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International Human Rights on Trial — The United Kingdom’s and Australia’s Legal Response to 9/11

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Abstract

This article assesses British and Australian legal responses to the threat from international terrorism since 11 September 2001 from an international human rights law perspective. Examining the United Kingdom’s Anti-terrorism, Crime and Security Act 2001 (UK) and the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth), it is argued that both pieces of legislation raise serious concerns in relation to international legal obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the United Nations International Covenant on Civil and Political Rights (ICCPR). Both international treaties allow for derogation from certain provisions in times of ‘public emergency’ (Article 15 ECHR/Article 4 ICCPR). While the United Kingdom has officially derogated from some of its treaty obligations, Australia has yet to submit a similar notification. This article argues, however, that the United Kingdom’s derogation is unlawful. Likewise, current circumstances in Australia would probably not permit lawful derogation from the ICCPR.

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1. Introduction

The tragic events of 11 September 2001 (hereinafter 9/11) have led to a dramatic change in the perception of international terrorism. The unthinkable turned into reality and it soon became clear that the so-called ‘war on terrorism’ was to be one of the defining conflicts of the early 21st century. Proclaiming that the attacks on New York City and Washington were a threat to international peace and security, the United Nations (UN) Security Council, acting under Chapter VII of the UN Charter, called on all States to redouble their efforts to prevent and suppress the commission of terrorist attacks, including denying safe haven to those who finance, plan or support terrorist acts.1 Governments around the world answered the UN call by enacting new legislation as part of their campaign to combat international terrorism. Unfortunately, many of these new anti-terrorism laws curtail civil liberties and human rights. While it cannot be denied that it was (and still is) sensible and necessary to reassess existing laws in the light of the 9/11 attacks, doubts arise as to whether the fight against international terrorism can be won ultimately by introducing new repressive laws.

The difficult question of how to respond to terrorism has not only arisen with the attacks of 9/11. For more than 35 years, policy makers, academics and lawyers have been preoccupied with developing efficient counter-terrorism models. While they were unable to develop a foolproof blueprint for effective and democratically acceptable counter-measures, terrorism experts agreed almost unanimously that any campaign against terrorism, if it were to be successful, had to adhere strictly to liberal democratic principles and the rule of law.2 As British scholar Paul Wilkinson, pointed out, ‘[t]he primary objective of any counter-terrorist strategy must be the protection and maintenance of liberal democracy’. He concluded that ‘[i]t cannot be sufficiently stressed that this aim overrides in importance even the objective of eliminating terrorism and political violence as such’.3 The maintenance of democracy requires, most of all, unfailing respect for three of liberal society’s fundamental values: the rule of law, civil liberties and human rights. In the context of human rights it is essential to comply with fundamental legal principles established in important international treaties, such as the UN International Covenant on Civil and Political Rights (ICCPR) and the European

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3 Paul Wilkinson, Terrorism and the Liberal State (2nd ed, 1986) at 125. Moreover, several scholars argued that an ability to deal with terrorism in a way that is widely held to be in conformity with established political and judicial principles will, in actuality, strengthen the commitment to uphold democratic institutions and, thus, further isolate and weaken those who seek to destroy them. See, for example Peter Chalk, ‘The Liberal Democratic Response to Terrorism’ (1995) 7(4) Terrorism and Political Violence 10.
Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). As confirmed by the UN General Assembly in Resolution 54/164, ‘all measures to counter terrorism must be in strict conformity with the relevant provisions of international law, including international human rights standards.’ [Emphasis added] Liberal democratic countries such as the United Kingdom and Australia, which have played a significant role in the development of human rights standards, bear a particular burden to uphold these rights even during the gravest of emergencies.

This essay assesses British and Australian legal responses to the events of 9/11 from an international human rights law perspective. It examines the United Kingdom’s Anti-terrorism, Crime and Security Act 2001 (UK) (hereinafter ATCSA) and the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth) (hereinafter ASIO Bill). Central to this analysis is the question whether or not British and Australian anti-terrorism laws are consistent with their international legal commitments, specifically with provisions of the ECHR and the ICCPR. It is argued that several passages of the ATCSA and the ASIO Bill raise serious concerns with regard to obligations under the international instruments. In a subsequent section, attention is drawn to circumstances in which breaches of international human rights law may be legally justifiable. Both the ECHR and the ICCPR allow for so-called ‘derogation’ from treaty obligations in times of ‘public emergency threatening the life of the nation’. Yet, the validity of any derogation depends on the fulfilment of strict legal requirements set forth in the treaties and further developed by relevant jurisprudence of the international monitoring organs. While the United Kingdom has officially derogated from Article 5 of the ECHR and Article 9 of the ICCPR due to threats from international terrorism in late 2001, Australia has yet to submit a notice of derogation. However, it might be asked, is the British proclamation legally valid? Answering this question requires analysis in three stages. First, it is examined whether and to what extent ‘international terrorism’ can qualify as ‘time of public emergency threatening the life of the nation’. Second, the question is whether or not the United Kingdom has fully complied with the requirements for lawful derogation. Finally, the analysis focuses on whether current circumstances would permit an Australian derogation from the ICCPR.

2. Recent Anti-Terrorism Legislation and International Human Rights

A. United Kingdom


Anti-terrorism legislation in the United Kingdom is, of course, nothing new. Confronted with terrorism and political violence in both Northern Ireland and on the British mainland for decades, the United Kingdom had a wide range of

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legislative counter measures in place even before 9/11. The centrepiece of this legislative framework was the Terrorism Act 2000 (UK), which placed many of the (temporary) emergency provisions of the 1970s and 1980s on a permanent footing. Nevertheless, in light of the 9/11 attacks, existing anti-terrorism laws were found to be insufficient and the British Government introduced the ATCSA into Parliament on 12 November 2001. The ATCSA is a lengthy piece of legislation consisting of 129 sections and eight schedules, and is portrayed by some observers as the ‘most draconian legislation Parliament has passed in peacetime in over a century.’ While the ATCSA contains a number of reasonable provisions dealing with important security safeguards (i.e., powers to freeze ‘terrorist’ assets or reinforcing powers concerning security in the nuclear industry), the central and most controversial part (Pt 4) introduces powers to detain ‘suspected international terrorists’ indefinitely and without trial.

(ii) Indefinite Detention of ‘Suspected International Terrorists’

According to s21(1) of the ATCSA, the Secretary of State may issue a certificate in respect of a person if he or she reasonably believes that the person’s presence in the United Kingdom is a risk to national security and that the person is a terrorist. For the purposes of this section ‘terrorist’ is defined as:

a person who (a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism, (b) is a member of or belongs to an international terrorist group, or (c) has links with an international terrorist group (s21(2)).

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5 Relevant legislation includes the Terrorism Act 2000 (UK), the Immigration Act 1971 (UK), the Extradition Act 1989 (UK), the Taking of Hostages Act 1982 (UK), the Customs and Excise Management Act 1979 (UK) and the Export of Goods (Control) Order 1994 (UK).


8 For a good summary of the principal changes made by the ATCSA, see <http://www.homeoffice.gov.uk/oicd/antiterrorism/atcsa.htm> (6 Jan 2003).

9 According to s21(3), a “group is an international terrorist group for the purposes of subsection (2)(b) and (c) if – (a) it is subject to the control or influence of persons outside the United Kingdom, and (b) the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism.” Section 21 (4) states that “[f]or the purposes of subsection (2)(c) a person has links with an international terrorist group only if he supports or assists it.”
'Terrorism' has the meaning given by s1 of the Terrorism Act 2000 (UK). The core of the ATCSA is to be found in s23(1). It provides that a 'suspected international terrorist', upon certification, may be detained indefinitely if either a 'point of law' or a 'practical consideration' prevents his removal from the United Kingdom. The provision applies to persons subject to immigration control under the Immigration Act 1971 (UK), and therefore does not apply to British citizens.

The detention of foreign nationals under s23 of the ATCSA is incompatible with Article 5 of the ECHR. Article 5 of the ECHR guarantees the right to liberty and security, and principally seeks to prevent arbitrary interference by a public authority with an individual’s personal liberty. Nevertheless, the European Convention permits deprivation of liberty on condition that deprivation measures are 'in accordance with a procedure prescribed by law'. Of particular relevance in the present context is Article 5(1)(f), which allows for 'lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. The purpose of s23 of the ATCSA is to detain suspected international terrorists.

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10 For the Terrorism Act 2000 (UK) see <http://www.hmso.gov.uk/acts/acts2000/20000011.htm> (2 Jan 2003). Section 1 reads:

(1) In this Act “terrorism” means the use or threat of action where –
(a) the action falls within subsection (2),
(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it –
(a) involves serious violence against a person,
(b) involves serious damage to property,
(c) endangers a person's life, other than that of the person committing the action,
(d) creates a serious risk to the health or safety of the public or a section of the public, or
(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section –
(a) “action” includes action outside the United Kingdom,
(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
(d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.'

11 Examples of a 'point of law' preventing removal include other international obligations such as Article 3 of the ECHR (see n13). An example of 'practical consideration' would be the absence of relevant travel documents.

12 The author acknowledges that the ATCSA provisions also breach obligations under the ICCPR, specifically Article 9(4). Although there are slight differences in the wording of Article 5 of the ECHR and Article 9 of the ICCPR, the provisions are similar. As Article 9(4) of the ICCPR will be subject to an in-depth analysis in the Australian context, focus here is on Article 5 of the ECHR only.
terrorists who cannot be removed from the United Kingdom due to a point of law, in this case Article 3 of the ECHR. Hence, detainees under s23 of the ATCSA are persons against whom action is not being taken with a view to deportation. Section 23 of the ATCSA therefore is in breach of Article 5(1) of the ECHR and does not fall under the exception of Article 5(1)(f) or any other paragraph of Article 5(1). Because of the incompatibility of s23 of the ATCSA with Article 5(1) of the ECHR some conservative members of Parliament wanted Home Secretary Blunkett to consider withdrawing from the European Convention altogether. The British Government, however, preferred to derogate formally from Article 5(1) of the ECHR and issued an order in accordance with Article 15(3) of the ECHR. No derogations were notified in relation to any other obligation under the ECHR.

(iii) Limited Access to Judicial Review

According to s25(1) of the ATCSA, a ‘suspected international terrorist’ cannot appeal to a British court of law against his or her certification under s21 of the ATCSA. Appeal is only available to the Special Immigration Appeals Commission (hereinafter SIAC), which has the power to cancel the certificate if it believes that it should not have been issued in the first place. This limited access to judicial review is in breach of Article 5(4) of the ECHR. Article 5(4) of the ECHR states that ‘everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful’.

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13 The paradigmatic example for removal from the United Kingdom being prevented by a ‘point of law’ is the case where such removal would expose the person to the risk of torture, or of inhuman or degrading treatment (Article 3 ECHR). See Chahal v United Kingdom (1996) 23 EHRR 413.

14 In Chahal v United Kingdom the European Court of Human Rights held that ‘any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible’: Chahal v United Kingdom, id at 465.

15 In particular, s23 of the ATCSA does not fall under the exception of Article 5(1)(c) of the ECHR.


17 Human Rights Act 1998 (Designated Derogation) Order 2001 (UK). The relevant passage reads: ‘There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom. As a result, a public emergency, within the meaning of Article 15(1) of the Convention, exists in the United Kingdom’ (Sch Article 2).

18 The United Kingdom also notified the UN Secretary-General of its Article 4(1) ICCPR derogation from Article 9(1) of the ICCPR.

19 SIAC was established by the Special Immigration Appeals Commission Act 1997 (UK) to hear appeals against immigration and deportation decisions that have been taken on national security grounds.

20 It seems worthy to note, however, that a cancellation does not prevent the Secretary of State from issuing a new certificate, ‘whether on the grounds of a change of circumstance or otherwise’ (s27(9)).
SIAC is not a typical court of law integrated in the standard British court system. However, in *X v United Kingdom*, the European Court of Human Rights held that in the context of Article 5(4) of the ECHR ‘the word “court” is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country’. The term rather serves to denote ‘bodies which exhibit not only common fundamental features of which the most important is independence of the executive and of the parties of the case, but also the guarantees … of [a] judicial procedure’. While SIAC has been established as an impartial and independent tribunal with the same status as the High Court, and thus undoubtedly provides some degree of control, serious doubts arise as to whether proceedings before it offer sufficient guarantees of judicial procedure.

The European Court of Human Rights found it essential that the person concerned be present at an oral hearing, where he or she has the opportunity to be heard either in person or through a lawyer, and the possibility of calling and questioning witnesses. In *Bouamar v Belgium*, for instance, the Court held that hearings before a juvenile court — undoubtedly a ‘court’ from the organisational point of view — conducted in the absence of the applicant’s lawyers did not satisfy the requirements of Article 5(4) of the ECHR. Also required is the benefit of an adversarial procedure ensuring equality of arms.

Proceedings before SIAC may be held in the absence of the appellant and/or his or her counsel. The detainee and his or her legal representatives will not be entitled to see all the evidence and will not be informed in detail about the reasons for the decisions that have been made in respect of him or her. Furthermore, the appellant’s legal representatives will be chosen for him or her by the Attorney–General and will not be responsible to the appellant. Proceedings before SIAC therefore do not offer sufficient guarantees of judicial procedure and cannot be considered a ‘court’ within the meaning of Article 5(4) of the ECHR.

**B. Australia**

(i) **New Anti-Terrorism Legislation**

In contrast to the United Kingdom, Australia has had little or no experience of terrorism, and before 9/11 there were no Australian laws dealing specifically with terrorism. A first package of anti-terrorism legislation, comprising five bills, was introduced into the Federal Parliament on 12 March 2002. The most important
bill of this first package was the controversial Security Legislation Amendment (Terrorism) Bill 2002 (Cth), which passed Parliament and the Senate only after it had been amended substantially to include recommendations by the Senate Legal and Constitutional Legislation Committee.  

The second cornerstone of Australia’s new anti-terrorism laws was meant to be the ASIO Bill. Its main purpose was to authorise the detention by ASIO of persons for questioning in relation to terrorism offences, as well as the creation of new offences in respect to withholding of information regarding terrorism. The ASIO Bill was first introduced into Parliament on 21 March 2002 and was likewise subject to heated discussion. While Attorney–General Daryl Williams was convinced that the new legislation would enable ASIO ‘to engage in an appropriate form of interrogation’ to gather relevant information for the prevention of terrorist attacks, critics argued that the bill was ‘rotten to the core’ and would establish ‘part of the apparatus of a police state’. After contentious debate in the Senate, the Bill was referred to the Senate Legal and Constitutional Affairs References Committee for a public inquiry and report. Still, it was rejected by the Senate on 13 December 2002. The Bill was reintroduced into Parliament in late March 2003, subject to a number of minor amendments. After intense negotiations between the Government and the Opposition, the revised Bill finally passed the Senate on 26 June 2003.

(ii) Arbitrary Detention of Non-Suspects

The ASIO Act authorises ASIO to seek a warrant to detain and question people for up to 24 hours. The person detained does not need to be suspected of any offence. People can be taken into custody without charges being laid or even the possibility that they might be laid at a later stage. According to s34D(1), it is sufficient that the ‘issuing authority’ has ‘reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence’. An ‘issuing authority’ is defined as a person, appointed by the

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28 The Bill introduced a definition of ‘terrorist act’ into federal law and contains criminal sanctions for involvement with a terrorist organisation, including for providing support or funding, recruiting members, directing its activities or being a member. According to s102.1, a terrorist organisation is ‘an organisation that is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)’.


Minister, who is a federal magistrate or a judge, who has consented to being appointed (s34AB). The warrant either requires a person to appear before a ‘prescribed authority’ to provide information or produce records or things or authorises a police officer to take the person into custody and bring him or her before a ‘prescribed authority’ for such purposes. While a single warrant must not exceed 24 hours, it is possible to extend detention by requesting successive warrants. In total, the successive extensions may not result in a continuous period of detention of more than 168 hours (7 days) from the time the person first appeared before any ‘prescribed authority’ for questioning under an earlier warrant (s34D(3)(c).

The detention of non-suspects authorised by a non-judicial body for the mere purpose of questioning is incompatible with Australia’s international human rights commitments, specifically obligations under the ICCPR. Article 9(1) of the ICCPR states that ‘[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention’. Referring to the ICCPR’s travaux préparatoires, Manfred Nowak pointed out that the term ‘arbitrary’ is not to be equated with ‘against the law’ but includes elements of injustice, unpredictability, unreasonableness, capriciousness and unproportionality. Confirming this interpretation, the Human Rights Committee stated in Van Alphen v The Netherlands that detention ‘must not only be lawful but reasonable in all the circumstances’ and ‘must be necessary in all the circumstances, for example to prevent flight, interference with evidence, or the recurrence of a crime’. [Emphasis added.] It is difficult to see how the detention of non-suspects for the purpose of questioning and intelligence gathering can be regarded as ‘necessary and reasonable in all the circumstances’ when:

1. ASIO confirmed in April 2002 that ‘there is no known specific terrorist threat to Australia at present’. Although Australia was a possible target, there were ‘a series of other countries more at risk of attack’, among them the United States and the United Kingdom. Nonetheless, neither the United States nor the United Kingdom have felt compelled to introduce legislation that facilitates the detention of non-suspects for mere questioning purposes.

2. Even in circumstances where detention for questioning purposes is considered to be indispensable, there is no clear reason why such detention should not be strictly confined to those reasonably suspected of being terrorists or being involved in terrorist activities.

33 According to s34B, a ‘prescribed authority’ may be a retired superior court judge, a current State or Territory Supreme Court or District Court judge, or a President or Deputy President of the Administrative Appeals Tribunal.
34 Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980.
37 ‘Australia will be terrorist target for years: ASIO’, The Age (Melbourne) (19 Apr 2002).
38 Ibid.
3. The ASIO Act, falls short of providing sufficient safeguards. Comparable legislation in Canada, for example, requires that a regular judge — independent from the executive — must make out the orders for so-called investigative hearings. In the absence of similar provisions, the Australian proposals lack any necessity, reasonableness and proportionality in ‘all the circumstances’, specifically as response to a possible terrorist threat. In consequence, detention powers under the ASIO Act may be held to constitute arbitrary interference with the individual’s right to liberty and security as protected by Article 9(1) of the ICCPR.

(iii) Limited Access to Judicial Review

The detention of non-suspects is not only unnecessary and disproportionate but also breaches Article 9(3) of the ICCPR. Article 9(3) requires that ‘[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release’. Under the ASIO Act, persons are not detained on criminal charges, but for questioning purposes. However, it would be inconsistent with the ICCPR’s underlying principles if it granted greater rights to persons officially arrested on criminal charges than to those who are compulsorily detained for questioning in relation to terrorism offences. Article 9(3) therefore is also applicable to administrative detention for questioning purposes. As the Human Rights Committee stated in its General Comment 8, prompt appearance before a judge or other officer authorised by law to exercise judicial power requires that the period before appearance ‘must not exceed a few days’.

In Freemantle v Jamaica, a four day delay in bringing the detainee before a judge was found to violate Article 9(3) of the ICCPR. Similarly, the European Court of Human Rights held in Brogan v United Kingdom that four days and 6 hours was too long to satisfy the requirement of ‘promptness’. ASIO Act provisions allow for detention for up to 168 hours (7 days) without judicial oversight at all. These arrangements constitute a serious breach of Article 9(3) of the ICCPR.

A further point of concern is that a ‘prescribed authority’ oversees the detention of persons for questioning purposes. Regarding Articles 9(3) and 9(4) of the ICCPR and Articles 5(3) and 6 of the ECHR, both the Human Rights Committee and the European Court have confirmed that the functions prescribed therein can only be carried out by a judicial body and not by quasi-judicial substitutes.

40 Human Rights Committee (hereinafter HRC), General Comment 8 (1982) at para 2.
43 See above n33 and accompanying text.
44 See above nn20–25 and accompanying text.
'prescribed authority', however, is a retired or current judge, or a President or Deputy President of the Administration Appeals Tribunal, appointed by the Minister under s34B. It may be argued that, as personae designatae, they are dependent on the favour of the executive if they wish to be reappointed. As an administrative body it is even 'less' judicial than the British SIAC. Rather it is similar to a British non-judicial body known as the 'three wise men'. The 'three wise men' acted as a review of the Home Secretary’s decisions to remove aliens from the United Kingdom whose presence was deemed to be ‘not conducive to the public good’ for reasons of national security. The European Court held in Chahal v United Kingdom that the system of the 'three wise men' contravened the European Convention and that the national authorities could not be 'free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved.' In consequence, the ‘prescribed authority’ as established in the ASIO Act cannot be considered a ‘court’ or ‘officer authorised by law to exercise judicial power’ within the meaning of Articles 9(3) and 9(4) of the ICCPR.

(iv) Privilege against Self-Incrimination and the Detention of Children

Section 34G of the ASIO Act contains offences (five years imprisonment) for failing to give the information, record or thing requested in accordance with the warrant. ‘Strict liability’ attaches to this offence and the detainee bears the burden of proof to establish that he or she does not have the information sought. In effect, these provisions remove the right to silence and reverse the onus of proof. Moreover, while the Act protects the detainee against direct use of answers in criminal proceedings against him or her (except in proceedings for an offence against s.34G), it does not provide protection from derivative use of any answers in future proceedings. This means, for example, that if the police forces find evidence based on the person’s answers during questioning (eg by later finding incriminating material at the person’s premises), this evidence may be used against the person in criminal proceedings. These provisions breach the non-derogable right to be presumed innocent until proven guilty enshrined in Article 14(2) of the ICCPR and also recognised in Article 11 of the Universal Declaration of Human Rights and Article 6 of the ECHR. Article 14(3)(g) of the ICCPR further clarifies that the accused has the right ‘[n]ot to be compelled to testify against himself or to confess guilt’. In Saunders v United Kingdom the European Court of Human Rights found that the right of any person charged to remain silent and the privilege against self-incrimination are generally recognised international standards which

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45 Chahal v United Kingdom, above n13 at 469.
46 The ASIO Act may also violate Article 17(1) of the ICCPR which provides that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.' In McVeigh, O'Neill & Evans v United Kingdom (1981) 5 EHRR 71 the European Commission of Human Rights found that the detention of suspected terrorists for 45 hours without access to their wives breached Article 8 of the ECHR, the equivalent to Article 17 of the ICCPR in the European Convention.
lie at the heart of the notion of a fair procedure. The rationale of both rights lies, inter alia, in protecting the person charged ‘against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6’ of the ECHR (right to a fair trial). In consequence, the Court held that it was a violation of Article 6 of the ECHR to admit evidence during a criminal trial, which had been obtained at an earlier administrative hearing during which the accused had been compelled by statute to answer questions and adduce evidence of a self-incriminatory nature.48 Similarly, the Human Rights Committee pointed out in its General Comment 13 that:

[i]n order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions (Article 14 ICCPR) are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable [Emphasis added].

The fact that the Human Rights Committee specifically used the term ‘wholly’ indicates that Article 14 of the ICCPR not only prohibits use immunity but also derivative use immunity. Section 34G of the ASIO Act is therefore in breach of Article 14 of the ICCPR.

Finally, and most disturbing, the ASIO Bill also permits the detention of children. Section 34NA provides that a person between the ages of 16 and 18 can be detained for questioning purposes if it is likely that this person ‘will commit, is committing or has committed a terrorism offence’. While these powers raise utmost ethical concerns, they may also violate essential provisions of the UN Convention on the Rights of the Child to which Australia became a party in 1991. In particular, it breaches Article 37(b) which provides that no child should be deprived of his or her liberty arbitrarily and that any detention should ‘be used only as a measure of last resort and for the shortest appropriate period of time’. [Emphasis added.]50 Furthermore, any child is to be presumed innocent until proven guilty.51

3. Derogation from International Human Rights Obligations

A. The International Rules on Derogation

In addition to several limitation clauses governing certain individual rights, both the ECHR and ICCPR contain a derogation clause with specific standards for

51 The Bill may also breach Articles 2(2), 3(1) and 19(1) of the CROC. Article 2(2) provides that a child must not be discriminated against on the basis of the expressed opinions of their parents. Article 3 (1)1 provides that ‘in all actions concerning children … the best interests of the child shall be a primary consideration’. Article 19(1) provides that the State must take all appropriate measures to protect the child from all forms of injury or abuse.
emergencies. While the State parties may not derogate from the entire treaty, they may legally suspend their obligation to respect and enforce specific rights contained in the convention during times of ‘war or other public emergency threatening the life of the nation’. In other words, not all rights enshrined in the ICCPR or ECHR are absolute. In exceptional circumstances, State parties are permitted to take measures that interfere with the enjoyment of rights otherwise protected by these instruments. Yet, even during the gravest of emergencies a number of rights are strictly ‘non-derogable’ on the grounds that they are too fundamental and too precious to be dispensed with. The ICCPR’s and ECHR’s derogation articles’ purpose is thus to balance the most vital needs of the state in times of crisis with the strongest protection of human rights possible. The derogation’s validity depends on the fulfilment of several legal requirements. First, the derogating government must establish the existence of a ‘public emergency


53 Article 15 of the ECHR reads:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law.
2. No derogations from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.’

Article 4 of the ICCPR reads:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other State Parties to the present Covenant, through the intermediary of the Secretary–General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”
threatening the life of the nation’. Second, the ‘public emergency’ must be officially proclaimed and relevant treaty organs must be notified. Third, the measures, which derogate from any obligation under the treaty, must only be to the extent strictly required by the exigencies of the situation. Finally, these measures must neither be inconsistent with other obligations under international law nor discriminatory.

B. Requirements for Derogation

(i) The Existence of a ‘Public Emergency’

The ICCPR and ECHR both lack a specific definition of ‘time of public emergency threatening the life of the nation’. Nevertheless, the international monitoring organs established under the treaties, notably the European Court and Commission (the Strasbourg authorities), have extensively interpreted the term and provided jurisprudence valuable for determining its meaning and scope. As the Strasbourg authorities tend to examine Article 15 in its natural and common sense, and due to the fact that many provisions in the ICCPR and ECHR are similar, in particular the derogation clauses, European decisions and findings are readily applicable to ICCPR cases.

The first substantive interpretation of Article 15 of the ECHR was made in Lawless v Ireland. Confirming the European Commission’s determination that Article 15 should be interpreted in the light of its ‘natural and customary’ meaning, the European Court of Human Rights defined ‘time of public emergency’ as ‘an exceptional situation of crisis or emergency which afflicts the whole population and constitutes a threat to the organised life of the community of which the community is composed’. The definition was further developed and clarified in the Greek case. Reaffirming the basic elements of the Court’s approach in Lawless v Ireland, the Commission emphasised that the emergency must be actual or at least ‘imminent’, a notion that is present in the Merits judgment in French (authentic version) but not in the English version. In order to constitute an Article 15 emergency, the Commission held that a ‘public emergency’ must have the following four characteristics:

1. It must be actual or imminent.
2. Its effects must involve the whole nation.
3. The continuance of the organised life of the community must be threatened.
4. The crisis or danger must be exceptional, in that the normal measures or

54 Lawless v Ireland (No 3) (1961) 1 EHRR 15.
55 Id at 31.
56 Greek Case (1969) 12 Yearbook ECHR 1
57 The relevant part reads: ‘Une situation de crise ou de danger public exceptionnelle et imminent…’ [Emphasis added.]
58 Greek Case, above n56 at para 153.
59 Some members of the Commission argued that when the organs of the State are functioning normally, there is no grave threat to the life of the nation and, therefore, emergency measures are not legitimate. However, the majority in the Commission did not follow this reasoning. In practice, both criteria (2) & (3) are generally applied in a rather relaxed way.
restrictions, permitted by Convention for the maintenance of public safety, health and order, are plainly inadequate.\textsuperscript{60}

As stated by the European Commission in the Greek Case, and by the Human Rights Committee in its General Comment 29, the State Parties bear the burden of proof in establishing the existence of a ‘public emergency’.\textsuperscript{61} However, in assessing whether a ‘public emergency’ exists and what steps are necessary to address it, States are granted a so-called ‘margin of appreciation’. The doctrine of margin of appreciation thus illustrates the general approach of the international organs to the difficult task of balancing the sovereignty of Contracting Parties with their obligations under the Convention.\textsuperscript{62} In the context of derogation in times of ‘public emergency threatening the life of the nation’, the margin of appreciation represents the discretion left to a State in ascertaining the necessity and scope of measures of derogation from protected rights in the circumstances prevailing within its jurisdiction.\textsuperscript{63} In Ireland v United Kingdom, the European Court held that:

\begin{quote}
[i]t falls in the first place to each Contracting State, with its responsibility for “the life of [its] nation”, to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) leaves the authorities a wide margin of appreciation. [Emphasis added.]\textsuperscript{64}
\end{quote}

\textsuperscript{60} Evidence of these requirements being recognised as general legal standards in the process of determining the meaning of ‘public emergency’ can also be found in the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (hereinafter Siracusa Principles), reproduced in ‘Syracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’ (1985) 7(1) Human Rights Quarterly 3. The Siracusa Principles were drafted by a group of 31 distinguished experts in international law convened by a number of well-respected organisations such as the International Commission of Jurists. The Conference was held in Siracusa, Italy in Spring 1984. In addition, these criteria are expressed in the International Law Association’s (hereinafter ILA) work on the issue: Paris Minimum Standards of Human Rights Norms in a State of Emergency ILA, (hereinafter the Paris Minimum Standards), reproduced in ‘The Paris Minimum Standards of Human Rights Norms in a State of Emergency’ (1985) 79 AJIL 1072.

\textsuperscript{61} HRC, General Comment 29 (2001) at paras 4 and 5.

\textsuperscript{62} As Ronald St J Macdonald observed, it is the doctrine of margin of appreciation which allows the Court to escape the dilemma of ‘how to remain true to its responsibility to develop a reasonably comprehensive set of review principles appropriate for application across the entire Convention, while at the same time recognising the diversity of political, economic, cultural and social situations in the societies of the Contracting Parties’. See Ronald St J Macdonald, ‘The Margin of Appreciation’ in Ronald St J Macdonald, Franz Matscher & Herbert Petzold (eds), The European System for the Protection of Human Rights (1993) 83 at 83.


\textsuperscript{64} Ireland v United Kingdom (1978) Series A No 35 at 78–9.
Yet, the Court stressed that states do not enjoy an unlimited margin of appreciation. The discretion of the State is ‘accompanied by a European supervision’. The Strasbourg Court generally seems prepared to grant a much wider margin of appreciation than the monitoring organ of the ICCPR, the Human Rights Committee. In *Landinelli Silva v Uruguay*, for instance, the Committee found that ‘the State Party is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes Article 4(1)’ and that it is the Committee’s function ‘to see to it that States parties live up to their commitments under the Covenant.’

(ii) The Requirements of Proclamation and Notification

Article 4(1) of the ICCPR requires that the existence of a public emergency be ‘officially proclaimed’. As explained by the Human Rights Committee in its *General Comment 29*, states ‘must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers’. Failure to comply with this requirement constitutes a violation of international law. This legal effect distinguishes the proclamation from the international duty to notify under Article 4(3) and Article 15(3). As Manfred Nowak observed, the latter is not a necessary condition of the lawfulness of emergency measures, but serves only the purpose of supervision by the international monitoring organs. Surprisingly, the requirement of official proclamation does not appear expressly in the ECHR. Indeed the European Court in the *Lawless* case found that Article 15 does not oblige ‘the State concerned to promulgate the notice of derogation within the framework of its municipal laws.’ However, Article 15 also provides that any derogation measure must be consistent with other obligations under international law. As a consequence, it appears that states party to both the ECHR and the ICCPR would still have to fulfil the requirement of ‘official proclamation’. Among others, this issue arose in *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539. Intervening NGOs challenged the United Kingdom’s declaration of a state of emergency on the grounds that it was not ‘officially proclaimed’. However, the European Court was satisfied that the detailed explanation by the Home Secretary in the House of Commons was sufficient to comply with the proclamation requirement. In any case, declarations of ‘public emergency’ must be made in good faith. Although not explicitly expressed in the derogation clauses themselves, the good faith principle can be derived from certain other provisions of the two treaties, which provide that no state may perform any act aimed at the destruction or undue limitation of rights and freedoms protected by the instruments. It is also recognised in Principle 62

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65 Ibid.
67 *HRC, General Comment 29*, above n61 at para 2. This requirement mainly seeks to reduce the incidence of the de facto states of emergency by obliging states to declare the emergency following the procedures of municipal law.
68 Nowak, above n35 at 80.
69 *Lawless v Ireland*, above n54 at paras 4–5.
of the Siracusa Principles, which states that any proclamation of a public emergency not made in good faith constitutes a violation of international law.71

(iii) The Proportionality of Measures: ‘to the extent strictly required’

A fundamental requirement for any measures derogating from the ECHR or the ICCPR is that such measures are limited ‘to the extent strictly required by the exigencies of the situation’.72 In other words, derogation measures must be strictly proportionate. The principle of proportionality constitutes a general principle of international law and includes elements of severity, duration and scope.73 It is equally applied by the Strasbourg authorities and the Human Rights Committee, yet with slightly different nuances.74 Any derogation measure must fulfil the following five basic requirements:

1. The measures must be necessary, i.e., actions taken under ordinary laws and in conformity with international human rights obligations are not sufficient to meet the threat.
2. The measures must be connected to the emergency, i.e., they must ‘prima facie’ be suitable to reduce the threat or crisis.
3. The measures must be used only as long as they are necessary, i.e., there must be a temporal limit.
4. The degree to which the measures deviate from international human rights standards must be in proportion to the severity of the threat, i.e., the more important and fundamental the right which is being compromised, the closer and stricter the scrutiny.
5. Effective safeguards must be implemented to avoid the abuse of emergency powers. Where measures involve administrative detention, safeguards may include regular review by independent national organs, in particular, by the legislative and judicial branches.

In determining whether derogation measures are strictly required by the exigencies of the situation, a certain ‘margin of error’ must be granted to the national authorities. In other words the doctrine of margin of appreciation is applicable, not only in the process of assessing the existence of a ‘public emergency’, but also in the context of proportionality. The European Court held in Ireland v United Kingdom that it falls to the Contracting Party to determine ‘how far it is necessary to go in attempting to overcome the emergency’.75 Again, Strasbourg seems to grant a substantial amount of discretion to national governments. On the other hand, the Siracusa Principles explicitly state that the principle of strict necessity shall be applied in an ‘objective manner’ and, moreover, that ‘the judgment of the national authorities cannot be accepted as conclusive’.76

71 A reference to a bona fide proclamation is also made in Principle 66 of the Siracusa Principles.
72 See Article 15(1) of the ECHR and Article 4(1) of the ICCPR.
73 See, for example Marc-André Eissen, ‘The Principle of Proportionality in the Case-Law of the European Court of Human Rights’ in Ronald St J Macdonald, above n62 at 125–137.
74 Ibid.
75 Above n64 at 78–9.
76 See Principles 54 and 57 of the Siracusa Principles.
(iv) The Principles of Consistency and Non-Discrimination

Article 4(1) of the ICCPR also states that derogation measures may not be inconsistent with other obligations under international law. Furthermore, they may not involve discrimination ‘solely on the ground of race, colour, sex, language, religion or social origin’. The ICCPR’s travaux préparatoires indicate that some delegations suggested extending the non-discrimination clause to include the criteria of national origin. The proposal, however, was rejected on the grounds that disparate treatment of enemy aliens would be necessary during wartime. While the principle of consistency also appears in Article 15 of the ECHR, the non-discrimination passage is missing in the European derogation clause. Nevertheless, the absence of the non-discrimination principle in Article 15 of the ECHR effectively has no major consequences, as discriminatory application of derogation measures is in most cases incompatible with the general non-discriminatory provision of Article 14 of the ECHR. Moreover, arbitrary discrimination against disfavoured groups of various types would be usually difficult to justify as being ‘strictly required by the exigencies of the situation’. In contrast to Article 4(1) of the ICCPR, Article 14 of the ECHR also prohibits discrimination on the basis of national origin.

4. Derogation in the Face of International Terrorism

A. The Phenomenon of International Terrorism

Circumstances which can provoke the proclamation of a ‘public emergency’ were originally considered to involve war, internal unrest, natural disasters or economic crises. The phenomenon of terrorism was not contemplated when the ECHR and the ICCPR were drafted in the aftermath of World War II. Yet, all cases that have reached the European Court of Human Rights on Article 15 of the ECHR have concerned threats to internal security arising from acts of terrorism. In Lawless, Ireland v United Kingdom, and Brannigan and McBride, the governments’ declarations of ‘public emergency’ were triggered by terror campaigns of the Irish Republican Army and their Unionist counterparts. Both Catholic and Protestant terrorist organisations were operating in Northern Ireland and, to a lesser extent, in England. Unlike these traditional forms of terrorism, however, the threat from Islamic extremism is not limited by geography. Terrorism today is a complex and global problem, not necessarily a localised and domestic one. As the United States Coordinator for Counterterrorism, Ambassador Francis X Taylor, pointed out, ‘small cells of terrorists have become true transnational threats — thriving around the world without any single state sponsor or homebase. [Emphasis added.]’

77 See, for example Jaime Oraa, Human Rights in States of Emergency in International Law (1992) at 178.
78 Id at 30–31.
Moreover, unlike its previous manifestations, contemporary terrorism is hardly attributable to a confined number of terrorist organisations, even though it has been mainly associated with Al-Qaeda. In other words, the threat scenario is much more diffuse and abstract. Most experts therefore expect the ‘war on terror’ to last for many years, with Islamic fundamentalist terrorism remaining a menace of profound concern. An important question that now has to be asked is: What implications do these findings have for the interpretation of international human rights treaties, specifically in the context of derogations due to threats from international terrorism?

In most circumstances the existence of a ‘public emergency threatening the life of the nation’ is or will be claimed in relation to a threat. In consequence, there has to be an assessment of the risk of the execution of the threat, as well as its seriousness. This assessment has to be conducted on a case-by-case basis. Because the terrorist threat is usually ‘international’ and non-specific, the government’s burden of justification in respect of the existence of a ‘public emergency’ is particularly high. In addition, the margin of appreciation granted to individual States in assessing the existence of a ‘public emergency’ and the proportionality of response measures need to be reconsidered and adjusted. The more global and non-specific the threat, the less the amount of discretion left to the State. As the threat of international terrorism is global, national authorities are not necessarily in a better position to decide on the imminence of a ‘public emergency’. Quite the opposite: other countries might even have superior intelligence on specific terrorist threats. Consequently, reactions and perceptions of other States have also to be taken into account. As far as the threat level in European countries is concerned, it is significant that an overwhelming majority of Council of Europe states have not regarded the actual terrorist threat to be of sufficient gravity to meet the ‘public emergency’ criteria and find enough flexibility in the ECHR’s standards to accommodate any special provisions for counter-terrorist purposes. Besides, in its Resolution 1271 (2002), the Parliamentary Assembly of the Council of Europe called upon all member states ‘not to provide for any derogation to the European Convention of Human Rights’ and to ‘refrain from using its Article 15 to limit rights and liberties guaranteed under its Article 5 (right to liberty and security)’. [Emphasis added.] This can be seen as an indication that, at present, the threat from international terrorism in Europe should not be considered as constituting an Article 15 emergency.

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80 The list of Islamic extremist terror organisations is both a long and an open one. It is also noteworthy that although the 9/11 attacks are considered to be initiated by Usama bin Laden, to this date, neither Al-Qaeda nor any other terrorist group has officially claimed responsibility.

B. United Kingdom

(i) The Existence of a Public Emergency

At the time of writing there have been no terrorist incidents directly attributed to Islamic extremism in the United Kingdom or anywhere else in Europe.82 Terrorist attacks believed to have been conducted by Al-Qaeda took place in Kenya, Tanzania, Yemen, Saudi Arabia, Tunisia, and, on 11 September 2001, in the United States. In consequence, the current situation is completely different to the United Kingdom’s position in Northern Ireland, which the European Court of Human Rights found to constitute an Article 15 ECHR ‘public emergency’. Between 1972 and 1992, over 40,000 terrorist incidents related to the Northern Ireland conflict caused approximately 3000 deaths and injured thousands more.83 This level of atrocity is clearly on a much greater scale than the international terrorism, which has afflicted the United Kingdom since 9/11. Terrorism at that time was occurring on a regular basis over a long period of time directly affecting the day-to-day lives of British citizens and creating a certain kind of general panic. Although it may be said that there is real concern among the population regarding acts of international terrorism, the level of public anxiety is in no way comparable to the fear caused by Northern Ireland related terrorist incidents. Moreover, those terrorist activities were directly connected to the affairs of the British Government. In contrast, Islamic extremist terrorism, for the most part, finds its roots in the Israeli-Palestinian conflict and American military presence in the Arab world.84 Apparently recognising these fundamental differences, the United Kingdom’s claim of the existence of an Article 15 ECHR emergency is not based on the actual existence of a ‘public emergency’ but rather on imminent threats from international terrorism. As the ‘public emergency’ is being claimed in relation to a threat, the United Kingdom bears a heavy burden to establish that it is facing the risk of an immediate execution of this threat. Yet, Home Secretary David Blunkett and several other government officials stated repeatedly on a number of occasions that there was ‘no immediate intelligence pointing to a specific threat to the United Kingdom’.85 If the threat is neither immediate nor specific, then how can there be a ‘public emergency threatening the life of the nation’?

The British claim of the existence of a ‘public emergency’ rests mainly on the assumption that, as a result of its strong support for the United States and Israel, even before the war in Iraq, the United Kingdom has become a potential target. However, in its submission to the Council of Europe, the United Kingdom did not

82 The author acknowledges that European countries, particularly France, Germany (eg Munich Olympics 1972) and the United Kingdom (eg Lockerbie crash of Pan Am 103, 1988), have been subject to attacks from terrorist groups with links to the Middle East. However, to this day, there have not been any attacks in Europe from Islamic fundamentalist terrorists commonly associated with Al-Qaeda.

83 Figures quoted by Tomkins, above n7 at 215–6.


85 Wintour, above n16.
explain why it should be more affected than other major European countries, which are also close allies of the United States. Given the exceptionality of measures, and the fundamental importance of Article 5 of the ECHR (right to liberty and security), such clarification would have been necessary. In the absence of sufficient explanation, it remains questionable whether there is a ‘public emergency’ within the terms of Article 15 of the ECHR existing at this time. It is also significant that the Human Rights Committee, in its concluding observations dated 2 November 2001, following the examination of the United Kingdom’s fifth periodic report on the implementation of the ICCPR, expressed ‘concern’ about the British government’s proposals to derogate. \(^\text{86}\)

Nonetheless, in _A and others v Secretary of State for the Home Department_, SIAC held on 30 July 2002 that the United Kingdom government was:

entitled to form the view that there was and still is a public emergency threatening the life of the nation and that the detention of those reasonably suspected to be international terrorists involved with or with organisations linked to Al Qa’ida is strictly required by the exigencies of the situation. \(^\text{87}\)

On this issue, the Court of Appeal upheld SIAC’s judgment on 25 October 2002. However, apart from the general finding that ‘no other European nation is threatened in quite the same way’, neither SIAC nor the Court of Appeal explained why the United Kingdom should be distinguished from its neighbours.

(ii) _The Proclamation of a ‘Public Emergency’_

A State Party derogating from the ECHR or ICCPR must issue the proclamation of ‘public emergency’ in good faith. \(^\text{88}\) Equally, restoration of a state of normalcy, where full respect for the international instruments can again be secured, must be the predominant objective of derogation. \(^\text{89}\) On 12 November 2001, Home Secretary David Blunkett publicly declared a ‘state of emergency’. At the same time, Blunkett told the _Guardian_ that the declaration was _not_ a response to any imminent terrorist threat, but rather a ‘legal technicality’, necessary to ensure that certain anti-terrorism measures that contravene the ECHR could be

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\(^{86}\) ‘The Committee notes with concern that the State Party, in seeking inter alia to give effect to its obligations to combat terrorist activities pursuant to Resolution 1373 of the Security Council, is considering the adoption of legislative measures which may have potentially far-reaching effects on rights guaranteed in the Covenant, and which, in the State Party’s view, may require derogations from human rights obligations. The State Party should ensure that any measures it undertakes in this regard are in full compliance with the provisions of the Covenant, including, when applicable, the provisions on derogation contained in Article 4 of the Covenant’: HRC, Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland (6 Dec 2001) at para 6.


\(^{88}\) See above notes 67–71 and accompanying text. As the British government notified the Council of Europe and the UN Secretary–General about the derogation from the ECHR and ICCPR, the requirement of notification has been fulfilled and is not discussed here any further

\(^{89}\) HRC, _General Comment No 29_, above n61 at para 1.
implemented. Moreover, in a statement to Parliament on 15 October 2001, Blunkett said that there was ‘no immediate intelligence pointing to a specific threat to the United Kingdom’. The Home Secretary’s public pronouncements therefore raise grave concerns that the United Kingdom sought to derogate from its international human rights obligations in the absence of conditions qualifying as a bona fide state of emergency.

(iii) Proportionality: ‘To the Extent Strictly Required’

Doubts also arise as to whether British measures are ‘strictly required by the exigencies of the situation’. First, it is generally questionable whether powers contained in ss21–23 of the ATCSA are strictly necessary. In Aksoy v Turkey the European Court of Human Rights found that not even the undoubted ‘public emergency’ in southeast Turkey could justify the detention of the applicant for 14 days, without sufficient judicial control, on suspicion of involvement in terrorist offences. In the light of the Aksoy decision it is difficult to ascertain how indefinite detention of suspected international terrorists can be ‘strictly required’, even in circumstances that amount to an Article 15 emergency. Moreover, the United Kingdom government has not established why actions taken under existing laws and in conformity with international human rights obligations are not sufficient to meet the terrorist threat. The Terrorism Act 2000 (UK), for instance, provides extensive powers for the arrest and prosecution of those reasonably suspected of being involved in terrorism. In particular, s41(1) of the Terrorism Act states that ‘[a] constable may arrest without a warrant a person whom he reasonably suspects to be a terrorist’.

Second, the principle of proportionality requires the government to demonstrate that the measures impair the right at issue, in this case, the right to liberty and security, as little as reasonably possible in order to achieve the legislative objective. The ATCSA’s purpose is to protect the United Kingdom from acts of international terrorism. Central to the introduction of the Act is the

90 Wintour, above n16.
91 Well respected human rights lawyer David Pannick QC, in an opinion prepared for the National Council for Civil Liberties (Liberty), made the additional point that the derogation from Article 5(1) is prompted by concern about an inability to remove foreign nationals from the United Kingdom because of Article 3 of the ECHR. He was ‘very doubtful’ that it is a valid use of Article 15(1) to impose detriments on persons because they seek to take advantage of rights conferred by Article 3, especially when Article 15(2) prohibits any derogation from Article 3 itself because of its fundamental nature. For Pannick, it is strongly arguable that the Home Secretary is not seeking to derogate from Article 5(1) because of a public emergency threatening the life of the nation, but because Article 3 prevents him removing from the United Kingdom asylum-seekers who may face persecution abroad. See Joint Committee On Human Rights, Anti-terrorism, Crime and Security Bill: Further Report, Fifth Report, (hereinafter Joint Committee on Human Rights Fifth Report) HL 51, HC 420, Session 2001–2002, Appendices, Appendix 5 at para 6(5): <http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/51/5102.htm> (20 Feb 2003).
92 It is significant to note that some of the measures, as a former Home Secretary admitted in the House of Lords, have been ‘hanging around in the Home Office for a long time’ waiting for a suitable legislative opportunity to arise. Quoted by Tomkins, above n7 at 220.
93 (1996) 22 EHRR 553.
assumption that the United Kingdom could be subject to an attack of the magnitude of the 9/11 atrocities. The 9/11 attacks on the United States are believed to have been carried out by Al-Qaeda, the only international terrorist organisation at the time considered to be capable of conducting large-scale terrorist operations. Indeed, the British government found that ‘[n]o other organisation has both the motivation and the capability to carry out attacks like those of the 11 September — only the Al Qaida network under Usama bin Laden’. 94 The claim of the existence of a ‘public emergency’ is consequently dependant on the threat posed by the Al-Qaeda network. However, ss21–23 of the ATCSA do not only apply to suspected terrorists associated with the Al-Qaeda group, but to all international terrorists, whether they threaten the national security of the United Kingdom or other states altogether.95 In other words, ATCSA provisions facilitate, for instance, indefinite detention of suspected Tamil Tigers or operatives from the Kurdish PKK and cover even persons that only have ‘links’ to the aforementioned organisations.96 The scope of detention powers therefore goes well beyond what could be reasonably considered as ‘strictly required by the exigencies of the situation’.

Third, as only the Al-Qaeda network has the ‘motivation and capability’ to pose a threat to the security of the United Kingdom constituting an Article 15 emergency, the government bears the burden to establish evidence for the continuing operational effectiveness of the terrorist organisation. A failure to do so would result in current measures being no longer strictly required by the exigencies of the situation. After an allegedly successful military campaign in Afghanistan, the detention of several Al-Qaeda fighters in Guantanamo Bay and the capture of the suspected mastermind of the 9/11 attacks in Pakistan in February 2003, a long-time CIA terrorism official and now head of the State Department’s counter-terrorism office, Cofer Black, described the Al-Qaeda leadership’s losses as ‘catastrophic’ and pointed out that the broader network ‘has been unable to withstand the global onslaught’ of counter-terrorism operations.97 President George W Bush, in a speech on 5 May 2003, noted that “…about half of all the top Al-Qaeda operatives are either jailed or dead” and that ‘in either case, they’re not a problem anymore’.98 The President’s judgment might be overly optimistic as it cannot be ruled out that terrorists associated with the Al-Qaeda network will conduct further attacks in the future. However, in the light of these statements and the allegedly successful counter-terrorism operations, it seems questionable

94 Quoted in Joint Committee on Human Rights Fifth Report, above n91 at Appendix 3, para 10.
95 In Home Secretary v Rehman [2001] 3 WLR 877 at 884 (Lord Slynn of Hadley) and 894 (Lord Hoffman), it was held that ‘action against a foreign state may be capable indirectly of affecting the security of the United Kingdom’ and that ‘the promotion of terrorism in a foreign country by a United Kingdom resident would be contrary to the interests of national security’.
96 For the Tamil Tiger example, see Joint Committee On Human Rights Fifth Report, above n91 at Appendix 3, para 21–2.
97 Walter Pincus & Dana Priest, ‘Spy Agencies’ Optimism on Al Qaeda is Growing’, Washington Post (6 May 2003) at A16.
whether al-Qaeda can nonetheless pose a threat to the United Kingdom which is so potentially serious that it requires extraordinary powers as set forth in ATCSA.  

Fourth, the ATCSA measures are disproportionate in the sense that they do not provide sufficient safeguards to avoid abuse of emergency powers. Detention orders are subject only to an appeal to SIAC rather than to a regular court of law. SIAC was originally instituted to hear appeals against immigration and deportation decisions that have been taken on national security grounds. It is not designed to deal with issues of indefinite detention. Furthermore, SIAC proceedings lack fundamental guarantees of judicial procedure. Given the fundamental importance of the right to liberty and security (Article 5 ECHR/Article 9 ICCPR), it is not strictly required by a public emergency, allegedly caused by threats from international terrorism, to deny suspected international terrorists basic judicial principles, such as the right to a fair hearing or trial.

In A and Others v Secretary of State for the Home Department, both the Court of Appeal and, to a lesser extent, SIAC were reluctant to exercise close scrutiny as to whether measures under the ATCSA were ‘strictly required by the exigencies of the situation’. Referring to Home Secretary v Rehmann and Brown v Stott, the Court of Appeal held that:

[de]cisions as to what is required in the interest of national security are self-evidently within the category of decisions in relation to which the court is required to show considerable deference to the Secretary of State because he is better qualified to make an assessment as to what action is called for’.

While it appears that the Court uses the deference to the Home Secretary’s decision as a substitute for coherent legal analysis of the issues at stake, this finding is also inconsistent with European case law. Although granting a certain margin of

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99 Terrorism experts believe that recent terrorist attacks in Riyadh and Morocco were ‘probably not orchestrated by Al Qaeda’ and have ‘little or no connection to Usama bin Laden’. The attacks are rather believed to have been carried out by local groups with anti-monarchist motivations: William O Beeman, ‘Saudi-Bombing – A Calculated Act With a Political Message’, Pacific News Service (14 May 2003).

100 It is not without significance that a number of British MPs rejected extending SIAC powers to rule on appeals of detention orders. Replying to the Home Secretary’s argument that MPs did not object to the creation of SIAC in 1997, one MP pointed out that ‘had MPs known that SIAC – a star chamber of an organisation, with draconian powers over evidence – was to be used as an appeals procedure, not for deportation but for the indefinite incarceration of people without charge or trial, MPs would not have voted for it’. See Bob Marshall-Andrews MP, A Fundamental Attack on Liberty Which Must Be Stopped: <http://www.poptel.org.uk/segni/articles/0112/page6d.htm> (4 Feb 2003).

101 See above notes 20–25 and accompanying text.

102 [2001] 3 WLR 877 at 896–7 (Lord Hoffman).

103 [2001] 2 WLR 817 at 834–5 (Lord Bingham of Cornhill).

appreciation to governments, the European Court of Human Rights expressly stated that this does not mean that national authorities could be ‘free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved’. This implies that the amount of discretion, which is left to the executive by a domestic court, is much less than the discretion that is granted by the European Court.

(iv) Consistency and Non-Discrimination

As indicated, derogation measures must fulfil the requirements of consistency and non-discrimination. The United Kingdom has derogated from Article 5(1) of the ECHR and Article 9(1) of the ICCPR only. However, as British derogation measures also breach Article 5(4) of the ECHR, they lack required consistency with other obligations under international law.

Furthermore, the derogation measures do not fulfil the requirement of non-discrimination. Sections 21–23 of the ATCSA apply only to persons subject to immigration control under the Immigration Act 1971 (UK). They do not apply to British citizens. These arrangements may be inconsistent with the requirement of non-discrimination as set forth in Article 14 of the ECHR and Article 4(1) of the ICCPR. While not explicitly mentioned in Article 4(1) of the ICCPR or Article 15(1) of the ECHR, it has long been recognised in the international law of human rights that, in the absence of war, disparate treatment on the grounds of national origin may be incompatible with the non-discrimination provisions.

Not all differences of treatment are considered to be discriminatory. In Belgian Linguistics the European Court of Human Rights held that only those differences in treatment for which the State could not give a ‘reasonable and objective’ justification are discriminatory. Nonetheless, the burden of justification is particularly high if certain grounds of discrimination are relied upon such as race, sex, nationality, and illegitimacy. This was confirmed in Gaygusuz v Austria, where the Court held that differences in treatment on the grounds of nationality require very weighty justification. In the present case, the United Kingdom government needs to establish that treating British nationals differently from aliens is reasonably and objectively justified. A distinction would be reasonably and objectively justified if the terrorist threat to the United Kingdom exclusively originates from the alien section of the population. However, the threat is not so confined. Hundreds of British nationals attended Al–Qaeda training camps in Afghanistan. Indeed, would-be shoe bomber Richard Reid holds British...

105 Chahal v United Kingdom, above n13 at 469.
106 See above notes 20–25 and accompanying text.
108 Belgian Linguistics Case (No 2) (1968) 1 EHRR 252.
109 Gaygusuz v Austria (1997) 23 EHRR 364 at 381.
citizenship. In these circumstances it is difficult to ascertain how the United Kingdom derogation can be regarded as other than discriminatory on the grounds of national origin.

While the violation of the principle of non-discrimination was confirmed by the SIAC judgment in *A and others v Secretary of State for the Home Department*, the Court of Appeal reached a different conclusion on the basis that British nationals are not in an analogous situation to foreign nationals who currently cannot be deported because of fears for their safety.112 ‘Such foreign nationals do not have the right to remain in the United Kingdom but only a right not to be removed’. However, this difference in legal status is neither relevant nor reasonably justifiable as the threat from acts of international terrorism stems from British nationals and aliens alike. Given that the threat is neutral as to nationality, the distinction between the legal status of the two groups bears no connection to the justification for detention. In consequence, the difference in legal status is not sufficient to meet the requirement of ‘very weighty justification’.

Summing up, the United Kingdom’s derogation from the ECHR and ICCPR is unlawful. The existence of a ‘public emergency’ remains questionable and its proclamation was not made in good faith. Moreover, the derogation measures lack any proportionality, and do not fulfil the requirements of consistency and non-discrimination.

**C. Australia**

(i) The Existence of a ‘Public Emergency’

Much of what has been said in relation to the existence of a ‘public emergency’ in the United Kingdom is applicable to the situation in Australia. To this date there has not been any terrorist incident on Australian soil. Nor, indeed, has Al-Qaeda even been identified unambiguously as the perpetrator of the attacks on the United States. Responding to a series of questions from members of the Senate’s Legal and Constitutional Legislation Committee, ASIO confirmed in April 2002 that there was ‘no known specific terrorist threat to Australia at present’ and that there were a ‘series of other countries more at risk of attack’.113 Since April 2002, Canberra’s unconditional support of American foreign policy and Australian involvement in the war on Iraq has undoubtedly increased Australia’s profile as a terrorist target. Besides, the Federal Government’s advice on ‘how to spot a

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110 Peter Beaumont, ‘Briton held in US camp as al-Qaeda prisoner’, *The Observer* (London) (13 Jan 2002) at 1. In addition, nine British citizens allegedly involved in terrorist activities were detained as a consequence of allied military action in Afghanistan. One of these detainees was recruited by a British preacher from a London mosque. See, for example Richard Willing, ‘London Mosque Called Central to al-Qaeda Efforts’, *USA TODAY* (30 Aug 2002) at A03.

111 Richard Reid tried to blow up a transatlantic flight from Paris to Miami on 22 December 2001 using explosives hidden in his sports shoes. See, for example Gary Younge & Duncan Campbell, ‘Shoe-bomber sentenced to life in prison’, *Guardian* (Manchester) (31 Jan 2003) at 16.

112 Above n104 at paras 45–56.

113 Above n37.
terrorist’ and freely dispatched fridge-magnets containing emergency instructions for terrorist attacks are likely to have heightened public anxiety. Nevertheless, while Australia may be in a state of alert, the actuality or imminence of a ‘public emergency’ remains strongly questionable. In particular, it is hard to see why Australia should be more affected by international terrorism than major European countries such as the United Kingdom, Germany, France or Italy.\textsuperscript{114}

(ii) Other Requirements for Derogation

At the time of writing, Australia has neither proclaimed the existence of a ‘public emergency’ nor notified the UN Secretary–General about its intention to do so. According to ASIO there is currently ‘no known specific terrorist threat to Australia.’\textsuperscript{115} It is therefore doubtful whether any proclamation could be regarded as made in good faith. In addition, even if it is assumed that the present threat to Australia constitutes an Article 4 ICCPR ‘public emergency’, it is highly unlikely that the detention of non-suspects, authorised by a non-judicial body for the mere purposes of intelligence gathering, is justifiable as ‘strictly required by the exigencies of the situation’.

First, it is generally debatable whether the detention of non-suspects is essential in order to gather intelligence on terrorist activities. The Government must demonstrate that the legislative objective of the ASIO Act, ie collecting intelligence that assists in the investigation of terrorism offences, cannot be achieved sufficiently by other means. To this date, Canberra has not established evidence that the collection of relevant intelligence is not achievable through other, less repressive, courses of action.

Second, as indicated, the ASIO Act allows for detention of non-suspects on the basis that such detention ‘substantially assists the collection of intelligence material that is important to a terrorism offence’. The intelligence information sought in no way has to have any connection to the terrorist activities and possible threats by the Al–Qaeda network. However, as the existence of the ‘public emergency’ is likely to be claimed on the ground of imminent threats by Islamic fundamentalist terrorism, a specific reference to it would be indispensable. In consequence, the scope of ASIO Act provisions is not strictly required by the ‘exigencies of the situation’.

Third, measures as introduced by the ASIO Act are disproportionate since they do not provide sufficient safeguards to avoid abuse of emergency powers. The detention of non–suspects is overseen by a non-judicial body lacking necessary independence from the executive. The ASIO Act does not allow for adequate judicial review of measures that seriously curtail the fundamental right to liberty and security.


\textsuperscript{115} Above n37.
Finally, any Australian derogation from the ICCPR would lack consistency with other obligations under international law. As indicated, the ASIO Act provides for powers to detain children. These arrangements contravene essential provisions of the *UN Convention on the Rights of the Child* (hereinafter CROC).\(^\text{116}\) In the light of these factors, Australia is not lawfully entitled to derogate from its international human rights obligations under the ICCPR.

5. Conclusion

One of America’s founding fathers, Benjamin Franklin, warned in 1759 that ‘[t]hey that can give up essential liberty to obtain a little temporary safety neither deserve liberty nor safety’.\(^\text{117}\) Ironically, the United Kingdom and Australia today are on the verge of giving up essential liberty without being able to obtain even temporary safety. It has been no part of the argument presented in this article that governments should be denied powers they genuinely need to defend our liberal democratic way of life against the scourge of international terrorism. But these powers need to strike a proper balance between the vital needs of the state and the liberty of its citizens, between national security necessities and international human rights obligations.

The British *Anti-terrorism, Crime and Security Act* 2001 (UK) and the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth) have not come close to accomplishing this delicate task. In particular, various provisions of both pieces of legislation raise serious concerns in relation to the United Kingdom’s and Australia’s legal commitments under the ECHR and the ICCPR respectively. As a consequence, the British Government submitted derogation from both treaties. However, for a number of reasons the legal validity of this derogation remains problematic. First, even granted a wide margin of appreciation, the United Kingdom has not sufficiently established that it faces a ‘public emergency threatening the life of the nation’ within the meaning of Article 15(1) of the ECHR and Article 4(1) of the ICCPR. Second, serious doubts arise as to whether the proclamation of the ‘public emergency’ has been made in good faith. Third, indefinite detention of suspected international terrorists regardless of whether or not they have links with the Al-Qaeda network could hardly be regarded as strictly required by the exigencies of the situation, in particular, as persons detained under ATCSA provisions do not have access to regular judicial review. Finally, measures as introduced by the legislation violate the principle of non-discrimination. The United Kingdom Government has failed to give a reasonable and objective justification for differently treating British nationals and aliens.

In contrast to the United Kingdom, Australia has not officially proclaimed derogation yet, and, indeed, it is highly doubtful that current circumstances would

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\(^{116}\) See above notes 50–51 and accompanying text.

allow for derogation from the ICCPR. First, it is difficult to see how there can be a ‘public emergency’ in the terms of Article 4(1) of the ICCPR existing in Australia at this time. Second, proposed measures arguably fail to fulfil the further requirements of lawful derogation. The detention of non-suspects authorised by a non-judicial body for the mere purpose of questioning goes well beyond what is strictly required to defend Australia from acts of international terrorism. In addition, several passages of the ASIO Act are not only inconsistent with ICCPR provisions but also with Australia’s other obligations under international law, specifically with the CROC.

Speaking to the Australian Law Council one month after the 9/11 attacks, High Court Justice Michael Kirby rightly warned that:

> every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause. Always it is wise to keep our sense of proportion and to remember our civic traditions as the High Court Justices did in the [Communist Party Case of 1951](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_after11sep01.htm) (14 Jan 2003).

Such restraint at the height of the Cold War and in the ‘golden age’ of Soviet espionage should have served as an example today, both in the United Kingdom and Australia.

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The Anglo-American Privilege Against Self-Incrimination and the Fear of Foreign Prosecution

CONSTANTINE THEOPHILOPOULOS*

1. Introduction

Traditional geo-political and economic barriers have shrunk in today’s complex and people mobile world. The twenty-first century is the new age of ‘internationalism’. The porous nature of political borders has helped in the emergence of sophisticated international crime and a corresponding increase in the number of co-operative crime prevention agreements between nations. A new term ‘co-operative internationalism’ has been coined to describe the incentives and methods by which a domestic government aids in facilitating foreign criminal prosecutions.

The purpose of this article is to determine the extent to which a suspect, wanted for crimes in another country, may make use of the common law, statutory or constitutional due process procedures of a typical accusatorial-adversarial criminal justice system. In particular, the article addresses the question of invoking the privilege against self-incrimination1 on the basis that testimony in a domestic court will result in the reasonable risk of a criminal prosecution within a foreign jurisdiction.

In Australia, for example, international terrorists, organised crime syndicate members, cross-border drug traffickers, money launderers, multinational corporate fraudsters, war crime suspects and illegal economic aliens seeking refuge in a first world country are increasingly being targeted for prosecution, deportation or extradition. It is reasonable to assume that Australian authorities may sometimes provide transcripts of self-incriminating testimony to foreign governments and Australian courts may inadvertently become good sources of information which assist foreign authorities in securing criminal convictions. Therefore the same rationales which allow for the application of the privilege against self-incrimination within the domestic forum may equally apply to the fear of a foreign prosecution.

Aliens in a domestic criminal proceeding may frustrate the prosecution’s attempt to establish a prima facie case by refusing to answer questions on the

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1 In the accusatorial system the witness’ privilege against self-incrimination is distinguished from the accused’s right to silence, which is a blanket immunity against answering questions. The privilege is a narrow immunity against the compulsory production of oral or documentary testimony. It is a selective immunity awarded to the suspect, accused, and defendant or more commonly to the non-party witness, Glanville Williams, The Proof of Guilt: A Study of the English Criminal Trial (3rd ed, 1963) at 37–38.
ground that there is a real and appreciable (the common law standard) or a real and substantial (the United States standard) risk of a foreign prosecution upon forcible repatriation to the country of origin. The privilege against self-incrimination creates a strong evidentiary barrier and has an inhibiting effect on the state’s ability to compel witness testimony in court. The invocation of the privilege may sometimes present a formidable obstacle to the successful prosecution of organised crime and trans-border white collar crime. An example would be directors of a United States company who bribe Australian officials and who find themselves facing criminal prosecution in both the United States and Australia. The successful invocation of the Fifth Amendment privilege against self-incrimination before a United States court may effectively halt a white-collar prosecution and also prevent the perpetrators from testifying against co-perpetrators in Australia.

A review of the law in various Anglo-American jurisdictions reveals a paucity of both case precedent and statutory regulation. The inevitable reference to the English common law is unsatisfactory as it is vague, antiquated and somewhat contradictory. The present English position statutorily limits the privilege against self-incrimination to the domestic forum in civil matters and the common law will probably follow the same approach in criminal cases. Canada and the United States follow the English approach, while the matter remains open in South Africa and Scotland. Similarly, case precedent and the statutes governing criminal and civil procedure in other accusatorial jurisdictions such as India, Malaysia, Singapore, Myanmar and Sri Lanka are silent on self-incrimination under foreign law.

In Australia the weight of case precedent appears to support an extra-territorial extension of the privilege, especially when the foreign law is a ‘fact established by the evidence’ and the content is proved by ‘foreign expert evidence’ and is ‘uncontradicted’. However recent decisions tend to leave the matter open and the High Court has not yet made an authoritative determination. In the Capital Territory and New South Wales, in terms of the Evidence Act 1995 (Cth) and (NSW) s128 (1), a statutory defined privilege may now be triggered when the evidence tends to prove the commission of an offence under the law of a foreign country.

2 Civil Evidence Act 1968 s14(1)(a).
4 United States v Balsys 118 S Ct 2218 (1998).
7 Adsteam Building Industries Pty Ltd v Queensland Cement & Lime Co Ltd (No 4) [1985] 1 Qd R 127 at 141 ( McPherson J).
8 Ibid.
9 Ibid.
2. Reasonable Risk of a Criminal Prosecution in the Domestic Forum

The accusatorial privilege against self-incrimination11 (hereafter referred to as ‘the privilege’) may be invoked within the domestic forum during a criminal or a civil proceeding,12 whenever there is a reasonable risk of a possible future criminal prosecution.13 The privilege applies to any person,14 whether a suspect, accused, witness, citizen, legal or illegal resident. The privilege must be expressly invoked either by the individual or the individual’s nominated legal representative.15 The privilege does not provide a blanket ban and must be claimed on a question-by-question basis.16 The invocation must be made timeously at the point when the incriminating question is asked and may not be made by an individual who has already been convicted of the offence, where the crime has prescribed or where the individual is no longer at the risk of prosecution.17 The privilege is said to flow naturally from an accusatorial type criminal justice system and is an important instrumental element of the fair trial principle. It is also said to protect the individual’s dignity, privacy and personal autonomy during the criminal process.

The risk of self-incrimination must be real, appreciable and not a mere remote and naked possibility of legal peril. This is a matter of judicial discretion and the court may test the validity and substance of the claim.18 R v Boyes19 sets out the test as:

... [t]he danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law ... not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.20

A mere invocation without some form of substantiation, even on oath, is not sufficient. It must be shown to the court from the circumstances and the nature of

11 Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs (1985) 156 CLR 385 at 393.
12 The privilege applies to judicial, quasi-judicial and other administrative proceedings. It may be claimed at discovery and during interlocutory processes including Anton Pillar orders and Mareva injunctions. The privilege extends to penalties and is either abolished or has fallen into disuse in respect to forfeitures.
13 Blunt v Park Lane Hotel Ltd [1942] 2 KB 253 at 257 (Lord Goddard CJ).
17 A–G v Cunard Steamship Co (1887) 4 TLR 177.
18 Triplex Safety Glass Co Ltd v Lancegaye Safety Glass Ltd [1939] 2 KB 395; S v Heyman, 1966 (4) SA 598 (A) at 608C.
19 (1861) 121 ER 730 and Renworth Ltd v Stephansen [1996] 3 All ER 244.
20 Id at 738 (Cockburn CJ).
the testimony that there is a reasonable danger. The inquiry must make an obvious contrast between a real and appreciable risk and a remote and unsubstantial one.\textsuperscript{21} Once the risk is regarded as real, and in the absence of \textit{mala fides}, the individual may claim the privilege, even though a possible criminal prosecution is rare or unlikely.\textsuperscript{22} A claim of privilege will not be allowed where the basis is a minor offence of no real concern to the defendant.\textsuperscript{23} Viscount Dilhorne in \textit{Rio Tinto Zinc Corporation v Westinghouse Electric Corporation}\textsuperscript{24} explains the test as follows:

> Once it appears that the risk is not fanciful, then it follows that it is real. If it is real, then there must be a reasonable ground to apprehend danger, and, if there is, great latitude is to be allowed to the witness …\textsuperscript{25}

The court is not called upon to assess the precise measure or degree of risk to the witness.\textsuperscript{26} Essentially the invocation must be made (a) in good faith (\textit{bona fides}), (b) in terms of a genuine apprehension by the witness, (c) under an objective measure of risk and in which (d) the witness bears the onus of proof.

The privilege encompasses answers which directly incriminate the witness but it also applies to initially innocent answers which may, by a causal chain of reasoning, eventually lead to incriminating evidence and the risk of a criminal charge. In \textit{R v Slaney},\textsuperscript{27} Lord Tenterden CJ holds:

> [A witness] would go from one question to another, and though no question might be asked the answer of which would directly incriminate the witness, yet they would get enough from him whereon to found a charge against him.\textsuperscript{28}

While the Commonwealth\textsuperscript{29} privilege against self-incrimination is generally a common law or statutory defined principle, the United States Fifth Amendment is constitutionally entrenched\textsuperscript{30} and is identified with a prohibition against the state coerced disclosure of oral testimony.\textsuperscript{31} The American privilege applies narrowly

\textsuperscript{21} \textit{Re Westinghouse Uranium Contract} [1978] 2 WLR 81 at 104 (Viscount Dilhorne).
\textsuperscript{22} \textit{Triplex Safety Glass Co Ltd}, above n18.
\textsuperscript{23} \textit{Rank Film Distributors Ltd v Video Information Centre} [1982] AC 380 at 441, 445. See also \textit{Brebner v Perry} [1961] SASR 177 (Mayo J).
\textsuperscript{24} \textit{Rio Tinto Zinc Corporation}, above n14.
\textsuperscript{25} Id at 628.
\textsuperscript{26} Id at 581 (Shaw LJ).
\textsuperscript{27} (1832) 5 C & P 213, 172 ER 944.
\textsuperscript{28} Id at 214, 945.
\textsuperscript{29} The label ‘Commonwealth’, does not refer to the Australian Commonwealth but generically to the loose political and cultural alliance of ex-British administered colonies and protectorates. The procedural laws of these countries are based on an adversarial-accusatorial system of justice.
\textsuperscript{30} Fifth Amendment to the Federal Constitution of the United States (1791) ‘… and not to be compelled in any criminal case to be a witness against himself’.
\textsuperscript{31} The Commonwealth privilege applies to documents and interrogatories, \textit{R v Associated Northern Collieries} (1910) 11 CLR 738 at 747. In contrast the United States has adopted a required records doctrine and can compel individuals to provide documents, \textit{Shapiro v United States}, 335 US 1 (1948), 33.
to the risk of a future criminal prosecution and does not prohibit coerced testimony which will subject the witness to disgrace, infamy or the fear of reprisal.  

*Hoffman v United States* 33 holds that a witness response will only be considered incriminatory when it furnishes ‘a link in the chain of evidence needed to prosecute’. 34 The establishment of a link or nexus in the chain of evidence is assessed both qualitatively (does the causal connection extend to all or only certain kinds of testimony which place the witness in danger?) and quantitatively (how close must the causal connection be?). The danger of a criminal prosecution must be real, practical, substantial and realistic. 35 The privilege may only be claimed for testimony which tends to prove guilt or would lead to evidence that tends to prove guilt 36 and is based on a genuine fear going beyond a mere fanciful possibility. To be privileged the compelled testimony need not amount to a prima facie case but one which merely furnishes a probable link in the chain of evidence. According to *Emspak v United States*: 37

> It is enough … that the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step-by-step to link the witness with some crime 38

When the witness invokes the privilege because of the fear of a future foreign criminal prosecution, two essential questions need to be asked. Firstly, the domestic court must concentrate on the threshold question of the reasonability of the foreign prosecution. It has been suggested that the threshold standard ought to be higher than the normal domestic standard when a foreign jurisdiction is at issue. Secondly, only once the threshold question has been answered will the court entertain the issue of justifying the extra-territorial reach of the privilege.

### 3. The International Perspective

#### A. The Commonwealth View

Whether or not the privilege may be claimed by a witness who fears the risk of a foreign criminal conviction is uncertain in most Commonwealth jurisdictions. This is largely due to the ambiguity of the original English common law precedents. 39

The earliest case, *East India Co v Campbell*, 40 a 1749 Court of Exchequer

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32 *Brown v Walker*, 161 US 591 (1896), 599  
33 341 US 479 (1951).  
34 Id at 486.  
35 *Heike v United States*, 227 US 131 (1913), 144.  
36 *McCarby v Arnstein*, 266 US 34 (1920), 40.  
38 Id at 198.  
40 (1749) 27 ER 1010. The defendant, a captain of the East India Company refused to answer questions in a criminal suit brought by the Attorney-General in England on a charge of the fraudulent and violent acquisition of goods from indigenous Indians.
decision,\textsuperscript{41} allowed the defendant to invoke the privilege because the disclosure of information would subject the defendant to a foreign prosecution in India. The court set out the initial precedent as:

… [t]his court shall not oblige one to discover that which, if he answers in the affirmative, will subject him to punishment of a crime… and it appears that the defendant is punishable in Calcutta, although not punishable here.\textsuperscript{42}

Although the \textit{East India} decision appears to be authority for the extra-territorial reach of the privilege, it has been persuasively argued that British India, at that time, was not a foreign jurisdiction but an East India Company administered colony.\textsuperscript{43} The Calcutta courts were staffed by English professionals and its procedures were governed by the English common law.

A hundred years later the Court of Chancery in \textit{King of Two Sicilies v Willcox}\textsuperscript{44} held that the privilege could not be invoked despite a substantial risk of a criminal prosecution in Sicily. According to the court, the privilege was part of British municipal law and therefore had jurisdiction exclusively within British borders and only to those acts made penal by British law.\textsuperscript{45} The court emphasised the difficulty for an English judge in determining the criminal implications of specific acts in a foreign nation, especially on the basis of testimony given in England.\textsuperscript{46} The court also made the practical observation that the defendants would face prosecution only if they left the protection of British law and intentionally moved to the foreign jurisdiction.\textsuperscript{47}

The precedent established in \textit{King of Two Sicilies} was overturned in 1867 by the seminal decision in \textit{United States v McRae}.\textsuperscript{48} The Court of Appeal in Chancery specifically extended the privilege to all individuals fearing prosecution outside England.\textsuperscript{49} The privilege is extended when the probability of a foreign prosecution is proved and the content of foreign law is clearly laid out. In the words of Lord Chelmsford:

\begin{quote}
\textit{41} See also \textit{Brownsword v Edwards} (1750) 28 ER 157 at 158 in which the Court of Exchequer allowed the witness to invoke the privilege for fear of a future prosecution, on a charge of marital infidelity, in the Ecclesiastical Court.
\end{quote}

\begin{quote}
\textit{42} \textit{East India Co}, above n40 at 1011.
\end{quote}

\begin{quote}
\textit{43} The East India Company under charter from Britain and in terms of a treaty with the local Indian sovereign administered the trade enclaves of Madras, Bombay and Calcutta.
\end{quote}

\begin{quote}
\textit{44} (1851) 61 ER 116. The defendants, representatives of a revolutionary Sicilian republican government were sued in England by the lawful monarch of the Two Sicilies. One of the defendants refused to produce documents, claiming exposure to a criminal prosecution in Sicily.
\end{quote}

\begin{quote}
\textit{45} Id at 128 (Lord Cranworth).
\end{quote}

\begin{quote}
\textit{46} Ibid.
\end{quote}

\begin{quote}
\textit{47} Ibid.
\end{quote}

\begin{quote}
\textit{48} (1868) LR 3 Ch App 79. The United States government instituted an action in England against the defendant for money deposited in English banks during the American Civil War. The defendant claimed that a law had been passed in the United States allowing for the confiscation of property belonging to ex-Confederate agents and if compelled to answer would be subject to confiscation proceedings in the United States.
\end{quote}

\begin{quote}
\textit{49} Id at 85, 87. The \textit{McRae} court noted that the \textit{King of Two Sicilies} was distinguishable on the facts. The defendants in \textit{King of Two Sicilies} had failed to satisfy the real and appreciable risk requirement set out by \textit{R v Boyes}.
\end{quote}
[The privilege may apply] where the presumed ignorance of the judge as to foreign law is completely removed by the admitted statements upon the pleadings, in which the exact nature of the penalty or forfeiture incurred by the party objecting to answer is precisely stated.\textsuperscript{50}

Lord Chelmsford goes on to state:

\ldots I cannot distinguish the case in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of our own municipal law.\textsuperscript{51}

However, in the early twentieth century, the precedent was once again reversed by the Kings Bench in \textit{Re Atherton}.\textsuperscript{52} According to Phillimore J:

Crimes committed abroad are not, with few exceptions, crimes at home \ldots I know of no principle which will enable a man to protect himself on the ground that he fears criminal proceedings in some other country.\textsuperscript{53}

The matter has finally been settled in England by the \textit{Civil Evidence Act} 1968 s14(1)(a) which expressly confines the privilege, at least in civil law, to the fear of criminal offences ‘under the law of any part of the United Kingdom and penalties provided for by such a law’.\textsuperscript{54} However the courts do retain discretion, in terms of the \textit{Supreme Court Act} 1981 s37, in respect to discovery and interlocutory injunctions and a disclosure order may well be influenced by a real probability of incrimination under foreign law.\textsuperscript{55} The present position in Canada is also to limit the privilege to the domestic forum.\textsuperscript{56} In Australia recent cases leave the issue open,\textsuperscript{57} but in FF Seeley Nominees Pty Ltd v El Ar Initiations (UK) Ltd,\textsuperscript{58} Zelling AJ casts doubt on the existence of a foreign law privilege, at least on the facts before him, by arguing that:

\begin{quote}
No amount of ad hoc tuition can put me in the position of the Greek magistrate who tries the case, no one can predict with certainty the twists and turns of evidence, no one can judge, who is not \textit{peritus} in the law of Greece \ldots\textsuperscript{59}
\end{quote}

\begin{itemize}
\item \textsuperscript{50} Id at 85.
\item \textsuperscript{51} Id at 87.
\item \textsuperscript{52} [1912] 2 KB 251. It has been argued that \textit{Re Atherton} is not authoritative as it deals with bankruptcy issues, and the privilege has been statutorily abrogated in bankruptcy proceedings.
\item \textsuperscript{53} Id at 255–256.
\item \textsuperscript{54} Since the \textit{European Communities Act} 1972 and the \textit{Human Rights Act} 1998 (incorporated August 2000), European Union law forms part of domestic English law. Fines and penalties imposed by the European Commission are recoverable in an English court. Decisions of the European Court of Human Rights are enforceable in English courts.
\item \textsuperscript{55} \textit{Arab Monetary Fund v Hashim} [1989] 3 All ER 466 compare \textit{Levi Strauss & Co v Barclays Trading Corporation Inc} [1993] FSR 179.
\item \textsuperscript{57} Above n10.
\item \textsuperscript{58} (1990) 96 ALR 468.
\item \textsuperscript{59} Id at 473.
\end{itemize}
Despite Zelling AJ’s opinion, the majority of court precedent does appear to support the notion of a foreign witness privilege. A privilege with an extra-territorial dimension is defined in the *Evidence Act* 1995 (Cth) and (NSW) s128 (1) read together with ss128 (2) and (5). However with the exceptions of the Capital Territory, New South Wales and the possible exceptions of Tasmania and Victoria, the nature and scope of a foreign influenced privilege continues to be governed by the common law.

Academic commentators in Australia and South Africa suggest that the issue of extending the privilege should be evaluated on a case-by-case basis taking into account the type of foreign system and the content of the foreign law. The privilege may be given an extra-territorial reach when the criminal sanction in the foreign court is reasonably clear and there is a real risk that the witness’s answers will lead to self-incrimination and a criminal conviction under the foreign law.

**B. The United States View**

In the seminal decision *Murphy v Waterfront Commission*, the United States Supreme Court held that the Fifth Amendment privilege had no internal jurisdictional limitation. The privilege protected both the state witness at the federal level and the federal witness at the state level. According to the principle of ‘co-operative federalism’, the privilege could be triggered by the fear of a possible prosecution in another state jurisdiction within the United States. While not directly addressing the issue of foreign prosecution, *Murphy* does refer to the English common law, especially to the decision in *United States v McRae*, which approvingly termed the ‘settled English rule’. *Murphy* has served as the principal authority for proponents who seek to justify the extra-territorial reach of the privilege.

In *Zicarelli v New Jersey State Commission of Investigation* the Supreme Court was for the first time directly faced with the question of the application of the Fifth Amendment to the fear of a foreign prosecution. The Supreme Court stated that the Fifth Amendment ‘protects against real dangers, not remote and speculative possibilities’ and found it unnecessary to decide the question, because on the facts, the danger of such a foreign prosecution was remote.

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61 Hoffmann & Zeffertt, above n5 at 242.
63 Id at 77–78.
64 Id at 56.
65 Above n48.
66 Id at 63. *Murphy* overruled an earlier case *United States v Murdock* 284 US 141 (1931), 146–149 which had held that the *King of Two Sicilies* represented the true English rule.
67 406 US 472 (1972). The defendant refused to answer questions concerning organised crime, racketeering and political corruption in New Jersey, claiming that the compelled answers would create a real and substantial risk of prosecution in Canada, Venezuela and the Dominican Republic.
68 Id at 478.
69 Id at 479. The court held that as the prosecution sought answers to local rather than international activities, the defendant was able to frame and edit testimony in order to avoid any foreign danger.
As a result of the Supreme Court’s initial ambivalence, the lower circuit and district courts differed widely in their interpretation of the privilege’s foreign scope. In In Re Trucis and in Re Cardassi, the district courts of Pennsylvania and Connecticut respectively, awarded the Fifth Amendment an extra-territorial reach on the basis that the essential justification for the Fifth Amendment was to restrict the excessive actions and overreach of government. The constitutional right against self-incrimination limited the activities of government organs by providing the individual with a protection against state coercion. The need to protect individual rights had no jurisdictional limitations and justified the extension of the Fifth Amendment to the fear of a foreign prosecution.

In Moses v Allard, a Michigan district court held that state abuse occurred when individuals were compelled to testify against themselves, regardless of the place of prosecution. If the right against self-incrimination did not extend to the risk of non-US. prosecution, the policies underlying the privilege would be defeated. The existence of a fair trial system in which the individual made no unwilling contribution to a conviction was more valuable than punishing the guilty. Such a system should logically extend the Fifth Amendment protection to the risk of a foreign prosecution.

In strong contrast to the district courts, a number of federal circuit courts have refused to extend the privilege on the practical ground that it would erode the effectiveness of domestic law enforcement without giving the witness a tangible or material protection within the foreign forum. In addition United States courts would find it difficult to interpret the content of foreign law and the witness invoking the privilege would find it difficult to demonstrate how a foreign government might prosecute or gain access to the testimonial records of the domestic forum. The Tenth Circuit Court of Appeals in In Re Parker refused to extend the privilege’s scope because protecting individuals for an act which might not be criminal in the United States would frustrate the purpose of the Fifth Amendment.

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70 89 FRD 671 (ED Pa 1981), 673. The government sought to revoke the defendant’s certificate of naturalisation for concealing a history of Nazi collaboration which would have resulted in a denial of naturalisation.

71 350 F Supp 1080 (D Conn 1972), 1085–1086. The defendant was granted immunity from prosecution and subpoenaed to testify before a grand jury investigating drug smuggling between Mexico and the United States. The defendant refused to testify, despite the immunity, on the ground that the testimony might be incriminating under Mexican law.


73 The policies behind the privilege are based on a fear of government abuse, at 873–874, and the fundamental unfairness of compelled self-incrimination, at 871. See also JH Langbein & Richard H Helmholz The Privilege Against Self-incrimination, its Origins and Development (1997).

74 Id at 874–875. A fundamental right would be defeated if a witness could be ‘whipsawed’ into incrimination in a foreign jurisdiction.

75 411 F 2d 1067 (10th Cir 1969). The defendant, charged with sabotage and destruction of war materials in terms of 18 USC § 2153, refused to answer questions before a grand jury hearing for fear of criminal prosecution in Canada. The court held that a sealing order, Federal Rule 6(e) which prevents publication of testimony, was an adequate protection against the fear of a foreign prosecution.
The Supreme Court of North Dakota in *Phoenix Assurance Co of Canada v Runck*\(^7\) emphasised that non-US law should not prevail over the needs of the United States government.\(^7\) In *United States v (Under Seal)*\(^7\) the Fourth Circuit introduced a ‘dual sovereignty’ principle whereby the scope of the privilege could only be extended when both the sovereign compelling the witness’s testimony and the sovereign using the testimony were constrained by the Fifth Amendment.\(^8\) The Eleventh Circuit Court of Appeals in *United States v Gecas*\(^8\) argued that the Fifth Amendment was a limitation upon the powers of the United States and not upon foreign governments; consequently the privilege did not apply to foreign courts that were not bound by the United States Constitution.\(^8\)

In *United States v Flanagan*,\(^8\) the Second Circuit Court of Appeals attempted to establish a middle ground between *Cardassi* and *Phoenix* by suggesting that, although the privilege does protect against a fear of a foreign prosecution, the witness must show a greater danger of incrimination than is ordinarily required before claiming the privilege. The court required claimants to show a greater-than-ordinary danger of foreign prosecution otherwise the privilege would become ‘a virtual license to frustrate almost any criminal investigation having international consequences, however peripheral’.\(^8\)

The split between the lower courts has finally been resolved by the United States Supreme Court in *United States v Balsys*,\(^8\) which holds that a witness may

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76 Id at 1071.
77 317 NW 2d 402 (ND), *cert denied* 459 US 862 (1982). An American insurance company sought to claim damages from three defendants who had made a fraudulent insurance claim on a building in Canada which they had burnt down. The defendants attempted to suppress discovery of testimony made before a grand jury on the basis that it would expose them to an arson charge in Canada.
78 Id at 412. Non-US law should not prevail over the needs of the United States Government and as the language of the Fifth Amendment did not mention non-US law, the privilege was not intended to apply to the risk of non-US prosecutions.
79 794 F 2d 920 (4th Cir) *cert denied* 479 US 924 (1986). The defendants, relatives of F Marcos, former president of the Philippines, refused to testify before a grand jury on the basis that it would expose them to corruption charges in the Philippines.
80 Id at 924, 926, 928. The court found the fear of a real and substantial risk of foreign prosecution to be valid but held that the Fifth Amendment does not protect against such fears.
81 120 F 3d 1419 (11th Cir 1997), 1422. The defendant, a Lithuanian national and alien resident in the United States, was refused the privilege even in the face of a real risk of prosecution for Nazi war crimes in Israel, Germany and Lithuania, see below n85. See also Daniel J Lindsay, ‘Comment: Tied Up in a Gordian Knot’ (1998) 82 Minnesota LR 1297.
82 Id at 1430–1433.
83 691 F 2d 116 (2d Cir 1982), 118–121. The defendant was granted immunity and requested to give evidence on gun smuggling between the United States and the IRA in Ireland. The defendant refused to testify, fearing prosecution in Northern Ireland and Ireland.
84 Ibid at 121. The privilege should not run counter to the policy that the public has a right to every man’s evidence.
not invoke the fifth amendment privilege with regard to a prosecution taking place outside of the United States.\textsuperscript{86} The Fifth Amendment is a wide protection, offering a due process guarantee, a defence against double jeopardy and a compensation for government taking.\textsuperscript{87} However, these wide protections have never been interpreted as being binding on governments other than the United States. It would be inconsistent to take a broader view of the Fifth Amendment protection absent a legislative directive to do so. There is no legislative history to the contrary and the court cannot remove the privilege from the ‘same-sovereign’ context of the Fifth Amendment’s language.\textsuperscript{88} The Constitution applies only to the government, which created it and cannot be used to bind those sovereigns that do not fall under its command.\textsuperscript{89} The Supreme Court also rejected the notion of ‘co-operative internationalism’ as a justification for the extra-territorial reach of the Fifth Amendment. It was an illogical misinterpretation of Murphy’s notion of ‘co-operative federalism’. While ‘co-operative internationalism’ might become determinative at some point in the future the court was not prepared to put much weight on such a notion at the present time.\textsuperscript{90}

4. Rationales

A. The Due Process Natural Law Theories

The Personality and the Instrumental rationales (both based on a due process model)\textsuperscript{91} reason that the privilege is a fundamental shield against state interference with the individual’s natural and human rights. Personality-based theories operate on the philosophical premise that the individual, much like the state, has a sovereign existence. The state and the citizen are equals and neither may exert an undue influence upon the other. The state has no right to compel the sovereign individual to surrender or to impair the right to self-defence. The privilege against self-incrimination has been extended beyond its traditional confines as an ordinary evidentiary rule and elevated to the status of a constitutional right in the United States,\textsuperscript{92} Canada\textsuperscript{93} and South Africa.\textsuperscript{94} In these countries, the prohibition against compulsory self-incrimination is defined as one of the qualifications of a

\begin{itemize}
\item \textsuperscript{86} Balsys, above n85 at 2222.
\item \textsuperscript{87} Id at 2223.
\item \textsuperscript{88} Id at 2223–4.
\item \textsuperscript{89} Ibid.
\item \textsuperscript{90} Id at 2233.
\item \textsuperscript{91} Herbert L Packer, ‘Two Models of Criminal Process’ (1964) 113 U of Pennsylvania LR 1. The due process model emphasises individual procedural and human rights by placing limitations on official power. Its validation requires an appeal to supra-legislative and constitutional law.
\item \textsuperscript{92} Above n30.
\item \textsuperscript{93} S11(c) and s13 read together with s7 of the Canadian Charter of Rights and Freedoms, Constitution Act 1982, Part 1. See also s2(d) of the Canadian Bill of Rights RSC 1985 App III.
\item \textsuperscript{94} The accused’s right against self-incrimination is entrenched in s35(3) of the Final Constitution 1996. The non-party witness privilege against self-incrimination remains a statutory definition in s203 of the Criminal Procedure Act 1977 and s14 of the Civil Proceedings Evidence Act 1965. See also Ferreira v Levin 1996 (1) SA 984 (CC).
\end{itemize}
fundamental human personality. The right not to testify against oneself is also entrenched in article 14(3)g of the International Covenant on Civil and Political Rights.

A privilege defined in terms of a natural or human rights philosophy places the individual interest above the government interest. Consequently, the state infringes the natural ‘higher’ law or the human rights order when it compels testimony from individuals who are at risk of a foreign prosecution. In the words of an Australian commentator:

In principle, if the privilege is regarded as a fundamental human right, then the place of prosecution is not of importance. If a real risk of prosecution under foreign law is apparent, so that the claim is bona fide, then the privilege ought to be granted.

The definition of the privilege in the language of human rights finds expression in New Zealand and Australia. The Commonwealth justification for a privilege based on natural human rights is ably expressed by Murphy J in _Pyneboard Pty Ltd v Trade Practices Commission._

The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity ... It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society’s acceptance of the inviolability of the human personality. [Emphasis added]

The American rationale is encapsulated by Goldberg J in _Murphy v Waterfront Commission_, who advances a bundle of various justifications including, ‘our unwillingness to subject those suspected of crime to the cruel “trilemma” of self-accusation, perjury or contempt’; ‘our fear that self-incriminating statements

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95 R v Amway (1989) 1 SCR 21 at 40, 56 DLR (4th) at 323 (Sopinka J) (Canada) ‘I am of the opinion that it [privilege] was intended to protect the individual against the affront to dignity and privacy inherent in a practice [of coerced self-incrimination]’; Braswell v United States 487 US 99, 119 (1988) the privilege is an explicit right of ‘a natural person, protecting the realm of human thought and expression’.

96 Although international law has no force in Australian domestic law, it does play a persuasive role in the development of the common law, especially in relation to human rights, _Mabo v Queensland [No 2] _ (1992) 175 CLR 1 at 42. See also the schedule to the _Human Rights Commission Act 1981 _ (Cth).

97 Ligertwood, above n60 at 5.76.

98 New Zealand Apple and Pear Marketing Board v Master and Sons Ltd [1986] 1 NZLR 191.


100 Above n62 at 55

will be elicited by inhumane treatment and abuses’ and ‘our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life’.

From these common law and constitutional guarantees, a number of justifications for the extra-territorial reach of the privilege may be extrapolated. The notion of human dignity justifies the privilege’s extra-territorial reach because it would be inherently cruel to compel self-incriminating testimony from the individual either in the domestic or the foreign forum. The cruel ‘trilemma’ of perjury, contempt or self-incrimination exists regardless of the defendant’s fears of prosecution within the domestic forum or outside its borders. The inviolability of human personality applies equally to the fear of a foreign prosecution.

The notions of privacy and personal autonomy suggest that state compulsion improperly infringes the personal space surrounding each individual. The privilege guarantees individual integrity and privacy by protecting against unwanted state intrusions. The fundamental objection against compelled self-incrimination is that law enforcement authorities treat the individual as a mere ‘thing’ for the impersonal extraction of evidence. The invocation of the privilege amounts to the exercise of an affirmative right and, according to Cartesian principles, excludes the exploitative state from the mind and soul of the human being. Such a justification has no territorial limitation.

The Instrumental theory views the privilege as a necessary procedural device which reinforces the panoply of fair trial rights and preserves the accusatorial nature of the criminal justice system. The instrumental privilege derives its philosophical reasoning from a Hobbes-Lockean concept of interlinking sovereign, social and contractual relationships. The privilege represents a basic factor in the balance of powers and rights which exist between the state and the individual. By preventing the compulsion of involuntary testimony, the privilege encourages the witness to testify, guards against unreliable testimony, strengthens the presumption of innocence and guarantees that the burden of proof is borne by the state, thereby ensuring a fair trial process.

103 Gecas, above n81 at 1461–2; Moses, above n72 at 874.
105 René Descartes, Meditations and Passions of the Soul in the Philosophical Works of Descartes, translated by ES Haldane and GRT Ross (1911).
107 Gecas, above n81 at 1456; (Under Seal), above n79 at 926.
108 John H Wigmore, ‘A Treatise on the Anglo-American System of Evidence’ in John McNaughton (ed), 1961 vol 8 para 2251 at 318, ‘… the individual is sovereign and the proper rules of battle between government and individual require that the individual not be bothered for less than good reason and not be conscripted by his opponent to defeat himself …’.
109 Woolmington v DPP (1935) AC 462 at 481, to allow the prosecution to take up silence and to use it as a sword against the accused would be a violation of a basic principle of adversarial justice. See (USA) Tehan v Shott 382 US 406 (1966), 415; (Canada) R v Noble (1997) DLR (4th) 385, 418, 43 CRR (2d) 233 and (South Africa) S v Zuma 1995 (2) SA 652 (CC) at para 33.
The privilege is primarily conceived of as a protection against government abuse and as a guarantee of fair trial procedures. Goldberg J in *Murphy v Waterfront Commission*  speaks of ‘our preference for an accusatorial rather than an inquisitorial system of criminal justice’ based on a ‘sense of fair play which dictates a fair state-individual balance’ and the ‘realisation that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent’. The focus of the privilege is on a balanced justice system in which the individual has a fundamental right to be free of government overreach and excess, wherever that may occur. The instrumental interests of the witness, within a fair justice system, outweigh any potential burden that an extra-territorial application of the privilege would have on law enforcement practices.

**B. The Crime Control Utilitarian Theories**

English criminal procedure is currently characterised by a crime control philosophy and this tendency is illustrated by a number of statutory limitations on the accused’s right to silence and the witness’s privilege against self-incrimination. The accused’s tactical use of silence at both the pre-trial and the trial stage has been curtailed by the *Criminal Justice and Public Order Act 1994*. The witness privilege is subject to a large number of statutory abrogations and its influence in civil procedure has been criticised. Lord Templeman in *Istel Ltd v Tully* states:

… I regard the privilege against self-incrimination exercisable in civil proceedings as an archaic and unjustifiable survival from the past.

A number of arguments, grounded on a utilitarian pragmatism, have been advanced against the extra-territorial extension of the privilege. If the privilege was to be extended to a fear of foreign prosecution, no domestic court could possibly guarantee the witness immunity against prosecution within the foreign jurisdiction. Dressing the privilege up as a human right might protect the individual in the domestic forum but does not give the witness stronger or

110 See also the European Court of Human Rights which has characterised the privilege in *Murray v UK* (1996) 22 EHRR 29 as an ‘international standard which lies at the heart of the notion of a fair trial’. The European Court has not yet ruled on whether a defendant may invoke the privilege on fear of a foreign prosecution.

111 Above n62 at 55.

112 Cardassi, above n71 at 1086, ‘constitutional privileges do not disappear or lose vitality simply because they may hinder law enforcement activities’.

113 Packer, above n91. Crime control emphasises administrative efficiency by reforming unnecessary protective procedural rules. Its validating authority is usually a legislative process.

114 The *Criminal Justice and Public Order Act 1994* s34 and s35 place a number of restrictions on the accused’s tactical use of silence during the criminal process. Similar restrictions exist in Australia, the *Evidence Act 1995* (NSW) and (Cth) s20. The South African Law Commission in a discussion paper, project 73 of 2001, has suggested amending the *Criminal Procedure Act 1977* by the insertion of provisions identical to the English statute.

115 [1993] AC 45 at 53; *Spedley Securities Ltd (in liq) v Bond Brewing Investments Pty Ltd* (1991) 9 ACLC 522 at 535–6 (Cole J), ‘the privilege is a mere procedural rule from a time when defendants were less able to protect themselves’.
additional protection in a foreign forum. A foreign court has no legal obligation to respect the domestic witness’s claim to silence. It is an accepted principle of public international law that a domestic constitution cannot protect its nationals against criminal acts committed within a foreign jurisdiction, nor may sovereign entities interfere in the domestic affairs of a foreign state. Awarding the privilege an extra-territorial reach would be tantamount to such interference.

The practical effect of an extra-territorial dimension to the privilege would be to give the witness an unfair advantage in the domestic court but no benefit at all in the foreign court. The government’s ability to enforce domestic law would then be dependent on issues of foreign law outside of its control. It would inhibit state officials in the collection of relevant evidence and negatively impact on domestic law enforcement. Unfairness would also result if the privilege protected the witness against foreign acts which are not considered criminal in the domestic court. A number of American commentators would limit the scope of the privilege:

[The courts] as they become conversant with the history of the privilege will see that it is a survival that has outlived the context that gave it meaning and that its application today is not to be extended under the influence of a vague sentimentiality but is to be kept within the limits of realism and common sense.

A domestic court is handicapped by a lack of knowledge about foreign law. The real and appreciable test for the application of the privilege within the domestic forum has no suitable application in the international context. It is difficult for a domestic court to assess the probability of a foreign prosecution. In the short period at its disposal in which to rule on the issue, a domestic court will be unable to develop a functional understanding of the foreign law, especially when the foreign law is alien to the Anglo-American accusatorial system. A witness may be tempted to cry incrimination under foreign law without any good faith basis. Sophisticated international criminals could easily manufacture evidence of a probable foreign prosecution in order to avoid testifying in the domestic court.

The domestic forum may well lose the power to trade a grant of indemnity for essential testimony because the domestic court cannot rely on the foreign sovereignty to honour grants of indemnity. The grant of indemnity is a rational accommodation between the imperatives of the privilege and the legitimate demand of the state to compel individuals to testify. Awarding the privilege an

116 (Under Seal), above n79 at 926; Phoenix, above n77 at 412.
117 Phoenix, above n77 at 412.
118 Parker, above n75 at 1070; Wigmore, above n108 at § 2258.
120 Charles McCormick, ‘Some Problems and Developments in the Admissibility of Confessions’ (1946) 24 Texas LR 239 at 277.
121 FF Seeley Nominees, above n58 at 473.
122 Gecas, above n81 at 1422.
extra-territorial reach would destabilise the rational accommodation and deal a heavy blow to domestic law enforcement.  

C. Alternative Theories

American commentators have advanced a number of plausible theories which avoid being interpreted either in the language of natural law or according to utilitarian rules. It has been argued that awarding the privilege an extra-territorial dimension is theoretically consistent with modern day developments which have reduced the world to a global village. The judgement in *Murphy v Waterfront Commission* illustrates this evolution by marking the end of the ‘separate state sovereignties’ doctrine and the beginning of a practical ‘co-operative federalism’. Arguably the next logical step is a natural extension to a type of ‘co-operative internationalism’. In *United States v Balsys*, the defendant argued that the government now has a significant interest in seeing individuals convicted abroad for their crimes, and is therefore subject to the same overreach incentives that has necessitated the application of the privilege within the domestic forum. Reciprocity between the federal and state governments within the United States contributed to the decision in *Murphy*, so why should international reciprocity between nations not result in the extension of the privilege to the fear of a foreign prosecution? *Balsys* did not rule out the idea of ‘co-operative internationalism’ but was not ready to place much weight on it at the present time. Co-operative internationalism could exist, if at some point the domestic forum joined forces with foreign governments in creating joint mechanisms, joint ventures or joint agencies for the prosecution of international criminals.

In *United States v (Under Seal)* the court held that the privilege would have extra-territorial reach when the relationship between domestic and foreign officials became one of a close and continuing agency. These foreign agents would then be used by domestic officials to compel evidence in the foreign forum which it could not compel in the domestic forum.

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123 The United States *Federal Immunity Act* 18 USC § 6002 (1976) provides for a ‘derivative use immunity’; s204 of the South African *Criminal Procedure Act* 1977 ‘transactional immunity’. The privilege has a common law basis in all Australian jurisdictions, although it has been variously modified or abrogated by state legislation. These modifications are sometimes coupled with ‘use immunity’ or ‘personal immunity’ provisions, i.e. *Evidence Act* 1958 (Vic) s30; *Evidence Ordinance Act* 1971 (ACT) s57(5), *Evidence act* 1906 (WA) s13 and the *Criminal Procedure Act* 1986 (NSW) s14. In Canada s5(1) of the *Canada Evidence Act* RSC 1985 revokes the privilege and replaces it with a limited ‘use immunity’ in terms of s5(2). S13 of the *Charter of Rights and Freedoms, Constitution Act* 1982 also provides for use immunity.

124 *Balsys*, above n85 at 2232; *Phoenix*, above n77 at 412.

125 *Kastigar v United States* 406 US 441 (1972), 453.

126 *Wigmore*, above n108 § 2269 at 342 ‘a rule which recognises incrimination under foreign law as a basis for privilege denies the forum sovereignty the power to grant immunity as broad as its privilege and thus denies it the power by any means to compel such testimony’.

127 Above n62.

128 Above n85 at 2232–33.

129 Id at 2235.

130 Above n79.
A possible substitute protection against the fear of a foreign prosecution is to grant the witness immunity from extradition. A witness usually does not face the possibility of extradition, and is not confronted by a real risk of foreign prosecution, unless the ‘act’ is punishable under both Australian and foreign law. Preventing the seizure and delivery of the witness to a foreign forum will negate the need for the witness to invoke the privilege. However, immunity from extradition is at best a half-measure as it does not protect the witness against seizure of foreign assets nor does it protect against a trial and conviction in ‘absentia’. Immunity from extradition may be a personal protection but it cannot protect family members from reprisals in the foreign forum, nor does it protect the witness who travels abroad and is extradited from a country which does not recognise the domestic forum’s grant of immunity.

International co-operative treaties in which the foreign government agrees not to use testimony compelled by domestic authorities is another possible approach. This type of agreement is dependent on the foreign state whose administrative processes are not reviewable by the domestic court. The absence of reciprocity may be a problem with many nations. It also requires substantial co-operation on the part of the executive which may not be forthcoming for various political reasons.

In addition there may already exist, within the laws of the foreign forum, certain procedural protections which bar the use of compelled testimony. The domestic witness may be adequately protected by a foreign statute of limitations prohibiting prosecution of the witness or foreign procedural rules which exclude the admissibility of coerced testimony, irrespective of where it was obtained.

Finally, in some circumstances, the witness may edit or qualify self-incriminatory testimony in the domestic court in such a way that it does not disclose information which might be incriminating under foreign law.

5. Conclusion

It would appear that equally good arguments can be advanced for both limiting the privilege to the domestic forum and for extending it to the fear of a foreign prosecution. This, and the ambiguity of common law precedent, is probably the reason why so many Commonwealth courts have shied away from directly addressing the matter. A compromise is therefore suggested, one which will allow the witness to invoke a privilege with an extra-territorial dimension but only in very specific and limited circumstances. A reasonable approach would be to apply a basic balancing test which takes into account the individual’s social imperative

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131 In most Commonwealth countries extradition is not permitted in the absence of an extradition agreement; United Kingdom Extradition Act 1989; South African Extradition Act 1988. For example, Australia-South Africa extradition agreement (RSA) Reg SR 1988 no 301; Australia-US treaty May 14, 1974, 27 UST 957.

132 In the United States extradition is usually an executive-political decision and it is unlikely that the courts would have the authority to block the government from responding to extradition requests.
in securing a wide protection against self-incrimination and the government’s interest in gathering prima facie evidence.\textsuperscript{133}

The suggested approach is influenced by the wording and the intention of the \textit{Evidence Act} 1995 (Cth) and (NSW) ss 128(1), (2) and (5).\textsuperscript{134} The suggested approach advances a number of plausible guidelines as to the manner in which the statutory defined extra-territorial privilege is likely to be interpreted in future. Similarly the approach is also highly relevant to those Australian States which presently retain the complete or partial common law definitions of the privilege against self-incrimination.

This solution would allow the witness to invoke the privilege but establishes a higher than ordinary standard or a real and appreciable risk which will ‘concretely’ or ‘immediately’ lead to a foreign criminal prosecution. It is reasonable to distinguish foreign prosecutions from domestic prosecutions because analysing foreign claims in terms of the ordinary domestic standard would (a) inhibit the evidence gathering ability of domestic authorities, (b) allow the foreign forum a measure of control over the domestic court and (c) enable the witness to fabricate evidence of a foreign prosecution in order to avoid testifying. The higher benchmark would be defined as a ‘greater than ordinary danger’, an ‘actual likelihood’ or a ‘near certain probability’ of a foreign prosecution. Essentially, raising the threshold standard will reduce the number of witnesses who can successfully invoke the privilege, while increasing the government’s ability to collect evidence. The invocation of the privilege would only occur when the witness clearly faces extradition and prosecution in a foreign forum. The witness would be required to supply the court with certified and translated copies of the pertinent foreign law. The court could also order documentary presentation of foreign judicial opinions, academic writings and expert testimony. The witness would have to clearly establish that the compelled self-incriminatory testimony would impose a foreign criminal sanction rather than a mere civil penalty.\textsuperscript{135}

A number of practical considerations will heavily influence the higher threshold standard. In order for the witness to be placed in danger, the foreign forum must (a) obtain custody of the witness, (b) gain access to the domestically compelled self-incriminating testimony, (c) criminally prosecute the witness and

\textsuperscript{133} The proposed balancing test is only applicable to Commonwealth jurisdictions and not to the United States. The US Fifth Amendment is strictly interpreted in near absolute terms, \textit{Fisher v United States} 425 US 391 (1976), 400 ‘when the constitutional privilege arises in its most pristine form, interest balancing is unnecessary and impermissible. The Fifth Amendment, unlike the Fourth, does not give way before reasonableness’.

\textsuperscript{134} The threshold standard set by the Act is quite strict. A literal interpretation of the wording of s128(1) requires that the privilege may only be invoked when the evidence ‘tends to prove’ that the witness ‘has committed an offence’ or ‘is liable to a civil penalty’ [Emphasis added.].

\textsuperscript{135} The criminal sanction must involve some form of incarceration or a capital punishment. Mere fines, penalties or forfeitures are insufficient. Exceptionally and subject to the court’s discretion, particularly onerous criminal fines or penalties may serve to trigger the privilege. In this regard the burden of persuasion rests on the witness to convince the court of the near certainty of an onerous fine or penalty. The \textit{Evidence Act} 1995 (Cth) & (NSW) s 128 (1)(b) refers specifically to liability for a civil penalty as a reasonable ground for invoking the privilege.
(d) use the witness’s testimony to further the prosecution. If any of these four factors is missing, the likelihood of a testimony driven foreign prosecution is low and the domestic court may properly refuse the witness’s privilege claim.

In summary, a four part test is advocated. The test is discretionary and founded on an objective evaluation of the witness’s reasonable fear of a foreign prosecution. The objective test is set out as follows:

a) The domestic court must ascertain whether the witness faces a ‘near certain probability’ of a prosecution or merely the fear of a possible foreign prosecution. Will the witness’s self-incriminating testimony initiate the foreign prosecution?

b) The domestic court must determine the nature of the feared foreign prosecution and the type of criminal sanction. The witness bears the burden of persuasion in this regard and the onus of adducing evidence to establish the nature of the prosecution and the type of sanction.

c) The interests of the domestic government must be assessed. How essential is the witness’s testimony for the domestic authority? Is the required information available from an independent source?

d) The court must take into account the probability of the witness’s extradition or deportation and the subsequent likelihood of the incriminating testimony falling into the hands of the foreign forum.

Finally, an analysis of the relevant case law reveals that most Commonwealth courts have assumed that a witness fearing foreign prosecution, rather than the prosecution seeking the witness’s testimony, bears the burden of persuasion. The allocation of a primary burden of proof upon the witness’s shoulders, instead of the prosecution, conflicts with accepted common law practice. However placing the burden of proof upon the shoulders of the prosecution is unrealistic and impractical. In this unique circumstance a reverse onus is justifiable. A burden should be placed on the witness to produce evidence of the specific ways in which foreign prosecution is feared and the type of criminal sanction likely in such an event, thereby narrowing the facts-in-issue. The prosecution would subsequently be called upon to rebut each specific fact-in-issue.

The objective balancing test is a reasonable compromise, which widens the scope of the protection offered by the privilege without unnecessarily inhibiting the government’s law enforcement ability. The solution not only takes into account the increasing number of international co-operative state agreements but also protects the witness’s human dignity, privacy and the panoply of fair trial rights without unduly infringing upon the local rights and international interests of the domestic society.
Reforming Chinese Telecommunications Law: An Incremental Approach

MARTYN TAYLOR*

1. The Challenge of Sustainable Chinese Economic Development

China has achieved a dramatic economic transition under the leadership of successive Presidents Deng Xiaoping and Jiang Zemin. From 1978, the traditional Chinese agricultural economy, based on communist command structures, has been transformed into a socialist market economy with a burgeoning industrial and service sector. These economic reforms have been reinforced by far-reaching institutional and legal reforms, as is well documented in the literature. As a result, China has achieved economic growth rates averaging an astounding 8.9 per cent per annum over the past 15 years. China’s economy now ranks as the world’s second largest behind the United States in real terms, suggesting China already ranks as a global economic superpower notwithstanding its developing status.

However, as the World Bank has noted, China must overcome daunting internal challenges if it is to sustain its present growth trajectory. Such challenges include rising income inequality, declining international competitiveness, regional disparities and rising unemployment. These challenges are compounded by the global information revolution, which will force Chinese industry to undergo further rapid restructuring to remain internationally competitive. Relevantly, to address such challenges, the World Bank recommended to the Chinese...
government in October 2001 that China’s existing five year strategic plan should be amended to further promote the development of Chinese telecommunications infrastructure. Indeed, while China has the largest telecommunications network in the world (dwarfing that of Australia), the accessibility of that network to the Chinese population remains comparatively low, indicating significant scope for further infrastructure development, as illustrated by the comparison in Table 1 below.

Within the context of its rapid economic reform programme, China has already moved swiftly in recent years to reform its telecommunications sector. Such reforms were expedited by China’s entry into the World Trade Organization (WTO) in 2001, resulting in significant amendments to Chinese telecommunications regulation. However, towards the end of 2001, the Chinese government indicated that it would prioritise and implement yet further telecommunications law and policy reforms. Such reforms remain firmly on the Chinese policy agenda for 2003 and 2004 and are likely to remain central to China’s future economic development strategy, particularly given the World Bank’s October 2001 recommendations.

Against this background, this paper identifies further reforms that could be made to China’s existing telecommunications laws and overall regulatory structure to address critical issues that Australia experienced during its own telecommunications law reforms. In undertaking this analysis, this paper undertakes a comparative analysis of Australia’s and China’s current telecommunications laws and assesses their effectiveness in meeting their respective policy objectives. This paper concludes with a number of law reform recommendations for the Chinese Government, consistent with the economic development strategy identified by the World Bank in its October 2001 report.

6 Chinese economic policy for the development of the telecommunications sector is articulated within China’s Tenth ‘Five Year Plan’ (2001–2005) which sets out various targets for such matters as telephone line penetration and infrastructure investment.


9 China’s APEC Individual Action Plan for 2001, for example, comments that: (a) during 2002–2005, China will progressively open its telecommunications market after its entry into the WTO; (b) during 2005–2010, China will continue to implement opening policy, strengthen international cooperation and exchanges, and promote further opening of the Chinese telecommunications industry; and (c) during 2010–2020, China will actively create conditions to promote the integration of China’s telecommunications industry into the world. See Government of China, ‘Peoples Republic of China: Individual Action Plan 2001’ (Singapore: APEC, 2001).
Table 1: Key comparative statistics between China and Australia*

<table>
<thead>
<tr>
<th>Statistic</th>
<th>China</th>
<th>Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Population</td>
<td>1273.1 million</td>
<td>19.4 million</td>
</tr>
<tr>
<td>Land area</td>
<td>9.3 million sq km</td>
<td>7.6 million sq km</td>
</tr>
<tr>
<td>GDP (2000 est.)</td>
<td>US$4.5 trillion</td>
<td>US$445.8 billion</td>
</tr>
<tr>
<td>GDP per capita (2000 est.)</td>
<td>US$3600</td>
<td>US$23200</td>
</tr>
<tr>
<td>GDP composition</td>
<td>15% agriculture, 50% industry, 35% services</td>
<td>3% agriculture, 26% industry, 71% services</td>
</tr>
<tr>
<td>Telephone lines in use</td>
<td>185.1 million**</td>
<td>9.6 million</td>
</tr>
<tr>
<td>Telephone lines per capita (%)</td>
<td>15%</td>
<td>50%</td>
</tr>
<tr>
<td>Mobile telephones</td>
<td>155.8 million***</td>
<td>10.3 million</td>
</tr>
<tr>
<td>Mobile phones per capita (%)</td>
<td>12%</td>
<td>53%</td>
</tr>
<tr>
<td>Internet users</td>
<td>27.5 million</td>
<td>8 million</td>
</tr>
<tr>
<td>Internet usage per capita (%)</td>
<td>2%</td>
<td>41%</td>
</tr>
</tbody>
</table>

* Statistics as at March 2002, unless otherwise stated.


*** See Total Telecom Asia, ibid.

2. **Comparative Telecommunications Sector Reforms**

In order to analyse Australia and China’s current telecommunications laws, it is necessary to understand the historical context to their respective telecommunications reforms. Telecommunications sector reforms were initiated, on an international basis, during the late 1970s and early 1980s in recognition that state ownership was hindering the development of telecommunications infrastructure and the adoption of new services and technologies. Such reforms were partly motivated by the rapid evolution of new technologies and the considerable capital investment that would have been required by governments to implement such technologies and meet growth in demand. Such reforms were also motivated by an increasing international emphasis on competition policy and market mechanisms as a means to promote economic efficiency and increase


11 See, for example, discussion in Peter Smith, ‘What the Transformation of Telecom Markets Means for Regulation’ in *Public Policy for the Private Sector*, Note No 121 (World Bank Group, 1997).
social welfare. The primary purpose of such reforms was to provide consumers with a greater quality and diversity of services at a lower overall cost.12

A. Australian Historical and Policy Context

Historically, Australian domestic telecommunications services were provided by the Australian Post Office and, later, the Australian Telecommunications Commission (ATC).13 International telecommunications services were provided by the Overseas Telecommunications Commission (OTC).14 The ATC and OTC each comprised statutory commissions operating statutory monopolies in their respective sectors. In 1989, the Australian government corporatised the ATC while enacting the Telecommunications Act 1989 to implement the first stage of Australian telecommunications reforms.15 This legislation permitted limited competition in the provision of certain value-added services, while establishing an independent regulatory agency (AUSTEL) to protect consumers and ensure fair competition.16

In 1991, the Australian government enacted the Telecommunications Act 1991 which facilitated the market entry of Optus Communications Limited (Optus) by way of competitive tender, and Vodafone Limited (Vodafone), as large-scale private sector competitors.17 Meanwhile, the OTC and ATC were amalgamated to form Telstra Corporation Limited (Telstra) under 100 per cent government ownership.18 Optus and Vodafone were granted statutory access rights to various Telstra networks and services, supervised by AUSTEL as independent industry regulator.19 Retail competition was increased by encouraging market entry by resellers who resold basic carriage services provided by Telstra.

In 1997, a new Telecommunications Act 1997 was enacted in conjunction with significant amendments to Australia’s Trade Practices Act 1974.20 These amendments were expressly intended to promote market entry and greater competition.21 As a result, there are now more than 60 holders of carrier licences in Australia and around 130 providers of telephony carriage services, indicating

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13 The ATC was established under the Telecommunications Act 1975 (Cth).
14 The OTC was established under the Overseas Telecommunications Act 1946 (Cth).
15 See also Telecommunications Act 1989 (Cth). This legislation was enacted following a major earlier enquiry into Australian telecommunications. See Davidson (Chairman), ‘Report of the Committee of Inquiry into Telecommunications Services in Australia’ (Canberra: AGPS, 1982). See also Minister for Transport & Communications, Australian Telecommunications Services: A New Framework, Ministerial Press Release (1988).
16 Part 17, Telecommunications Act 1989 (Cth).
19 Parts 8 and 9, Telecommunications Act 1989 (Cth).
21 See discussion in Explanatory Memorandum to the Telecommunications Bill 1996.
that Telstra, as incumbent, is now subject to significant competition. Relevantly, during 1997 and 1999, the Australian government reduced its ownership of Telstra to 50.1 per cent.

Underlying these Australian telecommunications reforms was a government policy emphasising the long-term interests of Australian consumers. This emphasis was complemented by the Australian government’s desire to enhance the efficiency and international competitiveness of the Australian telecommunications industry. To achieve these objectives, the Australian government sought to promote the greatest practicable use of industry self-regulation, but implemented a sophisticated overarching regulatory framework to guide such self-regulation and to ensure it remained consistent with Australian policy objectives.

B. Chinese Historical and Policy Context

Paralleling Australia, China’s telecommunications services were historically provided by a departmental statutory monopoly, the Ministry of Post and Telecommunications (MPT). Until 1994, the MPT was instrumental in promoting the development of the Chinese telecommunications sector in accordance with China’s successive ‘Five Year Plans’. In 1993, MPT’s statutory monopoly on telecommunications services was curtailed. The State Council approved a Chinese state-owned entity, the JiTong Communications Company (JiTong), to roll out its own data communications network in competition with MPT. Other firms were permitted to provide limited competition in paging, mobile telephony, email and video communications services.

On 17 July 1994, the statutory monopoly of MPT was formally ended by a directive from the Chinese State Council. Simultaneously, the commercial activities of the MPT were transferred into an entity known as China Telecom with responsibility for providing domestic and international telecommunications services. The MPT remained as an agency responsible for the development and enforcement of regulatory policy. Meanwhile, the China United

26 Certain telecommunications infrastructure was also operated by the Ministry of Electronics Industry, for defence purposes, and by the Chinese People’s Liberation Army, which had its own dedicated telecommunications infrastructure.
30 China Telecom remains the largest network operator in China. It has extensive fixed voice and data networks including switching centres and transmission lines.
Telecommunications Corporation (China Unicom) was formed by the Chinese Ministry of Electronic Industry (MEI), providing another state-owned competitor to China Telecom.31

In March 1998, within the context of significant reforms to the Chinese bureaucracy, the MEI and MPT were consolidated to form the Ministry of Information Industry (MII).32 The MII became the principal regulator of the telecommunications and information industry and was initially granted operational control over both China Telecom and China Unicom.33 During 1999 and 2000, China Telecom and China Unicom were restructured to promote greater competition, creating a total of seven distinct Chinese state-owned telecommunications enterprises each with primary operations in a different functional aspect of telecommunications, as set out in Table 2 below. In 2000, these seven state-owned enterprises were each given independent operational responsibility.34

Underlying these reforms was a Chinese policy driven by a number of different, and at times contradictory, policy concerns. These policy concerns included, for example, Chinese national security, co-ordinated regional development and the promotion of competitive domestic industry.35 Yet given the relatively low accessibility of telecommunications to the Chinese population and extreme socio-economic diversity, Chinese telecommunications policy remained consistently oriented towards the development of telecommunications infrastructure. This infrastructure development policy assumed a two-pronged approach:36

- Telecommunications policy in China’s more advanced coastal regions has emphasised the deployment of sophisticated new technologies and next-generation networks.37
- Telecommunications policy in inland provinces has emphasised basic connectivity.38

As China’s infrastructure development objectives are gradually achieved, it is likely that Chinese telecommunications policy will increasingly focus on competition policy. Such a change in focus is required by China’s basic

31 Also known as the Lian Tong Corporation.
32 See <http://www.mii.gov.cn>. The MII also assumed the telecommunications and information responsibilities of the Ministry of Radio, Film & Television (MRFT), the China Aerospace Industry Corporation, and the China Aviation Industry Corporation.
33 The MII is now a super-agency overseeing telecommunications, multimedia, satellites, and the Internet.
telecommunications obligations under the WTO and is consistent with China’s long term economic plans. Indeed, the Chinese Government’s recent draft Long Term Development Plan to 2015 expressly contemplates the establishment of a fair, transparent and effective market competition mechanism for telecommunications.

Table 2: Chinese state-owned telecommunications enterprises

<table>
<thead>
<tr>
<th>State-owned enterprise</th>
<th>Description of 1999/2000 restructuring</th>
</tr>
</thead>
<tbody>
<tr>
<td>China Telecom</td>
<td>China Telecom continued as operator of China’s fixed-line telephony business with a 99% market share in that market.*</td>
</tr>
<tr>
<td>China Mobile</td>
<td>China Mobile Communications Corporation (China Mobile) was established to operate China’s mobile telephony business with a 50% market share in that market.**</td>
</tr>
<tr>
<td>China Satellite</td>
<td>China Satellite Communications Group Corporation (China Satellite) was established to operate the key part of China’s satellite business previously owned by China Telecom.***</td>
</tr>
<tr>
<td>China Unicom</td>
<td>China Unicom was strengthened by divesting China Mobile’s paging business to it while permitting it to maintain its 25% market share in mobile telephony and to roll out new CDMA mobile technologies.†</td>
</tr>
<tr>
<td>China Netcom</td>
<td>China Netcom Communications (China Netcom) was established as a new state-owned entity to build and operate a broadband data transmission network and to provide Internet services.††</td>
</tr>
<tr>
<td>China Railcom</td>
<td>China Railcom was established as the second-largest fixed network provider by transferring to it a telephony network established by the Chinese Ministry of Railways along China’s rail networks.</td>
</tr>
<tr>
<td>JiTong</td>
<td>JiTong continued unchanged.</td>
</tr>
</tbody>
</table>

* See <http://www.chinatelecom.com.cn/en/>. According to the MII, for the year to April 2001, China Telecom accounted for 53 per cent of all telecommunications revenue in China, and over 90 per cent of non-mobile telecommunications revenue.

** See <http://www.chinamobile.com/english/english.htm>. Based on information compiled by the MII, China Mobile holds about 50 per cent of the Chinese mobile phone market.

*** ChinaSat operates two satellites: ChinaSat-6 and the planned ChinaSat-8. It has been given a mandate from Beijing to operate satellite-related businesses, including data, video, audio, channel leasing and equipment export and import. It has also been authorised to provide internet protocol telephony services. See, for example, discussion in W Farris, *The Future for Telecoms Companies in WTO China* (2001) 20(9) International Financial Law Review 56.


†† See <http://www.cnc.net.cn/english/indexe1024.html>.

C. Conclusions and Recommendations

China and Australia have both adopted a broadly similar pattern of telecommunications sector reforms. Government departments providing telecommunications services were initially restructured to separate their commercial activities from their regulatory and policy-making functions. Departmental operational monopolies were then corporatised, while being subjected to progressively greater private sector competition. Next, the regulatory and policy-making functions of such departments were isolated and bolstered. To promote market entry, a basic regulatory framework was enacted, including specific constraints on market power to promote competition. Any particular social policy concerns were addressed by issue-specific regulatory instruments. Finally, foreign investment has been permitted and, in Australia’s case, encouraged. Each of these reform elements are considered in turn below.

While the Chinese and Australian reforms are broadly consistent, their particular implementation has significantly differed as has their underlying policy orientation. While Australian telecommunications regulation has been driven by a desire to increase competition, Chinese telecommunications regulation has been driven by more eclectic objectives, particularly a desire to promote infrastructure development. Yet as China is likely to increasingly focus on competition policy over the next decade, Chinese and Australian telecommunications policy is likely to become increasingly aligned.

3. Corporatisation of Commercial Activities

The first stage of the telecommunications reforms in Australia and China involved the isolation of the commercial activities of governmental departments. These commercial activities provided the basis for the subsequent creation of state-owned telecommunications enterprises by a process of corporatisation. Such corporatisation was intended to encourage these commercial activities of government to be conducted under corporate governance structures with an emphasis on greater accountability in the allocation of resources and greater efficiency. Critical issues arising from such corporatisation in China and Australia have included the extent of operational autonomy of corporatised enterprises, the appropriate long-term market structure, and the extent of subsequent privatisation.

A. Australian Corporatisation Approach

The Telstra Corporation Act 1991 provided the mechanism for the Australian government to corporatise its commercial activities, creating Telstra as a single state-owned enterprise. During 1997 and 1999, Telstra was partially privatised by way of sale of shares to the Australian public in tranches of 33.3 per cent and

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41 See World Bank, ibid.
Further privatisation of Telstra may occur if the current Australian Liberal–National federal coalition government is elected for another term.

As a state-owned enterprise, Telstra has been granted a high degree of operational autonomy although it remains subject to specific accountability requirements. The Board of Telstra must keep the Minister of Finance appraised of any significant events and must report to the Minister on a regular basis. The Minister also has special powers to make written directions to Telstra, tabled in Parliament, which must be complied with by Telstra unless they relate to work done, or services, goods or information supplied by Telstra. While these statutory requirements have a high degree of transparency, the Australian Government controls the appointment of the Telstra Board and so continues to influence Telstra’s business activities. Investors remain concerned, in particular, that Telstra may be pressured to bear the costly burden of various Governmental social policy objectives. During the federal election year in 2001 in Australia, Telstra’s share price was materially devalued, partly due to the perceived political risk associated with costly Labor party social policies.

A significant issue arising during the corporatisation of Telstra was the extent to which it should be structurally separated into wholesale and retail operations. Structural separation is perceived as a means of promoting competition as it prevents vertically-integrated firms leveraging their wholesale market power into downstream retail markets. It also reduces incentives for vertically-integrated firms to deny competitors access to wholesale facilities. Partly due to the likely impact on the sale value of Telstra, the Australian government decided against structural separation and instead favoured relatively heavy regulatory controls. While structural separation of Telstra is still mooted by the Australian government from time to time, most recently in December 2002, it is likely that the fallout from existing Australian shareholders would now make such separation politically unpalatable.

B. Chinese Corporatisation Approach

Unlike Australia, China has favoured the creation of multiple state-owned enterprises. This is partly due to China’s larger size, but also due to the differing policy objectives of different factions of government. As each Chinese governmental agency has sought to assert its power and influence, so inter-agency
rivalry has resulted and different agencies have formed different state-owned enterprises to give effect to their particular policy objectives. Rivalry between MEI and MPT, for example, facilitated the market entry of both JiTong and China Unicom under the direction of the MEI, notwithstanding a fierce rear-guard action by MPT to preserve its monopoly over public telecommunications.49 Recent rivalry between MII and the Chinese State Administration of Radio, Film and TV (SARFT) facilitated the market entry of China Netcom under the direction of SARFT.50

The relationship between Chinese state-owned enterprises and the relevant Ministries has not been as transparent as in Australia. Allegations have historically been made that Chinese Ministries have favoured the particular state-owned enterprise that they control.51 For example, prior to 1998, both JiTong and China Unicom complained that MPT was unfairly promoting the interests of China Telecom, particularly in relation to telecommunications interconnection disputes.52 While allegations of unwarranted governmental interference and continued favourable protection of particular state-owned enterprises are still made from time to time, the situation has improved in recent years as the Chinese Government has sought to increase the operational autonomy of the various state-owned enterprises. This regulatory independence issue is further discussed below.

As with Australia, China is now facing concerns regarding the appropriate structure of state-owned enterprises to promote competition vis a vis concerns of devaluing prized government privatisation assets. Prior to May 2002, the existing seven relevant state-owned enterprises listed in Table 2 above dominated their respective functional areas, leading to concerns that such a structure did not promote effective competition given minimal competitive overlap.53 In May 2002, to increase competition, the Chinese State Council further restructured these state-owned enterprises to create six multi-functional state-owned enterprises with a high degree of competitive overlap.54 The restructuring is summarised in Table 3 below:

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50 See ‘Into the Crucible: Chinese Telecoms’ The Economist (3 November 2001) at 79.
51 See discussion in Xu Yan, ‘Fixed-Mobile Interconnection: The Case of China and Hong Kong SAR’, (Hong Kong Office of the Secretary General of the International Telecommunications Union, 2001).
53 See comments by C Liu, Director of the Department of Policy and Regulations Comment on the Reform of Telecommunications in China, MII Press Release (1 January 1999).
54 See Total Telecom Asia, above n8.
In addition, the State Council is likely to partially or fully privatise some of these state-owned enterprises to raise funds for further infrastructure investment. Relevantly, to date, a number of Hong Kong subsidiaries of these enterprises have already been privatised to raise capital for infrastructure investment. China Telecom was one of the first mainland SOE to be partially privatised, with an IPO of around 10 per cent occurring in November 2002.

**C. Conclusions and Recommendations**

While the Australian and Chinese approach to corporatisation has diverged, the Australian experience provides a number of insights for China. The Australian Government’s policy decision was to preserve Telstra’s privatisation value by retaining the benefits of vertical integration and economies of scope and scale. However, given concerns regarding Telstra’s market power, the Australian Government employed regulatory techniques, in the form of targeted competition legislation, to ensure Telstra remained subject to significant competitive constraints.55

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While China is now favouring further structural reforms with the intention of promoting greater competitive overlap between its various state-owned enterprises, such reforms are unlikely to address the underlying issue of market power associated with significant vertical integration. Furthermore, the Chinese Government’s policy to date has been to preserve the privatisation value of Chinese state-owned enterprises and vertical separation would be likely to significantly reduce such value. Accordingly, infrastructure access issues arising from vertical integration are likely to require further regulatory attention. In particular, as Australia’s experience demonstrates, to the extent vertical integration remains the Chinese Government should consider the extent to which targeted competition legislation may be appropriate given that incentives towards anti-competitive behaviour will remain. The relevant competition issues are considered in greater detail below.

However, immediate full scale privatisation does not appear appropriate in the Chinese context. Rather, incremental privatisation, similar to the model adopted in Australia, may appear more appropriate. This could be achieved, for example, by permitting increasing levels of private and foreign investment in the various state-owned enterprises with a view to achieving full privatisation within the next five to 10 years. In this regard, China’s existing WTO commitments are a useful start. In addition, a key concern with Chinese telecommunications regulation has been an alleged historical bias in favour of particular incumbent state-owned enterprises. This bias has been exacerbated by insufficient transparency between the Chinese Government’s regulatory and commercial operations. To the extent state ownership remains, some degree of governmental influence is inevitable even with a high degree of transparency, as illustrated by the Australian experience with Telstra. Full privatisation would provide the most convenient and effective solution to address such allegations of unwarranted political interference given that the governmental conflict of interest between regulatory and commercial functions would be removed. Australia, for example, is moving towards full privatisation of Telstra to address similar concerns.

4. Demarcating Regulatory and Policy-making Functions

The second stage of telecommunications reforms in China and Australia complemented the first stage and involved the separation of the regulatory and policy functions of government from commercial activities. Such regulatory and policy functions were, in turn, bolstered by creating specialist regulatory agencies. These regulatory agencies adopted a particular regulatory focus, consistent with prevailing government policy in China and Australia at the time. Critical issues arising from the demarcation of regulatory and policy-making functions in China and Australia have included regulatory independence, inter-agency rivalry, and the appropriate level of separation of enforcement and policy-making activities.

As noted above, while Australia’s policy-makers emphasised market entry and competition, China’s policy-makers have concentrated on the co-ordination of efficient infrastructure investment.
A. Australian Regulatory Agencies

The importance of separating the commercial activities of government from its policy-making and regulatory functions was highlighted in Australia as early as 1986, when the High Court of Australia reasoned that the ATC’s market power at that time partly arose from its ability to influence telecommunications regulation.\(^{57}\) Australia’s subsequent telecommunications reforms have now achieved a high degree of separation between governmental regulatory and operational activities. Telstra has minimal influence over the development of Australian telecommunications policy and has little material influence over regulatory activities.

In addition, the policy-making and regulatory functions of government have themselves been separated in Australia. Following the enactment of the Telecommunications Act 1997, three governmental entities now regulate Australia’s telecommunications markets:

- The Australian Communications Authority (ACA) is responsible for technical and general industry regulation.\(^{58}\) The ACA is an independent statutory body charged with the supervision and administration of telecommunications regulation, including licensing, facilitating self-regulation, and ensuring compliance with relevant standards.

- The Australian Competition & Consumer Commission (ACCC) is responsible for the supervision and enforcement of Australia’s competition laws.\(^{59}\) The ACCC is an independent statutory body charged with responsibilities which include the enforcement of Australia’s Part XIC access regime, as discussed below. The ACCC, in particular, is well respected in Australia partly due to its perceived political independence.

- The Australian Department of Communications, Information Technology and the Arts (DCITA) is responsible for the development of Australian telecommunications law and policy.\(^{60}\) DCITA also supervises the administration of the Australian telecommunications regime and advises the Minister on the exercise of his statutory powers in relation to that regime.

In practice, this tripartite structure has proved highly effective. Inter-agency rivalry has been mitigated by clearly demarcating the areas of responsibility of each agency and by providing DCITA with overall responsibility for resolving any differences of opinion or approach.

B. Chinese Regulatory Agencies

Importantly, policy-making in China has involved the complex inter-play of many different interests, subject to national priorities as determined by the Communist Party leadership, and as reflected through the State Council and other organs of

\(^{57}\) Tytel Pty Ltd v Australian Telecommunications Commission (1986) 67 ALR 433.

\(^{58}\) See <http://www.aca.gov.au>.


\(^{60}\) See <http://www.dcita.gov.au>.
Government. Government policy has typically been formed via a lengthy process of inter-agency bargaining, resulting in considerable inter-agency rivalry or ‘turf warfare’.61 Such rivalries have shaped the Chinese competitive landscape, given that they have resulted in the entry of new state-owned competitors which embody different governmental policies, as discussed above.62

To mitigate such turf warfare, the Chinese government consolidated the MPT and MEI into a single omni-powerful industry regulator, the MII. The MII is now solely responsible for the development, implementation and enforcement of Chinese telecommunications law and policy. However, the creation of the MEI has not eliminated turf warfare. Continued turf warfare is reputed to continue to impair the efficiency of Chinese telecommunications sector regulation. Convergence of telecommunications and media technologies has exacerbated the potential for such rivalries. Policy conflicts, for example, have arisen between MII and the SARFT over who should have jurisdiction to regulate telecommunications and broadcasting cable operators, to the frustration of Premier Zhu Rhongji.63 This conflict resulted in significant over-regulation of broadband cable sector and wasteful infrastructure duplication as SARFT and several other Ministries collaborated to facilitate the entry of China Netcom.64

While the MII is structurally independent from state-owned telecommunications operators it continues to maintain a close relationship with the state-owned incumbents.65 Indeed, this relationship has assisted China to achieve its telecommunications infrastructure development targets.66 Former MII officials, for example, were appointed to the key management positions in the state-owned enterprises while many other staff members of the state-owned enterprises are former MII bureaucrats with strong personal ties that could influence MII officials.67 Additionally, continued state ownership of these enterprises may make


64 China Netcom was created from a policy proposal to build a high-bandwidth Internet network. After approval by the Chinese Government, the company was formed by the China Academy of Sciences, SARFT, the Ministry of Railways and the Government of Shanghai. See also discussion in ‘Into the Crucible: Chinese Telecos’, above n50 at 79.

65 See, for example, comments in C Hsu & G Chua, ‘China: With or Without Change, Telecoms Continues to See Growth and Opportunities’ (Hong Kong: Pyramid Research, 2001).

66 Article 4 of the Telecommunications Regulations provides, for example that: ‘Telecommunications carriers shall abide by laws, follow commercial morality and accept supervision and concede to examinations according to the laws and regulations’.

it difficult for the MII to be perceived as impartial in the face of increasing private and foreign competition. Accordingly, while separation of policy-making and regulatory functions from commercial activities in China continues to increase, such separation remains incomplete and it remains to be seen whether the MII can maintain its neutrality and independence.

The consolidation of power in the MII has also created its own difficulties. The MII has been perceived as too powerful given its central control over both policy formulation and enforcement leading to reduced inter-agency accountability. Indeed, the predecessor to the MII to some extent became infamous for its apparent policy reversals. This is illustrated by the China Unicom fiasco in which 21 foreign investors were permitted to inject US$1.3 billion via Chinese-foreign joint ventures between 1995 and 1998 to finance China Unicom’s provincial cellular networks. However, following concerns expressed by the Chinese government that such investment was circumventing Chinese foreign investment restrictions, China Unicom conceded that these investments did not comply with Government policies. Accordingly, China Unicom ordered these foreign investors to withdraw their investments.

Partly to address these concerns, and in light of China’s WTO admission, the Chinese government has moved to establish a new Telecommunications Commission that is likely to have a similar function to Australia’s DCITA and will co-ordinate the relationship between MII and other agencies. The policy role of the MII is likely to be reduced so that it eventually becomes a hybrid of Australia’s ACA and ACCC, charged with enforcing and implementing rules and regulations set by the Commission. The Telecommunications Commission would assume responsibility for over-arching strategy and policy development, under greater supervision from the State Council.

68 See Allan Zhang, ‘What’s Ahead for China’s Telecoms Market?’ (PriceWaterhouseCoopers, 2002). See also discussion regarding the ‘calling party pays’ controversy in Peter Waters & Damian Cottier, ‘Foreign Investment in China’s Telecommunications: The Impact of Global Trends’ in Paper Presented to PT Supercomm Asia 2001 (Shanghai, 2001). See also the discussion in ‘Face Value: The Minister of Arbitrary Power’ The Economist (9 December 2000) at 76.
69 The legal ambiguity of the joint venture model sent a misleading signal to carriers such as Bell Canada, Cable and Wireless, France Telecom, NT&T, and Sprint International, which took a risk in the absence of clear rules, hoping for a future slice of China Unicom’s market.
71 These foreign investors received a return of their principal plus a nominal return well below that anticipated. See discussion in Xu Yan & Kali Kan, ‘Dancing with Wolves: Is Chinese Telecommunications Ready for the WTO?’ China Academy of Telecommunications Research (Ministry of Information Industry, Beijing) and Department of Information and Systems Management (Hong Kong University of Science and Technology, Hong Kong) 2000. See also Z Xiaohua, ‘China’s “F–C–C” Schemes: Are Early Birds Targets?’ (1998) 9(19) Telecommunications Reports International 10.
C. Conclusions and Recommendations

Regulatory independence is critical to the effective development of long-term competition. Generally, the greater the independence of the regulatory agency, the more effective the regulator will be at ensuring fairness to market entrants, and the more effective the subsequent development of competition will be. While Australia has achieved a high degree of regulatory independence, China has not yet done so. Partly as a result, the perceived quality of China’s regulatory regime has been affected by historical allegations that Chinese regulatory agencies have unfairly favoured the interests of the Chinese state-owned enterprises with whom they are affiliated.

As noted above, with the intended privatisation of many of the existing state-owned enterprises, the ability of the Chinese government to exert direct control over these enterprises will be removed, as will the incentives for the Chinese government to favour particular state-owned enterprises. Such privatisation would require the Chinese government to influence the conduct of market protagonists in a more transparent manner, by appropriate telecommunications regulation. Bearing this in mind, it is important that the quality of such regulation is maximised by improving the quality of the regulatory agencies that will supervise and enforce it.

However, China’s current approach consolidates both regulatory and policy-making powers within a single agency. The dangers of such concentration of power have been clearly evident, including reduced accountability and ad hoc policy formulation. The creation of the new Chinese Telecommunications Commission may provide an opportunity to resolve such issues and, in this regard, the Australian experience provides further insights. Ideally, that Commission should principally assume a policy-making role in the same manner as with the DCITA in Australia, while the enforcement and implementation role should remain with the MII. The Commission should also assume overall responsibility for refereeing turf warfare between different Chinese agencies and for achieving greater co-ordination of Chinese regulatory policy.

5. Implementing Basic Regulatory Obligations

To assist telecommunications markets to operate effectively, governments have imposed a range of basic regulatory obligations. These obligations have typically sought to benefit three different interest groups, namely end consumers, the community, and other telecommunications operators. As with most other nations, China and Australia have each utilised telecommunications licensing as a vehicle for imposing such basic telecommunications regulation. Critical issues arising in Australia and China in relation to such telecommunications licensing have

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included the extent of regulatory coverage, a desire to maximise regulatory flexibility, and the appropriate extent of industry self-regulation.

A. Australian Licensing Regime

Australia’s licensing regime commenced with the Telecommunications Act 1991 and was significantly refined with the enactment of the Telecommunications Act 1997. Importantly, the 1997 legislation sets out the broad regulatory framework, while many particular regulatory obligations have been imposed by subordinate legislation. Such an approach provided greater flexibility to the Australian government, thereby enabling it to better respond to the rapid pace of change in the dynamic Australian telecommunications industry. In addition, the Australian government has emphasised voluntary industry regulation. Industry codes, for example, provided further flexibility to address new issues that have arisen from time to time.

In order to apply basic regulatory obligations, Australia’s licensing regime makes an initial distinction which is common to most licensing regimes, namely between:

• carriers, which are owners or operators of underlying public telecommunications network infrastructure; and
• carriage service providers (CSPs), which are entities that provide telecommunications services to the public using that network infrastructure.

Each are considered in turn below. Most carriers are also CSPs as they use their own infrastructure to provide telecommunications services to the Australian public.

• CSPs: Under the Australian regime, CSPs do not require a licence, but must comply with a range of ‘service provider rules’ which, in turn, require CSPs to comply with Australian telecommunications legislation and with certain access obligations set out in Australian competition legislation. Where CSPs provide basic telecommunications services, they must ensure that those services achieve a particular level of quality and include particular elements, including operator and directory assistance, untimed local calls, emergency call services, call preselection and itemised billing. Such services must also be provided via standardised customer contracts.

74 See Explanatory Memorandum to the Telecommunications Bill 1996.
76 Part 3, Telecommunications Act 1997 (Cth).
78 See Part XIB and Part XIC of Australia’s Trade Practices Act 1974 (Cth) as discussed below.
79 See, for example, Parts 17 to 22, Telecommunications Act 1997 (Cth). See also, for example, Parts 4 to 8, Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth).
80 Part 23, Telecommunications Act 1997 (Cth).
Relevantly, CSPs must comply with applicable industry codes and must enter into Australia’s telecommunications ombudsman scheme, reflecting the Australian Government’s emphasis on industry self-regulation. CSPs must also, for example, ensure that telephone number information is provided to the central number database operated by Telstra and CSPs must comply with the Australian telephone numbering plan. CSPs must also co-operate with various government agencies for such purposes as national security, law enforcement and disaster management.

• Carriers: Carriers are more heavily regulated and require a ‘carrier licence’ from the ACA which is subject to a range of carrier licence conditions. There are no restrictions on the number of carrier licences that may be issued by the ACA so the market is not subject to artificial entry restrictions. Many of the obligations on carriers are similar to the obligations on CSPs. However, carriers have a number of additional rights and obligations by virtue of their ownership or operation of network infrastructure.

In particular, carriers must comply with an ‘industry development plan’ which sets out how each carrier intends to promote the development of the Australian telecommunications sector. Importantly, carriers must make a contribution to a universal service levy to assist Telstra to recover its costs of providing telephony services to uneconomic areas of rural Australia. Carriers also have certain rights arising from their status as holders of a carrier licence, including certain rights of use of, and entry onto, land in order to establish and maintain telecommunications infrastructure. However, they have correspondingly greater infrastructure access obligations.

B. Chinese Licensing Regime

Until 2000, there was a dearth of telecommunications legislation in China. Chinese telecommunications regulation was largely based on fragmented administrative decrees addressing mainly technical standards and service tariffs. The process for issuing and implementing such rules and regulations was non-transparent and inconsistent, exacerbating the difficulties faced by private sector market entrants. Chinese regulation also tended to be influenced by the incumbent state-
owned enterprises who could shape the regulatory environment in a manner favourable to their competitive interests.

On 20 September 2000, to address these concerns, the Chinese Government promulgated the *Regulations of the People’s Republic of China on Telecommunications* (Regulations) to unify Chinese telecommunications regulation while increasing transparency and updating the regulatory regime.\(^91\) These Regulations marked a milestone in China’s effort to manage Chinese telecommunications markets through regulation and created a range of obligations associated with licensing, competition policy, service standards, infrastructure development, and network security. Historically, China’s licensing regime restricted market entry, as well as providing a vehicle for regulation. However, the Regulations contained many pro-competition measures intended to assist China’s campaign for accession to the WTO.

The Regulations are supplemented by important and detailed Licensing Measures which annex model licences incorporating more detailed provisions on interconnection, dispute resolution and dominance.

The Regulations and Licensing Measures were together intended to provide an interim solution pending the enactment of a full Telecommunications Law which would sit at the apex of the telecommunications legislative hierarchy. However, this law has now been contemplated for over six years.\(^92\) As at July 2003, no draft has yet been circulated of this law and there is no timetable for its implementation, although the Law may be promulgated in 2004 or 2005. Unfortunately, the likelihood of further regulatory change in the near future increases the risks of investing in China’s telecommunications sector.

The Regulations and Licensing Measures now establish a Chinese telecommunications licensing regime which adopts the same basic distinction as the Australian telecommunications licensing regime, namely the distinction between infrastructure-owners and infrastructure-users. In particular, the Regulations and Licensing Measures distinguish between:\(^93\)

- basic telecommunications businesses (BTBs), which are businesses that involve building or operating public telecommunications network infrastructure;\(^94\) and

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\(^93\) However, while in Australia the distinction is established by broad statutory principles, the Chinese approach relies on the relevant government agency to pre-determine the classification of particular services within comprehensive classification catalogues. See Article 8, Telecommunications Regulations 2000. See also discussion in Stephen Lawson, ‘China Spells out Some Telecommunication Services Rules’ (2000) 22(44) *InfoWorld* 68.

\(^94\) Article 8, Telecommunications Regulations 2000 defines ‘basic telecommunications services’ as ‘the provision of public network infrastructure, the transmission of public data and basic voice communication’ with examples set out in the Attachment to the Telecommunications Regulations 2000.
value-added telecommunications businesses (VATBs), which are businesses that involve the provision of telecommunications services over that network infrastructure.95

The operation of a telecommunications business in China is conditional upon obtaining a BTB or VATB licence. Unlike Australia, the supply of BTB licences is closely integrated with China’s restrictions on foreign investment, as discussed later. The Chinese Government also retains a high degree of discretion regarding the potential issuance of licences.96

However, there is a lack of clarity in the definitions of BTBs and VATBs. As a result, certain providers that do not own or operate network infrastructure may still require a BTB licence, notably if they were to provide voice telephony services over the assets of another party (eg, resale). Ideally, the Regulations and Licensing Measures should be amended to increase the level of clarity and ensure that entities that do not own or operate telecommunications infrastructure should only require a VATB licence.

Furthermore, the coverage of China’s telecommunications regulatory regime is not as comprehensive as Australia’s, leading to several important omissions, including number portability and preselection.97 Relevant requirements of the Regulations include that:

- BTBs and VATBs must provide telecommunications services in accordance with service standards stipulated by the MII.98 As with Australia, failure to meet these service standards can result in liquidated damages payable to end users.99 However, unlike Australia, BTBs and VATBs are also required to ‘accept social supervision’ in order to improve the quality of their telecommunications services.100
- Itemised billing must be provided free of charge to customers and customers must be notified of abnormally large bills.101 The consequences of customers failing to pay invoices are prescribed in the regulations.102 BTBs and VATBs are also required to notify customers of outages.103 While the thrust of such obligations is similar to Australia, the level of their legislative granularity is significantly greater.

95 Article 8, Telecommunications Regulations 2000 defines ‘value-added telecommunications services’ as ‘the provision of telecommunications and information services through public networks’ with examples set out in the Attachment to the Telecommunications Regulations 2000.
97 Preselection refers to the ability of a customer to pre-determine their service provider on a permanent basis. Number portability refers to the ability of customers to keep their telephone number when they change their telephone service network provider.
100 Article 39, Telecommunications Regulations 2000.
101 Article 34, Telecommunications Regulations 2000.
102 Article 34, Telecommunications Regulations 2000.
103 Article 36, Telecommunications Regulations 2000.
The design and construction of telecommunications networks must correspond with national security requirements and network security requirements and must comply with Governmental plans, constructions and operations. Unlike Australia, telecommunications infrastructure development is subject to state planning and is correspondingly heavily regulated by the Chinese central and local governments.

The Regulations also address a number of essential telecommunications services, such as emergency call services. Emergency call services, for example, must be provided at no charge in China as in Australia.

C. Conclusions and Recommendations

The Regulations were intended to be supplemented by ‘implementing rules’ which would flesh out many of the broad principles and obligations. However, as at July 2003, few if any implementing rules have been promulgated. Furthermore, the Chinese Government has reiterated on several occasions that the Regulations must be viewed only as an interim measure providing a basis on which a fully comprehensive Chinese national Telecommunications Law can subsequently be developed.

A key concern with China’s current regulatory regime is that it still requires the unifying structure likely to be provided by the Telecommunications Law. At present, multiple issues are addressed in the Regulations and Licensing Measures in a fairly eclectic manner at different levels of detail. On the one hand, many issues are addressed broadly almost as statements of intent, creating potential legal uncertainty. On the other hand, the granularity of other aspects of the Regulations and Licensing Measures appears inappropriately high, such as obligations relating to customer billing, creating potential inflexibility. The number of regulations addressing interconnection, for example, illustrates the patchiness of the current regulatory framework pending introduction of the Telecommunications Law.

In addition, a number of critical issues are presently omitted from the regulatory regime, creating industry uncertainty as to how such issues will be resolved and scope for commercial disputes. Such uncertainty is anathema to private and foreign investors who need regulatory certainty upon which they can make their investment decisions. The fact that China has not issued implementing rules, and has stated that the Regulations are to be considered only an interim measure, has further heightened such uncertainty.

The current challenge for China is therefore how to bolster and expand its regulatory regime while addressing the various regulatory issues at an appropriate level of detail, without losing flexibility. In this regard, the Australian experience provides a number of insights. The level of sophistication and detail of the Australian regulatory regime is significantly greater than that of China and each of the issues omitted from the Chinese regime are addressed by Australian

104 Article 61, Telecommunications Regulations 2000.
105 Section 4, Telecommunications Regulations 2000.
106 Article 37, Telecommunications Regulations 2000.
legislation. Yet notwithstanding such granularity, Australian regulation remains relatively flexible.

To achieve such coverage yet flexibility, Australia has deliberately adopted a structure whereby broad regulatory obligations and principles are set out in legislation, with specific detail fleshed out by subordinate regulation and industry codes. Australia has also relied on a hybrid of industry self-regulation and governmental regulation, known as ‘co-regulation’.107 On detailed technical matters, for example, the industry itself determines the appropriate level of regulation which is then incorporated into Australian law by ACA notification. Such an approach could prove useful in China.

In summary, the key to success for China will lie in crafting an integrating regulatory framework that resolves the key industry uncertainties in a coherent fashion, provides assurances to private and foreign investors, and responds flexibly to technological innovation and changes in government policy priorities.

6. **Imposing Specific Regulatory Constraints on Market Power**

The principal concern of competition regulation in the telecommunications sector is with the ability of firms with substantial market power to exploit that market power with adverse effects on market competition.108 Such market power may be particularly acute in the case of telecommunications as it is impossible for any market entrant to provide full telecommunications capability without interconnecting to the incumbent carrier’s network.109 Accordingly, the incumbent has significant market power arising from its control over existing telecommunications infrastructure.110 Australia and China have each adopted specific regulatory constraints to address such issues. Critical issues arising from such regulation have included the appropriate extent of telecommunications-specific regulation, appropriate infrastructure interconnection requirements, and the desirability of price controls.

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Historically, Australia’s approach to the regulation of market power involved restrictions on the behaviour of the ‘dominant carrier’ (i.e., Telstra), coupled with requirements to charge in accordance with filed tariffs and certain non-discrimination obligations.\textsuperscript{111} AUSTEL, as industry regulator, had the power to disallow anti-competitive tariffs.\textsuperscript{112} Disputes involving interconnection were subject to arbitration by AUSTEL.\textsuperscript{113}

In light of various recommendations flowing from Australia’s Hilmer Report into national competition policy in August 1993, the Australian government moved to implement a more effective competition regime for telecommunications based on generic competition legislation.\textsuperscript{114} The Australian Trade Practices Act 1974 was amended to include a new Part XIB and XIC which set out more stringent competition obligations on telecommunications firms and created a telecommunications-specific access regime.\textsuperscript{115}

In particular:

- **Part XIB:** Under Part XIB, the ACCC can issue ‘competition notices’ if it has reason to suspect that any carrier or CSP is in breach of the ‘competition rule’.\textsuperscript{116} The competition rule involves a more severe application of Australia’s generic competition obligations to Australian telecommunications markets. Non-compliance with a competition notice attracts significant penalties, including fines of up to A$1 million per day.\textsuperscript{117} The ACCC has already issued several competition notices against Telstra, most recently in March 2002.\textsuperscript{118}

- **Part XIC:** Under Part XIC, the ACCC may ‘declare’ services provided over telecommunications infrastructure where it considers that such declaration would promote the long-term interests of end-users.\textsuperscript{119} Such declaration is typically made only if access to that service is essential to competition and the service is not subject to significant competition.\textsuperscript{120} Where a service is declared, statutory non-discrimination, access and interconnection obligations apply to that service. In the event of disputes relating to access to the declared service,
the ACCC may arbitrate the dispute and make binding determinations.\textsuperscript{121} This Part XIC access regime has resulted in a proliferation of access disputes in the Australian telecommunications industry, largely involving Telstra.\textsuperscript{122} Under Australian telecommunications regulation, a separate access regime also applies to enable access to particular underlying infrastructure, including giving carriers a statutory right to make use of facilities owned by other carriers (ie a form of mandated infrastructure sharing).\textsuperscript{123} In the event of disputes over access, the ACCC again has the power to arbitrate such disputes.\textsuperscript{124}

To date, almost all access disputes in Australia have concerned the price of access to the relevant telecommunications service. Given the critical importance of determining a price which balances the interests of access seekers against the interests of access providers, the ACCC has publicly announced the relevant pricing methodologies that it will apply to resolve access disputes. In the Australian context, a ‘TSLRIC’ pricing methodology is predominantly used which prices the service at a level which enables the access provider to recover the underlying costs of providing that service plus a reasonable risk-adjusted return on investment.\textsuperscript{125}

In addition to these access obligations, Telstra is subject to specific price controls. In particular, Telstra must ensure that the overall price of a defined basket of its telecommunications services continues to decline by a rate of 4.5 per cent relative to inflation. Particular services are also subject to ‘sub-caps’ within this basket, including a cap on local calls of 22 cents and a requirement for aggregate local calls and line rental increases not to exceed the inflation rate (although they may be adjusted relative to each other).\textsuperscript{126}

B. Chinese Competition Obligations

Given China’s historical background of state-ownership and control, the Chinese telecommunications sector remains heavily regulated by world standards and is still to be fully liberalised and deregulated.\textsuperscript{127} Furthermore, China’s policy model

\textsuperscript{121} Part XIC, Division 8, \textit{Trade Practices Act} 1974 (Cth).
\textsuperscript{122} See discussion in Productivity Commission, above n22.
\textsuperscript{123} Schedule 1, Parts 3 to 5, \textit{Telecommunications Act} 1997 (Cth).
\textsuperscript{124} See, for example, paragraph 18 of Schedule 1, Part 3, \textit{Telecommunications Act} 1997 (Cth).
\textsuperscript{126} See \textit{Telstra Carrier Charges — Price Control Arrangements, Notification and Disallowance Determination No. 1 of 2001}.
\textsuperscript{127} China Telecom, for example, retains a monopoly over international calls and has a 99 per cent market share in basic fixed-line telephony. See International Telecommunications Union, \textit{World Telecommunications Development Report 2001} (Geneva: ITU, 2000).
Historically, a prime motivating force in the industry has been competing state interests rather than competitive market forces. The concept of a ‘socialist market economy’ in the telecommunications sector still contemplates that the activities of state-owned telecommunications enterprises will remain subject to a high degree of governmental influence, enabling the Chinese government to better implement its Five Year Plans. However, continued significant governmental involvement potentially reduces the scope for private sector competition and risks introducing adverse market distortions.

The challenge for China is how to introduce greater competition principles into its overall regulatory regime while gradually reducing government intervention. In this regard, China’s accession to the WTO has placed a clear obligation on China to further adopt Chinese competition policies. The Regulations themselves already clarify that the supervision and administration of Chinese telecommunications must conform with the principle of ‘the encouragement of competition’. However, China will also be required to now implement the pro-competitive regulatory principles contained in the WTO ‘Reference Paper’ on Basic Telecommunications, so further reforms are likely to be forthcoming.

China’s generic competition legislation is not as comprehensive as Australia’s generic Trade Practices Act 1974 and fails to address many issues of concern relating to telecommunications competition. While the Chinese government has indicated it will enact comprehensive competition legislation in 2003, such legislation apparently has low priority relative to other policy initiatives. Competition issues in the Chinese telecommunications sector have thus been addressed within the context of the Regulations, principally via:

(a) price controls; and
(b) interconnection-specific regulation.

Each are considered in turn below.

- Price controls: Historically, price controls have been pervasive in the Chinese telecommunications sector. Price floors were justified as ensuring stable

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130 The Law for Countering Unfair Competition adopted at the Third Session of the Standing Committee of the Eighth National People’s Congress in China and promulgated on 2 September 1993. This law does address some competition issues. For example, Article 12 prohibits tie-in sales. Article 27 prohibits price fixing or bid rigging. However, the Law is principally directed at fair trading in general and addresses such matters as bribery, deceptive advertising and coercive sales. The Law is not as comprehensive as the generic competition laws of most nations.
telephony revenue to encourage government-mandated infrastructure investment.131 Price ceilings were justified to protect consumers from over-charging. Notwithstanding such price controls, allegations of predatory pricing still existed. China Unicom, for example, alleged that China Telecom was engaging in predatory behaviour and was utilising a price squeeze to reduce China Unicom’s competitive effectiveness.132 Over the past several years, many of the price restrictions have been relaxed and minimum prices have been reduced to promote more effective competition. As a result significant tariff rebalancing has occurred, providing greater scope for competition.133 However, significant price controls still remain.

In particular, two types of price controls may be applied by the MII to telecommunications services if it considers such services to be insufficiently competitive. Government-guided rates can be imposed for both BTB and VATB services, requiring prices to be set within a range prescribed by the MII. Government-fixed rates can be imposed for BTB services.134 The price setting process is moderately transparent, requiring the MII to consult with Chinese industry and the State Development and Planning Commission before seeking approval from the State Council.135 It is likely that these price controls will be gradually phased out as competition increases in the Chinese telecommunications sector.

- Interconnection regulations: The Regulations set out basic principles applicable to the interconnection of telecommunications networks, including overriding principles of ‘technological feasibility, economical reasonableness, fairness and justice, and reciprocal cooperation’. These Regulations are supplemented by more specific interconnection regulations.136 Under Chinese law, ‘dominant’ telecommunications operators may not refuse requests for interconnection by other telecommunications operators and must formulate binding MII-approved interconnection rules based on principles of transparency and non-discrimination. Network operators must also

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131 Due to regulatory concerns over ‘vicious competition’ leading to the devaluation of state assets, China Telecom and China Unicom were required by the MII to comply with price controls. China Unicom was only permitted to reduce its tariff by a maximum of 10 per cent below the regulated rate. Although some local operating companies of China Unicom and China Telecom sought to circumvent this regulation by offering discounts to subscribers, they were immediately prohibited by MII from doing so. In April 2000, the MII required China Telecom and China Unicom to execute an agreement, and each party agreed to follow the regulated tariff of the MII.


133 Over the past several years, China Telecom has sought to rebalance its telecommunications tariffs to better prepare for greater competition in basic telephony services. Its previous pricing structure was based on high installation fees but low monthly fees and call charges. However, the latter barely covered the operating costs of local operating companies.

134 Prices are still considered high in China. See discussion in Charles Dodgson, ‘China Looking for the Great Leap Forward’ Communications International, London (November 2000) at 84.


136 Regulations for Administration of Interconnection of Public Telecommunication Networks, promulgated by the MII with effect from 10 May 2001.
interconnect with one another in accordance with any regulations proscribed by the MII with respect to the technical standards, management and settlement methods.137

If operators fail to reach agreement on the terms of interconnection they may apply for statutory mediation or binding expert arbitration. The MII is empowered to promulgate further specific regulations for the administration of interconnection and for the determination of interconnection charges. The Regulations set out a more general principle that charges for telecommunications services will be determined on a cost basis, taking into account the requirements of the national economy, the development of the telecommunications sector and affordability to end users.138

In addition to the above, the Regulations set out a number of competition obligations with more generic application. In particular, there are specific prohibitions against unreasonable cross-subsidisation, unfair pricing below cost, and the imposition of restraints on customers.139

C. Conclusions and Recommendations

While China’s existing telecommunications markets are not yet fully competitive, and China continues to adhere to a form of managed competition with significant price controls, China is progressively liberalising its markets to realise full scale competition. However, as China moves toward market-based policies, it is important for it to develop an effective competition policy. In this regard, Australia’s experience provides three important insights:

• First, successful implementation of competition policy is dependent on effective competition laws, well-defined property rights and overall adherence to the Rule of Law.140 While the latter two elements are becoming increasingly well established in the Chinese legal system, effective generic competition laws have not yet been enacted and should be given higher priority on the Chinese reform agenda. In particular, generic competition policy reforms should ideally complement future telecommunications reforms and would be consistent with China’s WTO obligations.

• Second, China should implement a basic regulatory framework to promote telecommunications-specific competition, particularly in respect of infrastructure access. While the Regulations address such issues, Australia’s experience suggests that they do not extend far enough. The Chinese Regulations, for example, do not contemplate such critical issues as network

139 Article 42, Telecommunications Regulations 2000.
unbundling and do not prohibit a wholesale provider from refusing to supply services for anti-competitive reasons.

• Third, China should ensure that its enforcement agencies are adequately funded and resourced, given that pro-active enforcement will remain essential to promoting and preserving competition in the Chinese market. The earlier comments relating to regulatory independence apply.\textsuperscript{141}

China’s current regulatory approach of a mandatory interconnection offer, coupled with potential MII oversight, is potentially stricter in some respects than Australia’s Part XIC regime. However, the effectiveness of this regime is only as effective as the agencies that supervise and enforce it. Issues of transparency and natural justice therefore remain critical. Furthermore, given the critical importance of pricing in telecommunications interconnection, the MII should publish a guiding pricing methodology. In this respect, Australia’s experience is useful, with Australia favouring a ‘TSLRIC’ pricing model to ensure prices reflect underlying costs.\textsuperscript{142}

China’s tariff structure also requires urgent deregulation if competition policy is to be effectively employed in China. As Australia’s experience with local call pricing illustrates, Government price controls have the potential to significantly distort economic incentives. China Telecom’s interconnection prices, for example, are not necessarily cost based in some areas, partly due to the cross-impact of MII tariffs on fixed line and mobile products, but also due to China Telecom’s ability to bundle services subject to price controls with those not subject to such controls.\textsuperscript{143} Reform of price controls is a necessary prelude to effective price competition in the Chinese telecommunications markets. Current Chinese Government concerns regarding price wars could be addressed once Chinese telecommunications operators recognise the value of product differentiation and non-price competition based on quality and customer service.

7. \textit{Addressing Market Failure by Targeted Regulatory Instruments}

A clear intention of telecommunications reforms in China and Australia has been to assist market mechanisms to operate efficiently. However, in certain circumstances markets may lead to an allocation of resources considered sub-optimal or socially undesirable, resulting in ‘market failures’. Of particular concern are market failures associated with:

• management of limited strategic resources, such as the control, ownership and transfer of telephone numbers (Numbering); and

• universal service obligations (USO), namely the provision of basic telephony services to uneconomic areas for social reasons.

\textsuperscript{141} See the earlier discussion in Section 3 of this paper.

\textsuperscript{142} See earlier discussion relating to the TSLRIC pricing model.

Telephone numbers have strategic value in the telecommunications industry and can be exploited by incumbent firms as a means to dissuade competition. USO requirements are necessary to give effect to government social policies. Both issues have been addressed in China and Australia by targeted regulatory instruments.

A. Australian Numbering and USO Issues

Numbering: Telephone numbering issues were addressed at an early stage in Australia by retaining ownership of telephone numbers with the Government. All telephone numbers in Australia are now allocated to carriers by the ACA in accordance with the *Australian Telecommunications Numbering Plan*. This allocation may occur in a number of ways, including by auction or tender. Once a number is allocated, the carrier to whom it is allocated has a statutory ‘right of use’ in relation to that number under the *Numbering Plan*.

If a customer wishes to keep the same telephone number, but physically connect to a network owned by another carrier, then a ‘number portability’ issue arises. Australia has gradually implemented procedures to allow number portability over the past few years and in 2001 implemented number portability in relation to mobile telephony. Telephone numbers in Australia are now freely transferable between different carriers. Telstra also maintains a numbering database of all telephone numbers and customer addresses on behalf of the Australian telecommunications industry for the purposes of directory assistance and production of telephone directories.

USO: The universal service obligation in Australia has proved controversial. A key policy concern of the Australian government is that constituents in remote rural areas are given the same standard of telecommunications services, at the same cost, as constituents in the major Australian capital cities. In particular, the government’s express policy is that basic telephony services should be reasonably available to all people in Australia on an equitable basis, regardless of where they reside or carry on business. Under the conditions of its carrier licence, Telstra is currently required to provide such basic telephony services to all Australians as the default Australian ‘universal service provider’.

However, the underlying costs of providing basic telephony services to rural areas are significantly greater than providing such basic telephony services to metropolitan areas. Given fierce price competition in metropolitan areas, Telstra cannot increase its metropolitan charges to cross-subsidise rural areas.

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144 *Australian Telecommunications Numbering Plan 1997*, made by the Australian Communications Authority pursuant to subsection 455(1) of the *Telecommunications Act 1997* (Cth).
146 See discussion by the ACA at <http://www.aca.gov.au/number/local.htm#Mobile>.
147 This is a condition of Telstra’s carrier licence.
Accordingly, Telstra provides telephony services to rural Australia at a loss.151 To assist Telstra to recover this loss, the Australian government imposes a universal service levy on all carriers and then redistributes that levy to Telstra.152 The level of that levy has proved highly controversial. The Australian Government has capped the levy at roughly A$300 million, however Telstra has historically claimed that its actual unrecovered costs of providing the USO are closer to A$1.8 billion. From 1991, the Australian Government introduced a policy of USO tendering to appease rural constituents known as ‘USO contestability’. Few if any, serious operators have participated in such tenders, indicating that Telstra’s claims regarding the relevant USO costs may be closer to the truth than the Australian Government would currently like to believe.

B. Chinese Numbering and USO Issues

Numbering: As with Australia, the Chinese Government has favoured centralised management of numbering resources and ownership of telephone numbers has remained with the Chinese Government.153 The Numbering resource is currently administered by the MII and other operators must pay standard charges to the MII for the utilisation of the Numbering resource.154 The MII may allocate telephone numbers either by auction or designation.155 Once an operator has acquired the right to use numbers, all other telecommunications operators are required to co-operate with it to ensure the efficient use of the overall numbering resource.156 Unlike Australia, only limited number portability has been implemented in China as at July 2003.

USO: As China has poor telecommunications coverage in many rural areas and a significant rural-urban wealth differential, the need for a universal basic telephony service is clearly acute and remains fundamental to current Chinese Government telecommunications policy. To date China has relied on cross-subsidisation within the context of mandated pricing to enable China Telecom to provide basic telephony to rural areas; effectively an informal USO. However, with the onset of competition and the relaxation of price controls such cross-subsidisation will become unsustainable. Furthermore, any privatisation of China Telecom will require the Chinese Government to formalise its USO.

In this respect, the Regulations already contemplate a Chinese universal service regime and enable the MII to impose a USO on certain telecommunications operators in accordance with regulations to be prescribed by the MII.157 The cost

incurred by such operators would be compensated in accordance with the
mechanism prescribed in such regulations. In February 2002, the MII
announced its intention to implement a Chinese USO regime probably in 2003 or
2004. The USO regime is most likely to involve a levy on all telecommunications
operators in China based on their annual revenue.

C. Conclusions and Recommendations

In relation to numbering issues, the Chinese and Australian approaches are broadly
similar. However, China will need to ensure that it implements full number
portability to increase each customer’s willingness to switch between different
telecommunications providers, thereby promoting competition. Mobile number
portability, for example, does not yet exist in China, hence Chinese mobile phone
users cannot switch between different providers without being required to change
their phone numbers. Associated customer inertia can be disadvantageous to
market entrants. Australia implemented mobile number portability from

In relation to universal service issues, China must develop an effective strategy
to enable the sustainable provision of basic telephony to rural areas. The current
Chinese approach relies on cross-subsidisation and is contingent on continuing
price controls. China Telecom, for example, has relied heavily on cross-subsidies
from eastern to western China, and from mobile and long-distance services to local
phone services, such cross-subsidisation achieved as a result of price controls.
Such price controls effectively require consumers in low cost areas to bear the cost
of providing services to high cost consumers. However, as noted previously, the
removal of such price controls is a necessary precursor to full price competition in
the Chinese market. This then begs the question, how will China Telecom’s USO
be funded if it cannot rely on such cross-subsidisation?

Australia’s experience provides several insights. While Australia imposed a
levy on all carriers to contribute to the cost of Telstra’s USO, this levy proved
highly susceptible to political influence. China should ideally seek to mitigate this
political risk by implementing a highly transparent and independent mechanism
for costing the USO. Australia’s experience also suggests that the Chinese
Government should carefully consider the appropriate scope of the USO to ensure
it remains affordable, particularly given the vast rural areas in western China. For
example, the operational costs in western China are believed to be exceptionally
high because of the harsh natural conditions and low population. This situation is
similar to the high costs Telstra experiences in providing telephony services to
outback Australia.

159 See discussion in Bing Zhang, ‘Telecom Competition, Post–WTO Style’ (2000) 27(3) The
China Business Review 12.
8. Promoting Greater Foreign Investment

Finally, Chinese and Australian telecommunications reforms have involved the opening of the respective markets of both nations to foreign investment. Such foreign investment has provided necessary capital for infrastructure investment while further increasing competition. Critical issues arising in relation to such foreign investment in both Australia and China have included the appropriate level of such investment and the extent to which foreign investment should be restricted.

A. Australian Approach to Foreign Investment

Historically, to address concerns regarding foreign control of strategic assets, the Australian government imposed foreign ownership restrictions on Telstra in the prelude to Telstra’s partial privatisation. These restrictions ensure that no single foreign person can own more than 5 per cent of Telstra and no group of foreign persons can own more than 35 per cent.160 In addition, Telstra must remain incorporated in Australia and maintain a substantial operational business in Australia.161 The Chairperson and majority of directors of Telstra must be Australian citizens.162 Initially, foreign ownership restrictions were also placed on both Vodafone and Optus, although these restrictions have now been lifted.

Otherwise, Australia has no remaining foreign investment restrictions applicable specifically to the telecommunications sector. Rather, all foreign investors are subject to Australia’s generic foreign investment laws.163 These laws require notification to the Federal Treasurer, via the Foreign Investment Review Board, of proposed acquisitions by foreign persons in excess of prescribed statutory thresholds.164 Once a proposed acquisition is notified, the Federal Treasurer has 30 days in which to decide whether or not to object to the acquisition. The Federal Treasurer may block the acquisition if satisfied that it would be contrary to the Australian national interest.165 The application of this regime to telecommunications foreign investment was tested in 2001 when SingTel Limited of Singapore acquired Optus. Notwithstanding concerns regarding Singapore ownership of certain infrastructure vital to Australian national security, that transaction was ultimately approved.166

B. Chinese Approach to Foreign Investment

Historically, China has expressly prohibited foreign investment in most parts of its telecommunications sector, ostensibly for national security and sovereignty reasons but allegedly also to retain control over Chinese communications. Where

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162 Part 2A, Division 9, Telstra Corporation Act 1991 (Cth).
163 The relevant requirements are set out in the Foreign Acquisitions and Takeovers Act 1975 (Cth) and Foreign Acquisitions and Takeovers Regulations 1989 (Cth).
165 Sections 18 and 19, Foreign Acquisitions and Takeovers Act 1975 (Cth).
foreign investment was permitted, such investment was heavily restricted and subject to arbitrary state-intervention. Accordingly, foreign participation was typically limited to contracts for equipment supplies or specific work on particular infrastructure projects. With China’s accession to the WTO, China has reformed these telecommunications-specific restrictions. While foreign investment in the Chinese telecommunications sector remains heavily restricted, these restrictions will be gradually relaxed over a five year period from 2002.

In particular, China’s foreign investment regulations applicable to telecommunications are now set out in the Provisions on the Administration of Foreign-invested Telecommunications Enterprises 2001 (FITE Provisions) which are supplemented by operating permit procedures. These FITE Provisions contain various licensing qualification criteria, and set out application and approval procedures, which must be met and followed before a foreign entity can invest in the Chinese market. Essentially, this involves a two-tier approval process by MII and MOFTEC. In all circumstances, such investments must be made via a Chinese–foreign equity joint venture, severely limiting investment vehicle flexibility. While foreign investors have sought to adopt structures to circumvent such restrictions, these remain high-risk structures that are currently tolerated but could equally be declared illegal if the Chinese government’s view on the benefits of foreign investment were to change.

Importantly, the extent to which investment may occur in Chinese BTB and VATB businesses is restricted in accordance with a transitional timetable established pursuant to China’s WTO commitments. Foreign investment up to a level of 49 per cent in a BTB and 50 per cent in a VATB will be gradually phased in over the 2002 to 2007 period, commencing with VATB services, then BTB mobile and fixed-line services. Beijing, Shanghai and Guangzhou are the first geographic regions to be subject to such foreign investment, followed by the 17

171 This could occur, for example, by establishing a subsidiary in China or acquiring a stake in a Chinese firm.
172 A Chinese–foreign equity joint venture is a form of limited liability company with a registered capital set by law as a proportion of its total investment. The venture remains subject to Chinese law in general as well as specific laws for foreign-investment enterprises. See, for example, discussion in YY Wu, ‘Joint Venture Law of the People’s Republic of China’ in Tay & Doeker-Mach, above n 2 at 498–526. See also discussion in BC Potter, ‘China’s Equity Joint Venture Law: A Standing Invitation to the West for Foreign Investment?’ in Tay & Doeker-Mach, id at 527–553.
major Chinese cities. From 2007, no geographical restrictions will apply. In effect, these geographic restrictions prevent foreign investment in the existing state-owned geographically unrestricted enterprises until 2007, potentially curtailing Chinese privatisation activities.

C. Conclusions and Recommendations

Notwithstanding China’s entry into the WTO, China’s restrictions on foreign investment in telecommunications remain among the strictest in the world. This contrasts starkly with Australia’s desire to encourage foreign investment in its telecommunications sector. The issue arises, what are the likely consequences of this difference in approach? In this regard, China’s continued restrictions on market entry are likely to continue to restrict competition in the Chinese market, to the detriment of Chinese consumers and overall economic efficiency. Furthermore, future investment in Chinese infrastructure will continue to be financed by foreign debt, rather than foreign equity. Both issues are potentially disadvantageous to Chinese long-run economic development.

Accordingly, a clear recommendation of this paper is that China needs to further relax its foreign investment restrictions to promote greater market competition and to increase the mechanisms for foreign investment. The challenge for the Chinese Government is to recraft internal political ideology, and counter internal vested interests, in a manner that will enable such restrictions to be further reduced. An incremental approach may assist in this regard, permitting domestic Chinese operators to develop the relevant knowledge and expertise as competition increases.

9. Conclusions

Notwithstanding their significantly different socio-economic and political contexts, the telecommunications reforms of China and Australia have surprisingly similar themes. This is not surprising given that modern telecommunications policy reflects universal themes as articulated in such documents as the Basic Telecoms Regulatory Reference in the WTO. However, the challenge for China lies in customising such policy recommendations to suit China’s unique socio-economic and political context. It is precisely these differences which challenge the process of applying Australia’s lessons to China.

However, the manner in which Australia has successfully addressed certain issues provides clear insights for China. In particular, given that China will be required to rely more heavily on competition policy in future years, Australia’s experience in promoting effective telecommunications competition remains clearly relevant. Australia’s incremental approach to several issues also offers solutions to current Chinese policy concerns.

Based on the analysis set out in this paper, six key customised policy recommendations can be made to the Chinese Government:

• Recommendation 1 (Incremental privatisation): China should move incrementally towards full privatisation of its state-owned enterprises, thereby removing the governmental conflict of interest between regulatory and commercial functions. This could be achieved by permitting increasing levels of private and foreign investment in the various state-owned enterprises with a view to achieving full privatisation within the next five to 10 years. Such privatisation would reduce the international perception that China’s state-owned enterprises could potentially influence government policy to suit their competitive objectives, boosting international confidence. Such privatisation would also lead China away from its current model of ‘managed competition’ towards full-scale private sector competition.

• Recommendation 2 (Policy-making separation): China should curtail some of the powers of the MII by giving the Telecommunications Commission the role of policy formulation, leaving the MII with enforcement and administrative functions. China should also ensure the MII is adequately resourced and subject to requirements of transparency and natural justice, thereby ensuring Chinese regulatory policy is implemented fairly and effectively.

• Recommendation 3 (Telecommunications legislation): China should quickly enact a comprehensive and unified Telecommunications Law which resolves key industry uncertainties in a coherent fashion, provides assurances to private and foreign investors, and responds flexibly to technological innovation and changes in government policy priorities. The current Regulations are insufficient.

• Recommendation 4 (Competition legislation): China should enact targeted competition legislation focused on infrastructure access, thereby mitigating competition issues arising from vertical integration. China should also adopt underlying generic competition laws and should emphasise the development of competition policy, consistent with the APEC Competition Principles and China’s WTO obligations.

• Recommendation 5 (Promoting competition): China should implement key reforms intended to bolster competition. In particular, China should incrementally phase out all price controls to ensure greater price competition while promoting the virtues of non-price competition based on service quality and customer service. As part of such reforms, China should implement an affordable USO funded by an independently determined USO levy. China should also move to quickly implement full number portability.

• Recommendation 6 (Foreign investment): China should further relax its foreign investment restrictions. Such relaxation would complement China’s privatisation activities and would assist the financing of China’s infrastructure development. An incremental approach would also assist in this regard, permitting domestic Chinese operators to develop the relevant knowledge and expertise as competition increases.

By implementing these six recommendations, China will take significant steps towards implementing the economic development strategy identified by the World Bank in its October 2001 report.
With All My Worldly Goods I Thee Endow:*  
A Review of the Attorney-General’s Proposed Reform of Bankruptcy Law**

LUCY ROBB†

1. Introduction

In recent years, the number of high-income individuals who use bankruptcy to avoid their taxation obligations has steadily increased. In a study conducted by the Australian National Audit Office in 1999, it was found that a small number of barristers, accountants and medical practitioners had tax debts amounting to five times the national average. These cases of bankruptcy were remarkable in a number of respects. First, the sole or major creditor was the Australian Taxation Office (ATO). Second, the bankrupts were insolvent despite continuing to earn substantial incomes. Third, the trustee in bankruptcy was unable to recover sufficient assets to distribute to creditors because the bulk of the bankrupt’s property had been transferred to an ‘associated entity’ prior to the commencement of bankruptcy. Fourth, while the bankrupt did not own the property, he or she used it as though it was his or her own.

The ATO estimates that it lost over 20 million dollars in revenue between 1996 and 1999 from 56 barristers alone. In response to this situation, the Attorney General Daryl Williams and the then Assistant Treasurer Senator Rod Kemp commissioned a Joint Taskforce, comprised of members of the ATO, the Attorney-General’s Department, the Treasury and the Insolvency and Trustee Service Australia, to consider amendments to the existing law.

** Bankruptcy Act 1966 (Cth); Family Law Act 1975 (Cth).
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3 ANAO Report No 23, id at para 50.
4 Under the Bankruptcy Act 1966 (Cth) (hereinafter Bankruptcy Act), ‘associated entities’ refers to companies (s5B); natural persons, for example the bankrupt’s close relatives, agents, employees, trustees or solicitors (s5C); partnerships (s5D), and trusts (s5E).
On 2 May 2003, the Taskforce published its Report. It contains 12 recommendations, including a proposal to insert a provision which operates in a similar manner to s79 of the Family Law Act 1975 (Cth) into the avoidance provisions of the Bankruptcy Act 1966 (Cth). Section 79 relates to the alteration of property interests between separating spouses. The purpose of the proposal is to extend the basis upon which a trustee in bankruptcy can recover property from third parties. This article will assess the necessity for and utility of that proposal.

2. **Earlier Proposals to Reform the Avoidance Provisions**

On 20 November 1983, the Federal Attorney General asked the Australian Law Reform Commission to inquire into ‘the law and practice relating to the insolvency of both individuals and bodies corporate, in particular … the provisions of the Bankruptcy Act, in its application to both business and non-business debtors’. In 1988, the ALRC published its Report. It made the following recommendation:

When a related person is involved [in an antecedent transaction] there should be a presumption of intent [to delay or defeat creditors]. With the shifting of the onus in this way, there is more control over transactions which, while clothed with apparent legal respectability, are repugnant in a commercial sense.

The Commission’s recommendation was not adopted when the law was amended by the Bankruptcy Legislation Amendment Act 1996 (Cth).

3. **The Current Proposal**

In its report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax, the Taskforce expressed the problem facing the ATO and other creditors in the following terms:

It is common for professional persons to own no significant assets. Typically, a spouse or a family trust or company owns them. Where a bankrupt professional owns nothing and his or her spouse owns all the assets of the marriage, the question arises whether it is apt that legal ownership structures be regarded as inviolate. If they are, the bankrupt’s trustee — and creditors — get no access to assets registered as owned by the bankrupt’s spouse even if their acquisitions were solely funded by the bankrupt’s endeavours.

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7 The term ‘avoidance provisions’ is used in this article to refer to ss120, 121 and 122 of the Bankruptcy Act.
10 Ibid.
11 Id at para 282.
Accordingly, the Taskforce made the following recommendation:

Courts having bankruptcy jurisdiction might be empowered to determine asset recovery applications by bankruptcy trustees where associated entities (including family members) of the bankrupt hold assets sourced from the bankrupt’s income flow or activities. This jurisdiction is to be additional to that conferred already under Division 4A of Part VI of the Bankruptcy Act.

The amount recovered could be determined by reference to family law principles relating to the contributions and needs of the parties to the marriage or, where applicable, by principles of property division under State domestic relationships law: in each instance the principles would be applied as if the relevant relationship between the bankrupt and another person had broken down.13

The Taskforce’s recommendation would therefore permit the trustee to recover assets from associated entities subject to two requirements. First, the trustee must be able to prove that property owned by an associated entity was ‘sourced’ from the bankrupt’s income or ‘activities’. Second, the trustee’s share of the property would be determined by applying the provisions applicable to the judicial division of property as between separating couples in s79 of the Family Law Act.

The recommendation was made by the Taskforce for the purpose of discussion, so no text of the proposed amendment is currently available. Accordingly, the proposal must be evaluated at a level of some generality. It is submitted, however, that the recommendation is sufficiently radical to warrant examination at this early stage.

It will be useful to commence by considering the principles which presently govern asset recovery in bankruptcy law.

4. Asset Recovery in Bankruptcy Law

A. General Outline

There are two ways in which a trustee may gain access to a bankrupt’s property in order to distribute it amongst creditors. First, property owned by the bankrupt at the commencement of the bankruptcy will vest automatically in the trustee under s58 of the Bankruptcy Act. Second, property formerly owned by the bankrupt but transferred prior to the commencement of bankruptcy will be recoverable if the transactions were made in circumstances that would allow the court to declare the transfer void as against the trustee.14

B. The Significance of Ownership in the Bankruptcy Act

Ownership is the foundation of asset recovery in bankruptcy law. It prescribes the limits of the trustee’s powers of recovery under the Bankruptcy Act. This is evident

14 See below for a discussion of the circumstances in which a transaction will be considered voidable.
from the terms of ss 58 and 116. Section 58 states: ‘the property of the bankrupt … vests forthwith’ in the trustee.\textsuperscript{15} Property is defined as ‘real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property’.\textsuperscript{16} Section 116(1) states, ‘all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him, or has devolved or devolves to him, after the commencement of the bankruptcy and before his discharge’ will be divisible among the creditors.\textsuperscript{17} Section 116(2) enumerates the few exceptions to this rule.\textsuperscript{18} It is clear that the principal difficulty faced by a trustee in recovery proceedings will usually be the need to establish the bankrupt’s title to the property.

\section*{C. Legal Implications of Transactions with Associated Entities}

The following examples illustrate the way in which a property transaction between a bankrupt and an associated entity, prior to the commencement of bankruptcy, can frustrate the asset recovery procedure under s58 of the \textit{Bankruptcy Act}. The analysis assumes that the transfer complied with the rules for valid assignment of property in law and equity.\textsuperscript{19}

Prior to bankruptcy, property may have been transferred to a company controlled by the bankrupt. Company law is founded on the principle that companies have separate legal personality to those who manage or are employed by them.\textsuperscript{20} From this premise flows the principle of limited liability. A company cannot be required to satisfy the personal liabilities of an associated bankrupt, even if the bankrupt is the company’s founder and sole employee,\textsuperscript{21} or the source of all its assets.\textsuperscript{22}

Alternatively, the bankrupt may have transferred property to a trustee to be held on trust for the bankrupt or other associated persons. If the trust is discretionary, the beneficiaries will not have a proprietary interest in the trust property.\textsuperscript{23} They will merely have a personal right against the trustee to compel due administration of the estate. Thus, the interest in a discretionary family trust which vests in a trustee in bankruptcy will be personal, not proprietary.

\begin{footnotes}
\item[15] Emphasis added.
\item[16] \textit{Bankruptcy Act} s5.
\item[17] Emphasis added.
\item[18] For example, the trustee will not have access to the bankrupt’s clothing, necessary household items or his or her main form of transportation.
\item[21] \textit{Lee v Lee’s Air Farming Ltd} [1960] 3 All ER 420.
\item[22] Although, if the bankrupt owns shares in the company those shares will vest in the trustee under s58 of the \textit{Bankruptcy Act} and the trustee will gain access to the company’s property by that means.
\item[23] H Ford & W Lee, \textit{Principles of the Law of Trusts} (3\textsuperscript{rd} ed, 1996) at 47.
\end{footnotes}
Dispositions of property within families are more complicated. A valid assignment of property prior to bankruptcy will ordinarily vest the bankrupt’s legal and equitable title in the transferee. However, in some cases, the circumstances surrounding the transaction may mean that the transferee holds the property on trust for the transferor. This may occur where the transferor has contributed all or some of the purchase price when the property was originally acquired. In these circumstances, a resulting trust may arise because the courts will infer that the parties intended the transferor to retain an equitable interest in the property. The existence of a resulting trust may be displaced by evidence of the parties’ contrary intention, or by the presumption of advancement. The presumption of advancement generally only applies to gifts made by husbands to wives, or parents to children. Therefore, if a wife transferred property to her husband, he would hold it on trust for her, but a transfer by a husband to a wife will usually vest full beneficial ownership in the wife. In the context of recovery proceedings in bankruptcy, this means that the trustee may have access to property transferred by a bankrupt wife to her husband, but not property transferred by a bankrupt husband to his wife. All this is subject to the trustee being able to prove that the parties intended the transferor to retain an interest in the property. Given that the purpose of a disposition by a bankrupt to his or her spouse or child will usually be to alienate the full beneficial interest, it is unlikely that the courts will find a resulting trust. Consequently, no property will be available to distribute amongst creditors.

In circumstances like those illustrated above, the trustee will have to rely on the avoidance provisions of the Bankruptcy Act, which are contained in Division 4A of Part VI.


(i) The Historical Development of the Avoidance Provisions

The first consolidated Bankruptcy Act was enacted in England in 1825. Before that time the antecedents of many provisions now found in the Bankruptcy Act 1966 (Cth) existed in separate statutes. The precursor to the modern s120, which concerns undervalued transactions, was the 1604 Statute of James I. According to Lewis’ Australian Bankruptcy Law:

25 Ibid.
26 Ibid.
27 Section 122 of the Bankruptcy Act relates to preferential transfers of property to creditors. The origins of s122 will not be considered here because the definition of ‘associated entities’ under s5 of the Bankruptcy Act does not include creditors. Consequently, s122 has no application to the transactions currently under review.
28 For a general history of bankruptcy law, see Dennis Rose, Lewis’ Australian Bankruptcy Law (11th ed, 1999) chapter 2. Also, PT Garuda Indonesia Ltd v Grellman (1992) 35 FCR 515.
29 Lewis’ Australian Bankruptcy Law, id at 14.
The Act of 1604 introduced a new principle. Hitherto property conveyed in good faith before bankruptcy was protected from seizure by the Commissioners. The 1604 Statute provided that all conveyances made by the bankrupt before bankruptcy, unless made in consideration of marriage or for value, should be treated as void and the property concerned recovered for distribution among creditors.

The consolidated Bankruptcy Act of 1825 enshrined these principles in section LXXIII. It stated that a transaction could be avoided if it was made at any time before bankruptcy, as long as the transferor was insolvent at the time of the transaction. Section LXXIII of the Bankruptcy Act 1825 was amended by s91 of the 1869 Act. Section 91 provided that settlements were void against the trustee if made within two years of bankruptcy (irrespective of solvency) and, if made within 10 years, were void unless the transferee could prove solvency. Older settlements were not at risk of avoidance under s91.

The earliest New South Wales statute was the Insolvency Act of 1841. It was in materially the same terms as the 1604 Statute of James I. Section 6 of that Act provided that transactions made by an insolvent transferor, at any time prior to bankruptcy, were liable to be set aside, if they were not made for valuable consideration. Subsequently, the NSW Parliament enacted the Bankruptcy Act of 1887, which adopted the same time limits as s91 of the Bankruptcy Act 1869 (UK).

In 1901, bankruptcy and insolvency became a federal matter under s51(xvii) of the Commonwealth Constitution. The first Commonwealth Bankruptcy Act was passed in 1924. Section 94 provided that voluntary settlements made within two years of the commencement of the bankruptcy were voidable and, if made within five years, were voidable unless the transferee could establish that the transferor was solvent.

Section 120 of the Bankruptcy Act 1966 (Cth), which replaced s94 of the 1924 Act, was in materially the same terms. Section 120 was then amended by the Bankruptcy Legislation Amendment Bill 1996 (Cth), which replaced the concept of a ‘voluntary settlement’ with that of an ‘undervalued transaction’. The amendment did not disturb the two-tiered time regime under which transactions could be set aside under the 1966 Act.

This brief historical review shows that s120 has an ancient lineage. The balance it strikes between the rights of creditors and the bankrupt’s associates has been broadly accepted as fair and adequate for four hundred years. In fact, the provision has, if anything, been slanted in favour of the bankrupt’s associates by the gradual

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30 32 Vic, c 71.
31 5 Vic, c 19.
32 51 Vic, c 19, s91.
33 Although the wording was copied verbatim from s47 of the Bankruptcy Act 1883 (UK), which was a re-enactment of the 1869 statute.
34 As a consequence, property transfers now fall under the ambit of the Act, even if they were only intended to be temporary, or the property was intended to be dissipated. This differs from the position under the old section: see, for example, Barton v Official Receiver (1983) 52 ALR 95.
reduction of the period of time during which insolvent transactions were liable to be set aside. On the other hand, the interests of the creditors were protected by the introduction of the rule that all undervalued transactions made within two years of bankruptcy were voidable, irrespective of the transferor’s solvency.

The equivalent of s121 of the Bankruptcy Act 1966 (Cth) was not introduced into bankruptcy legislation until 1966. Prior to that, fraudulent dispositions were governed by state and territory acts, which were in turn based on the 1571 Statute of Elizabeth. That legislation provided that transfers of property for the purpose of ‘delaying, hindering or defrauding creditors’ of their lawful debts were ‘to be cleanly and utterly void, frustrate and of none effect’.

Section 121 was amended by the Bankruptcy Legislation Amendment Bill 1996 (Cth) to remove the emphasis on fraud. Under the old section, the trustee had to prove that the transferor intended to defraud his creditors. The new section requires the trustee to establish that the bankrupt’s main purpose was to delay or defeat creditors. The amendment also introduced s121(2), which empowers the Court to infer that a transfer was made with the main purpose of defeating or delaying creditors if the transferor was insolvent at the time that the transfer was made.

Given that the law has remained substantially unchanged for over four hundred years, it is submitted that it would be unwise to amend it further without good reason. The following section examines the scope of the avoidance provisions and their application to the transactions currently under review.

(ii) The Current Law

The avoidance provisions of the Bankruptcy Act 1966 (Cth) give a trustee in bankruptcy access to property transferred prior to the commencement of the bankruptcy. Unlike the recovery procedure available under s58 of the Act, avoidance provisions do not have the effect of automatically vesting the bankrupt’s (former) proprietary interest in the trustee. This is because these transactions are not void but voidable. They are valid for all purposes and against all persons, unless and until the trustee applies to have them set aside by the Court.

35 It was inserted into the Commonwealth Act upon the recommendation of the Committee appointed by the Attorney General of the Commonwealth to review the bankruptcy laws of the Commonwealth (Clyne Committee).
36 Conveyancing Act 1919 (NSW) s37A; Property Law Act 1958 (Vic) s172; Law of Property Act 1969 (WA) s86; Mercantile Act 1867 (Qld) s46; Conveyancing and Law of Property Act 1884 (Tas) s40.
37 13 Eliz 1, c 5.
39 For a more detailed comparison of the old and new law, see Prentice v Cummins (No 5) [2002] FCA 1503.
40 This appears to be a codification of the common law position under the old s121. See, James Edelman, ‘The Meaning of Fraud in Insolvency and Bankruptcy Law: A 400 Year Old Riddle’ (2000) C&S LJ 97.
41 Williams v Lloyd (1933) 50 CLR 341 at 374 (Dixon J).
42 Brady v Stapleton (1952) 88 CLR 322 at 333 (Dixon CJ, McTiernan & Fullagar JJ).
There are three circumstances in which a trustee may challenge an antecedent transaction: (i) where the transfer took place within five years of the commencement of bankruptcy and the consideration provided was less than market value;\(^{43}\) (ii) where the intention of the transferor was to delay or defeat creditors;\(^{44}\) and (iii) where the effect of the transaction was to prefer the interests of some creditors over others.\(^{45}\) Preferential transactions have no application in the present circumstances because the relevant ‘associated entities’ are not creditors.\(^{46}\) The following analysis will therefore focus on the effect of ss 120 and 121.

(iii) Relationship between Sections 120 and 121

Before embarking upon a detailed examination of the scope of ss 120 and 121, it is important to understand the relationship between them. The purpose of the avoidance provisions is to enable trustees to recover assets where the transfer was prejudicial to the creditors’ interests because it reduced the size of the bankrupt’s estate.\(^{47}\) Both ss 120 and 121 apply to transfers that were undervalued. However, s120 operates to invalidate ‘innocent’ transfers, while s121 applies to transfers made for the purpose of putting the property out of the reach of creditors, or hindering or delaying their access to it. The scope of the trustee’s power of recovery is limited under s120 to transfers taking place within five years of the commencement of the bankruptcy. This is in recognition of the fact that the transfers may not have been inherently wrongful. In contrast, a transfer that satisfies the criteria in s121 may be set aside whenever it took place. Section 121 is a reflection of the law’s enduring abhorrence of fraud or, what is now termed, a main purpose to delay or defeat creditors.

(iv) Undervalued Transactions

In *Cook v Benson*\(^{48}\) the majority of the High Court commented:

> The Court [in *Barton v Official Receiver*\(^{49}\)] said that the purpose of the English [equivalent of s120] was to prevent properties from being put into the hands of relatives to the disadvantage of creditors.

Of course, it is not confined to dispositions to relatives …

In order to invalidate a transaction under s120 of the *Bankruptcy Act*, the trustee has the onus\(^{50}\) of proving that no consideration, or consideration that was not equivalent to the market value of the property, was provided. If the transfer took place within two years of the commencement of bankruptcy, it will be voidable. Similarly, if it took place within five years of the commencement of

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\(^{43}\) *Bankruptcy Act* s120.

\(^{44}\) *Bankruptcy Act* s121.

\(^{45}\) *Bankruptcy Act* s122.

\(^{46}\) Above n27.

\(^{47}\) *PT Garuda Indonesia Ltd v Grellman*, above n28.


\(^{49}\) Above n34.

\(^{50}\) *Official Trustee in Bankruptcy v Alvaro* (1996) 66 FCR 372 at 417.
bankruptcy, and the bankrupt was insolvent at the time, the transaction will be voidable. If, however, the transfer took place within two to five years of bankruptcy, and the transferor was solvent, the transaction will be secure.\(^{51}\) When a transaction is voidable, s120(4) requires the trustee to refund any consideration that was paid for the property.\(^{52}\)

The time limits in s120 are the major obstacles preventing the trustee from being able to avoid an antecedent transaction. If a bankrupt has adopted a practice throughout his or her career of transferring assets to their spouse, the trustee may be unable to access them under this provision because of the effluxion of time.

\(v\) Transfers to defeat creditors

If the trustee wishes to challenge a transaction which took place more than five years before the commencement of bankruptcy, he or she must bring a claim under s121. Section 121 requires the trustee to prove that the main purpose of the transfer was either ‘to prevent the transferred property from being divisible among the transferor’s creditors’,\(^{53}\) or ‘to hinder or delay the process of making property available for division among the transferor’s creditors’.\(^{54}\)

The principal difficulty faced by the trustee will be proving that the transferor’s main purpose was to defeat creditors. The High Court stated in relation to the old s121:

\[\ldots\text{it is clearly established that the party seeking to avoid disposition of property has the onus of proving an actual intent by the disponor at the time of the disposition to defraud creditors. The creditors … need not be existing creditors; they may be future creditors … [b]ut … the intent must accompany the disposition.}\]\(^{55}\)

The new law has partially overcome the problem of proving ‘actual intent’ (or ‘main purpose’) by allowing the court to draw an inference where the transaction was made when the transferor was insolvent.\(^{56}\) The trustee has less chance of succeeding if the transferor was solvent. In the context of transactions between family members, the courts have occasionally been reluctant to infer an intention to defeat creditors.\(^{57}\) The case of *Williams v Lloyd*\(^{58}\) is particularly apt. It involved

\(^{51}\) Bankruptcy Act s120(3).

\(^{52}\) It is unclear to what extent a spouse’s unremunerated domestic work may amount to valuable consideration for the purposes of s120. Section 120(5) provides that factors such as the relationship between the parties, or their mutual love, shall not be taken into account. However, domestic labour, such as shopping, cooking and cleaning, which does have a market value, may be relevant: *Mateo v Official Trustee in Bankruptcy* [2002] FCA 344. If so, the trustee will be required to reimburse the non-bankrupt spouse for the full amount of his or her consideration. If the value of the work exceeds the market value of the asset, title will not vest in the trustee at all.

\(^{53}\) Bankruptcy Act s121(1)(b)(i).

\(^{54}\) Bankruptcy Act s121(1)(b)(ii).

\(^{55}\) Cannane, above n38 at para 10.

\(^{56}\) Bankruptcy Act s121(2).

\(^{57}\) Carruthers, above n8 at 99.

\(^{58}\) Above n41.
a gift of property by a solvent husband to his wife and children. The gift was made because the husband was contemplating investing in a risky business venture. The bankrupt’s wife encouraged him to transfer the property to her and their children in order to protect it from being lost in the event that the husband became insolvent. Starke J, with whom the Chief Justice agreed, stated:

The fact that the dispositions in the present case were in favour of the [transferor’s] wife and children, and … were made at a time when he was not embarrassed, is a circumstance entirely favourable to the bankrupt, for it is but natural and proper that a man should make provision for his wife and children without any intent whatsoever of defeating his creditors.59

This case illustrates the difficulty in proving the relevant purpose in cases relating to transfers between family members.60 While on one view, the main purpose of the transfer was clearly to defeat creditors, the Court preferred to characterise the transfer as ‘protective’ rather than ‘fraudulent’. In cases which involve gifts within families, a trustee may have difficulty not only in proving that defeating creditors was the ‘main’ purpose of the transaction, but also in establishing that there was any purpose to defeat creditors at all.

E. Summary of the Inadequacies of the Existing Law

Trustees may have difficulty recovering assets under the existing law in circumstances where the bankrupt has transferred property in an antecedent transaction for three principal reasons. First, although the property may be used by the bankrupt on a regular basis, he or she may not own it, so the property will not vest in the trustee under s58 of the Bankruptcy Act 1966. Second, if the property was transferred more than five years prior to the commencement of bankruptcy, s120 of the Act will not apply, and the trustee will fail in relation to transactions effected more than two years before the bankruptcy if the bankrupt was solvent at the time. Third, even if s120 does apply, proving that the ‘main’ purpose of a transaction was to defeat creditors may be difficult, especially in the context of gifts between family members.

5. Alteration of Property Rights under s79 of the Family Law Act 1975 (Cth)

Under s79(1) of the Family Law Act 1975 (Cth) (hereinafter Family Law Act), courts having jurisdiction under the Act are empowered to make declarations altering the existing property interests of the parties to a marriage.61 Section 79(1) does not affect proprietary rights prior to the Court making an order, so until the

59 Id at 361.
60 Although contrast the case of Re Butterworth; ex parte Russell (1882) 14 Ch D 588, in which the Court decided that the transaction was fraudulent in substantially the same circumstances.
61 There are equivalent provisions in state and territory legislation. See, for example, Division 2 of the Property (Relationships) Act 1984 (NSW).
order is made, the ordinary rules governing legal and equitable interests continue to apply.62

There are three stages in the process of reallocating property under s79 of the Family Law Act. First, the full extent of both parties’ property must be ascertained.63 It is irrelevant how, when or by whom the property was acquired.64 This includes property that was acquired before the marriage, after separation or even through an inheritance.65 Second, the property must be valued. Third, the judge must exercise his statutory discretion to allocate property interests between the parties. The discretion given under s79 is wide. In De Winter v De Winter,66 Gibbs J observed: ‘Few curial orders can have a greater effect on ordinary citizens of modest means. It needs hardly be said that such a discretion is to be exercised with scrupulous care.’67

The judge’s discretion is guided by the requirement under s79(2) that his or her order be ‘just and equitable’. Justice and equity are determined by reference to seven mandatory considerations enumerated in s79(4).68 The first three considerations relate to the parties’ past contributions to the property and welfare of the marriage, and the subsequent four concern the parties’ present economic situation. Each case is considered on its own merits and there are no guidelines to influence the manner in which a judge should exercise his or her discretion, other than the provisions of s79 itself.69

6. Analysis of the effect of the Proposal

A. Preliminary Comments

Before considering the merits of the Taskforce’s proposal, it is worthwhile noting that the matter of tax evasion is properly the concern of taxation law, not bankruptcy. Under the Taxation Administration Act 1953 (Cth), the Commissioner of Taxation has certain powers with respect to the investigation and collection of tax debts. If the ATO had detected the practice of bankrupts who transfer assets to associated entities to defeat tax collection at an earlier stage, it might have been able to recover the debts while the debtor was still solvent. In cases where the debtor was already insolvent and bankruptcy had commenced, the trustee may have been able to recover the alienated property under s120 of the Bankruptcy Act. The Australian National Audit Office made a similar point in its 1999 Report.70 It stated that the ATO’s practices in regard to the investigation of tax evaders could be more effective.71 Ideally, flagrant disregard of tax should not go undetected for

62 In the Marriage of Fisher (1986) 82 FLR 421 at 434.
63 In the Marriage of Carter [1981] FLC 91-061.
64 Ibid.
65 In the Marriage of Aroney [1979] FLC 90-709 at 78-785.
67 Ibid.
68 In the Marriage of Hirst and Rosen [1982] FLC 91-230 at 77, 251.
70 ANAO Report No 23, above n2.
71 Id at chapter 3.
so long that it becomes a matter which cannot be remedied without a fundamental change to bankruptcy law.

Second, it is unclear how many instances of tax evasion will arise in the future because of the abuse of bankruptcy law. At this stage, there appears to be only a handful of barristers, accountants and medical practitioners who regularly use bankruptcy to avoid their debts.\(^\text{72}\) This figure may decrease given that professionals now have to register with the ATO in order to be provided with an Australian Business Number (ABN) so as to receive credit for Goods and Services Tax (GST) paid as part of their business expenses. It will make it difficult, if not impossible, for high-income individuals to shield their incomes from the ATO for a prolonged period of time. It is therefore possible that the proposal, if implemented, will become law at a time when it is no longer necessary.

B. The Existing Law

It is submitted that the law should not be amended until it has been thoroughly tested, and the existence and nature of any deficiencies established. There have been clear judicial statements to the effect that the recently amended s121 of the Bankruptcy Act\(^\text{73}\) will make it easier for trustees to recover property.\(^\text{73}\) The ATO should be encouraged to fund a trustee to run appropriate test cases in order to establish that the existing law is incapable of addressing the problem. It is possible that, in many cases, s121 (as amended) is sufficiently flexible to provide a direct remedy to the specific problem. As discussed above, s121 is available when a transfer of property was made many years prior to the transferor becoming bankrupt. In cases where the transferor was insolvent, s121(2) allows the Court to infer that the transaction was made with the main purpose of delaying or defeating creditors. Problems only arise for the trustee in situations where the transferor was solvent.

However, it by no means follows that s121 will be unavailable because the transferor was solvent. Take, for example, the situation of a husband who transfers the family home into his wife’s name and shortly thereafter stops paying his tax. Although he was solvent when he made the transaction, the proximity between the transfer and the accumulation of the debt may be a basis upon which the transfer could be avoided.\(^\text{74}\) The Court is not limited in the number and nature of considerations it may take into account in determining whether the circumstances surrounding a property transaction suggests an intention to defeat creditors.\(^\text{75}\)

This being said, an intention to defraud creditors is notoriously difficult to prove.\(^\text{76}\) There is one situation, in particular, in which the trustee will be unlikely to avoid a transfer under s121. Taking the example given above, if the family house

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72 Id at para 50.
73 Ashton v Prentice (Federal Court of Australia, Hill J, 23 October 1998).
74 Curruthers also suggests that the Court may have regard to factors such as the magnitude of the risk of the new venture, the total value of the disposed property and the extent to which the transferor continues to enjoy the disposed property. Above n8 at 99.
75 Bankruptcy Act s121(3).
76 Cannane, above n38 at para 30.
is given to the bankrupt’s wife for the main purpose of providing her with financial security, and the actual decision to evade tax is formed later, s121 will be inapplicable. The temporal disjunction between the act and the formulation of intent defeats the avoidance mechanism. Section 121 would only be available if the trustee could establish that the intention accompanied the disposition. It must be accepted that s121, even in its present form, will probably not avail the ATO in all cases of tax avoidance followed by bankruptcy of high-income individuals. It may, therefore, be necessary to introduce limited reform. However, until a test case is run, the practical utility of s121 will be uncertain, and there is a risk that the law will be amended unnecessarily.

C. Scope of the Proposal

If it is accepted that an amendment is necessary, the reform should be carefully tailored to address the specific vice. The vice in question relates to tax evasion. Accordingly, the reform should be available to the ATO and not to the general body of unsecured creditors. There are a number of factors which distinguish the position of the ATO from that of the ordinary unsecured creditor. First, the ATO is not in a position to detect all debts before they fall due. Unlike general creditors, it cannot choose whether or not to extend credit. Nor can it protect itself against the risk of loss. Ordinary unsecured creditors have a range of means at their disposal to protect themselves or reduce the risk of bad debts. For example, they can require security over the debtor’s property, demand guarantees or insist on cash on delivery. In contrast, the ATO must rely on individuals to faithfully declare their tax obligations before it knows how much it is owed. While the onus of investigating and collecting tax debts lies with the ATO, it cannot be expected to detect all misconduct as soon as it occurs. The resources of the ATO, although extensive, are not unlimited, and it is bound to ensure that it uses those resources efficiently and effectively. If the limits of the ATO’s power of investigation and collection are acknowledged, it follows that there may be a need to reform the law in order to provide the ATO with an additional mechanism to recover debts in cases where detection is extremely difficult.

Second, the ATO is more likely to be affected by long-term debt than general creditors. Most unsecured creditors suffer losses as a result of their clients’ short-term business difficulties. It would be rare for general creditors to allow a debt to exist for more than five years. Thus, it is, in principle, more likely that a trustee acting on their behalf would be able to recover the bankrupt’s assets under s120 of the Bankruptcy Act.

If the Taskforce’s proposal is implemented, general creditors will have more rights against debtors than they currently enjoy under the Bankruptcy Act. It is submitted that this would be unwarranted. As a general principle, the law does

77 Ex parte Mercer; In re Wise (1886) 17 QBD 290 at 299–300.
78 Even if they did, their claim would be barred after six years: for example, Limitation Act 1969 (NSW) s6.
79 There are some exceptions, for example banks and other lending institutions are required to fulfill prudential requirements.
not require people to organise their affairs in order to ensure that they can always pay their debts. Furthermore, the law recognises that there are many situations in which undervalued property transfers are legitimate. Indeed, there are some circumstances in which gifts are positively encouraged.\textsuperscript{80} The avoidance provisions of the \textit{Bankruptcy Act} are a reflection of the principle that undervalued transactions are legitimate unless the law states otherwise because they enumerate the limited circumstances in which a transaction will not be legitimate. Arguably, the introduction of a bankruptcy equivalent of s79 of the \textit{Family Law Act} will undermine this principle because it will not create a new exception but rather, will act as a catch-all provision, which trustees may fall back on when other remedies fail.

\textbf{D. The Difficulty of Identifying Assets ‘Sourced’ from the Bankrupt’s Income}

The first limb of the proposal requires the trustee to identify whether property owned by an associated entity was purchased, in whole or in part, by the bankrupt’s income. There may be cases where proof of this criterion is clear. The bankrupt may simply give property which he or she owns to an associate. In other cases, the bankrupt may be the only income earner, so that it is reasonably clear that the bankrupt is the sole source of the funds used to acquire the property. However, it is commonly the case that property is acquired by way of mortgage, and the mortgage debt repaid over a substantial period of time. In these, and perhaps other cases, it may not be easy to identify the extent to which the bankrupt has been the ‘source’ as contemplated by the Taskforce. Particularly in circumstances of rising property values, it may be difficult to relate the income diverted by the bankrupt from paying tax debts, to the provision of the original purchase price of the asset.

\textbf{E. Impact on Marriage, De Facto Relationships and Same-Sex Partnerships}

While the proposal would affect transactions between bankrupts and associated entities generally, its impact on marriages and families warrants separate consideration. The following analysis focuses on marriage but the position is the same with respect to \textit{de facto} relationships and same-sex couples.

The law treats marriage as an unusual combination of a private union\textsuperscript{81} and a commercial contract between two legally distinct personalities.\textsuperscript{82} The dichotomy between unity and individuality must be remembered when assessing the Taskforce’s proposal. The basis of the proposal is the assumption that couples who receive the benefits of marriage should also be required to bear the burdens.\textsuperscript{83} This accords with the view that marriage is a union. On one level, the argument has superficial appeal. However, it overlooks the fundamental legal principle that, in relation to property matters, spouses have separate legal personality. Separate

\textsuperscript{80} See, for example, the extract from Williams, above n59.
\textsuperscript{81} \textit{Crabtree v Crabtree (No 2)} [1964] ALR 820 at 821.
\textsuperscript{83} ALRC, above n9 at paras 4.29–4.31.
ownership of property has existed for over one hundred years, since the Married Women’s Property Act was passed in 1882.84 That Act abolished the doctrine of unity, according to which married couples were considered a single entity and gave wives the right to own property in their own names.85 The abolition of the doctrine of unity meant that spouses could no longer be held responsible for their partner’s liabilities without express agreement to the contrary. The right to risk property is an incident of the right to own it. Accordingly, only the owner may engage in commercial transactions, or accumulate debts, which might result in the property being removed in the event of bankruptcy. The Taskforce’s proposal might have the effect of diminishing a wife’s right to separate legal ownership, since it would make full and uninterrupted enjoyment of her legal entitlements contingent upon her husband’s commercial liabilities. By enabling the trustee to treat the marriage as an economic unit, the proposal re-introduces certain aspects of a long defunct and socially unacceptable principle of property law.

A corollary of the right to own property is the right to freely alienate it. With very few exceptions, the law does not dictate how married couples must own property.86 Even s79 of the Family Law Act might be seen as an example of a couple’s right to choose how to deal with property. One of the principal aims of that Act is to enable spouses to apply for an order altering their property interests at any time during their joint lives, whether during cohabitation or after separation.87 The re-allocation of property interests between couples is therefore a matter of choice, not an imposition by the law. Freedom of property ownership and alienation within a marriage is tied to the notion that families are traditionally regarded as private and immune from intervention by the state.88 It is submitted that the use of s79 principles outside family law will result in an unwarranted intrusion upon the private right of couples to allocate property as they see fit. It is not being suggested that the state does not already intrude upon family life in bankruptcy. Clearly, the vesting of property owned by a bankrupt spouse in the trustee in bankruptcy through the ordinary operation of s58 of the Bankruptcy Act can be devastating. It is submitted, however, that by interfering with the fundamental freedoms associated with property ownership, the proposal would extend the nature of the state’s current level of intervention in new and unacceptable ways.

84 Separate ownership of property has always existed for de facto and same-sex couples.
85 For a general history, see Lee Holcombe, Wives and Property (1983).
86 For example, in NSW, a conveyance of land to two or more people now creates a tenancy in common: Conveyancing Act 1919 (NSW) s26.
87 Henry A Finlay, Family Law in Australia (5th ed, 1997) chapter 32.
88 Otto Kahn-Freund wrote, ‘the normal behaviour of husband and wife or parents and children towards each other is beyond the law — as long as the family is healthy. The law comes in when things go wrong.’ See Otto Kahn-Freund, preface to John Eekelaar, Family Security and Family Breakdown (1971) at 7, cited in Regina Graycar & Jenny Morgan, The Hidden Gender of Law (2nd ed, 2002). Contrast Kahn-Freund’s view with that of K O’Donovan, ‘Divisions and Dichotomie’ in Sexual Divisions in Law (1985), which argues that there are many direct and indirect invasions of family life by the law.
It is also submitted that property orders like those made under s79 of the *Family Law Act*, if used in the context of bankruptcy, would place the family under unnecessary emotional strain and increase the risk of future discord. Section 79 is inherently divisive and intended to ensure that there is no further need for legal or financial interaction between the parties.\(^9\) As the consequences of bankruptcy are already severe, it would be wholly undesirable to place further pressures on a family by imposing the equivalent of financial divorce.

Moreover, it will be very difficult to apply the principles of justice and equity, which presently guide the Court’s discretion under s79 of the *Family Law Act*, if the Court is required to treat the parties as though they were separating. The allocation of property interests within a continuing relationship must necessarily differ from the way such property would be distributed if the couple were to separate. This is particularly true of bankruptcy. If the couple continues to live together, the bankrupt spouse will, for a short time at least, become financially dependant on his or her partner. If the fiction of separation is applied without acknowledging the reality of the couple’s future life together, an artificial and unjust outcome may ensue.

**F. Impact upon other Associated Entities**

In relation to other associated entities, it is not clear how the contributions method of assessing ownership will work. How is a judge to assess the relative contribution between a bankrupt and a trust? The factors that may be relevant under s79 of the *Family Law Act* in the context of a dispute between natural persons will not easily translate to proceedings involving trusts or companies. If the proposal is to have any effect, the legislature may have to establish a separate regime for transactions between natural persons and other legal entities.

**G. Conceptual Inconsistency within the Asset Recovery Provisions**

It is submitted that, if the Government wishes to change the basis of asset recovery in bankruptcy law, it should do so consistently. If the proposal is enacted, asset recovery will be governed by two concepts of property ownership: legal title and contributions. This may lead to anomalous applications of the *Bankruptcy Act*. For example:

(a) Where one spouse owns property and becomes bankrupt, the whole property will vest in the trustee;

(b) Where the property is jointly owned, the property will be sold and the bankrupt’s interest will vest in the trustee;

(c) Where the non-bankrupt spouse owns the property, the trustee will be able to apply for a redistribution of ownership and the bankrupt spouse’s interest will vest in the trustee.

If examples (a) and (c) are compared, it is apparent that the proposal may lead to a certain level of injustice. In example (a), the non-bankrupt spouse’s rights are

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\(^{89}\) *Mallet, above n69 at para 2 (Gibbs CJ).*
constrained by legal ownership. He or she will not be entitled to rely on his or her contributions to the marriage in order to retain an interest in the property, except in the special circumstances which give rise to a constructive trust in his or her favour. In contrast, the trustee in example (c) will be able to recover part of the property on the basis of the bankrupt’s contribution. It is submitted that the law may become a motley combination of provisions in which the rights of the non-bankrupt spouse will be a matter of happenstance. If there is a genuine need to amend bankruptcy law by changing its reliance on the criterion of ownership, then it is arguable that the whole law of asset recovery should be reconsidered in order to promote consistency and justice between the parties.

**H. Effect on the Process of Asset Recovery**

It is submitted that the proposal is likely to make asset recovery more inefficient. Two important objectives of bankruptcy law are speed and simplicity. The complicated procedure of identifying and redistributing property under the principles embodied in s79 of the *Family Law Act* is anything but simple or swift. The costs associated with bringing an application would seem to be prohibitive for all but the most determined trustee. Except in a limited range of circumstances, the proposal is likely to have limited utility.

**I. The Potential for Future Tax Evasion**

Finally, it is doubtful whether the proposal would truly eradicate tax evasion by wily bankrupts. Various loopholes would continue to exist. The most straightforward way of subverting the proposal would simply be to transfer assets to an offshore trust fund. Under private international law rules, domestic courts cannot enforce foreign revenue laws. Given that high-income individuals often own significant assets overseas, there is a risk that the proposal will be ineffective against the very people whose conduct is arguably the most egregious. On this basis alone, there is a sound argument for abandoning the proposal in favour of a more reliable remedy.

**7. Conclusion**

Two fundamental questions must be considered in relation to the Taskforce’s recommendation. First, is it necessary or desirable to amend the existing law to increase creditors’ rights of asset recovery against debtors and their associates? Second, if it is necessary, is the introduction of principles of family law relating to the redistribution of property between separating spouses an appropriate basis for allocating property rights between a bankrupt and his or her associated entity? In answer to these questions, the following broad submissions were made. First, it has not been established that the existing law is incapable of applying a direct remedy

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90 Domestic labour alone does not create an interest in the family property: *Burns v Burns* [1984] Ch 317 at 330-331. See, for example, *Baumgartner v Baumgartner* (1987) 164 CLR 137, in which the material factor appeared to be the pooling of the couple’s financial resources.

91 See, for example, *Ayres v Evans* (1981) 56 FLR 335.
to the apparent mischief. Second, it is arguable that the cases which do not fall within the scope of the current law should not, as a matter of public policy, be brought within its ambit. Third, the introduction of s79 principles of property distribution would fundamentally undermine the freedom to own and alienate property.

In the final analysis, however, a single fact must be emphasised. The Taskforce is proposing a radical and inefficient amendment to the *Bankruptcy Act 1966 (Cth)* in order to address a very specific problem of taxation law, caused by a relatively small number of people. If it is accepted that some form of amendment is required, it must surely be recognised that the benefits of the current proposal do not outweigh the detriments. It is difficult to avoid reaching the conclusion that the Government has rashly overlooked the fact that, in a liberal democracy, people are entitled to own or alienate property in any way they choose. There is nothing inherently wrong with transferring assets to a spouse or other associated entity, even if one of the purposes of the transfer is to protect the transferor against a future financial calamity. Indeed, it is arguable that such protection measures are prudent because the social costs of bankruptcy are immeasurable. There is a fundamental difference between these situations and cases where the bankrupt has wilfully frustrated tax collection by deliberately imposing a state of insolvency upon himself or herself. For these cases, the law already provides a remedy in the form of s121 of the *Bankruptcy Act*. Thus, to extend the circumstances in which a trustee may gain access to a bankrupt’s alienated property would not only be unnecessary, it would also be unjust.
Before the High Court

Politics, Police and Proportionality — An Opportunity to Explore the Lange Test: Coleman v Power

ELISA ARCIONI*

1. Patrick Coleman: From Student Activist to High Court Appellant

On 26 March 2000, Patrick Coleman stood in the Townsville Mall and handed out leaflets with the following printed on them: ‘Get to know your local corrupt type coppers’, identifying Constable Brendan Power as one of the ‘slimy lying bastards’ the subject of Coleman’s attention. A number of police officers, including Constable Power, attended the scene and, following a struggle, Coleman was placed in a police vehicle. He was charged with distributing material with insulting words contrary to s7(1)(d)1 of the Vagrants Gaming and Other Offences Act 1931 (Qld) (hereinafter Vagrants Act), using insulting words contrary to s7A(1)(c)2 of the same Act, obstructing police, serious assault against police and wilful damage. At trial, Coleman was found guilty of all the charges except that of wilful damage.

Coleman was unsuccessful in the District Court but the Queensland Court of Appeal allowed his appeal in part. That Court was unanimous in concluding that the relevant part of s7A(1)(c) was beyond the Queensland Parliament’s legislative power, as it infringed the implied constitutional freedom of political communication. However, the Court was split in relation to whether s7(1)(d) was invalidated and the consequences of any invalidity of the Vagrants Act on the remainder of Coleman’s charges and sentence.

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1 ‘Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear: … (d) uses any threatening, abusive or insulting words to any person … shall be liable to a penalty of $100 or to imprisonment for six months and may, in addition thereto, or in substitution therefore, be required by the court to enter into a recognisance, with or without sureties to be of good behaviour for any period not exceeding 12 months, and, in default of entering into such recognisance forthwith, may be imprisoned for any period not exceeding six months unless such recognisance is sooner entered into.’

2 ‘Any person: (a) who by words capable of being read either by sight or touch prints any threatening, abusive, or insulting words of or concerning any person by which the reputation of that person is likely to be injured, or by which the person is likely to be injured in the person’s profession or trade, or by which other persons are likely to be induced to shun, or avoid, or ridicule, or despise the person; or … (c) who delivers or distributes in any manner whatsoever printed matter containing any such words … shall be liable to a penalty of $100 or to imprisonment for six months.’
On 15 November 2002, Coleman was granted special leave to appeal to the High Court. Coleman argues that the legislation forming the basis of the ‘insulting words’ charges is invalid and that therefore all the charges against him fall away. Coleman asserts invalidity by claiming that the two relevant sections of the Vagrants Act infringe the implied constitutional freedom of political communication by going ‘far beyond any legitimate aim [of the Act] … far beyond protecting the public integrity of the police force’. Further, that his purported arrest was unlawful, based on charges which were invalid, that they therefore constituted unlawful assault upon him, giving rise to a right of self-defence against the police officers which he exercised and which formed the factual basis of the charges of obstructing and assaulting police.

The Coleman v Power appeal presents the High Court with an opportunity to further consider the scope of the implied constitutional freedom of political communication, the test to determine legislative invalidity of regulation that inhibits that freedom and possibly examine issues such as police powers of arrest. This is Coleman’s second attempt at raising the issue of the constitutional freedom in the High Court. His individual position aside, the rest of the Australian community should watch with interest to see how the Court interprets and applies the freedom. Will the Court give the freedom a strong role in restricting the legislative power of the state, placing great weight on citizens’ need and desire to protest? Or will it confine the freedom’s operation to a limited sphere?

2. The Freedom

From the late 1970s, decisions of the High Court and English courts have reflected the importance of freedom of communication generally and, more specifically, on political matters. However, it was not until 1992 that a majority of the High Court accepted that a freedom of political communication is implied in the Australian Constitution. Even then, each judgment of the majority described the freedom differently and to this day differences remain. Nevertheless, some elements are agreed upon. First, the freedom finds its source in the system of governance established by the Constitution, although the precise description of that system and the requirements for its operation are not settled; neither is the scope of the freedom (this is considered below). Secondly, the freedom of political communication is freedom from legislative and executive restraint, not a positive

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3 Coleman v Power (Queensland District Court, Pack J, 26 February 2001) at [18].
4 Coleman’s last (failed) attempt was an application concerning the Queensland Court of Appeal’s decision in Sellars v Coleman [2001] 2 Qd R 565. Special leave was refused on 26 June 2002.
5 Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth (1977) 139 CLR 54 at 88 (Murphy J); Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39 at 52 (Mason J); Miller v TCN Channel Nine Pty Ltd (1986) 161 CLR 556 at 581–82 (Murphy J); Davis v The Commonwealth (1988) 166 CLR 79 at 100 (Mason CJ, Deane & Gaudron JJ) and 116–17 (Brennan J); Attorney-General v Observer Ltd [1990] AC 109 at 203.
right capable of enforcement; nor is it an absolute freedom. The freedom affects
Australian legislation by rendering it invalid when it infringes the freedom in an
unacceptable way. It is this outcome that Coleman will urge upon the Court in
relation to portions of the Vagrants Act.

In the uncharacteristically unanimous reasons for judgment in Lange v
Australian Broadcasting Corporation (hereinafter Lange), the High Court
explained how legislative validity is to be determined in relation to legislation
which impacts upon the freedom:

First, does the law effectively burden freedom of communication about
government or political matters either in its terms, operation or effect? Second,
if the law effectively burdens that freedom, is the law reasonably appropriate and
adapted to serve a legitimate end the fulfilment of which is compatible with the
maintenance of the constitutionally prescribed system of representative
government and the procedure prescribed by s128 [of the Constitution] for
submitting a proposed amendment of the Constitution to the informed decision of the people … If the first question is answered “yes” and the second is answered
“no” the law is invalid.

The Lange test seems to have been accepted by courts around the country as the
authoritative approach in determining the validity of legislation and in interpreting
the common law. I do not propose to challenge that acceptance in this article and
consider it unlikely that the High Court will do so in this appeal. However, there is
scope for disagreement as to its application, perhaps reflective of a diversity of
opinion regarding which method of reasoning in earlier judgments concerning the
implied freedom is the one encapsulated by the Lange test. It is also unlikely that
a majority of the Court will question the underlying existence of the freedom, given
the unanimous judgment of the High Court in Lange, its application in subsequent
cases and the parties’ implicit acceptance of both the freedom and the Lange test
at the special leave application for this appeal. However, only three members of the
Lange bench remain on the Court (McHugh, Gummow and Kirby JJ) and two other
members of the current bench have made public their criticism of the line of
authority regarding the freedom.

7 (1997) 189 CLR 520.
8 Id at 567–68.
10 Id at 300, 324, 339, 387–88. In this context, there is little difference between the test of
‘reasonably appropriate and adapted’ and the test of proportionality: see at 377, 396.
11 Roberts v Bass (2002) 77 ALJR 292 at 304 [66] (Gaudron, McHugh & Gummow JJ) and 323
342 [3] (McMurdo P) and 354 [45] (Thomas JA with whom Davies JA agreed at 351 [34];
Coleman v Power, above n3 at [22]–[23].
Quadrant 9 at 17; Roberts v Bass, id at 345 [285] (Callinan J) referring to his Honour’s earlier
reasons in Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR
199 at 330–332 [338].
3. **The First Limb of the Lange Test — Threshold Requirements and a Question of Scope**

The first requirement of the *Lange* test is that the legislation ‘effectively burden’ the freedom in its terms, operation or effect. This requirement necessarily gives rise to a question about what constitutes a ‘burden’. There does not appear to be any reason to depart from the ordinary definition of the word. In the context of the *Lange* test, ‘burden’ should therefore have a broad meaning, encompassing any inconvenience, restriction or adverse consequence imposed upon political communication, although it is questionable whether any ‘mere’ burden is sufficient. Nevertheless, prohibition, such as that provided for in the *Vagrants Act*, could clearly fit within the concept of burden in the *Lange* test. The two relevant sections of the *Vagrants Act* each create a legal restriction on communication, backed by the possibility of a criminal record, financial penalty and/or incarceration. There is also the direct practical restriction on the exercise of the freedom, through the possibility of arrest. Such consequences would presumably deter individuals from exercising the freedom and in the event of its exercise, expose the individual to damage to personal reputation through a criminal record, loss of money and perhaps liberty through the imposition of a custodial sentence.

If providing for damages constitutes a burden on the freedom, by having a ‘chilling effect’, all the more reason for prohibition to undoubtedly fall within the scope of ‘effective burden’.

Although prohibition per se will almost certainly constitute a ‘burden’ for the purposes of the first limb of the *Lange* test, because of the wording of the relevant sections of the *Vagrants Act* this is relevant to Coleman’s appeal only if ‘insulting’ language can also be political communication. In the absence of legislative definition, ‘insulting’ must be given its ordinary meaning, with assistance to be drawn from judicial consideration of the word. In addressing this matter, the Queensland Court of Appeal drew together relevant authorities, which all support a broad interpretation of the word ‘insulting’. The word clearly includes ‘to treat insolently’ or with scorn, or to ‘affront’, possibly extending to the broader idea of ‘an act … of attacking’, but does it include political communication? I would support the Court of Appeal’s recognition of the reality of politics and answer that question in the affirmative. Political debate, in the most limited sense of

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13 ‘Burden’ is defined in the *Macquarie Dictionary* (3rd ed, 1998 reprint) at 293: ‘1. that which is carried; a load. 2. that which is borne with difficulty …’; the *Oxford English Dictionary* (1970) vol I also emphasises the notion of a ‘load’ at 1182.

14 *Roberts v Bass*, above n11 at 312 [102] (Gaudron, McHugh & Gummow JJ).

15 The reasons in *Lange* would support that conclusion by implying that prohibition would be sufficient. See above n7 at 568: ‘The law of defamation does not contain any rule that *prohibits* an elector from communicating … Nevertheless, in so far as the law of defamation requires electors and others to pay damages for the publication of communications … it effectively burdens the freedom of communication’. [Emphasis added.]

16 *Coleman v P*, above n11 at 344–45 [11]–[13] (McMurdo P) and 356–57 [52]–[55] (Thomas JA with whom Davies JA agreed at 351–52 [35]).


argument regarding the policies of elected representatives or electoral candidates, can clearly fall within the scope of ‘insulting’ language. Debate in this area of political communication would encompass vigorous argument, including passionate attempts to destroy another’s electoral reputation. In the High Court’s recent decision in *Roberts v Bass* it was held by a majority of the Court that ‘targeting’ an electoral opponent, in the sense of acting with a motive to injure his or her reputation as a politician, was not improper but part of a ‘political struggle’. The High Court’s acceptance of the combative nature of politics, together with observations such as it being ‘unrealistic’ that political campaigns in Australia be ‘genteel’ and that ‘political debate’ does not fit any ‘platonic ideal’ tends towards the conclusion that political communication and ‘insulting’ language are not mutually exclusive.

Once it is concluded that the *Vagrants Act* has the potential to burden the freedom, there is an argument that a further threshold must be passed before attention is given to the second limb of the *Lange* test. That possible further requirement is that the actual communication in question must fall within the scope of the freedom. That is, not only must the legislation have the theoretical breadth to burden political communication, the factual circumstances of any case questioning the validity of the legislation must fit within the scope of ‘political communication’ protected by the Constitution. This argument is based on the need for the Court to have before it a factual basis upon which to determine the legal issues, the circumstances must constitute a ‘suitable vehicle’ to traverse the legal ground. In the special leave application of the Rabelais case, Gleeson CJ and Gummow J did not seek to dissuade the parties of the submission that such a threshold requirement exists. At the special leave application for the present appeal, when asked whether the Attorney-General of Queensland accepted that ‘it was a political statement that was here involved’, his counsel responded ‘we accept that the section is apt to be engaged when a political statement is made, and we accept that the nature of the statement was such as to be possibly characterised as that’. The latter statement suggests that the respondents do not go so far as to concede the issue.

I hope that at least one of the parties raises the argument left open by the ‘possibly’ in the Attorney’s response, in order for the Court to provide some timely guidance concerning the scope of the freedom. It is clear from *Lange* that the freedom applies to ‘communication about government or political matters’.

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19 *Coleman v P*, above n11 at 345 [13] (McMurdo P) and 355 [48], 359 [66] (Thomas JA).
20 Id at 292.
21 Id at 300–01 [39]–[42] (Gleeson CJ), 313 [107] (Gaudron, McHugh & Gummow JJ) and 327 [184] (Kirby J).
22 Id at 325 [171] (Kirby J).
24 Compare with *Coleman v P*, above n11 at 354 [46] (Thomas JA).
26 *Coleman v Power* (transcript of special leave application, 15 November 2002) at 3. [Emphasis added.]
27 Above n7 at 567.
although it is questionable how ‘government’ and ‘political’ sit together — whether one is a subset of the other or if not, what the overlap is between the two. Regardless of the outcome of that debate, the freedom covers more than communication concerning electoral candidates during an election period.28 It includes communication concerning State, Territory and national issues, possibly extending to international issues that may have implications in this country.29 But how far does it extend? Members of the Court have questioned whether there is an end to what is ‘political’30 while another has cautioned that the freedom not be ‘debased’31 by giving it too broad a coverage. It is unlikely and perhaps undesirable for the Court to give a definition of ‘political’ that could apply to all situations. However, a consideration of the position of police in society could provide one avenue of argument for this appeal.

The scope of the freedom must be referable to what is deemed to be necessary for the operation of the system of governance prescribed by the Constitution. The essence of that system is representative and responsible government. It is settled that the details of the system must be based firmly on the text and structure of the Constitution and a number of sections have been cited as the font of such a system. These include ss7, 24, 25 and 128.32 However, it is inevitable that notions external to the text will assist in determining what is required for the maintenance of that constitutionally-prescribed system. A basic description of representative government is a system where parliamentarians are elected by the people through free and informed elections. Responsible government begins with the consequent relationship between electors and the elected, in that the elected members are responsible, ie accountable, to the citizens whom they represent. However, responsible government does not end there; it extends accountability to the apparatus of government and official conduct more generally.

In Lange, the unanimous Court stated ‘the attitudes of the electors to the conduct of the Executive may be a significant determinant of the contemporary practice of responsible government’.33 The ‘executive’ is the branch of government whose apex is the Ministers, elected representatives of the people and therefore accountable to them. However, it is not only the Ministers and their personal actions that is covered by the freedom. It is the entire executive arm of government that falls within its scope, which includes the public service,34 the ‘institutions and agencies of government’35 and those who staff them.36 Those institutions and individuals are the repositories of significant power. To restrict the

28 Id at 561.
29 Id at 576.
31 Levy v Victoria, above n23 at 638 (Kirby J).
32 See, for example Nationwide News, above n6 at 46 (Brennan J) and 71–2 (Deane & Toohey JJ); Australian Capital Television, above n6 at 137–8 (Mason CJ) and 227–232 (McHugh J).
33 Above n7 at 559.
34 Id at 561. See also Nationwide News, above n6 at 74 (Deane & Toohey JJ).
35 Nationwide News, id at 48 (Brennan J); Compare at 34 ‘public institutions’ (Mason CJ); Theophanous, above n30 at 124 (Mason CJ & Gaudron J) and 150 (Brennan J); Australian Capital Television, above n6 at 217 (Gaudron J); Cunliff, above n9 at 329 (Brennan J).
36 Nationwide News, id at 79 (Deane & Toohey JJ).
coverage to the Ministers alone would give the freedom little substance. Just as in Roberts v Bass, where the Court looked to the reality of politics to determine the requirements of the freedom, the Court in this case should take the same approach.

Police officers are arguably part of the executive by reason of being the holders of a public office, with responsibilities including the protection of the rule of law and maintenance of the peace. As members of the executive, discussion of their functions must fit within the scope of the freedom. There is continuing debate concerning the precise position of police, as they have a measure of independence perhaps inconsistent with much of the public service. It is also clear that they are not ‘servants’ of the state. Nevertheless, a consideration of their functions and powers shows the need for accountability. Police are the enforcement arm of the government. In exercising their responsibilities, police are given wide powers over citizens; to restrain, detain, question and charge. The impartiality of the police force is essential for the operation of that role. That enforcement must therefore be open to public scrutiny, just as are tribunals and courts. In Theophanous v The Herald & Weekly Times Ltd, the ‘propriety, appropriateness or significance of official conduct’ was one of the descriptions of the type of communication that was determined to fall within the scope of the freedom. The conduct of police clearly falls within this conception of the freedom.

4. The Balancing Act — Finding the Legislation’s Purpose and Evaluating its Reasonableness

The second part of the Lange test requires the Court to determine whether it was open to the legislature to consider the legislation as ‘reasonably appropriate and adapted’ to achieve a legitimate purpose or purposes consistent with the prescribed system of governance. Well-accepted methods of statutory interpretation should be used, considering the complete sections of the Vagrants Act, read in the context of the whole Act, although it should be noted that isolating the purpose or purposes of the legislation may be difficult, perhaps impossible. The legislative history and perhaps previous judicial discussion of its terms would also assist. The Court of Appeal’s description of the Act’s purposes, as well as Coleman’s own submission in that court, provide a number of options. They include the prevention of breaches of the peace, to ‘ensure basic standards of conduct in public’ and prevent ‘public acrimony and violence’, and the maintenance of the integrity of the police. All of these may be accepted to be legitimate aims consistent with the maintenance of the constitutionally-prescribed system of government.

37 Above n11 at 312 [102] (Gaudron, McHugh & Gummow JJ).
39 Enever v The King (1906) 3 CLR 969.
41 Above n30 at 180 (Deane J).
43 Coleman v P, above n11 at 348 (McMurdo P).
44 Id at 352 [36] (Davies JA). Each of those formulae possibly arising from the Queensland Attorney–General’s submission that the purposes were the ‘regulation of the conduct of persons, the promotion of good behaviour and the prevention of breaches of the peace’: id at 355–56 [51] (Thomas JA).
The focus then becomes whether the methods employed in the relevant sections of the Vagrants Act were ‘reasonably appropriate and adapted’ to achieve those ends. That is the phrase used in Lange which includes a footnote to Cunliffe v The Commonwealth and the statement that ‘[i]n this context, there is little difference between the test of “reasonably appropriate and adapted” and the test of proportionality’. The use of those two concepts abounds in the jurisprudence concerning characterisation of a law for the purpose of determining legislative power. However, little assistance can be drawn from their prevalence, except to say that the essence of the test is the balance that is struck between the methods employed and the purpose of the legislation.

A distinction has been made concerning the test to be applied to legislation, depending on whether it has as its object the restriction of the freedom or whether that is the incidental effect of its operation. That distinction emerged before Lange but has been applied since. In the first category, it has been stated that such legislation requires ‘compelling justification’ to be held valid, while the second category is subject to a less stringent test. If the distinction is applied in this appeal, the Vagrants Act seems to fall within the second category, although from some of the parliamentary debates there arises a suggestion that political speech may have been its target. However, it is questionable whether such a distinction can exist within the confines of the second limb of the Lange test. The better view is that the distinction merely serves to emphasise that the test applies differently to different legislation and that in every case it is a question of degree.

Regardless of the legislation’s characterisation, in order to evaluate this ‘question of degree’, a number of considerations should be addressed, as set out below, rather than merely stating that the law was or was not ‘reasonably appropriate and adapted’. Guidance is required from the Court to give content to statements such as the legislation being ‘extreme’ or constituting an ‘extraordinary intrusion’ into the freedom. In doing so, it is important to remember that it is for the Parliament to decide the way in which the balance should be achieved. The Court has the restricted role of overseeing that choice.

A. Some Relevant Considerations

(i) Legislative Purpose and the Freedom — Their Relative Importance

Although the focus is on the relationship between the legislative purpose and the methods chosen to achieve it, that should be done in the context of the impact the provisions have on the freedom of political communication. The conclusion will

45 Above n9 at 300, 324, 339, 387–88, with reference also given to 377, 396.
46 Nationwide News, above n6 at 76–77 (Deane & Toohey JJ); Id at 299.
47 Kruger v The Commonwealth (1997) 190 CLR 1 at 126–28 (Gaudron J); Levy v Victoria, above n23 at 619 (Gaudron J).
48 Mr Maher, Queensland, Legislative Assembly, Parliamentary Debates (Hansard), 27 November 1936 at 1825; See also The Honourable Premier of Queensland W Forgan Smith at 1838–39 quoted in Coleman v P, above n11 at 348–49 [24] (McMurdo P).
49 Cunliffe, above n9 at 338 referring to Nationwide News, above n6.
50 Nationwide News, id at 101 (McHugh J).
always be a value judgment, reflecting the way in which the individual Justices prioritise the freedom and the purposes of the legislation. It is therefore important that in conducting the balancing exercise, explicit consideration should be given to their relative importance. The detrimental and beneficial effects of the legislation should be canvassed against each.

(ii) An Attempted Balance or an Absolute Ban?
The Court may derive assistance from considering whether the Parliament has attempted to achieve a balance. One approach is to consider the legislation prima facie beyond power if it exhibits no attempt at balancing the legislative aims and the freedom, with the onus placed on the party seeking to uphold the legislation’s validity to prove that such absolute prohibition is necessary to achieve the legislative aims. There is no doubt that legislation can regulate the exercise of the freedom, but a balance is required. The Court should consider whether there are any defences, exceptions, exemptions, options for gaining permission to contravene the general section and whether such a process is subject to review. Where the regulation is of a severe nature, are there practicable alternatives or is the severity necessary to achieve the legislation’s purposes?

(iii) Manner and Effect of Restriction — Time, Place, Form & Quality
Whether the inhibition placed on the freedom is direct or indirect, the Court should consider the nature of the temporal and spatial restrictions as well as the form or forms of communication that are regulated. Although again a matter of degree, a connection must be shown between the choice of restrictions and the legislative aim. The Court must assess not only what types of communication are affected by the regulation but also the effect of such inhibition on the purpose of the communication, i.e. dissemination. The freedom is not merely to allow individuals to express their views, rather, it is to allow those views to be received by others. The nature and specific subject-matter of the communication and the expected and desired audience are factors to be taken into account. The Court should assess whether there are ample alternative means of communication available in light of the restrictions in question and whether, by those restrictions, any meaningful exercise of the freedom is affected. For example, restrictions on prime time television are obviously more significant than those placed on the ‘graveyard’ shift.

(iv) Co-existing Alternative Regulation
The Court should consider whether there are alternative regulatory regimes already in place to achieve the purposes of the relevant legislation and if so, whether that legislation adds anything to the regime or merely creates greater restrictions on the exercise of the freedom. In this appeal, there are obvious parallels with criminal defamation, assault and perhaps other offences related to breaches of the peace. In conducting the balancing exercise, the Court may also
derive assistance from jurisprudence relating to those areas of regulation. In this case, assistance should be drawn from the law of defamation and the way in which the Court has previously required the defences to defamation to be redefined in order to comply with the constitutional freedom.

5. A Possible Application to Coleman and the Consequences of Invalidity

One interpretation of the facts of this appeal is that Coleman was publicly communicating his interpretation of the way in which certain Townsville police officers had been exercising their public powers. Considering the discussion above, that should fall within the scope of the freedom and therefore lead to a consideration of the second limb of the Lange test. However, the respondents may wish to raise two arguments in favour of the opposite conclusion, both of which should be rejected. The first is that Coleman was engaged in a personal not political campaign, therefore nullifying any recourse to the constitutional protection. This distinction cannot be accepted. It is impossible to draw a clear line between the two. Political campaigns can be personal ones, directing public attention to an alleged instance of misuse of public power against a citizen. On the facts, regardless of Coleman’s personal history with the particular policemen identified in his communications, those communications were clearly directed to the voting public, in a public place and in relation to public officers and institutions.

The second argument is that the communication went beyond that which was appropriate or necessary. The freedom should not be concerned with what is ‘appropriate’. Once a communication fits within the scope of subject matter covered by the freedom, there should not be limitations inherent in the exercise of that freedom. The legislature and the general common law exist to protect other interests of individuals or the community as a whole, and that should be the location of such restrictions. Unlike the law of defamation, alleged malice should not be powerful enough to destroy the protection of the freedom at such a threshold stage. There should be no requirement of balancing competing interests, rights or protection in determining whether the communication falls within the scope of the freedom. The only relevant balancing exercise is contained in the second limb of the Lange test.

In applying that second limb, the Court may reach the conclusion that both sections of the Vagrants Act are invalid for going further than is necessary for the achievement of any of the purposes described above. There is no doubt that public order, general peace and the integrity of the police force are important aims to be achieved. However, that should not be done in such a way as to seriously inhibit the freedom where there are distinct benefits from the exercise of that freedom in relation to at least one of those aims — the integrity of the police. In order to

54 Analogous to ‘Hyde Park’: see Levy v Victoria, above n23 at 641–42 (Kirby J).
55 See Mr Bennett’s suggestion of such a limitation in the special leave application for Brown v The Members of the Classification Review Board, above n25 at 6.
achieve that aim, there must be the opportunity for criticism and debate of the exercise of police powers. ‘[T]he public interest is never, on balance, served by the suppression of well-founded and relevant criticism of the … organs of government or of the official conduct or fitness for office of those who constitute or staff them’.56 Considering the broad definition to be given to both ‘insulting’ and ‘public place’,57 there is a severe curtailment of the exercise of the freedom. There does not seem to be any reason for such severity. The restriction is not limited in time and the restriction as to place is relatively meaningless, given the broad definition of ‘public place’. There seem to be no defences available to the charges under the Vagrants Act.

If Coleman seeks support from the quotation above, the respondents may argue that Coleman’s communications were not ‘well-founded’ or ‘relevant’, although this was neither conceded in the courts below nor even addressed. Such characterisation of Coleman’s acts is irrelevant. His acts are the vehicle to bring the validity of the Vagrants Act into question, but its validity is to be judged against its general operation, not only Coleman’s actions. Once Coleman’s acts fall within the freedom’s scope, the factual circumstances become irrelevant in balancing the legislative purposes against the means employed to satisfy them. His acts would only have been relevant at this stage if there existed a defence of ‘well-founded and relevant criticism’ to the charges of insulting language.

If the Court upholds the conclusion of the Court of Appeal in relation to s7A(1)(c) and also concludes that the prohibition in s7(1)(d) of using ‘insulting’ language is invalid, the Court will have to consider the question of severance. The Court could sever the word ‘insulting’ from the two sections, leaving them to operate on ‘abusive’ or ‘threatening’ language, although it may have to consider the operation of the subsections as a whole to determine whether they, in their entirety, ‘exceed[d] power’.58 Alternatively, the Court may consider ‘reading down’ the sections so that they do not apply to political communication. That would create difficulties in enforcement, if the police were not given some guidance on how to recognise such communication. The better approach is for the Court to sever the offending word ‘insulting’ and leave it to the Queensland Parliament to determine the manner in which the balance should be struck if they wish to reinstate an offence regarding insulting language. Thus, the legislation would read: s7(1)(d) “Any person who … (d) uses any threatening or abusive or insulting words … shall be liable to …” and s7A(1)(c) “ Any person … who … prints any threatening or abusive, or insulting words or … (c) who delivers or distributes in

56 Nationwide News, above n6 at 79 (Deane & Toohey JJ).
57 ‘Public place’ being defined in s2 of the Vagrants Act to include, relevantly: ‘… every road and also every place of public resort open to or used by the public as of right, and also includes: (a) any vessel, vehicle, building, room, licensed premises, field, ground, park, reserve, garden, wharf, jetty, platform, market, passage or other place for the time being used for a public purpose or open to access by the public, whether on payment or otherwise, or open to access by the public by the express or tacit consent or sufferance of the owner, and whether the same is or is not at all times so open; and (b) a place declared, by regulation, to be a public place …’
58 Acts Interpretation Act 1954 (Qld) s9.
any manner whatsoever printed matter containing any such words … shall be liable to …”.

In either case, Coleman’s charges under those sections would be set aside. However, do the other charges of obstructing police and assaulting police then fall away in a domino effect? If the head charges were based on invalid legislation, does that infect the arrest made? Police powers of arrest must come under scrutiny. The focus will likely be upon the construction of s35 of the Police Powers and Responsibilities Act 1997 (Qld) (being the relevant legislation in force at the time of the purported arrest) and its relationship with any common law relating to powers of arrest. If the arrest is found to have been unlawful, the law of self-defence would need to be considered to determine whether Coleman’s actions constituting the basis for the charges of assault and obstruction fall within it. If the answer to those questions is yes, all the charges would fall away.

6. The Beginning or the End?

Coleman’s fate in the High Court will clearly have ramifications for the general community’s freedom to engage in such protests and other actions. There is no doubt the Court will have to balance the benefits of public peace and protest. I hope that it does so in a way that acknowledges that balancing act, taking a realistic approach to what is required for our system of governance to operate. I also hope that some broader guidance is provided to legislatures — federal, State and local, concerning how they should be striking that balance when placing limits on what we can do where, when and how.
The Panel Case and Television Broadcast Copyright
MICHAEL HANDLER*

1. Introduction
In Network Ten Pty Ltd v TCN Channel Nine Pty Ltd,1 the High Court will have the opportunity to consider for the first time certain fundamental issues relating to television broadcast copyright. The central question for the Court relates to the scope of the exclusive rights of the owner of copyright in a television broadcast under the Copyright Act 1968 (Cth) and, as a corollary, what constitutes an infringement of television broadcast copyright. In particular, the High Court will consider whether, as was held by the Full Federal Court, the owner of copyright in a television broadcast has the exclusive right to make a cinematograph film of, or re-broadcast, any of the visual images in the broadcast, irrespective of whether those images constitute a ‘substantial part’ of the broadcast.

The outcome of the case will have important implications for the Australian broadcasting industry, in particular as regards the way in which television broadcasters use other broadcasters’ material. Yet the case will also afford the High Court the rare chance to provide guidance on such vexed questions as what is a copyright ‘work’ or ‘subject matter’, and to analyse critically the nature of the ‘substantial part’ requirement in copyright law.

2. Background
Between August 1999 and June 2000, Network Ten Pty Ltd (‘Ten’) re-broadcast on its weekly program The Panel excerpts from 20 programs originally broadcast by rival television network TCN Channel Nine Pty Ltd (‘Nine’). Prior to each episode of The Panel, Ten made videotapes of each of Nine’s broadcast programs, and subsequently made tapes of those first videotapes in order to isolate the excerpts to be re-broadcast. The excerpts were of between eight and 42 seconds in duration.2 Ten re-broadcast many of these excerpts to make satirical reference to incongruous, sometimes farcical, moments within the excerpts, often to draw attention to the disparity between the ethos of the original program and its actual content. On some occasions the excerpts were shown for their topical value as a stimulus to both serious and irreverent discussion.

Nine brought proceedings in the Federal Court against Ten, alleging that Ten had infringed Nine’s copyright in its television broadcasts pursuant to s101 of the Copyright Act. At first instance, Conti J found that Ten had neither copied nor re-

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1 Special leave granted, unreported, S213/02, Gummow and Heydon JJ, 11 April 2003.
2 The duration of each excerpt and the duration of each of Nine’s programs or segments from which the excerpts were taken are set out in TCN Channel Nine v Network Ten (2001) 108 FCR 235 (hereinafter “Trial Decision No 1”) at 286–287 (Conti J).
broadcast a substantial part of any of Nine’s broadcasts, and therefore had not infringed Nine’s copyright in them. On appeal, the Full Court held that Ten had both copied and re-broadcast the entirety of each of Nine’s broadcasts. The Full Court then considered whether Ten’s pleaded fair dealing defences were established,3 in the result holding that Ten had infringed Nine’s copyright in relation to 11 of the 20 excerpts.4 Ten has elected to appeal only the Full Court’s findings as to what constitutes a filming and re-broadcasting of a television broadcast to the High Court.

It is suggested that there are significant errors in the Full Court’s judgment, and while there are problems with some of Conti J’s reasoning, the result reached at first instance was the correct one.

A. The Decisions of Conti J

Nine argued that Ten had infringed copyright by contravening Nine’s exclusive rights under ss87(a) and (c) of the Copyright Act. At the time, s87 provided:

For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a television broadcast or sound broadcast, is the exclusive right:

(a) in the case of a television broadcast in so far as it consists of visual images — to make a cinematograph film of the broadcast, or a copy of such a film;

...  

(c) in the case of a television broadcast or of a sound broadcast — to re-broadcast it.5

Conti J gave separate judgments, first on s87(c)6 and then on s87(a).7 In his first judgment, Conti J considered that s87(c) had to be interpreted in light of s14(1)(a). This provision, which is of critical importance for the arguments presented here, states:

In this Act, unless the contrary intention appears:

(a) a reference to the doing of an act in relation to a work or other subject-matter shall be read as including a reference to the doing of that act in relation to a substantial part of the work or other subject-matter...

3 Although not required to do so, in Trial Decision No 1 Conti J determined whether Ten’s pleaded fair dealing defences would have been established. On appeal, Nine did not appeal, and Ten did not put on a Notice of Contention in relation to, nine of Conti J’s findings as to fair dealing.
5 As a result of the Copyright Amendment (Digital Agenda) Act 2000 (Cth), which came into force on 1 April 2001, s87(c) now reads: ‘in the case of a television broadcast or of a sound broadcast — to re-broadcast it or communicate it to the public otherwise than by broadcasting it’. This amendment does not impact on any aspect of the case.
6 Trial Decision No 1, above n2.
7 TCN Channel Nine v Network Ten (No 2) (2001) AIPC 39,722 (hereinafter ‘Trial Decision No 2’).
On this interpretation, the key question was whether Ten had, in broadcasting the excerpts, re-broadcast a ‘substantial part’ of Nine’s broadcasts. This in turn required a mechanism for determining the ‘boundaries’ of the broadcast. Conti J held that copyright in a television broadcast subsists in the broadcast of a program, or a segment of a program if that program is susceptible to subdivision, or an advertisement, or a station break or logo.8 In light of this interpretation, Conti J concluded that Ten had not re-broadcast a substantial part of any of Nine’s broadcasts. His Honour reached this conclusion on the basis of the quantity, quality and purpose of Ten’s dealings, placing particular emphasis on the lack of harm to Nine’s commercial interests.9

In his second judgment, Conti J considered Nine’s argument that s87(a) must be read in light of s25(4)(a), which states:

In this Act:
(a) a reference to a cinematograph film of a television broadcast shall be read as including a reference to a cinematograph film, or a photograph, of any of the visual images comprised in the broadcast…

Nine contended that its exclusive right under s87(a) extended, by virtue of s25(4)(a), to making a film of ‘each and every visual image’ in its broadcasts,10 a right which Ten had contravened by making the subsequent videotapes of Nine’s broadcasts. Conti J disagreed, holding that such an interpretation overlooked the effect of the ‘substantial part’ test in s14(1)(a). His Honour held that the relationship between ss87(a), 25(4)(a) and 14(1)(a) is such that the making of a film of single images could lead to infringement, but only provided that there is a sufficiency of images capable of amounting to a substantial part of the broadcast.11 For the same reasons as in his first judgment relating to the substantiality of Ten’s dealings, Conti J held that Ten had not made cinematograph films of a substantial part of any of Nine’s broadcasts.

B. The Decision of the Full Court

Nine jointly appealed Conti J’s findings in both judgments to the Full Court, which held unanimously that Ten had contravened ss87(a) and 87(c).

Hely J (with whom Sundberg and Finkelstein JJ agreed) first considered how s87(a) should be interpreted. Hely J did not agree with Conti J’s characterisation of the relationship between ss87(a), 25(4)(a) and 14(1)(a). Rather, Hely J held that s25(4)(a) was a ‘self-contained definitional provision’ that was ‘not subject to further modification by section 14’.12 His Honour thus held that the owner of copyright in a television broadcast has the exclusive right to make a cinematograph film of ‘any one or more’ of the visual images contained in the broadcast.13 This

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8 Trial Decision No 1, above n2 at 272.
9 Id at 288.
10 Trial Decision No 2, above n7 at 39,724–39,725.
11 Id at 39,726.
12 TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (2002) 118 FCR 417 (hereinafter ‘Full Court Decision’) at 434.
13 Id at 433.
meant that there was no need to determine the boundaries of Nine’s broadcasts, or whether Ten had filmed a substantial part of each of them, for the purposes of interpreting s87(a). On this basis, Ten’s act of filming images broadcast by Nine contravened s87(a).

As to s87(c), Hely J held that whether an act of re-broadcasting a television broadcast contravened this provision depends on how the television broadcast is defined. His Honour noted that the definition of ‘television broadcast’ in s10(1), namely ‘visual images broadcast by way of television, together with any sounds broadcast for reception along with those images’, did not seek to define the subject matter in terms of a ‘whole’, of which the visual images and accompanying sounds were but a part.14 Rather, Hely J considered that the definition should be interpreted such that copyright subsists in any broadcast of ‘visual images and accompanying sounds’;15 regardless of duration, except perhaps for a transmission lasting ‘for a fraction of a second only’.16 Finkelstein J, who agreed with Hely J, went a step further in stating that copyright subsists in ‘each and every still image’ transmitted or capable of being observed as a separate image on a television screen.17 The effect of the Court’s interpretation of ‘television broadcast’ was not that each image broadcast constituted a separate broadcast, but that in any given period of broadcasting, the copyright owner has the exclusive right to re-broadcast any of the actual images and accompanying sounds broadcast.18 The scope of each copyright broadcast would be determined by the amount re-broadcast. As a result, the Court held that Ten had re-broadcast the entirety of each of Nine’s broadcasts by re-broadcasting the excerpts on The Panel.19 Hely J acknowledged that the Court’s interpretation of s87(c) meant that issues of ‘substantial part’ would only arise in respect of re-broadcasts of visual images without accompanying sounds (or vice versa), or of re-broadcasts of ‘cropped’ images.20

C. Issues for the High Court

The first issue for the High Court will be to clarify the labyrinthine relationship between ss87(a), 25(4)(a) and 14(1)(a). Ultimately, the question for the High Court will be whether the Full Court’s highly literal interpretation of these provisions does in fact promote the object or purpose of s87(a), or whether an alternative construction of these provisions is preferable. If, as this article suggests, the High Court declines to follow the Full Court’s interpretation, the second question for the High Court, relevant to both ss87(a) and (c), will be what constitutes a taking of a ‘substantial part’ of a broadcast. This is a complex issue involving the delimitation of the scope of a television broadcast and the establishment of principles as to what factors are to be taken into account in assessing whether a ‘substantial part’ of a broadcast has been copied or re-broadcast.

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14 Id at 436. See also at 422 (Finkelstein J).
15 Id at 436.
16 Id at 437.
17 Id at 422. Sundberg J purported to agree with both Finkelstein and Hely J’s reasons, at 419.
18 Id at 436 (Hely J).
19 Ibid.
20 Ibid.
3. **How Should s87(a) be Interpreted?**

**A. The Literal Approach: A Simple Solution with Problematic Implications**

As to the first issue, it is certainly possible to interpret the relationship between ss87(a), 25(4)(a) and 14(1)(a) as the Full Federal Court did. This is because both ss14(1)(a) and 25(4)(a) could be seen as operating on the same continuum — both are definitional provisions which provide that the exclusive rights of copyright owners to do certain acts in relation to their copyright material extend to the doing of those acts in relation to *something less* than the entirety of their copyright material. Section 14(1)(a), which applies to all works and subject matter ‘unless the contrary intention appears’, states that this ‘something less’ is a ‘substantial part’ of the copyright material. Read literally, 25(4)(a) goes further than 14(1)(a): it operates to extend the exclusive right of the owner of television broadcast copyright beyond making a film of a ‘substantial part’ of a broadcast to making a film or photograph of ‘any of the visual images comprised in the broadcast’. On this literal reading, it is difficult to see how s25(4)(a) could be subject to a qualification, as imposed by Conti J, that the film contain a *sufficiency* of visual images so as to amount to a substantial part of the broadcast. If that were the case, there would be no need for s25(4) as it applies to the making of a cinematograph film of a broadcast — ss87(a) and 14(1)(a) would be sufficient for this purpose. Further, the use of the singular term ‘a photograph’ in s25(4)(a) logically means that the copyright owner has the exclusive right to make a single photograph of a single image contained in the broadcast. It stretches the language of s25(4) to suggest that the copyright owner’s right is only exclusive if a sufficient number of photographs are made such as to constitute a substantial part of the broadcast. Conti J’s approach, designed specifically to preserve the ‘substantial part’ test, glosses over the restrictive language used in s25(4) and the fact that s14(1)(a) operates only in the absence of a contrary intention. The Full Court’s interpretation fits these provisions together with less friction.

However, the Full Court’s literal interpretation has a number of worrying implications. The most significant is that it makes television broadcast copyright an extraordinarily strong right, easily the strongest of all copyrights in Australia, able to be infringed by taking less than a substantial part of the broadcast. The Full Court’s interpretation seems counter-intuitive given the nature of broadcasts and the rationale for granting copyright in them. It also overlooks the relationship between the right to film broadcasts in ss87(a) and the re-broadcasting right in s87(c).

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21 The Full Court’s approach has received support in principle: see James Lahore, *Copyright and Designs* (Butterworths Looseleaf Service, updated June 2003) at 34,117.

22 Compare *Copyright, Designs and Patents Act 1988* (UK) s17(4): ‘Copying, in relation to a film, television broadcast or a cable programme includes making a photograph of the whole or any substantial part of any image forming part of the film, broadcast or cable programme.’ As a result, it has been suggested that making a *film* of a broadcast will infringe only if ‘a whole or substantial part of the broadcast’ is copied, see Kevin Garnett, Jonathan Rayner James & Gillian Davies (eds), *Copinger and Skone James on Copyright* (14th ed, 1999) (hereinafter *Copinger*) at para 7-101.

23 Trial Decision No 2, above n7 at 39,725.
Broadcasting involves the provision of a service, namely the act of transmitting or communicating signals. Those signals encode visual and aural content, which may itself constitute copyright subject matter, such as films, sound recordings or original works. Broadcast copyright recognises the value in the dissemination of that content only, not in its creation or organisation. As Ricketson and Creswell state:

"Although … it is possible that the broadcaster has applied considerable skill and judgment in its selection and compilation of what is broadcast, it does not seem that these elements are the object of Part IV protection. It is simply the transmissions themselves."

However, the effect of the Full Court’s approach is that the mere act of disseminating content as a broadcast gives rise to stronger rights in the content than those afforded to the creators or organisers of the content. For example, owners of copyright in a cinematograph film or sound recording contained in a broadcast would need to demonstrate that a substantial part of their subject matter has been copied to establish infringement, whereas the disseminator of that same subject matter as a broadcast does not. This appears anomalous — it places a higher value on the investment involved in the communication of images and sounds than on the investment or creativity involved in bringing those images and sounds into being, for example as films or sound recordings, in the first place. And yet broadcast copyright is a ‘neighbouring’ right, traditionally a form of copyright which provides for a narrower scope of protection than for original works. As will be seen below, there is nothing in the legislative history of either the Copyright Act or its UK counterpart to indicate that such a result was intended.

A second problem is that the Full Court’s approach tends to gloss over the relationship between ss87(a) and (c). An act of re-broadcasting can technically occur in one of two ways: by making a copy on videotape from the sending station’s signal and re-broadcasting the contents of that tape; or by ‘pulling down’

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26 See Ten’s submission, quoted in Trial Decision No 2, above n7 at 39,726 (Conti J). Hely J criticised this submission on the basis that it failed to recognise that television broadcast copyright can be infringed only by taking the actual images or sounds broadcast (Full Court Decision, above n12 at 437). However, cinematograph films and sound recordings can themselves only be infringed by the taking of actual images or sounds (see in relation to cinematograph films, Telmuk Teleproducts Australia Pty Ltd v Bond International Pty Ltd (1985) 66 ALR 118 at 124 (Wilcox J); Norowzian v Arks Ltd (No 1) [1998] FSR 394 at 400 (Deputy Judge Steinfeld QC); and in relation to sound recordings, CBS Records Australia Ltd v Telmuk Teleproducts (Aust) Pty Ltd (1987) 17 FCR 48 at 51–52 (Bowen CJ)). To the extent that Hely J suggested that television broadcast copyright is narrower in scope than in relation to underlying subject matter, such a suggestion is erroneous.
28 See section 4(B) below.
the sending station’s off-air or satellite signal through a transmitter, and re-broadcasting that signal.\(^\text{29}\) Not only does Ten not use this second method of re-broadcasting, Nine itself acknowledged that it had never employed this method.\(^\text{30}\) This indicates that the taping of a broadcast is in practice a necessary antecedent step in the act of re-broadcasting. However, if a broadcaster has the exclusive right to control the taping of any of the images in the original broadcast, then a party seeking to re-broadcast a non-substantial part of another’s broadcast — an act that would not contravene s87(c) — will necessarily contravene s87(a). This interpretation renders s87(c) almost redundant as an independent right. It makes the provision relevant only in relation to re-broadcasting by ‘pulling down’ another network’s signal through a transmitter. This is despite the fact that Hely J expressly acknowledged that the meaning of ‘re-broadcasting’ in the Copyright Act was never intended to be so confined.\(^\text{31}\) Logically therefore, the Full Court should have considered carefully whether a literal interpretation of section 87(a) gives effect to the legislative intention in respect of s87(c) that Hely J recognised.

**B. A Purposive Approach?**

In light of the problematic implications set out above, it must be asked whether the Full Court’s literal construction of s87(a), as modified by s25(4)(a), does in fact ‘promote the purpose or object underlying the Act’ and, if not, whether the High Court could give those provisions an alternative construction that promotes such a purpose, pursuant to s15AA of the Acts Interpretation Act 1901 (Cth).

Such an approach is certainly open to the High Court. It is arguable that given the place of broadcasts within the framework of the Copyright Act, their relationship with other forms of copyright subject matter and the rationale for their protection, the purpose of giving broadcasters the exclusive right to make films of their broadcasts is to allow them to control the copying of a certain quantity of images, rather than individual images, within broadcasts. As will be discussed below, the history of the broadcast copyright provisions tends to support this interpretation. The issue is then whether the words of s87(a) are capable of more than one construction and of being interpreted in a manner that gives effect to this purpose.\(^\text{32}\) This does appear possible. Section 25(4)(a) can also be read as indicating that the visual images contained in the film may be sourced from any part of the broadcast, that they do not have to be sequential and that they do not have to be incorporated into the film in the same order as broadcast. On this basis, ss87(a) and 14(1)(a) could be read together as stating that the owner of television broadcast copyright has the exclusive right to make a film of a substantial part of that broadcast, with s25(4)(a) indicating that that substantial part can be comprised of non-consecutive images taken from any part of the broadcast. Such an interpretation of s87(a), while perhaps ‘strained’, is ‘neither unreasonable or

\(^{29}\) Trial Decision No 2, above n7 at 39,729 (Conti J); Full Court Decision, above n12 at 426 (Hely J).

\(^{30}\) Trial Decision No 2, id at 39,730.

\(^{31}\) Full Court Decision, above n12 at 435.

\(^{32}\) See *R v L* (1994) 49 FCR 534 at 538 (Burchett, Miles & Ryan JJ); D C Pearce & R S Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) at 26–27.
unnatural’, and avoids the ‘improbability’ resulting from the Full Court’s approach. If this construction is adopted by the High Court, the key question would then become how the scope of a broadcast is to be defined and whether Ten, in making videotapes of the excerpts used on The Panel, copied a substantial part of Nine’s broadcasts (as to which, see section 4 below).

It should be acknowledged, however, that there are two problems with such an alternative construction. First, as is explored below, the external evidence as to the intended effect of s87 is somewhat scarce, meaning that the High Court should be cautious in stating categorically that the Full Court’s construction does not promote the purpose or object of the Copyright Act. Secondly, s15AA of the Acts Interpretation Act does not permit the High Court to ignore the words of the Copyright Act, even if the result of applying such words would lead to anomalous outcomes. Thus even though it may appear counter-intuitive to interpret s87(a) so as to make broadcast copyright a stronger right than in respect of any other copyright works or subject matter and to limit drastically the operation of s87(c) such that it is of little practical effect as an independent right, this may simply be the unfortunate consequence of applying the words of the Copyright Act. However, it is suggested that a sufficiently clear (albeit not strongly expressed) purpose to s87(a) can be gleaned and that the words of ss25(4)(a) and 87(a) are capable of more than one construction. As a result, it is open to the High Court to find that the Full Court’s interpretation did not give effect of the purpose of s87(a), and that s87(a) is to be interpreted in light of both ss14(1)(a) and 25(4)(a).

4. The Scope of Broadcast Copyright

If the High Court adopts the construction of s87(a) recommended above, it will then be required to consider two fundamental, related issues: first, what are the boundaries of a television broadcast for the purposes of copyright law; and secondly, what is a ‘substantial part’ of that broadcast. In any event, the High Court will be required to consider both these issues for the purpose of determining the s87(c) claim. As has already been noted, the Full Court interpreted s87(c) as broadly as it did s87(a). Although in theory the Full Court preserved the ‘substantial part’ test for the purposes of s87(c), the Court held that the scope of the broadcast is to be determined by reference to that which the defendant has taken. Crucial to this finding is the significance the Court placed on the statutory definition of ‘television broadcast’. This merely refers to ‘visual images broadcast’, and the Court therefore concluded that re-broadcasting must occur when any visual images are taken. This allowed the Full Court to find that Ten had re-broadcast the entirety of each of Nine’s broadcasts. On this reading, it would only be possible to re-broadcast less than the whole of a broadcast if the re-broadcaster alters the broadcast in some way, for example, by cropping the images. The High Court needs to determine whether this definition of a

33 See Newcastle City Council v GIO General Ltd (1997) 191 CLR 85 at 113 (McHugh J).
35 See Pearce & Geddes, above n32 at 27.
36 Full Court Decision, above n12 at 436–437 (Hely J).
broadcast and marginalisation of the substantial part test in relation to s87(c) is appropriate. This in turn requires a consideration of precisely the same questions that arise on the interpretation of s87(a) argued for above, namely, what is the broadcast, and what is a substantial part of it.

A. What is the Broadcast?

The Full Court’s interpretation of the boundaries of a television broadcast which it used to determine the scope of s87(c) could be applied equally to s87(a). Thus, even if the High Court were to adopt the interpretation of s87(a) argued for here, it would be possible for it to conclude that Ten made films of a substantial part of Nine’s broadcasts because, as in relation to s87(c), Ten had copied the entirety of each of Nine’s broadcasts. Thus the first question that arises is whether the Full Court’s method of determining the boundaries of broadcast copyright is appropriate.

If the phrase ‘television broadcast’ had been left undefined, it would not be apparent from the nature of a broadcast how copyright attaches to it. A broadcast is not a tangible object, but a dissemination of information through the transmission of electro-magnetic energy. Copyright cannot subsist in an action of dissemination. Further, since the electro-magnetic signals transmitted in a broadcast are evanescent and imperceptible, any rights over those signals alone would be ineffectual. Instead, broadcast copyright must subsist in the perceptible substance of broadcasts — the visual images or sounds that are encoded as signals by the broadcaster, transmitted and finally decoded and received.

The definition of ‘television broadcast’ in s10(1) simply makes this clear. It states that copyright subsists in the content of a broadcast, not its imperceptible means of communication. The central problem with the Full Court’s approach is that it assumes that the definition also establishes a quantitative standard of subsistence — that is, it demarcates the scope of the property. Yet there is no evidence that this was the legislature’s intention in s10(1), and the Full Court’s approach reads more into the definition than it is meant to achieve. Further, the Full Court’s interpretation is inconsistent with the way in which a ‘broadcast’ is defined elsewhere in the Copyright Act. For example, s135B refers to ‘making of a copy of the whole or a part of the broadcast’, which clearly indicates that a copyright broadcast is meant to consist of a quantifiable number of images and sounds. The definition of ‘television broadcast’ in s10(1) is in many respects like the statutory definition of ‘literary work’, which includes a ‘compilation, expressed in words, figures or symbols’. This definition indicates that subject matter that is not self-
It does not purport to state that copyright subsists in every possible grouping of words, figures or symbols. Rather, the boundaries of the literary work, as with the boundaries of the broadcast, must be separately determined. The foundations of the Full Court’s approach are therefore fundamentally unsound.

If s10(1) does not indicate the parameters of a television broadcast, the question is how are these to be determined. This is a difficult metaphysical question in copyright law generally, particularly where the subject matter in question is capable of being subdivided into smaller elements. Yet it is an important question because of its impact on the scope of the copyright owner’s rights and on the question of infringement.

The result of the Full Court’s approach is that a ‘television broadcast’ is capable of almost infinite subdivision, to either a transmission of visual images that lasts for more than a fraction of a second, or ‘each and every visual image’ broadcast. The copyright broadcast takes its shape only in infringement proceedings, by reference to the amount copied or re-broadcast. For example, if in any given hour of broadcasting, a competitor re-broadcast one second, one minute or the entire hour of the broadcast, then this would infringe copyright in the entirety of three copyright broadcasts, respectively lasting one second, one minute and one hour. It is suggested that such an interpretation is unsustainable, and rather that, for the reasons outlined below, a ‘television broadcast’ should be seen as coterminous with a unit of programming.

While there is no simple way of demarcating the scope of a copyright work or subject matter, a number of methods may prove useful. The first method is through the legislative treatment of the subject matter. As indicated, the definition of ‘television broadcast’ in s10(1) does not establish the outer limits of the scope of the property. It does, however, state that a broadcast means ‘visual images’. Thus Finkelstein J’s statement that copyright subsists in each and every image broadcast cannot be sustained — at the very least a plurality of images is required.

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43 See generally Brad Sherman & Lionel Bently, The Making of Modern Intellectual Property Law: The British Experience, 1760-1911 (1999) at 192–193, arguing that unlike patents, designs and trade marks, where the scope of the property was determined through representative registration, copyright law deals with the object itself rather than a representation thereof, leaving the courts to decide how the nature and limits of the object should be defined.

44 Full Court Decision, above n12 at 419 (Sundberg J), 436–437 (Hely J).
45 Id at 419 (Sundberg J), 422 (Finkelstein J).
46 Id at 436 (Hely J).
48 See also Data Access Corporation v Powerflex Services Pty Ltd (1999) 202 CLR 1 at 27, where Gleeson CJ, McHugh, Gummow & Hayne JJ held in part that individual words were not ‘computer programs’ as defined in s10(1) because each word was not a ‘set of instructions’.

49 See generally Brad Sherman & Lionel Bently, The Making of Modern Intellectual Property Law: The British Experience, 1760-1911 (1999) at 192–193, arguing that unlike patents, designs and trade marks, where the scope of the property was determined through representative registration, copyright law deals with the object itself rather than a representation thereof, leaving the courts to decide how the nature and limits of the object should be defined.
The legislative history of the broadcast copyright provisions in the Copyright Act and its UK counterpart, although sparse, provides greater assistance, and tends to support the notion that this ‘plurality of images’ must constitute a unit of programming. In 1952, the Gregory Committee in the UK recommended that a broadcaster be afforded ‘the right to prevent the copying of its programmes either by re-broadcasting, or by the making of records’. It has been suggested that ‘these recommendations were adopted’ in s14 of the Copyright Act 1956 (UK). If it were the case, as held by the Full Court, that the UK legislature departed from the recommendations of the Gregory Committee and the Board of Trade and intended for broadcast copyright to extend over every single image contained within a program, it might be expected that there would be some acknowledgment of this in the history of the UK Act, yet none is apparent. In Australia in 1959, it was proposed in the Spicer Report that television broadcasters should have protection ‘against the kind of pirating envisaged by section 14’ of the UK Act. While there are no explicit statements in the Spicer Report as to the scope of a broadcast, it was suggested that one of the rights in s14 to cause a television broadcast to be seen or heard in public was a right of public display of a program. Again, no statements during the passage of the Copyright Act 1968 (Cth), which

50 Copyright Act (1956), 4 & 5 Eliz II, c74.
52 United Kingdom, Report of the Copyright Committee, Cmnd 8662 (1952) (hereinafter ‘Gregory Committee’) at para 328 (Recommendation 31) (emphasis added). See also at paras 117, 186, 192. See also the discussions of clause 14 of the Copyright Bill 1956 (UK) in UK Public Record Office Document BT 281/14, Board of Trade, Solicitor’s Department, Bill Papers, Copyright Act 1956: Department Papers: ‘The prohibition on the copying of the programme, for example the manufacture of a gramophone record from a sound broadcast or a film from a television broadcast, is in general lines with current thinking’ (emphasis added). See further UK Public Record Office Document BT 209/533, Board of Trade, Patent Office and Industrial Property and Copyright Department, Copyright Bill 1955–56: instructions and memoranda prior to introduction in Parliament, in which the President of the Board of Trade, in minute 5, made it clear that broadcast copyright was to subsist in programs.
53 Copinger, above n22 at para 3–61.
54 Full Court Decision, above n12 at 428 (Hely J).
55 See, for example, the lack of any comment in the Second Reading Speeches in the House of Lords and the House of Commons: Mr P Thompson, UK, House of Commons, Parliamentary Debates (Hansard), 4 June 1956 at cols 498–559; UK, House of Lords, Parliamentary Debates (Hansard), 15 November 1955 at cols 715–811. Similarly, there is nothing in the 1958 edition of Copinger to indicate that the provisions of the Copyright Act 1956 (UK) were intended to extend beyond the recommendations of the Gregory Committee, see FE Skone James & EP Skone James, Copinger and Skone James on the Law of Copyright (9th ed, 1958) at 294–295, 297–298.
57 Id at paras 292–3. See also at para 286: ‘there seems to us, at least in the case of television, to be a case for protection against the display in public to a paying audience of the programme received.’
incorporated the relevant recommendations of the Spicer Report, indicate that the scope of a broadcast was to be broader than this.58 In addition, the High Court may take some guidance from subsequent developments in the UK. In 1977, the Whitford Committee recommended that the UK law provide copyright in ‘the diffusion of programmes other than broadcast programmes’,59 leading to the introduction of s14A to the Copyright Act 1956 (UK) which provided copyright protection for ‘cable programmes’. Similarly, under the Copyright, Designs and Patents Act 1988 (UK) (which maintains protection for cable programmes),60 there are provisions that treat the person making a broadcast as the person who transmits or provides ‘the programme’ included in the broadcast,61 as well as a defence allowing the BBC to make copies of its broadcast programmes.62 The fact that no-one marked any of these provisions as in any way changing the scope of broadcast copyright63 strongly suggests that under the 1956 Act, broadcast copyright subsisted in a broadcast program. As a result, it is suggested that under the Copyright Act 1968 (Cth), a broadcast should be treated in the same manner.

A second method that may assist in defining the boundaries of a broadcast is through an economic analysis of broadcast copyright. The problem is that various modes of economic analysis yield different results. A neoclassicist approach suggests that copyright is a mechanism of ‘market facilitation’, allowing works to be transferred in the market to those that value them most highly, and that as such,

58 In the Second Reading Speech for the 1968 Bill, the Attorney–General noted that the Bill established a ‘new category of protection’ for television broadcasts, in addition to the provisions under the Broadcasting and Television Act 1942 (Cth). These provisions prohibited the Australian Broadcasting Commission or a licensee of a commercial broadcasting station from broadcasting ‘the programme’ of another broadcasting station (see s121(1)). The Attorney–General’s reference to a ‘new category of protection’ suggests that under the Copyright Act broadcasters were to be granted rights in their broadcasts – it does not suggest that the scope of these broadcasts was any different from before: see Sir Nigel Bowen, Commonwealth of Australia, House of Representatives, Parliamentary Debates (Hansard), 16 May 1968 at 1533.

59 United Kingdom, Report of the Committee to consider the Law on Copyright and Designs, Cmnd 6732 (1977) at para 464 (emphasis added). See also at paras 465, 468 (Recommendation (x)).

60 Sections 1(1)(b), 7(1).

61 Section 6(3).

62 Section 69(1).

63 During the passage of the Cable and Broadcasting Bill 1984 (UK), it was suggested that the new s14A of the 1956 Act was intended to provide cable operators with copyright in their own programmes comparable in extent to the right given to broadcasters, see Baroness Trumpington, UK, House of Lords, Parliamentary Debates (Hansard), 2 February 1984 at cols 846; Viscount Long, UK, House of Lords, Parliamentary Debates (Hansard), 1 March 1984 at cols 1422–1423. In the debate over the Copyright, Designs and Patents Bill 1988 (UK), s6(3) was seen as significant only because it meant that ‘programme contractors’ were to be treated as broadcasters, see Lord Young of Graffham, UK, House of Lords, Parliamentary Debates (Hansard), 2 November 1988 at cols 201–203. Section 69(1) in its present form was not commented on at all, see Lord Beaverbrook, UK, House of Lords, Parliamentary Debates (Hansard), 29 March 1988 at cols 655–656. In addition, commentaries on these new provisions did not suggest that they had altered the scope of copyright in broadcasts, see Gerald Dworkin & Richard D Taylor, Blackstone’s Guide to the Copyright, Designs and Patents Act 1988 (1989) at 29–30, 47; Copinger, above n22 at paras 4–73, 7–134, 9–102.
owners should be provided with extensive rights over all valuable uses of their works. On this basis, the fact that every visual image in a broadcast has market value is a reason for granting rights over it. The problem with such an approach is not only that it allows an unspecified notion of the ‘market’ to usurp the role of the law in determining what should be protected, but also that it leaves little scope for recognising the social benefits possible if parties are able to use parts of others’ copyright material. An alternative method is to focus on the incentive theory of copyright protection and ask what is the minimum scope of protection necessary to ensure that broadcasts are provided. The broadcasting industry is structured around the provision of programs rather than mere sequences of images. Broadcasters expend significant investment in the organisation of programs to be broadcast. Ratings and (for commercial networks) advertising revenue are determined primarily by reference to units of programming. Broadcasters do not require incentives to produce mere collocations of visual images and sounds, regardless of length or structure, but rather, as recognised by the UK Board of Trade in 1956, to produce programs. Thus while the limitations of an ‘incentive’ approach are acknowledged, it does perhaps suggest that copyright should subsist in the broadcast of programs.

A third method that may be employed is to use experience and common sense to determine the parameters of the copyright subject matter. Such an approach can be seen in Hyperion Records Ltd v Warner Music (UK) Ltd, in which an owner of copyright in a sound recording lasting over five minutes argued that the eight note excerpt copied by the respondents itself constituted a discrete sound recording. Mr Hugh Laddie QC, sitting as a deputy Judge of the High Court, rejected this argument, stating:

I do not accept that all copyright works can be considered as a package of copyright works, consisting of copyright in the whole and an infinite number of subdivisions of it... If the copyright owner is entitled to redefine his copyright work so as to match the size of the alleged infringement, there will never be a requirement for substantiality.

64 See Neil Netanel, ‘Copyright and a Democratic Civil Society’ (1996) 106 Yale LJ 283 at 309.
65 Id at 325–336; Sherman, above n47 at 105.
66 As acknowledged by Nine, see Trial Decision No 1, above n2 at 260 (Conti J).
67 See UK Public Record Office Document BT 281/14, above n52: ‘The production and emission of the programmes calls for considerable financial outlay and the exercise of considerable skill and it is nothing more than natural justice that the BBC or ITA (in the legitimate interests of the programme contractors) should be given power to control any subsequent copying of these programmes by any means whatsoever’. See also Newspaper Licensing Agency Ltd v Marks and Spencer Plc [2001] 3 WLR 290 at 295, 296, where Lord Hoffmann held that the term ‘published edition’ should be interpreted as understood by publishers in the publishing trade.
69 Sherman, above n47 at 107–108.
70 Unreported, UK High Court, Mr Hugh Laddie QC, 17 May 1991.
71 Id at para 17. See also CCH Canadian Ltd v Law Society of Upper Canada, above n48 at 461 (Rothstein JA): ‘some limitations must exist on the degree of disaggregation that is permissible when characterising a work’.
Deputy Judge Laddie QC considered that a copyright work ‘must have a beginning, middle and end’ — an organic, identifiable form. Elements of this approach can be seen in Conti J’s first judgment. His Honour held that a ‘sensible and practical’, and ultimately the ‘only feasible’, measure of the scope of a television broadcast was by reference to units of programming. Like Deputy Judge Laddie QC, Conti J was also concerned that a ‘television broadcast’ should be defined in such a way that the substantial part requirement could meaningfully operate.

While such an intuitive approach does provide a workable solution, the obvious problem with it is that it is based entirely on a judge’s preconceived notions of what the subject matter is. However, there are a number of additional factors that lend support to the conclusion that it is ‘sensible and practical’ to treat copyright broadcasts as coterminous with programs. First, it establishes an identifiable external reference point for determining what is a ‘whole’ broadcast, which is in keeping with the way the term is used in the Copyright Act. Secondly, such an approach sits comfortably alongside the legislative history of the broadcast copyright provisions. Thirdly, it ensures that a ‘measure of symmetry’ is maintained between rights in broadcasts and cinematograph films, such that the interests of broadcasters are not unduly privileged over the creators of underlying copyright material.

Thus, although there is no definitive method of delimiting the scope of copyright subject matter, whichever method is employed tends to lead to the conclusion that television broadcast copyright should subsist in a broadcast program.

B. What is a Substantial Part of the Broadcast?

If the High Court does define the scope of a television broadcast in these terms, it will then need to decide whether Ten has made cinematograph films of, and re-broadcast, a ‘substantial part’ of Nine’s broadcasts for the purposes of ss87(a) and (c) respectively.

Although there is no clear indication as to how the test of ‘substantial part’ was intended to operate when it was introduced into the Copyright Act 1911 (UK) or its Australian counterpart, it has been generally accepted that the test is one of ‘fact and degree’ which refers more to the quality of what is taken than the quantity. The test has generally been bound up with questions of ‘originality’,

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72 Hyperion Records Ltd v Warner Music (UK) Ltd, id at para 17.
73 Trial Decision No 1, above n2 at 270.
74 Id at 272.
75 Id at 270. See also CCH Canadian Ltd v Law Society of Upper Canada, above n48 at 422 (Linden JA), 460 (Rothstein JA).
76 Trial Decision No 1, id at 272.
77 1 & 2 Geo V, c46, s1(2).
78 Copyright Act 1912 (Cth) s8.
79 Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 WLR 273 (hereinafter Ladbroke) at 283 (Lord Evershed).
80 Id at 276 (Lord Reid), 283 (Lord Evershed), 288 (Lord Hodson), 293 (Lord Pearce); Autodesk Inc v Dyason (No 2) (1992) 176 CLR 300 at 305 (Mason CJ).
namely whether a sufficient degree of an author’s skill or labour in creating an original copyright work has been appropriated.\textsuperscript{81} With few exceptions, the test has been applied restrictively, operating as little more than a de minimis threshold.\textsuperscript{82}

The question of how the test should be interpreted in respect of non-original copyright subject matter has been addressed in relation to published editions. Both the Full Federal Court in *Nationwide News Pty Ltd v Copyright Agency Ltd*\textsuperscript{83} and the House of Lords in *Newspaper Licensing Agency Ltd v Marks and Spencer Plc*\textsuperscript{84} held that published edition copyright protects the product of skill, labour and judgment in the overall presentation of the edition, and that whether a substantial part has been taken is to be determined by reference to the quality of the taking.\textsuperscript{85} In *NLA*, Lord Hoffmann held that the question was whether there had been an appropriation of ‘sufficient of the relevant skill and labour’ in the presentation of the edition.\textsuperscript{86}

The problem with focusing on the skill, labour and judgment involved in the creation of non-original copyright subject matter is that it conflates the rationale for granting copyright protection with questions of subsistence. Published edition copyright may well have been granted by the legislature as a reward for the time and labour expended by publishers.\textsuperscript{87} However, these are not essential elements for the purposes of subsistence of copyright, since published editions do not have to be ‘original’. Since it is immaterial whether any skill, labour or judgment is involved in the creation of a copyright published edition (as distinct from, for example, certain literary works), it is difficult to see how the appropriation of these elements could be relevant for the purposes of infringement. Similarly, although broadcast copyright may have been granted in recognition that a broadcaster ‘assembles its own programmes and transmits them at considerable cost and skill’,\textsuperscript{88} these factors are not required for copyright to subsist in a broadcast. Therefore, factors such as ‘the quality of presentation and screen appearance of the program which has been taken’\textsuperscript{89} should not be relevant in the ‘substantial part’ inquiry.

This raises questions as to whether it is appropriate to refer to the ‘quality’ of the taking in relation to non-original subject matter. For example, because broadcast copyright subsists in the actual images and sounds broadcast, it is unlikely that the quality of the broadcast (as distinct from the content) will change.

\begin{footnotesize}
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\item[81] *Ladbroke*, id at 287–288 (Lord Hodson), 293 (Lord Pearce). This focus on the originality of the part taken has been approved by the High Court in respect of computer programs: *Autodesk Inc v Dyason (No 2)*, id at 305 (Mason CJ), 312 (Brennan J); *Data Access Corporation v Powerflex Services Pty Ltd*, above n49 at 32–33 (Gleeson CJ, McHugh, Gummow & Hayne JJ).
\item[83] (1996) 65 FCR 399 (Jenkinson, Burchett & Sackville J) (hereinafter *Nationwide*).
\item[84] [2001] 3 WLR 290 (hereinafter *NLA*).
\item[85] *Nationwide*, above n83 at 418–419 (Sackville J); *NLA*, id at 298 (Lord Hoffmann).
\item[86] *NLA*, id at 297, 298.
\item[87] *Nationwide*, above n83 at 416–417 (Sackville J).
\item[88] Gregory Committee, above n52 at para 117.
\item[89] Trial Decision No 1, above n2 at 274 (Conti J).
\end{itemize}
\end{footnotesize}
throughout the duration of a program.90 As a result, a variety of primarily quantitative tests of substantiality have been proposed for non-original subject matter. It has been suggested91 that it may be apt to rely on 'the rough practical test that what is worth copying is prima facie worth protecting',92 for example by asking whether the part taken has 'discernible market value'.93 However, this 'test' was never intended to provide guidance as to what constitutes a substantial part of copyright subject matter,94 and it has been criticised as effectively proscribing any act of copying.95 It has also been recommended that for non-original subject matter, a substantial part must be 'anything that is not de minimis'96 or something that is 'real and consequential' rather than 'trifling and insignificant'.97 There is something to be said for such comments — given that the taking of a photograph of any part of a broadcast may constitute an infringement,98 it may well be the case that each of the excerpts copied and re-broadcast by Ten, although of relatively short duration in relation to the programs from which each was taken, is a substantial part of each of Nine’s broadcasts.

Yet there may be another way to look at the question of ‘substantial part’ which focuses more on the use made of the taking. In Hawkes & Son (London) Ltd v Paramount Film Service Ltd, Slesser LJ indicated that the ‘substantial part’ test in the Copyright Act 1911 (UK) preserved the pre-1911 case law allowing ‘fair use’ to be made of the copyright material.99 In one such ‘fair use’ case, the following factors were held to be relevant:

the nature and objects of the selections made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profits, or superease the objects, of the original work.100

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91 Copinger, above n22 at para 7–96.
92 University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 601 at 610 (Peterson J), quoted with approval in Ladbroke, above n79 at 279 (Lord Reid), 288 (Lord Hodson), 293–294 (Lord Pearce).
93 Laddie et al, above n38 at para 8.37.
94 The ‘test’ was propounded by Peterson J in the context of determining whether subject matter could be regarded as an original literary work.
95 Nationwide, above n83 at 417–418 (Sackville J); Hyperion Records Ltd v Warner Music (UK) Ltd, above n70 at para 31 (Deputy Judge Laddie QC); Lionel Bently, ‘Sampling and Copyright: Is the Law on the Right Track? (Part II)’ [1989] JBL 405 at 406. See also R v Licensing Authorities, ex parte Smith Kline & French Laboratories Ltd [1990] AC 64 at 106 (Lord Templeman).
96 Laddie et al, above n38 at para 8.37.
97 Id at para 7.59.
98 Copyright Act 1968 (Cth) s25(4)(a).
99 [1934] Ch 593 at 606, quoting Chatterton v Cave (1878) LR 3 App Cas 483 at 492 (Lord Hatherley).
100 Scott v Stanford (1867) LR 3 Eq 718 at 722 (Sir W Page Wood V–C), quoting Folsom v Marsh (1841) 2 Story 100 at 116 (Story J), a Massachusetts District Circuit Case on 'fair abridgement'.
In *Nationwide*, Sackville J suggested that these factors were relevant in determining the ‘quality’ of the part of a published edition taken,\(^{101}\) although it is perhaps preferable to see them as ‘other factors’ going to the question of ‘substantial part’.\(^{102}\) If these factors can be taken into account under Australian law, it is at least arguable that they support a finding that Ten has neither copied nor re-broadcast a substantial part of Nine’s broadcasts.\(^{103}\) Although Nine characterised Ten’s purpose as identical to Nine’s own, namely to ‘fill up TV screens with footage that people want to watch’,\(^{104}\) this assumes that visual images have the same value regardless of the context of their dissemination. Ten’s purpose in re-broadcasting the excerpts was not simply to demonstrate what had been broadcast by Nine, but rather to recontextualise, analyse and problematise the meanings of the images contained in the excerpts. Further, it is suggested that Ten’s re-broadcasts do not affect the market for Nine’s broadcast programs. Although the parties are in competition with each other, a factor that generally favours the copyright owner,\(^{105}\) it is difficult to see how the value of Nine’s programs as a whole is affected by Ten’s conduct,\(^{106}\) since the objects of such programs are not superseded and the market for them not supplanted. These factors, when combined with the length of the excerpts relative to Nine’s programs, may well indicate that the parts copied by Ten were not substantial, and that Ten has not contravened ss87(a) and (c).

5. **Conclusion**

The issues in this case raise complicated questions of statutory interpretation and of the definition and application of key terms in the *Copyright Act*. It is suggested that although these questions are not easily resolved, the approach of the Full Federal Court in its interpretation of both ss87(a) and (c) was in error, and Ten’s appeal should be allowed. Ultimately, the High Court’s decision will provide some certainty in this vague area of copyright law. If the approach recommended in this article is heeded, the High Court’s decision may also provide some guidance on two of the more difficult aspects of copyright law, namely how copyright subject matter is to be defined and how a ‘substantial part’ of that subject matter is to be determined.

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101 *Nationwide*, above n83 at 419.
103 As was held in Trial Decision No 1, above n2 at 288 (Conti J).
104 Id at 265–266.
105 See Bently, above n95 at 408.
106 See *Cambridge University Press v University Tutorial Press* (1928) 45 RPC 355 at 343–344 (Maugham J).
Books


The first edition of this book appeared a generation ago, in 1974. The second appeared in 1983 and the third in 1990. The delay in producing the current edition has thus, by the standards of the author, been considerable, and, for the many lawyers who use and depend on the work, most painful.

To some extent the author’s claims are modest. He says that the book ‘analyses and synthesises’ the cases that have come to his attention and ‘records’ legislative changes. He expresses the hope that the book remains a ‘work of scholarship’. A larger claim is the truthful claim that the book has been rewritten from start to finish — a demanding technique rarely followed by those who prepare the second or later editions of law books, but one which substantially increases the tightness and coherence of the legal analysis which results. The author rightly complains of the volume of case law and of the radical character of the changes that have taken place in it.

It must be at least 30 years since the author began to write the work, and in that time the law of torts in general and the law of damages relating to personal injuries and death in particular have been subject to tense struggles which have had impacts on the surrounding social and even physical landscape comparable with those experienced by the German lands in the Thirty Years’ War.

Like many modern academic authors, the present author views without regret modern judicial tendencies, particularly in cases following Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound (No 2)) [1967] 1 AC 617 and Wyong Shire Council v Shirt (1980) 146 CLR 40, to suck any rigour out of the phrase ‘reasonable foreseeability’. In that respect the decision of the Privy Council not to uphold the approach of Walsh J at trial, and the decision of the High Court not to return to that approach, were very significant steps. Thus the author says approvingly ([2.1.6]): ' "Foreseeability" has proved to be a highly malleable concept and can easily be used to mask what is truly a policy decision as to the extent of responsibility.' The work also exhibits a pervasive assumption (eg [1.1.12]) that most defendants (apart from the State agencies or wealthy self-insurers) are insured, and an assumption (eg [1.2.27]) that the insurers, in well-regulated modern conditions, are always solvent. It is a not very well known fact that insurance companies, like other limited liability companies, have often gone into liquidation in the past. It is a better known fact that two very large insurance companies went into provisional liquidation in early 2001, and that various medical ‘insurers’ recently got into difficulties. These events took place before 12 November 2001, the date of the Preface to this work. This recently experienced combination of a tort of negligence which has a quite low threshold of liability,
very wide classes of defendants who thought they had insurance cover but turned out to lack it, and very wide classes of plaintiffs who found that the defendants they had sued or were expecting to sue were uninsured and had limited assets is thought-provoking, but not discussed. But that gap is no criticism if the work is viewed as a treatise on the law as it is.

There are two striking features of the work when so viewed. One is its range. The other is the usefulness of its exposition. So far as range is concerned, all core elements of the substantive law are dealt with, and many which are ancillary are also dealt with in Chapter 11 (‘Miscellaneous’) and Chapter 12 (‘Appeals’). Each element covered within the range is examined with considerable care and in considerable detail. Only a reader who has worked through particular sections of the text, in this edition or earlier editions, and compared what is said in the cases referred to — which usually comprise all the cases worth referring to — with a view to solving a particular problem can appreciate how skilful and valuable this work is. It will be in only rare instances that such a reader will be let down, or will feel that the treatment is incomplete. Only two instances of that kind have been detected — one as a result of a gloss on recent statutory changes which may turn out not to survive, and one which may lead to a future change in the practical operation of the law, though it cannot be said that it has yet done so.

The first instance is the discussion in [11.6.7] of the inadmissibility, as evidence of its truth, of the history given by a patient to a doctor and reported to the court by the doctor. That discussion might have noted the possible impact of the Evidence Act 1995 (Cth), which applies in Federal Courts in the Australian Capital Territory, the Evidence Act 1995 (NSW) and the Evidence Act 2001 (Tas). The evidence has been said to be admissible at common law as providing the foundation, or part of the foundation, for the doctor’s opinions: Ramsey v Watson (1961) 108 CLR 642 at 649. Section 60 of the legislation provides that the hearsay rule does not apply to evidence of a previous representation that it is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation. It has been said that s60 has made the history admissible as evidence of its truth: R v Welsh (1996) 90 A Crim R 364 at 369; R v Hilder (1997) 97 A Crim R 70 at 83. The reasoning is that the history is a previous representation by the patient to the doctor. It is admitted when narrated to the court by the doctor because it is relevant for a purpose other than proof of the facts intended to be asserted by the patient. That other purpose is the provision of a basis for the doctor’s opinions. Hence, though the previous representation would be hearsay if tendered to prove the truth of the facts asserted, s60 provides that the hearsay rule in s59 does not apply. Some judges disagree with this reasoning. Others point to the importance of limiting the use to be made of the evidence under s136. It may be that the doctor’s report of what the patient said should not be treated as evidence of a previous representation, but merely as evidence of an assumption to which s60 does not apply: Quick v Stoland Pty Ltd (1998) 87 FCR 371 at 378. And it may be that in truth the history is not admissible at all unless it is supported by admissible evidence from the patient or otherwise, or is admissible by reason of s72. The High Court in Ramsay v Watson (1961) 108 CLR 642 at 649
said: ‘if the man whom the physician examined refuses to confirm in the witness box what he said in the consulting room, then the physician’s opinion may have little or no value, for part of the basis of it has gone.’ An opinion with no value is not relevant (both at common law and by reason of s55), and ought not to be admitted, or, if it has been admitted, ought to be excluded. These controversies have practical importance, because though voluminous medical evidence is tendered in personal injury cases, involving copious recitation of histories, scarcely any of the authors of the reports give evidence, and of those that do, hardly any give their evidence in chief structured by reference to specific assumptions about the symptoms of the plaintiff. The precise status of this mass of uncross-examined evidence thus bears analysis.

The second instance relates to paragraphs [12.2.3]-[12.2.6]. Those paragraphs discuss the standard tests controlling the power of intermediate appellate courts to receive further evidence. Though CDJ v VAJ (1998) 197 CLR 172 is referred to, greater emphasis might have been placed on the strong statements at [97]-[103] by the majority (McHugh, Gummow and Callinan JJ) that those standard tests were tests which applied in English common law courts in their original as distinct from their appellate jurisdiction, and that the High Court cases expounding those tests ‘have nothing authoritative to say about the admissibility of further evidence in respect of a statutory power to admit evidence on appeal’. In those cases the High Court ‘was not concerned with the terms of any modern statute expressly conferring on an appellate court a power to receive additional evidence’. To regard those cases ‘as defining the jurisdiction or controlling the discretion to admit evidence in statutory appeals is erroneous’. The first of the conditions is that the evidence could not have been obtained with reasonable diligence for use at the trial. If, pursuant to the approach indicated in CDJ v VAJ, that condition ceased to be an essential condition and became only a discretionary factor of fluctuating weight, there would be a revolution in appellate litigation by opening up the possibility of further evidence going to central questions which, though of vital significance, could have been tendered at trial.

This book has developed into one of the most outstanding treatises ever written on Australian law. It reflects great credit on its author, and on the traditions of legal scholarship on which he draws. But it poses one central paradox. The author makes it plain in the Preface, in Chapter 1, and at other appropriate points throughout the work that he regards the entire structure of the modern law as radically flawed. It is part of a system which is ‘irrational, expensive, wasteful, slow and discriminatory’: p x. He has long wanted it to be replaced by ‘a social insurance scheme that is properly integrated into the social security safety net that we must continue to provide”: p xi. He attacks the four basic principles underlying the law: the compensatory principle on the ground that it is said to reproduce existing inequalities, and even increase them by transferring wealth from the poor to the rich; the rule that damages are recovered in a lump sum on a once-and-for-all basis, ‘inevitably prove to be wrong’, creates impossible tasks for judges and leads to under-compensation; the lack of court control over how the money awarded as damages is spent, with the result that
despite the payment by the defendant, the community at large often has to meet the needs of an improvident plaintiff through tax-funded social security, and with the risk of advantaging the plaintiff’s relatives rather than the plaintiff; and the onerous way in which the placement of the burden of proof on the plaintiff can operate. Yet the passionate disapproval which the author has of the present law does not distort his exposition of it or otherwise damage the quality of that exposition. Though it is not unprecedented, it is highly unusual for so substantial a work to proceed through four editions over three decades in the hands of a single author, and there will be widespread gratitude that this author has been able to perform with success the enormous tasks involved for the fourth time.

JUSTICE JD HEYDON

Justice of the High Court of Australia

The Brennan Legacy is not, as its main title might suggest, a full biography of Sir Gerard Brennan, nor is it a comprehensive assessment of his outstanding contribution to the law generally in Australia. With some later papers added, it is largely a collection of papers presented at a special conference convened by the editors in 1998 in order to honour the contribution of Sir Gerard to administrative law in Australia.

The nine essays in the collection are promoted as having three themes: judicial review, human rights (including the impact of international law) and administrative tribunals.

One might consider the value of the publication partly in terms of whether it contains worthwhile novel contributions to current significant debates on these themes. My opinion is that this collection is somewhat limited by its origins in a conference (of a particular kind) that took place some five years ago. However, on balance I think it contains enough of value. Any survey of current issues in Australian administrative law might include the following as ‘hot topics’: the treatment of privative clauses in relation to attempts through the legislature to narrow the scope of judicial review; the distinction between jurisdictional and non-jurisdictional error; and the content of the ‘legitimate expectations’ principle. Wider debates in the field include the effect on the availability of public law remedies of ‘outsourcing’ of government functions, and the future composition and function of merits review bodies. While I consider the extent of treatment of some of these themes below, that Sir Anthony Mason, Sir Gerard himself and other distinguished public lawyers offer background, comment and reflection on these and other issues is perhaps a recommendation in itself.

Readers whose interests lie outside administrative law should not be too quick to pass over the publication. True, the first major theme of the collection is a chronicle of the obstacles facing the realisation of the package of reforms that gave birth to the Commonwealth Administrative Appeals Tribunal (the AAT) in the 1970s, and the significance of Sir Gerard’s inaugural presidency of that tribunal. However, the essays address profound political and societal issues. Sir Gerard’s own essay discusses elemental principles of law and government in a way that is both of general interest and that gives particular force to the other essays on the administrative review theme. Sir Gerard’s argument is well worth a rough description.

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1 Robin Creyke and Patrick Keyzer are both well-known Australian public lawyers and are on the academic staff of the Law Faculty, the ANU, Canberra, and the Law Faculty, the University of Technology, Sydney, respectively. The conference formed part of the annual Public Law weekend of the Australian National University.
The necessary mechanism to review the exercise of power in a democracy is part political, part legal. Generally, the mechanisms for review of legislative power (judicial review of defined and limited law-making powers) and of judicial power (appellate procedures) have worked well, but the review of executive power is more problematic. The Constitution provides for legal review of the executive by the courts (to effectuate the rule of law). It also provides for political review of executive power, whereby the executive is responsible to Parliament. This political review and scrutiny of the executive is appropriate because issues of policy are appropriately reviewed in a political forum. But, partly as a result of two World Wars, executive power has grown massively and well beyond the practical capacity of Parliament to review. This led to recommendations that resulted, by way particularly of the Kerr Committee and its report, in the ‘new administrative law’ package including the AAT, in order both to provide some opportunity, outside the court system, for the citizen to challenge the ‘vast range of powers and discretions … which may detrimentally affect the citizen’ and to produce ‘better decisions’ all round.

In their affectionate and entertaining contributions, Daryl Davies, Justice Margaret Balmford and Stephen Skehill all relate the early, uncertain days of the AAT, the existence of which (and of the many bodies modelled on its success) many of us will have come to take for granted. Skehill reminds us that challenge by the average citizen to the government ‘simply was not a frequent or effective part of Australian public administration … it would not have been unprecedented for the new regime to be quietly emasculated either overtly by the Parliament … or through the subterranean machinations of the bureaucracy’. He usefully shows how the change that the package represented in the culture of government was so profound and ‘its implications for ministerial and bureaucratic powers were so far-reaching … that it is truly remarkable that the package ever became a reality.’

The success of the new regime depended upon balance between the rights and interests of the public and those of the bureaucracy. The essayists all show that it was not altogether clear whether the AAT was to follow a more administrative model (simply another decision-making tier in the bureaucracy) or whether, and if so in what degree, it would take on more independent, process-based judicial features. The Act establishing the tribunal was remarkable for how little it contained about the intended character of the tribunal. What all three essays emphasise is how, through administrative leadership and actual decisions, and through establishing a relaxed, less formal but overall judicial model, Sir Gerard set the culture of the AAT and earned its acceptance with citizens and bureaucrats alike. It is in this sense that (as the subtitle of the collection indicates) Sir Gerard enabled legal orthodoxy to open up the corridors of administrative power, in a way that would to help ensure that decisions are not made in excess of power and are

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made according to the conditions governing the exercise of the power. Sir Gerard was also acutely conscious of the tribunal’s dual, longer-term purpose: to have the normative effect of improving the quality of governmental primary decision-making generally.

The various essays on the history and early years of the AAT and merits review are valuable as a record of Sir Gerard’s immeasurable contribution in this area. However, Sir Gerard is substantially alone among the contributors in discussing the future of merits review and review bodies in Australia, on which aspect the other essays constitute merely interesting background. Having in his essay documented some of the problems faced by the AAT, Sir Gerard considers critically the attempted transformation of mechanisms for administrative review following the *Better Decisions* report of 1995, opining that the proposed reforms would impair the independence, competence and legal capacity of the AAT.

A second core theme of the collections is judicial review. Sir Anthony Mason’s paper documents Sir Gerard’s contributions in this area, considering Sir Gerard’s preferred theory of the justification for review by reference to major controversial issues in administrative law. This is useful (and authoritative), given that the High Court has, since the date of this publication, considered a number of these issues. For example, there is discussion of Sir Gerard’s views on the protection of individual rights in a system of legislative supremacy. Sir Gerard’s approach of proper deference and his opposition to a Bill of Rights are discussed.

Another important current issue discussed is the *Teoh* legitimate expectations principle. Sir Anthony observes that ‘Sir Gerard has been a stern opponent of the *Teoh* principle … on the grounds that judicial review provides no remedies to protect interests falling short of enforceable rights’. Sir Anthony considers the principle ‘firmly entrenched but in need of refinement’, to avoid the result reached in recent English case law. Recently, the High Court in *Re Minister for...*

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4 Such as *Re Becker v Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 161, and on issues on which the Act was silent, such as the meaning of ‘merits review’, onus of proof, standing or the need for interests to have been affected, the need for assistance to the Tribunal by the decision-maker including the departmental advocate as a quasi-*amicus curiae*, the taking of evidence, and the vexed *Drake* issue of the proper place for governmental policy in AAT determinations: (1978) 2 ALD 162 (Tribunal), (1979) 2 ALD 60 (Federal Court Full Bench), (1979) 2 ALD 162 (Tribunal, rehearing).

5 *Collector of Customs v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307.

6 There is also very little discussion of tribunals other than at the Commonwealth level, although one is given to infer that the example and tone set at AAT and Commonwealth level have had positive effects in the State government arena in terms of the balance, if one is necessary, between open and efficient government.


Immigration and Multicultural Affairs; Ex parte Lam\textsuperscript{10} has chilled the tendency to read the Teoh principle for more than it really is. The Court emphasised that although the distinction between substantive and procedural expectations is not clear-cut, a legitimate expectation is not a rule of law and cannot convert a procedural expectation into something substantive. Sir Anthony’s position in the essay has been affirmed: that the principle remains only an entitlement to procedural fairness and cannot generate a right to any particular substantive outcome.

Administrative lawyers and students may find useful comments from Sir Anthony, made by reference to Sir Gerard’s contributions, on other topical issues such as the scope and method for judicial identification and application of common law and other ‘external’ values in reformulating legal principle, including the extent of the legitimate normative influence of international law on the common law.\textsuperscript{11} The doctrines of procedural fairness and abuse of process are considered. And both Sir Anthony and Stephen Gageler SC (whose essay is a reply to Sir Anthony’s) treat the often-misconceived distinction between jurisdictional and non-jurisdictional errors of law (maintained in Craig v South Australia notwithstanding Anisminic)\textsuperscript{12} in a way that one may find dispels any lingering confusion.

The proper theoretical basis and justification of judicial review\textsuperscript{13} is a question of some significance, and I found the discussion by Sir Anthony and Stephen Gageler of Sir Gerard’s approach to be valuable, in particular in the light of current debate surrounding privative clauses and the Hickman principle:\textsuperscript{14} what is the approach in judicial review of the exercise of an administrative decision-making power if the relevant statute, by use of ‘privative’ clauses, purports to exclude or immunise the decision from judicial review? Do such clauses protect the decision from review provided the three Hickman grounds of review remain open: whether the constitutional grant of power has been exceeded, whether there has been a ‘narrow’ jurisdictional error, whether the decision is infected with mala fides? Such issues raise difficult questions of how to accommodate separation of powers with any theory of constitutional entrenchment of judicial review, and wider debates about open government.

Sir Anthony’s essay emphasises Sir Gerard’s ‘strong convictions concerning the paramountcy of the rule of law’ and the centrality to his thinking of Sir Owen Dixon’s notion of the proper judicial method: the separation of powers and the limits inherent in the judicial role. The basic constitutional Marbury v Madison


\textsuperscript{11} Mabo (No 2) (1992) 175 CLR 1, 42 (Brennan J).

\textsuperscript{12} Craig v South Australia (1995) 184 CLR 163; Compare Anisminic v Foreign Compensation Commission [1969] 2 AC 147.

\textsuperscript{13} Various justifications are discussed including the powers of judicial review as constitutionally entrenched, the ultra vires theory, as an implied limitation in the relevant statute, or as a creation of the common law.

\textsuperscript{14} R v Hickman; ex parte Fox and Clinton (1945) 70 CLR 598.
premise, that it is ‘the [whole or only] province and duty of the judicial department
to say what the law is’, is demonstrated by Gageler to underlie and inform Sir
Gerard’s notion of the source, nature and limitations of judicial review. He
considers how one might see section 75(v) of the Constitution as an ‘outworking
of the general principle in *Marbury v Madison*’ and so a Constitutional
entrenchment of judicial review.

In his own essay Sir Gerard expresses concern at the recent withdrawal of some
statutory review jurisdiction from the Federal Court in relation to *Migration Act
1958 (Cth)* decisions (‘a conscious incursion [by Parliament] upon the rule of
law’). Sir Gerard’s concerns are ‘not least at the possible embarrassment of the
High Court’, but essentially because ‘to the extent that the courts are impeded from
exercising judicial review of administrative decisions, the rule of law is negated …
[and a] charter of arbitrariness is thereby created’.

The *Hickman* principle as it affects the construction of privative clauses has
recently been considered at length by the High Court in relation to clauses inserted
into Part 8 of the *Migration Act* in late 2001 that have had the effect of narrowing
the grounds of review: *Plaintiff S157/2002 v The Commonwealth* [2003] HCA 2;
(2003) 195 ALR 24. The exchange between Sir Anthony and Gageler, which pre-
dates the Court’s decision, will nevertheless be of interest to those following this
issue. Sir Anthony Mason noted his own, and Sir Gerard’s, continued support for
the *Hickman* principle despite the paucity of elucidation of the ‘inherent
uncertainties’ of its three conditions. Privative clauses enable the legislature to
confine the scope of judicial review by a privative clause because such clauses are
taken by the courts, not as ousting jurisdiction or immunising invalid acts from
review, but as enlarging the authority of the decision-maker to make (non-
jurisdictional) errors of law. Sir Anthony asked whether in this context ‘such a
complex and artificial principle [as the *Hickman* principle] contributes to the
integrity of the legislative and political process’.

Gageler accepts that if privative clauses were ‘taken literally’, they would
permit the executive to ignore (because the courts could not enforce these) legal
limits to its authority and would fundamentally undermine or challenge the rule of
law. But, since the courts approach these clauses as a matter of construction and,
rather than reading down judicial review power, they read up the statute so that
limits to the power (to make errors) are expanded, there is in fact no complexity
and the integrity of the system is preserved. The courts are not deprived of their
duty. The executive is not free to trespass across the limits set by the legislation.
‘It is all just a matter,’ Gageler rather airily concludes, ‘of interpreting precisely
where legal limits have been set.’ The debate in these essays is useful as
background to the High Court decision, and Sir Anthony’s reference to

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15 *Marbury v Madison* 5 US 87 (1803), 111 (Marshall CJ); see *Attorney-General (NSW) v Quin*
(1990) 170 CLR 1, 36 (Brennan J). See also *Church of Scientology v Woodward* (1982) 154
CLR 25, 70 (Brennan J): the Australian Constitution is framed upon the assumption of the rule
of law, the enforcement of which is the province (no more nor less) of the judiciary (see *Plaintiff
I found one of the most valuable aspects of the collection to be Sir Gerard’s fairly lengthy discussion of the problems of external review of public power when government enlists a non-governmental entity to perform certain of its functions. Obtaining review of governmental power is one thing: what if the functions (and so decisions) are ‘outsourced’? Particularly where the function is carried out by a private entity under a contract with the government, but in a way that affects the interests of third parties (members of the public), Sir Gerard points out that there may be ‘little incentive for the government to be astute to protect those interests’. And, has a member of the public not lost the possibility of any public law remedy in relation to their affected interest? It would be for the government to seek enforcement of the contract, Sir Gerard explains, if it felt so inclined. Not only would the public be without public law remedy, they would also be without a contractual remedy, unless they could establish themselves as beneficiaries of the contract entitled to sue for performance. Now statutory-based merits review might be inherently susceptible to variation, but what would have happened, in an outsourcing situation, to judicial review, which is not wholly dependent on statute? One could simply state that any exercise of public power attracts (or should attract) public law whether or not the actor wielding the power is a public entity or not. What are the essential features that reveal a power as ‘public’? It is beyond the scope of this review to describe further how Sir Gerard proceeds in his essay to discuss these very interesting issues by reference to judicial attempts in common law countries to identify public power and its actors and source, in order to establish if, when and why a public remedy might be available.

Is a paper on any particular topic missing, the inclusion of which might have made the collection more complete? It is difficult to say, the collection is somewhat of a mixed bag. I have not found space in this review for consideration of the essays on Sir Gerard’s contribution to human rights law, nor Robin Creyke’s discussion of Sir Gerard’s extra-curial statements on issues of public law and administration. The editors intend this book as a form of tribute. Deep affection and respect for Sir Gerard is clearly apparent in the various essays. A clear impression is left with the reader of Sir Gerard’s contributions and achievements not simply as a judge but also as a leader and administrator of courts and tribunals, and a leading ‘public lawyer’ in the profounder sense of that phrase. Sir Gerard has made both a direct and an indirect contribution to Australian society and its law.

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16 Appended to the essays is a (select) bibliography of Sir Gerard’s speeches (1978–1998) on public law topics. Creyke’s introductory opinion is that ‘a judge’s contribution to the law and to the community is to be measured as much by [public and community participation and speaking] as by his or her judgments’. I do not agree with this view. I doubt that Sir Gerard would agree.
and government. However, I was left uneasy that the work merited such an ambitious main title as ‘The Brennan Legacy’. That legacy goes well beyond what this collection covers, and the title would suit a more broad and substantial publication.

The editors also intended the collection to ‘represent a striking account of the nascence of modern Australian administrative law’. That one can consider embarking on any account of the flowering of administrative law in this country by tracing the singular contributions of Sir Gerard, goes some way towards illustrating the significance of his contribution.

Open and transparent government may be a political entitlement or expectation, at least, of those living in a constitutional representative democracy. Plainly, the executive government must act according to law, but how is this statement made effective? The collection helps show that Sir Gerard’s legacy endures in what should always be an area of great public concern: the balance between citizen and governmental interests, and the measures for ensuring the exercise of public power is open and in accordance with the rule of law, and accountable to what is its political, moral and perhaps its ultimate legal source, the public itself.

I have described how Sir Gerard in his essay notes the great increase in executive power necessitated by, in particular, the 1939–1945 World War, and the practical problems this created for supervision of the executive. The new administrative law was an attempt to reduce this political review deficit. Whether or not one considers government as effectively an ‘elected dictatorship’, in my opinion it is possible (without being alarmist) to observe the potential and temptation for an incremental, steady ‘creep’ in executive power in an age defined by, amongst other things, vulnerability to remote globalised economic and other forces, and a war on terrorism. By its very nature, any struggle against terrorism will be a long-term one and, like the Cold War, is likely to pervade many aspects of life. No doubt the people do not wish their executive to be hamstrung in matters essential to the conduct on our behalf of its anti-terror campaign. There exist of course some powers of a prerogative nature in this area. But in most areas of life, transparent and open government should not be undermined, even if inadvertently,

20 See on this Secretary of State v Rehman [2001] 3 WLR 877, especially at [49]ff (Lord Hoffmann), albeit with the caution expressed by Lord Steyn at [31]. See also Al Masri, above n8 [130].
21 See Ruddock v Vardalis (2001) 183 ALR 1; see (2002) 13 Pub LR 89. While it may be for the courts to define the limits of prerogative executive power, its actual exercise might still be non-reviewable in some areas. The source and scope of the modern executive power and its justiciability I think requires more attention by constitutional scholars, as does the notion of ‘deference’ by the judiciary in relation to both the executive and the legislature.
in the course of this struggle. Nourishing the rule of law in such an environment is a display of grace under fire. It is preferable that Parliament prescribes for necessary governmental action through law, than that long-term, undefined necessities lead to closing up of government and a creeping widening of the general province roam ed by the executive.

Despite what one might see as some drawbacks, in addition to including reflective authoritative contributions on issues of current significance, the collection under review is, in conclusion, valuable in helping to record aspects of Sir Gerard’s legacy in the field of Australian administrative law.

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