terms of a tax but in terms of a penalty that must be paid if health insurance is not purchased. As its fall-back argument, the Government asserted that, just because the assessment for not purchasing insurance was termed a penalty, this did not mean that it does not constitute a lawful tax. The Chief Justice was receptive to this argument. He noted that the penalty was paid and assessed by the income tax authority – the Internal Revenue Service (IRS) – and that the amount of penalty was determined by income level:

Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes ... That, according to the Government means the mandate can be regarded as establishing a condition – not owning health insurance – that triggers a tax – the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress’s constitutional power to tax.⁴⁰

The Chief Justice stated that taxation was frequently used to promote socially desirable activity such as the deduction allowed for interest paid on home mortgages and professional education.⁴¹ Viewed through the taxation lens, the so-called penalty is but an item of tax that does not have to be paid if the taxpayer engages in a certain activity, namely, purchase of health insurance. The Chief Justice concluded that the individual mandate was a constitutionally lawful tax:

The ACA’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.⁴²

Chief Justice Roberts was reluctantly joined by Justices Ginsburg, Breyer, Kagan and Sotomayor to craft a five vote majority upholding the individual mandate.⁴³ The liberal justices were less than happy because they felt that the individual mandate was authorised by the Commerce Clause power and not just the taxation power. This is significant because under the Commerce Clause, the Federal Government is accorded broad regulatory rights whereas under the taxation clause, the Government is more or less limited to simply imposing monetary taxes. Justice Ginsburg’s unhappiness was clearly stated in her observation that the Chief Justice’s interpretation of the Commerce Clause ‘makes scant sense and is stunningly retrogressive.’⁴⁴ The Chief Justice even acknowledged that the taxation authority conferred a significantly narrower constitutional authority than would be found under the Commerce Clause:

³⁹ Ibid 2609, 2626-2627.

⁴⁰ Ibid 2593-2594.

⁴¹ Ibid 2599.

⁴² Ibid 2600.

⁴³ Ibid 2609.

⁴⁴ Ibid 2609.

Once we recognise that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs ... By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it.⁴⁵

While the liberal Justices were not satisfied with the Chief Justice's argument, they could take comfort in the upholding of the individual mandate's constitutionality. Not so for Justices Scalia, Kennedy, Thomas and Alito. In a lengthy opinion, Justice Scalia was very strident in his opposition to the constitutionality of the mandate. With respect to the taxation power argument, he focused on the point that the legislation speaks in terms of a 'penalty' and not a tax:

Our cases establish a clear line between a tax and a penalty: '[A] tax is an enforced contribution to provide for the support of government; a penalty...is an exaction imposed by statute as punishment for an unlawful act.'... We have never held that any exaction imposed for violation of the law is an exercise of Congress's taxing power – even when the statute calls it a tax, much less when (as here) the statute repeatedly calls it a penalty. When an act adopts the criteria of wrongdoing and then imposes a monetary penalty as the 'principal consequence on those who transgress its standard, it creates a regulatory penalty, not a tax.'⁴⁶

Although four Justices were agreeable to joining the Chief Justice in finding that the mandate was constitutional under the Taxation Power, this did not resolve the validity of the individual mandate because of special legislation relating to judicial challenges to tax laws. The Federal *Anti-Injunction Act* prohibits any lawsuit to restrain the assessment or collection of any tax.⁴⁷ Under this statute, the litigation challenging the ACA would not confer jurisdiction on the courts. Rather, the tax for not purchasing mandated health cover would first need to be paid and then followed by a suit for refund. Perhaps Chief Justice Roberts resolved the conundrum by concluding that a tax, as defined by the Constitution under Article 1, is not always a tax but sometimes constitutes a penalty under legislation. That is, the tax paid by those not having health cover is a tax for constitutional purposes but a penalty for purposes of the *Anti-Injunction Act*. He explained that whether the payment was constitutionally lawful as a tax does not depend on labels imposed by Congress but on judicial interpretation of the Constitution and the legislation. But whether the *Anti-Injunction Act* applied was to be determined by reference to how the legislation in question had been labelled by Congress:

It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress's choice of label on that question. That choice does not, however, control whether an exaction is within Congress's constitutional power to tax.⁴⁸

Without much ado and perhaps biding their peace, Justices Ginsburg, Breyer, Sotomayor and Kagan joined the Chief Justice.⁴⁹ And, to make this the only unanimous point in the entire decision, Justices Scalia, Kennedy, Thomas and Alito

⁴⁵ Ibid 2600.

⁴⁶ Ibid 2651-2652.

⁴⁷ 28 USC 7421(a).

⁴⁸ *National Federation v Sebelius*, 132 S Ct 2566, 2594.

⁴⁹ Ibid 2609.

also agreed that the Anti-Injunction Act did not apply – the conservative wing thus holding on the ground that the penalty was in any event a penalty and not a tax.⁵⁰

The ACA also provided for substantially broadening the range of persons covered by the existing Medicaid program. The remaining constitutional issue concerned whether this program, known as Medicaid Expansion, was a lawful exercise of Federal power under the Spending Clause of the Constitution.⁵¹ Medicaid has always been a voluntary program, with Congress providing part-funding to States that want to provide Medicaid. All fifty States participate in the program and Medicaid works to provide healthcare for children and families, but not unattached adults, through a combination of State and Federal funding. Under the ACA, the scope of Medicaid under Medicaid Expansion is to expand dramatically and provide benefits for virtually all citizens who are not required to purchase health insurance and who are not covered by Medicare.⁵² Under the ACA, the Federal Government will initially provide 100% of the funding for Medicaid Expansion with the contribution dropping back to 90% over a period of a few years.⁵³ Similarly, if a State declines to participate in Medicaid Expansion, the Federal Government will have the right to not only withhold payments for Medicaid Expansion but also to withhold all Medicaid reimbursements.⁵⁴

For the ACA to provide something close to universal healthcare, it is essential that persons not required by the individual mandate to purchase private health cover be provided with some other form of health care. While seniors are covered by existing Medicare, low income individuals, especially adults, are not always covered by existing Medicaid. Medicaid expansion is designed to provide health benefits to the many millions who cannot afford health insurance and do not have any benefits under the existing Medicaid programs.⁵⁵ The current Medicaid program, even with Federal reimbursements, is one of the most expensive programs offered by the States – amounting to over 20% of the average State's total budget.⁵⁶ However, Federal funding reimburses 50-83% of those costs and is thereby a major component of the State expenditure.⁵⁷ The threat of losing federal funding is obviously a matter of substantial concern to the States. Medicaid Expansion is projected to add \$100 billion annually to existing Medicaid expenses.⁵⁸

The Spending Clause of the Constitution has been interpreted to allow Congress to provide funds to the States and to condition the grant upon usage of the funds in ways that Congress could not otherwise compel.⁵⁹ In other words, while there may not be an enumerated power authorising Congress to compel States to do certain things, it is permissible for Congress to offer funding to States on the condition that the funds are used for certain purposes.⁶⁰ In this way, Congress may influence State policies and

⁵⁰ Ibid 2656.

⁵¹ The Spending Clause authorizes Congress to pay the Debts and provide for the ...general welfare of the United States: Article 1, Section 8, clause 1.

⁵² *National Federation v Sebelius*, 132 S Ct 2566, 2601.

⁵³ Ibid.

⁵⁴ Ibid 2603.

⁵⁵ Ibid 2601, 2606.

⁵⁶ Ibid 2604.

⁵⁷ Ibid.

⁵⁸ Ibid 2601.

⁵⁹ Ibid.

⁶⁰ Ibid 2602.

programs. But, influence is one thing and compulsion is another. Keeping in mind that the Federal Government is acting outside its enumerated powers, it can only influence or persuade States with respect to Medicaid or Medicaid Expansion. Some of the States raised the constitutional challenge that by threatening to withhold all Medicaid funding, the Federal Government was compelling the States to adopt Medicaid Expansion.⁶¹

Spending Clause arguments focused on a technical point – whether Medicaid Expansion was a new program or just an adjustment of an existing program. If Medicaid Expansion was viewed simply as a modification to existing Medicaid, it would likely be found to be lawful within the Spending Power. However, if taken to be something new, it could be viewed as unconstitutional pressure on the States to accept policy changes. Chief Justice Roberts wrote:

The States contend that the expansion is in reality a new program and that Congress is forcing them to accept it by threatening the funds for the existing Medicaid program. We cannot agree that existing Medicaid and the expansion dictated by the ACA are all one program simply because Congress styled them as such.⁶²

The Chief Justice concluded that Medicaid Expansion accomplished ‘a shift in kind, not merely degree’⁶³ and that ‘this statute is clearly beyond [the line between persuasion and compulsion].’⁶⁴ Consequently, the ability of the Federal Government to withhold all Medicaid funding unless a State accepts the terms of Medicaid Expansion was found to be unconstitutional. The Chief Justice was joined by Justices Scalia, Kennedy, Thomas and Alito as well as two deserters from the liberal camp (Justices Breyer and Kagan) with the result that there was a 7-2 vote for unconstitutionality, with only Justices Ginsburg and Sotomayor willing to uphold the law on the grounds that the States have no entitlement to receive funding and enjoy only the opportunity to accept funds on Congress’s terms.⁶⁵

Having found a portion of the ACA unconstitutional, the remaining issue was whether the entire Medicaid Expansion legislation fails or whether the unconstitutional part could be severed. Again the deciding voice was that of the Chief Justice who noted that Chapter 42 of the United States Code which includes Medicaid Expansion (42 USC 1396c) also contains a severability clause (section 1303), which states that if any provision of a chapter is held to be invalid, the remainder shall remain unaffected. Again, there was a 5-4 majority, with the Chief Justice being joined by Justices Ginsburg, Breyer, Sotomayor and Kagan.

Besides requiring a scorecard to keep track of the voting on the various issues, one may inquire about the constitutional effect of this decision, both as to healthcare and future issues. From the perspective of the ACA, individuals who earn in excess of 133% of the federal poverty level will now be required to purchase private health insurance or pay additional tax.⁶⁶ As for the millions of persons below this income

⁶¹ Ibid 2601.

⁶² Ibid 2605.

⁶³ Ibid.

⁶⁴ Ibid 2606.

⁶⁵ Ibid 2630.

⁶⁶ The poverty level set by the US Department of Health and Human Services for a family of four persons in 2012 is US\$ 23,050: *Federal Register*, Vol 77, No 17, Jan 26, 2012, pp 4034-4035.

level, the future is uncertain. While they would receive health care under Medicaid Expansion, it remains to be seen whether the States will adopt Medicaid Expansion. The Governor of one large State, Texas, has already indicated that Texas will not be participating.⁶⁷ However, it is likely that with the Federal commitment of an additional \$100 billion annually for Medicaid Expansion, the States will be hard pressed to refuse – and even Governor Perry of Texas may only have been posturing politically. If the States agree to Medicaid Expansion, the US will have achieved something approaching universal healthcare but, like the rest of the US healthcare delivery system, it will remain a complex mixture of State, Federal and private funding. Whether it can achieve any efficiencies in the delivery of health care remains the undecided question and it is in this respect that the limited constitutional grounds for the ACA's validity may pose serious obstacles.

A major challenge with health care in the US is the high cost associated with delivery including unregulated use of specialists, diagnostic testing and expensive technology. In Australia, most aspects of these issues are dealt with through Medicare administration and the result is an efficient, though not perfect, delivery system. Had the ACA been sustained under the Commerce Clause, the proverbial floodgates would have been opened for additional and pervasive federal regulation. For this reason, Justice Ginsburg and her allies were justifiably less than enthusiastic about the Chief Justice's reliance on the narrow grant of power under the Taxation Clause. While a majority upheld the law, it did so by the narrowest of grounds – so narrow that it will be difficult for the Federal Government to legislate much beyond the current legislation. Unless the Commerce Clause power is invoked, the US may have something less than a universal healthcare system. To this extent, the liberal wing may have won the battle, but, at least for the time being, lost or at least suffered a serious setback in the war. At the end of the day, perhaps only the Chief Justice was fully satisfied with the eight Associate Justices having to be satisfied with diverse bits and pieces of the legislation.

⁶⁷ Daniel Borunda, 'Governor Rick Perry rejects Medicaid expansion' *El Paso Times*, 10 July 2012, <<http://www.elpasotimes.com/news/ci21040962/governor-ricl>> at 10 Oct 2012.