

AUSTRALIAN BUSINESS LAW REVIEW

Volume 42, Number 1

February 2014

EDITORIAL 3

ARTICLES

In-house counsel advising on foreign law: Is it privileged? – *Dan Butler*

This article considers whether legal advice on the law of a foreign jurisdiction is privileged. This question is particularly pertinent to in-house counsel. The globalisation of commerce and the growth of multinational companies have seen an increase in the number of in-house counsel whose role may extend into jurisdictions in which they are not admitted. The Queensland Supreme Court was asked recently in *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 (hereafter *Aquila Coal*) to consider whether advice provided by a foreign lawyer on Queensland law was privileged in circumstances where the foreign lawyer was not admitted in Australia. The decision is significant because the court found, no doubt to the relief of many in-house counsel, that privilege can attach to such advice. This article discusses the decision in *Aquila Coal*, together with the broader privilege issues that it raises, and considers its implications for the in-house profession. 5

Queensland shale gas – a rocky road ahead for the new kid on the block?

– *Michael Walton*

Experts have known for years about the vast deposits of shale gas throughout the world but technological difficulties and the high cost of producing shale gas made it impractical to consider as a serious energy source. However, following technological advancements pioneered in the United States in the 1990s, shale gas is now “rocking the world”. The true extent of shale gas resources in Australia is unknown but the potential is enormous. Shale gas exploration and production in Australia is in its infancy but momentum is now growing. The purpose of this article is to consider the issues facing the industry in Australia and in particular Queensland and to assess whether the existing regulatory framework has the capacity to regulate the industry in an effective and transparent manner to create acceptance and a “social licence” to operate. 16

Insurance and trust: Lessons from the Christchurch Cathedral – *Julie-Anne Tarr* and *Myles McGregor-Lowndes*

This article examines important insurance and trust law issues that may confront trustees charged with the governance and protection of unique properties with broad community and heritage significance. Often trustee roles are assumed by community leaders without full appreciation of the potential difficulties and consequences when unforeseen circumstances arise. Three recent New Zealand court decisions in relation to the deconstruction and repair of the Christchurch Cathedral and to the interim construction of a transitional “cardboard Cathedral” highlight how difficult – and legally exposed – the role of trustee can be. The Cathedral cases go to the heart of defining the core purpose for which a Trust is created and examine the scope of discretion in fulfilling this charge its Trustees carry. Arising in the wake of the devastating Christchurch earthquakes, the

Cathedral’s Trustees were called upon to consider the best directions forward for a crippled and dangerous building subject to potential demolition, the wellbeing of the Cathedral’s direct community, and the broader heritage and identity factors that this “heart” of Christchurch represented. In the context of a seemingly grossly underinsured material damage cover – and faced with broader losses across the Diocese’s holdings – the Trustees found that their sense of mission failed to gel with that of a community-based heritage buildings preservation trust. The High Court had to consider how monies received under the material damage policy could be applied by the Trustee in deconstructing, reinstating or repairing the Cathedral and if monies could be partly deployed to create an interim solution in the form of a transitional cathedral – all this in the context of the site-specific purpose of the Cathedral trust. The cases emphasise further the need to assess professionally the nature and quantum of cover effected to protect against various risks. In addition, in the case of historic or unusual buildings extra care must be exercised to take account additional costs associated with reinstatement so as to substantially retain the character and intrinsic value of such properties.	29
National competition policy: Coming of age – Professor Frederick G Hilmer AO	
Professor Frederick G Hilmer AO, President and Vice-Chancellor of the University of New South Wales delivered the following speech at the Fourth Annual Baxt Lecture on 19 September 2013.	36
COMPETITION LAW AND MARKET REGULATION – Stephen Corones	
The root and branch review of competition law and policy – Robert Baxt AO	46
Agents as intermediaries: When do they compete with their suppliers? – Stephen Corones	50

Editorial

The 2014 calendar year promises to see rather interesting law reform initiatives being pursued to successful conclusions. We now have in power an enthusiastic Liberal National Party Government. Already in progress is our second major inquiry into the banking and financial sectors (many people refer to it as the “Son of Wallis”). David Murray, former chief executive of the Commonwealth Bank of Australia and also the chairman of the futures fund will head a highly qualified team of experts who are required to report to the Federal Government before the end of 2014 on a range of issues, the terms of reference of which were circulated for comment by the Treasurer in late 2013.

Following hard on the heels of the Murray Inquiry will be the “root and branch” review of competition law and policy. At the time of writing the members of the Panel to oversee this important task have yet to be announced (we are advised that finishing touches to the appointment of the panel are occurring as we move to the end of January). Draft Terms of Reference (terms of reference) were released to the States and Territories towards the end of 2013, and whilst they have not been released publicly, in a formal sense, they had already attracted considerable attention from a range of experts and groups within the community. It is expected that the review will occupy nearly 12 months. In this context, it is significant that in this issue of the Review we publish the paper, “National competition policy: Coming of age” delivered by Professor Fred Hilmer, who was the chairman of the 1993 Hilmer Review. The paper by Professor Hilmer was delivered in September 2013 in a lecture series in my name, sponsored by the University of Melbourne. It contains some fascinating insights into what promises to be a challenging and important review of not just our legislation, but also of competition policy. Such a review has not been seen since the *Hilmer Report*.

Whether this “root and branch” review and its terms of reference are too ambitious, whether it is based in part on what many believe to be misconceived concerns about the alleged inadequacies of our competition legislation (especially in dealing with the examination of the behaviour of so-called big business) remains to be seen. In the Competition Law and Market Regulation section of this Review, I have provided an overview of some of the more important matters (my opinion of these) that may be at the forefront of the root and branch review process.

The Senate Economic References Committee (the Committee) will soon be commencing a hearing shortly into the performance of the Australian Securities and Investments Commission (ASIC). The media has been full of commentary concerning the many submissions that have been made to the Committee in relation to the performance of ASIC in a range of matters under its jurisdiction. Interestingly, one critical matter that has received considerable publicity, is ASIC’s processes in examining and prosecuting allegations of insider trading. The *Fysh* case (*Fysh v The Queen* (2013) NSWCCA 284) on insider trading has been one matter that has attracted a significant amount of attention; submissions by Stuart Fysh, who was exonerated (and cleared) by the New South Wales Court of Appeal in relation to allegations of insider trading will be one witness whose oral testimony will be closely examined.

The Future of Financial Advice (FOFA) reforms which were a centre piece of the previous governments pledge to support investors and the superannuation industry, and which contained some further rules (imposing requirements for more disclosure and arguably unnecessary additional “protection” to be implemented by 1 July 2014, are now the subject of further review and draft regulations “watering down” some of the previous legislation, were released for consideration on 29 January. This move has created considerable disagreement in sections of the community and the changes may be delayed if not supported in the Senate.

The controversy over the Treasurer’s “blocking” of the potential acquisition of Graincorp Ltd by overseas interests has led to new calls for a review for our foreign investment rules. Australia, unlike the United States and Canada, for example, has had in place what many would describe as a “broad/brush” approach to this area; significant discretions are vested in politicians which although replicated in other jurisdictions, are not accompanied by more detailed legislation and processes which are productive of “more sunlight” into the processes, with the result of greater transparency Calls are being made for greater flexibility, on the one hand, and more “protection” on the other whilst a third stream seeks a more evenly balanced review process in dealing with such matters.

Taxation reform will also be a matter of significant concern during 2014. Already the government has promised to review a range of legislation which had been proposed over the last few years of the previous government; the proposals to remove some of this legislation were not progressed and more “progress” promise by the team.

Of course, the government will do its best to repeal both the carbon tax and the mining tax laws which have been the centre of a good deal of political controversy prior to the election.

In this issue of the Review, we publish four articles. In addition to the article by Professor Hilmer, referred to earlier in this Editorial, Dan Butler’s article, “In-house counsel advising on foreign law: Is it privileged?” examines the impact of the Australian rules in relation to legal professional privilege, arising in particularly cases such as the recent decision of the Queensland Supreme Court in *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82. In that context, it is interesting to note that Senator George Brandis QC, the Attorney General, has referred to the Australian Law Reform Commission (ALRC) a significant new inquiry into the so-called “rule of law” in which issues including legal professional privilege will once again come under the microscope. In that context it is interesting to remind readers that the previous ALRC inquiry into legal professional privilege published in 2008 has yet to be formally dealt with by the Federal Government. Michael Walton in his article, “Queensland shale gas – a rocky road ahead for the new kid on the block?” examines how the United States has dealt with serious questions of law and policy arising out of the growth in the shale gas industry. There have been several controversies about how far Australia should allow the pursuit of mining in this context.

The final article in this issue of the Review is by Julie-Anne Tarr and Myles McGregor-Lowndes. In “Insurance in trust: Lessons from the Christchurch Cathedral”, the authors present an interesting examination of how insurance law interacts with trust law in protecting the rights of citizens of others in the context of natural disasters.

Apart from my overview commentary on the root and branch review of competition law, we also publish in this issue of the Review an interesting commentary by Professor Stephen Coronos on the decisions of the Federal Court in *Australian Competition and Consumer Commission v Australia & New Zealand Banking Group Ltd* and *Australian Competition and Consumer Commission v Flight Centre Ltd (No 2)*.

Professor Robert Baxt AO
General Editor

In-house counsel advising on foreign law: Is it privileged?

Dan Butler*

*This article considers whether legal advice on the law of a foreign jurisdiction is privileged. This question is particularly pertinent to in-house counsel. The globalisation of commerce and the growth of multinational companies have seen an increase in the number of in-house counsel whose role may extend into jurisdictions in which they are not admitted. The Queensland Supreme Court was asked recently in *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 (hereafter *Aquila Coal*) to consider whether advice provided by a foreign lawyer on Queensland law was privileged in circumstances where the foreign lawyer was not admitted in Australia. The decision is significant because the court found, no doubt to the relief of many in-house counsel, that privilege can attach to such advice. This article discusses the decision in *Aquila Coal*, together with the broader privilege issues that it raises, and considers its implications for the in-house profession.*

INTRODUCTION

The proliferation in recent decades of multinational companies has witnessed the growth in global businesses whose operations span many jurisdictions. Those businesses frequently have permanent in-house legal capabilities. Indeed, their in-house lawyers may themselves be based throughout a number of the jurisdictions in which the business operates. From time to time, those lawyers may be asked to advise on legal issues concerning a jurisdiction in which they have not been admitted to practice. Is such advice protected by privilege?

In *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 (*Aquila Coal*), the Supreme Court of Queensland had to consider whether privilege attached to legal advice provided by an in-house counsel who was advising on Queensland law but who had not been admitted in Queensland, or indeed in any other jurisdiction in Australia. Rather, the in-house counsel had been admitted in a foreign jurisdiction, namely New York. In short, the court found that privilege could attach to such advice.

This article discusses the decision in *Aquila Coal* and its implications. It does so by reference to the three situations in which the application of privilege may arise when foreign law is involved, namely:

- (a) *first*, when a foreign lawyer advises on Australian law;
- (b) *second*, when an Australian lawyer advises on foreign law; and
- (c) *third*, when a foreign lawyer advises on foreign law.

The impact of the uniform evidence legislation on the application of privilege in these situations is also considered.

However, before discussing these issues, the test and rationale for the doctrine of legal professional privilege, together with the principles which have developed governing its application to in-house counsel, are revisited.

THE TEST AND RATIONALE FOR PRIVILEGE

It is well established that legal professional privilege is a substantive and fundamental common law right: *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002)

* Barrister at Law, Gerard Brennan Chambers, Brisbane, LLM (Cantab) (Hons 1), LLB (UQ), BCom (UQ). The author appeared for one of the parties in *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82.

213 CLR 543.¹ It allows a party to withhold the disclosure of communications which are properly the subject of a claim to privilege. The ability to withhold the disclosure of communications extends beyond adversarial proceedings and includes such matters as the ability to resist disclosure pursuant to a search warrant: *Baker v Campbell* (1983) 153 CLR 52.

The test of whether a communication or document is subject to legal professional privilege is whether the communication was made or the document was prepared for the dominant purpose of obtaining or providing legal advice (ie legal advice privilege) or to conduct or aid in the conduct of litigation in reasonable prospect (ie litigation privilege): *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [2] and [61] per Gleeson CJ, Gaudron and Gummow JJ.

Barwick CJ in *Grant v Downs* (1976) 135 CLR 674 put it like this (at 677):

Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the Court should state the relevant principle as follows: a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

The dominant purpose is a reference to the “ruling, prevailing, or most influential purpose”: *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 416.

The underlying rationale for legal advice privilege is perhaps best explained in a frequently cited passage by Mason J, as his Honour then was, Stephen and Murphy JJ in *Grant v Downs* (at 685):

The rationale of this head of privilege, according to traditional doctrine is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available.

In terms of procedure, where a party makes a valid claim to privilege over a document, that document need not be disclosed.² Typically, claims to privilege are made in the list of documents provided to the other party during disclosure, which, depending on the rules, may need to be verified by affidavit or, if a claim to privilege is challenged, may then need to be verified by affidavit.³

If a party remains unsatisfied with the other party’s claims to privilege it may bring an application seeking disclosure of those documents.⁴ In such an application, the onus of establishing that the documents are privileged lies with the party asserting privilege: *Grant v Downs* (at 689); see also *AWB v Cole (No 5)* [2006] FCA 1234 at [44](1). During the course of the application, the court may inspect the documents to determine whether they attract privilege. Indeed, the High Court has stated that courts have exercised this power too sparingly in the past: *Grant v Downs* (at 689). This can be achieved, in a practical sense, by handing a confidential folder containing the documents to the judge, but not to the party contesting the privilege claim.

Cross-examination may be permitted during the application in order to determine the dominant purpose for which a document was created: *Seven Network Ltd v News Ltd* [2005] FCA 142 at [3]. Put

¹ At [9], [11], [44] and [132].

² See eg, r 212 of the *Uniform Civil Procedure Rules 1999* (Qld); r 21.5 of the *Uniform Civil Procedure Rules 2005* (NSW).

³ See r 213 of the *Uniform Civil Procedure Rules 1999* (Qld); r 21.4 of the *Uniform Civil Procedure Rules 2005* (NSW); r 29.04 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) and r 20.17 of the *Federal Court Rules 2011* (Cth). Some rules provide that the affidavit must be made by a person who knows the facts giving rise to the claim: see r 213 of the *Uniform Civil Procedure Rules 1999* (Qld); r 29.10 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

⁴ See eg, r 223 of the *Uniform Civil Procedure Rules 1999* (Qld).

another way, in determining whether a document was created for the dominant purpose of legal advice or anticipated litigation, it may be necessary to consider the state of mind of the person creating the document and to examine a number of diverse purposes and to balance them to resolve the question: *Esso* (at [73]).

Many of the cases dealing with privilege concern in-house counsel. This may be due to the special relationship that in-house counsel occupy. That is, an in-house counsel is both legal adviser and employee. For this reason, a significant amount of jurisprudence has developed addressing the position of in-house counsel.

THE POSITION OF IN-HOUSE COUNSEL

The starting point in any discussion on the application of privilege to in-house counsel is the High Court's decision in *Waterford v Commonwealth of Australia* (1987) 163 CLR 54. That case concerned whether privilege attached to confidential communications between government agencies and their salaried legal officers that were undertaken for the purpose of seeking or giving legal advice.

In short, the High Court found that privilege could attach to such communications. Central to the court's reasoning in *Waterford* were two factors: first, whether the salaried lawyers were independent of their employer, and secondly, whether the lawyers were competent. In upholding the privilege claim, Brennan J, as his Honour then was, stated (at 70):

If the purpose of the privilege is to be fulfilled, the legal adviser must be competent and independent. Competent, in order that the legal advice be sound and the conduct of litigation be efficient; independent, in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice which he gives or the fairness of his conduct of litigation on behalf of his client. If a legal adviser is incompetent to advise or to conduct litigation or if he is unable to be professionally detached in giving advice or in conducting litigation, there is an unacceptable risk that the purpose for which privilege is granted will be subverted. As to competence, there is much to be said for the view that admission to practice as a barrister or solicitor is the sufficient and necessary condition for attracting the privilege, but the question was not argued and need not be decided.

Similarly, Mason J, as his Honour then was, and Wilson J stated (at 62):

Whether in any particular case the relationship is such as to give rise to the privilege will be a question of fact. It must be a professional relationship which secures to the advice an independent character notwithstanding the employment.

More recent decisions have developed these principles insofar as they apply to in-house counsel. Thus, in *Seven Network Ltd v News Ltd*, Tamberlin J stated (at [4]-[5]):

The dominant purpose test has particular importance in relation to the position of in-house counsel because they may be in a closer relationship to the management than outside counsel and therefore more exposed to participation in commercial aspects of an enterprise. The courts recognise that being a lawyer employed by an enterprise does not of itself entail a level of independence. Each employment will depend on the way in which the position is structured and executed. For example, some enterprises may treat the in-house adviser as concerned solely in advising and dealing with legal problems. As a matter of commercial reality, however, both internal and external legal advisers will often be involved in expressing views and acting on commercial issues.

The authorities recognise that in order to attract privilege the legal adviser should have an appropriate degree of independence so as to ensure that the protection of legal professional privilege is not conferred too widely.

Thus, Tamberlin J was also concerned with determining whether the in-house counsel had "an appropriate degree of independence" before privilege could attach. It is clear from the above comments that Tamberlin J was also cognisant of the difficulties that can arise where an in-house counsel's role may extend into commercial matters. In this regard, his Honour's conclusion was significant (at [38]):

I am cognisant of the fact that there is no bright line separating the role of an employed legal counsel as a lawyer advising in-house and his participation in commercial decisions. In other words, it is often practically impossible to segregate commercial activities from purely "legal" functions. The two will often be intertwined and privilege should not be denied simply on the basis of some commercial

involvement. In the present case, however, I am persuaded that [the in-house counsel] was actively engaged in the commercial decisions to such an extent that significant weight must be given to this participation. In many circumstances where in-house counsel are employed there will be considerable overlap between commercial participation and legal functions and opinions. As can be seen from the specific rulings below, I am not persuaded that in this proceeding [the in-house counsel] was acting in a legal context or role in relation to a number of the documents in respect of which privilege was claimed. Nor am I persuaded that the privilege claims were based on an independent and impartial legal appraisal.

Thus, Tamberlin J was of the opinion that the in-house counsel had crossed the rubicon and was not acting in a legal role in relation to a number of the documents over which privilege had been claimed. Each case, of course, turns on its own facts. For this reason, his Honour's remark that "privilege should not be denied simply on the basis of some commercial involvement" is noteworthy.

In *Telstra Corp Ltd v Minister for Communications, Information Technology and the Arts (No 2)* [2007] FCA 1445, Graham J set out a test for when an in-house lawyer *lacks* the necessary measure of independence (at [35]-[36]):

In my opinion an in-house lawyer will lack the requisite measure of independence if his or her advice is at risk of being compromised by virtue of the nature of his employment relationship with his employer. On the other hand, if the personal loyalties, duties and interests of the in-house lawyer do not influence the professional legal advice which he gives, the requirement for independence will be satisfied.

In the case presently before the Court, there is no evidence, as I have earlier remarked, going to the independence of the internal legal advisers involved in the communications said to have been brought into existence for the dominant purpose of providing or receiving legal advice. There is nothing to indicate from the description of the six documents with which the Court is presently concerned that they must be documents for which privilege is properly claimed. Different considerations may apply if, say, the documents in question were opinions expressed by identified senior counsel where one might start off with the premise that by its nature the document would have privilege attaching to it. This is not such a case.

Thus, Graham J considered that the requirement for independence would be satisfied provided that the personal loyalties, duties and interests of an in-house lawyer do not influence the lawyer's advice. Resolving this question, however, is not a straight forward matter for a court.

In *Australian Hospital Care (Pindara) Pty Ltd v Duggan (No 2)* [1999] VSC 131, Gillard J discussed the burden of proof in relation to a claim for privilege by an in-house counsel:

In my opinion once the client swears the affidavit of documents claiming legal professional privilege in a way which leads the court to the conclusion that the claim is properly made, then the prima facie position is that the legal adviser was acting independently at the relevant time.

It follows that if any other party to the litigation disputes the claim for legal professional privilege then it has the evidentiary burden of establishing facts which prima facie rebut the presumption.

...

If the party opposing the claim for privilege does establish facts which rebut the prima facie presumption then in the end result the party claiming the privilege must establish the propriety and validity of the claim.

The court may, after considering the issues, reach the conclusion that the lawyer was acting independently and accordingly the privilege is upheld, or that the lawyer was not acting independently and accordingly there is no privilege, or the court may reach a position where it is in doubt. If the latter stage is reached then the court should inspect the documents to determine the propriety and validity of the claim.

... the mere fact that the legal adviser is an employee of the client or that his duties may involve performing non-legal work do not establish that at the relevant time he was not acting independently. It is recognised that employees will perform non-legal work and it is an essential element of the establishment of the privilege that at the relevant time the employee was performing legal work.

The fact of employment is relevant but the weight to be attached to that fact in considering independence will depend on all the circumstances.⁵

Thus, Gillard J considered that the fact of employment does not result in a lack of independence. Like Tamberlin J in *Seven Network Ltd v News Ltd* Gillard J also found that simply because the in-house counsel's duties involve non-legal work does not mean that the in-house counsel's *legal work* is not privileged.

However, legal advice privilege can only ever attach when *legal advice* is actually given or requested by an in-house counsel. With modern communications, in-house counsel are no doubt the recipients of emails that are sent to others within the business, but which are copied to the in-house counsel. Simply copying an email to an in-house counsel will not be sufficient to attract privilege unless that is done for the dominant purpose of seeking legal advice, or to conduct or aid in the conduct of actual or anticipated litigation. In this context, Katzmann J stated in *Dye v Cth Securities Ltd (No 5)* [2010] FCA 950 (at [50]):

The email appears to have been copied to [the in-house counsel] for the purpose of keeping him informed of the status of the applicant's complaints and so that he was aware of what Mr Carroll was doing about them, not for the dominant purpose of seeking his legal advice or to conduct or aid in the conduct of litigation in reasonable prospect.

Nonetheless, the overriding principle remains that communications involving in-house counsel are capable of attracting privilege, provided the other requirements for a privilege claim are established. Put another way, whilst a court may look at the position of in-house counsel more closely, "there is no doubt that legal professional privilege may attach to communications with a lawyer who is a salaried employee": *GSA Industries (Aust) Pty Ltd v Constable* [2002] 2 Qd R 146 per Holmes J (as her Honour then was) at [14].

How then do these principles operate when questions of foreign law are involved? It is worth noting at the outset that the principles discussed below apply equally to any legal advisers. However, it is likely that in-house counsel will encounter these issues more frequently than lawyers in private practice.

FIRST SITUATION: FOREIGN LAWYER ADVISING ON AUSTRALIAN LAW

Turning then to the first situation in which questions of foreign law may arise – when a foreign lawyer advises on Australian law.

This was the situation which confronted Boddice J in *Aquila Coal*. In that case, Aquila Coal had entered into a joint venture agreement with the defendant, Bowen Central Coal Pty Ltd (BCC), for the development of a proposed mine in central Queensland.⁶ The application before the court concerned Aquila Coal's claim that certain documents over which BCC claimed privilege were not in fact privileged and should be disclosed.

A preliminary issue for determination was a submission by Aquila Coal that documents created by BCC's in-house counsel were incapable of attracting privilege. This was because the in-house counsel had never been admitted as a lawyer in Australia. Instead, BCC's in-house counsel had been admitted in a foreign jurisdiction, in this case New York. Thus, the question for the court was whether advice provided by a foreign lawyer on questions of Australian law could attract privilege.

Central to Aquila Coal's argument was the Queensland Court of Appeal's decision in *Glengallan Investments Pty Ltd v Arthur Anderson* [2002] 1 Qd R 233. In that case, the court was required to determine whether privilege could attach to advice provided by partners at Arthur Anderson who held law degrees, but were not admitted to practice. The Court of Appeal found that the advice was not privileged because privilege "can only attach where a lawyer admitted to practice is involved": (at 245). However, the court was silent as to whether admission to practice *in Australia* was required, or whether it was sufficient to be admitted in a *foreign jurisdiction*.

⁵ *Australian Hospital Care (Pindara) Pty Ltd v Duggan (No 2)* [1999] VSC 131 at [67], [68], [70], [71], [81] and [82]. Relied upon by Boddice J in *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 at [9].

⁶ *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 at [1].

In seeking to uphold its claim to privilege, BCC relied upon McLelland J decision's in *Ritz Hotel Ltd v Charles of the Ritz Ltd [No 4]* (1987) 14 NSWLR 100. That case concerned a claim for privilege by an in-house counsel who was a member of the New York State Bar. In upholding the claim to privilege, McLelland J stated (at 101-102):

The author of the document, Mr Morrazzo, is a qualified lawyer and member of the Bar of the State of New York and the Federal District Court for the Southern and Eastern Districts of New York. He is an expert of trade mark law. He is employed by Revlon Inc, the parent company of the second defendant, in what is called its Law Department, which consists of a group of attorneys and their support staff, whose function is to provide legal advice and counsel to the management of Revlon Inc and its subsidiaries. ...

I am satisfied that the sole purpose of the bringing into existence of this memorandum was to provide legal advice on these matters to Revlon Inc in connection with the proposed acquisition, that in doing so Mr Morrazzo was acting in his capacity as a professional legal adviser to the company, and that the memorandum was of a confidential nature.

It was submitted that because many of the trade marks were registered in foreign countries and that the litigation (or much of it) was in foreign courts, Mr Morrazzo was not competent to give legal advice in relation to such matters, notwithstanding his legal qualifications in the United States.

I do not consider that legal professional privilege is as limited as this submission would suggest. ... it seems to me that legal professional privilege is not confined to legal advice concerning or based on the law of a particular jurisdiction in which the giver of the advice has his formal qualification. For instance, I have no doubt that legal advice by a lawyer qualified in New South Wales on matters involving the law of, for example, Victoria or the United Kingdom, would, in appropriate circumstances, attract legal professional privilege. Similarly, and particularly in a field with such international ramifications as trade mark law, I see no reason why legal advice from a lawyer qualified in New York, concerning trade marks and trade mark litigation in another country, would not, in appropriate circumstances attract legal professional privilege.

Whilst *Charles of the Ritz* was no doubt of assistance in seeking to uphold BCC's claim to privilege, the ratio of that decision is not clear. Whilst it is clear that the in-house counsel in that case was qualified in New York, it is unclear from the judgment which country's laws the in-house counsel was advising on. Further, the advice concerned trade mark law, a field with "international ramifications". Does it make a difference if the advice concerns issues that do not have international ramifications?

Charles of the Ritz case was referred to, without disapproval, by Holmes J (as her Honour then was), in *GSA Industries (Aust) Pty Ltd*. Again, that case concerned the position of in-house counsel. Her Honour's comments are significant:

There is no amplification in the material submitted on behalf of the respondent as to what the position of legal counsel entails, and it is not asserted that Mr Moratti is admitted to practise as barrister or solicitor.

There is no doubt that legal professional privilege may attach to communications with a lawyer who is a salaried employee. The question was considered in *The Attorney-General for the Northern Territory of Australia v Kearney* and answered in the affirmative, at least in relation to government employees, in *Waterford v The Commonwealth of Australia*. In *Ritz Hotel Ltd v Charles of the Ritz Ltd* McLelland J concluded that a company employee who was a qualified lawyer and a member of the New York State Bar, was acting as a professional legal adviser whose communications were capable of attracting legal professional privilege. It is to be noted, however, that the lawyer in that case was admitted to practice, albeit in another jurisdiction.

...

Whether admission to practise be relevant to independence or to competence, it is clear, in this State at least, that privilege exists only in respect of legal advisers admitted as barrister or solicitor: *Glengallan Investments Pty Ltd v Arthur Andersen*. Having regard to that authority, and the absence of any evidence that Mr Moratti was an admitted practitioner, I conclude, inevitably, that his communications, whether involving legal advice or not, could not attract privilege as the communications of a legal practitioner.⁷

⁷ *GSA Industries (Aust) Pty Ltd v Constable* [2002] 2 Qd R 146 at [13], [14] and [17].

In *Aquila Coal*, Boddice J had to consider the application of the above principles to BCC's claims to privilege. Usefully, his Honour summarised the position governing the application of privilege to in-house counsel as follows:

Where the legal advisers are employees of the party to the litigation, legal professional privilege may still attach, provided the claim relates to a qualified lawyer acting in the capacity of an independent professional legal adviser. Independence is crucial, as an important feature of inhouse lawyers is that at some point the chain of authority will result in a person who is not a lawyer holding authority, directly or indirectly, over the inhouse lawyer. The relevant question for consideration is whether the advice given is, in truth, independent.

In the case of inhouse lawyers, there is no presumption of a lack of independence.⁸

Thus, again, independence is critical and the court does not start with a presumption that an in-house counsel lacks independence. Ultimately, his Honour concluded that "the authorities relied upon by [Aquila Coal] do not support a finding that legal professional privilege cannot attach to the advice given by [BCC's] inhouse lawyers or to the instructions provided to those inhouse lawyers, simply because [BCC's] general counsel was not admitted as a legal practitioner in Australia": (at [22]). The essence of his Honour's reasoning is found in the following passages:

A conclusion that legal professional privilege can attach to the documents in question, notwithstanding that the defendant's general counsel is not admitted as a legal practitioner in Australia, is consistent with the purpose of, and rationale behind, the doctrine of legal professional privilege.

Legal professional privilege is the privilege of the client, not the lawyers. It exists even where the client erroneously believed the legal adviser was entitled to give the advice. It would be contrary to the notion of the privilege being that of the client that the client should lose the privilege merely by reason that the legal adviser, who is admitted elsewhere, is not admitted in Australia.⁹

In reaching this finding, his Honour also dealt with a submission by Aquila Coal that (1) the restrictions on the in-house counsel practicing law contained in the *Legal Profession Act 2007* (Qld) (the LPA) and (2) the in-house counsel's lack of a practising certificate, both supported a conclusion that privilege should not apply. His Honour stated:

The provisions of the *Legal Profession Act 2007* (Qld) (and their corresponding equivalents in the other jurisdictions in Australia) also do not support such a finding. That Act provides for the regulation of legal practitioners. It does not purport to regulate the availability of legal professional privilege. Further, the lack of a current practising certificate, whilst a very relevant factor in determining whether legal professional privilege exists in respect of advice given by inhouse legal representatives, is not determinative of the existence of privilege.¹⁰

Thus, his Honour did not consider the provisions of the LPA were relevant in determining whether privilege applied, nor was his Honour persuaded to reject the privilege claim by reason of the absence of a practising certificate. Putting this aside, it is nonetheless important for any lawyer to abide by the practising requirements contained in the LPA, given the potential ramifications for that lawyer of not doing so.

In summary, legal advice privilege can still attach to advice provided by a foreign lawyer on questions involving Australian law, provided that the foreign lawyer is admitted in a foreign jurisdiction and displays the necessary degree of independence from the business.¹¹ Similarly, litigation privilege can also attach to documents created by that lawyer for the dominant purpose of conducting or in aid of litigation in Australia, again, provided that those same conditions apply.

What then of the converse situation? That is, where an in-house counsel admitted to practice in Australia advises on foreign law?

⁸ *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 at [8] and [9].

⁹ *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 at [24] and [25].

¹⁰ *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 at [23].

¹¹ See also *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529 at 536 (Templeman LJ); referred to in *Grofam v ANZ* (1993) 45 FCR 445 at 455.

SECOND SITUATION: AUSTRALIAN LAWYER ADVISING ON FOREIGN LAW

The second situation in which questions of foreign law may arise is where an Australian lawyer advises on questions involving foreign law. It is this situation which is perhaps of most significance to in-house counsel who are admitted in Australia, but not admitted in the foreign jurisdiction.

Take the following example. A general counsel works in Australia for a British-based oil and gas company. The general counsel has been admitted in Australia, but not elsewhere. The general counsel reports to the global head of legal in London and is responsible for the legal function of the company's operations in Australia, New Zealand and South East Asia. The general counsel advises on a contract governed by Singaporean law. Is such advice privileged?

Again, in order for privilege to apply, the necessary pre-conditions discussed above would need to be met. That is, the general counsel would need, at the least, to be admitted in Australia. The advice would also need to be confidential and provided by the general counsel acting in the capacity of an independent professional legal adviser. Beyond that, there does not appear to be any authorities concerning whether advice by an Australian lawyer on foreign law can attract privilege.

In principle, if the decision in *Aquila Coal* is followed, such advice may also be privileged. Applying his Honour Boddice J's reasoning, such a finding would be consistent with the purpose of and rationale behind the doctrine of legal professional privilege. That is, it would be contrary to the doctrine of privilege that privilege should be lost merely by reason that the general counsel, whilst admitted in Australia, is not admitted in the foreign jurisdiction in respect of which the advice is given, namely Singapore.¹²

However, a respectable argument exists that such advice is *not* privileged. It is this. The in-house counsel's employer must know, or, at the least, ought to know, that the in-house counsel is *not* admitted in Singapore. It is *not* a case of a lay client mistakenly believing that a solicitor was admitted to practice, in which case, privilege can still apply: see *Grofam v ANZ* (1993) 45 FCR 445. In *Grofam*, the Full Federal Court reached this view because "legal professional privilege is essentially concerned with the protection of the client" (at 456).

Turning then to the case at hand – why does an in-house counsel's employer require any "protection" when it knows, or ought to know, that the in-house counsel is not admitted in Singapore? Put another way, what public interest exists in maintaining privilege in those circumstances? Indeed, is there even a relationship of lawyer and client upon which privilege could attach?

Perhaps the most that can be said is that, on the current state of the authorities, doubt exists as to whether privilege attaches to legal advice provided by an Australian lawyer on foreign law. Whilst the reasoning in *Aquila Coal* suggests that it does, that case did not decide this point.

For this reason, in-house counsel would no doubt take comfort from a decision in which the ability of privilege to apply in these circumstances is confirmed.

THIRD SITUATION: FOREIGN LAWYER ADVISING ON FOREIGN LAW

The third situation in which questions of foreign law may arise is where a foreign lawyer advises on questions involving foreign law. Changing the above factual scenario slightly, the British oil and gas company again requires advice on a contract which is governed by Singaporean law. Instead of providing the advice in-house, the general counsel engages a Singaporean law firm to provide the advice on Singaporean law. Is such advice privileged from disclosure in proceedings brought in Australia?

This question came before the Full Federal Court in *Kennedy v Wallace* (2004) 142 FCR 185. In obiter, Allsop J (as his Honour then was) discussed whether privilege could apply in this situation. His Honour started by considering the reality of modern commercial life in which the assistance of foreign lawyers may be necessary:

Members of the community may well need to seek the assistance of foreign lawyers. The considerations of the kind that Wilson J spoke of in *Baker v Campbell*: the multiplicity and complexity of the demands

¹² *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 at [25].

of the modern state on its citizens, the complexity of modern commercial life and the increasing global interrelationships of legal systems, commerce and human intercourse, make treatment of the privilege as a jurisdictionally specific right, in my view, both impractical and contrary to the underlying purpose of the intended protection in a modern society.¹³

Thus, given the realities of the modern world, his Honour considered that privilege should not be restricted to advice on local law. Put another way, Allsop J considered that privilege should *not* be a “jurisdictionally specific right”. In upholding the claim to privilege, Allsop J also relied on the rationale underpinning the privilege doctrine:

A refusal to recognise foreign lawyer’s advice privilege or narrowly to constrict advice privilege to the precise communication requesting or imparting the advice ... would undermine the rationale of the privilege. It would also undermine the administration of justice by enlivening a threat in this jurisdiction to the confidentiality of communications which would otherwise be protected in other places.

...

The above conclusion as to the place of foreign lawyers undermines, from a legal perspective, any view which may be taken to have been expressed by the primary judge that the claim for privilege must fail for lack of connection between the advice and the administration of justice in Australia because it was advice of a foreign lawyer.¹⁴

In short, his Honour considered there was “no basis for viewing foreign lawyers and foreign legal advisers differently to Australian lawyers and legal advice”.¹⁵

Interestingly, his Honour left open the question of whether advice on foreign law by a foreign lawyer could be privileged in Australia in circumstances in which the advice was not privileged under the foreign law. His Honour stated:

Also, nothing I have said should be taken as expressing a view on the existence of privilege in Australia where, under the legal system governing the foreign lawyer, or under the legal system of the state where the advice was given, no privilege would attach.¹⁶

In summary, if Allsop J’s remarks find support elsewhere,¹⁷ there is nothing to prevent advice on foreign law by a foreign lawyer from attracting privilege.

THE IMPACT OF THE UNIFORM EVIDENCE ACT REGIME

The common law position, as set out above, has been modified somewhat in the jurisdictions in which the uniform evidence legislation applies. For convenience, the provisions of the Commonwealth Act, the *Evidence Act 1995* (Cth) (the *Evidence Act*) are referred to below.

The *Evidence Amendment Act 2008* (Cth) made a number of changes to the *Evidence Act*, including changes with respect to the application of privilege. These changes implemented the majority of recommendations made in a joint report published by the Australian, NSW and Victorian Law Reform Commissions in February 2006.

Under s 118 of the *Evidence Act*, privilege can attach to a confidential communication between a client and a “lawyer”. The 2008 amendments extended the definition of “lawyer” to include foreign lawyers. In particular, a “lawyer” now includes “Australian registered foreign lawyers” and “overseas registered foreign lawyers”: s 117. An “Australian registered foreign lawyer” is a person registered as a foreign lawyer under the law of one of the States or Territories.¹⁸ An “overseas registered foreign lawyer” is a natural person who is properly registered to engage in legal practice in a foreign country

¹³ *Kennedy v Wallace* (2004) 142 FCR 185 at [200].

¹⁴ *Kennedy v Wallace* (2004) 142 FCR 185 at [202] and [216].

¹⁵ *Kennedy v Wallace* (2004) 142 FCR 185 at [207].

¹⁶ *Kennedy v Wallace* (2004) 142 FCR 185 at [214].

¹⁷ See *Australian Crime Commission v Stewart* [2012] FCA 29; upheld on appeal: *Stewart v Australian Crime Commission* (2012) 206 FCR 347.

¹⁸ See the definition in the Dictionary and reg 10 of the *Evidence Regulations 1995* (Cth).

by an entity that has that function.¹⁹ Thus, by these amendments the definition of lawyer includes anyone that is properly registered in a foreign country as a lawyer.

Noticeably, however, the Act is silent as to whether privilege attaches to advice provided by a lawyer on the law of a jurisdiction other than the one in which they are admitted to practice.

Relevantly, the Explanatory Memorandum introducing the new definition of lawyer stated:²⁰

This item also extends the definition of “lawyer” so that it includes a person who is admitted in a foreign jurisdiction. The rationale of client legal privilege to serve the public interest in the administration of justice and its status as a substantive right means it should not be limited to advice obtained only from Australian lawyers. This position reflects the reasoning of the Full Federal Court in *Kennedy v Wallace* (2004) 142 FCR 185.

Thus, privilege should not be restricted to advice from Australian lawyers. As the Explanatory Memorandum notes, the amendments are said to reflect the common law position in *Kennedy v Wallace*. *Kennedy v Wallace*, however, only dealt with the third situation identified above, that is, where a foreign lawyer advises on foreign law. Thus, s 118 confirms that such advice is privileged. However, *Kennedy v Wallace* was not concerned with the first or second situations identified above, that is, where a foreign lawyer advises on Australian law, or an Australian lawyer advises on foreign law. For that reason, the amendments do not seem to have any application to these two situations. The common law, as discussed earlier, still applies. The amendments only impact upon the third situation (ie. foreign lawyer advising on foreign law) and simply reflect the position at common law. Thus, in summary, the expanded definition of “lawyer” in the *Evidence Act* does not seem to have changed the common law position that applies in any of the three situations discussed earlier.

Further, it is worth noting that the *Evidence Act* only applies to privilege claims at trial, and to certain interlocutory processes or document requests pursuant to a court order.²¹ The *Evidence Act* has no application to non-curial proceedings.

Before concluding, s 119 of the *Evidence Act* also requires comment. That section is headed “Litigation” and establishes a statutory test for claiming litigation privilege.²² It extends privilege to confidential communications between a lawyer and a client made for the dominant purpose of providing “professional legal services” with respect to actual, anticipated or pending proceedings in Australia or in an overseas court. Privilege also attaches to confidential communications between a lawyer and another person, as well as the contents of a confidential document, provided the communication was made, or the document was prepared, for that same dominant purpose. In order for the privilege to apply, it is also necessary that the client “is or may be, or was or might have been” a party to the Australian or overseas proceedings.

The same expanded definition of “lawyer” as set out above applies. Thus, communications with foreign lawyers acting for clients in proceedings before an overseas court can attract privilege. In particular, the provision of “professional legal services” to such a client is privileged if that was the dominant purpose of the communication. “Professional legal services” is not defined in the legislation. Odgers²³ takes the view that a document prepared for use in such proceedings will be privileged.²⁴

Thus, in short, the effect of the expanded definition of “lawyer” seems to be this. Privilege may be claimed over communications with foreign lawyers with respect to actual, anticipated or pending proceedings in foreign courts provided that the dominant purpose of the communication was for the provision of “professional legal services”. Similarly, privilege may be claimed over documents prepared for use in such proceedings, again provided that that same dominant purpose is present. In

¹⁹ See the definition in the Dictionary.

²⁰ Explanatory Memorandum to the *Evidence Amendment Bill 2008* at [174].

²¹ See *Esso v Federal Commissioner of Taxation* (1999) 201 CLR 49 and s 131 of the *Evidence Act 1995* (Cth).

²² Although the section can also extend to legal advice: see Odgers S, *Uniform Evidence Law* (10th ed, Thomson Reuters, 2012) at [1.3.10720].

²³ Odgers, n 22 at [1.3.10720].

²⁴ Relying upon *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 81 FCR 526.

this manner, s 119 provides statutory recognition of litigation privilege to communications with foreign lawyers in relation to foreign proceedings. No doubt this is welcome news for multinational companies who may be involved in a number of cross-border disputes at any one time.

CONCLUSION

The decision in *Aquila Coal* represents a significant win for the in-house profession. It confirms that advice on Australian law provided by a lawyer admitted in a foreign jurisdiction can attract privilege. That is, privilege can still attach to the advice even though the foreign lawyer was not admitted in Australia.

In *Aquila Coal*, the court grounded its decision by looking to the purpose of, and rationale behind, the doctrine of privilege. The court reasoned that it would be contrary to the notion of privilege that privilege could be lost by reason of the lawyer being admitted elsewhere, but not in Australia. Adopting that same analysis, advice on foreign law by lawyers admitted in Australia may also attract privilege - provided, of course, that the other requirements for a privilege claim are met. However, as outlined above, there is a respectable argument to the contrary. The amendment to the definition of "lawyer" in the *Evidence Act* does not seem to have changed the position at common law. Thus, judicial confirmation that privilege can apply to advice on foreign law would no doubt be welcome news for multinational companies and their in-house counsel.

Queensland shale gas – a rocky road ahead for the new kid on the block?

Michael Walton*

Experts have known for years about the vast deposits of shale gas throughout the world but technological difficulties and the high cost of producing shale gas made it impractical to consider as a serious energy source. However, following technological advancements pioneered in the United States in the 1990s, shale gas is now “rocking the world”. The true extent of shale gas resources in Australia is unknown but the potential is enormous. Shale gas exploration and production in Australia is in its infancy but momentum is now growing. The purpose of this article is to consider the issues facing the industry in Australia and in particular Queensland and to assess whether the existing regulatory framework has the capacity to regulate the industry in an effective and transparent manner to create acceptance and a “social licence” to operate.

Given that the momentum of the [shale gas] industry in Australia is increasing, it is a matter of some urgency to more fully assess the nation’s shale gas resources and reserves ... the urgency arises because of the need to understand (whilst the industry is at an early stage) what the potential environmental, social and related impacts might be and the need to regulate the industry in an effective and transparent manner that will help to minimise or prevent any adverse impacts in order to establish and retain a social licence to operate.¹

INTRODUCTION

Shale gas is “rocking the world”,² becoming an energy “game changer”,³ helping to create a “golden age of gas”⁴ and the cause of a “global energy revolution”.⁵

Shale gas might be “rocking the world” but not everyone is happy.⁶ The United States is the undisputed leader in the development of shale gas. The United States’ experience demonstrates both the massive benefits offered by this industry as well as the controversy. There are also serious questions as to whether the success in the United States can in fact be replicated in Australia.

A key constraint for the industry is that it does not enjoy the degree of societal acceptance needed in order to flourish.⁷ Without a sustained and successful effort from governments and operators to address the environmental and social concerns that have arisen, it may be difficult, if not impossible, to convince the public that despite the undoubted benefits, the impacts and risks from shale gas development are acceptable.

Shale gas exploration in Queensland is in its infancy and now is the time to consider the key issues facing the Queensland Government, proponents and landowners for the development of the resource.

* Consultant (fulltime), Norton Rose Fulbright, Australia.

¹ Australian Council of Learned Academies (ACOLA), *Engineering Energy: Unconventional Gas Production – a Study of Shale Gas in Australia* (May 2013).

² Jaffe A, “Shale Gas will Rock the World”, *The Wall St Journal* (10 May 2010).

³ Sakmar S, “The Global Shale Gas Initiative: Will the United States be the Role Model?” (2011) 33 *Houston Journal of International Law* 369.

⁴ International Energy Agency (IEA), *World Energy Outlook 2011: Are We Entering a Golden Age of Gas?* (2011).

⁵ ACOLA, n 1, p 42.

⁶ For instance, the documentaries *Gasland* and *Gasland Part II* and the *Four Corners* report called “The Gas Rush” identify some of the controversial environmental and health issues said to be caused by the industry and in particular the practice of fracking: Adlesic T, Gandour M, Fox J, and Roma D (prods), *Gasland* (2010) and *Gasland Part II* (2013); *Four Corners*, “The Gas Rush” (Australian Broadcasting Network, originally aired 21 February 2011).

⁷ International Energy Agency (IEA), *World Energy Outlook 2012: Golden Rules for a Golden Age of Gas* (2012) p 15.

The issues facing the industry in Australia, and in particular Queensland, will be considered as a basis for assessing whether the existing regulatory framework has the capacity to regulate the industry in an effective and transparent manner to create acceptance and a “social licence” to operate.⁸

Is Queensland and its regulatory framework ready to cope with this “*new kid on the block*”?

SHALE GAS – SETTING THE SCENE

Shale gas refers to natural gas that is trapped within shale formations.⁹ Shale gas is one type of unconventional gas. Unconventional gas includes shale gas, tight gas and coal seam gas. It is largely the rock type and the trapping mechanism which determines whether a gas is regarded as “conventional” or “unconventional”.

Shale gas occurs in very fine-grain, low permeability organic-enriched sediments, usually in the deeper part of the basin. The gas is formed when the organic matter within the shales is subjected to higher temperature and pressures. The difference between this type of gas and conventional deposits is that the shale gas remains within the impermeable shale. Therefore the shale is both the source rock and the reservoir rock. Invariably, there are two challenges in sourcing this type of gas, namely the depth of the shale,¹⁰ and the need to create permeability to allow the gas to flow from the rock. This can be done by hydraulically fracturing (fracking) the rock to facilitate the extraction of the shale gas.¹¹

The extraction of unconventional gas such as shale gas has some distinctive features and requirements which have been the cause of much controversy. Unconventional resources are less concentrated than conventional deposits and do not give themselves up easily.¹² The following features¹³ raise concerns about risk of environmental damage and adverse social impacts:

- Extraction difficulties – Shale gas is difficult to extract because it is trapped in deep, low-permeability rock that impedes the flow of gas;
- Scale of production facilities – the shale gas resource is more diffuse and difficult to produce. The scale of the industrial operation required for a given volume of unconventional output is much larger than for conventional production. As a consequence, the shale gas drilling and production activities can be considerably more invasive because of the need for more wells. This leads to a network of geographically scattered production facilities and flow lines;¹⁴
- Hydraulic fracturing – shale gas almost always requires hydraulic fracturing to generate adequate flow rates. Hydraulic fracturing (also commonly called “fracking” or “fracking”) involves pumping a fluid¹⁵ at high pressure into the well and then into the target rock creating fractures a few millimetres wide which may extend hundreds of metres.¹⁶ The associated use and release of

⁸ ACOLA, n 1, p 14.

⁹ United States Energy Information Administration, *What is Shale Gas and Why is it Important?* (5 December 2012). Available at http://www.eia.gov/energy_in_brief/article/about_shale_gas.cfm.

¹⁰ By way of example, a typical well in the Haynesville and Eagle Ford shale plays in the United States have a vertical depth in the order of 3,000 m and with a horizontal section of 1,200 m: IEA, *Golden Rules for a Golden Age of Gas*, n 7, p 54.

¹¹ ACOLA, n 1, pp 4-6.

¹² IEA, *Golden Rules for a Golden Age of Gas*, n 7, p 18.

¹³ IEA, *Golden Rules for a Golden Age of Gas*, n 7, pp 19-23.

¹⁴ Guarnone M, Rossi F, Negri E, Grassi C, Genazzi D, and Zennaro R, “An Unconventional Mindset for Shale Gas Surface Facilities” (2012) 6 *Journal of National Gas Science and Engineering* 14.

¹⁵ Fracturing fluid is roughly 99% water but also contains numerous chemical additives as well as propping agents, such as sand, that is used to keep fractures open once produced under pressure. See also Jackson RB, Rainey Pearson B, Osborn SG, Warner NR and Vengosh A, *Research and Policy Recommendations for Hydraulic Fracturing and Shale-Gas Extraction* (Centre on Global Change, Duke University, Durham NC, 2011).

¹⁶ Jackson et al, n 15.

water gives rise to a number of environmental concerns. The quantity of water used during the hydraulic fracturing can be between 1 to 5 million gallons;¹⁷

- Horizontal drilling—the primary method of shale gas extraction involves a combination of two production technologies – hydraulic fracturing and horizontal drilling. Horizontal drilling has been instrumental in increasing production. It involves drilling a vertical well to the shale rock and then drilling laterally to access a larger portion of the reservoir. Once the target area is reached, hydraulic fracturing is then used to help produce the gas.¹⁸

Just 15 years ago shale gas production was virtually non-existent, but recent drilling and fracture stimulation innovations have revolutionised the shale gas market. This “shale gale”¹⁹ was largely driven by the massive growth in the North American shale gas production, where shale gas is contributing to abundant and low-priced domestic gas production.²⁰

It is appropriate to briefly consider the North American experience.

THE UNITED STATES’ EXPERIENCE

Overview

Experts have known for years about the vast deposit of shale gas throughout the world. However, technological difficulties and the high cost of producing shale gas made it impractical to consider as a serious energy source.²¹

In the 1990s, two independent energy companies, Mitchell Energy and Chesapeake, believed that commercial quantities of gas could be extracted economically from the Barnett shale in Texas. They eventually achieved this goal due to significant advances in the use of horizontal drilling and well stimulation technologies, and the refinement of the cost effectiveness of these technologies.²²

While technology was an important part of this gas revolution, the “game changer” was a combination of factors, which came together to create favourable conditions, including technological innovation, government policy, private entrepreneurship, private land and mineral right ownership, high natural gas prices in the 2000s, favourable geology, water availability and existing gas pipeline infrastructure.²³

These factors have resulted in a massive increase in shale gas production in the United States over the last 10 years.²⁴ As a consequence, the United States has become the undisputed world leader in the development of shale gas due to its success in unlocking the vast tracks of shale gas in the United States. Shale gas accounted for only 1.6% of the total natural gas production in the United States in 2000, but this jumped to 4.1% by 2005 and to an astonishing 23.1% by 2010.²⁵

It seems that the United States has “won the lottery” in the form of shale gas. The United States Energy Information Administration (EIA) has estimated that the United States has more than

¹⁷ IEA, *Golden Rules for a Golden Age of Gas*, n 7, p 30.

¹⁸ Sakman, n 3 at 376-377.

¹⁹ Robertson S, “Unconventional Gas – Legal Issues”, *2012 AMPLA Yearbook* (2012) p 311.

²⁰ Rogers H, “Shale Gas – the Unfolding Story” (2011) *27 Oxford Review of Economic Policy* 117.

²¹ Halliburton (Firm), *US Shale Gas: An Unconventional Resource, Unconventional Challenges* (2008) http://www.halliburton.com/public/solutions/contents/Shale/related_docs/H063771.pdf.

²² Langon R, “A Short History of the Shale Gas Phenomenon in North America”, paper delivered at the 23rd International Geophysical Conference and Exhibition, Melbourne, Australia, 11-14 August 2013.

²³ Wang Z and Krupnick A, *A Retrospective Review of Shale Gas Development in the United States – What Lead to the Boom?* (RFF Discussion Paper 13-12, April 2013) available at <http://www.rff.org>.

²⁴ Sakmar, n 3.

²⁵ Wang and Krupnick, n 23.

2,200 trillion cu ft of natural gas in technically recoverable sources. This is sufficient to satisfy all of America's natural gas demand for 100 years at current consumption levels.²⁶

The development of shale gas has had a profound effect on the United States energy market. It has led to a complete turnaround in the United States' reliance on oil and gas imports and the marked fall in its domestic gas prices.²⁷ One author noted that studies have indicated the United States economy would most likely be in recession without the stimulus delivered by lower gas prices and the flow-on electricity price benefits.²⁸

The United States shale gas production growth since 2005 has also had an impact on other regional markets. As of mid-2010, North America became a self-sufficient "natural gas island".²⁹ This has meant that unwanted LNG³⁰ has been redirected from the United States to Europe.³¹

Is the United States' success exportable to Australia?

So far, the United States is the undisputed leader in the development of shale gas. That is not to say that its record is impeccable or indeed that its success is exportable to other parts of the world, in particular Australia.³²

There are a number of factors or challenges³³ that might impede or limit the "shale gale" impact on Australia, including the different gas ownership regime. In the United States the underlying resources are in the ownership of the landowner, while in Australia the resources belong to the State. In the United States, landowners receive royalties and this acts as an incentive to agree to the activity on their land.³⁴ Another factor is the limited availability of water resources. Water fracturing of shale gas wells requires a few million gallons of water per well.³⁵ The main shale plays in Australia are in dry remote parts of Australia and water availability, or lack thereof, may constrain development.³⁶ Finally, compared to the United States, Australia lacks basic infrastructure (roads and pipelines) and markets,³⁷ and there is a shortage of experienced people and drilling equipment in Australia.³⁸

In recognition of the growing worldwide interest in developing unconventional gas reserves, in April 2010 the United States Department of State launched the Global Shale Gas Initiative (GSGI). The purpose of the GSGI was to assist countries to utilise their unconventional natural gas resources by identifying and developing them safely, economically and in an environmentally sensitive manner.³⁹ Under the GSGI, the United States has established partnerships with China, India, Poland,

²⁶ Taliangis P, "Australia's Unconventional Gas Challenge", *2012 AMPLA Yearbook* (2012) p 344. Sakmar, n 3 at 381.

²⁷ Robertson, n 19, p 311.

²⁸ Taliangis, n 26, p 344.

²⁹ Wang and Krupnick, n 23.

³⁰ Liquefied Natural Gas.

³¹ Rogers, n 20.

³² Langon, n 22.

³³ United States Energy Information Administration (EIA), *Technically Recoverable Shale Oil and Shale Gas Resources: An Assessment of 137 Shale Formations in 41 Countries Outside the United States* (June 2013) pp 10-12, available at <http://www.eia.gov>.

³⁴ Wang and Krupnick, n 23

³⁵ Wang and Krupnick, n 23.

³⁶ Leather D, Bahadoni A, Nwaoha C and Wood D, "A Review of Australia's Natural Gas Reserves and Their Exploitation" (2013) 10 *Journal of Natural Gas Science and Engineering* 68.

³⁷ Muir W, *Shale Gas in Australia, Drivers and Roadblocks* (PNR Online) available at <http://www.pnronline.com.au>; Morgan Stanley (Firm), *Australian Oil and Gas: Shale Gas, Grab a Surfboard and Get Ready to Ride the Wave* (3 June 2011); Guarnone et al, n 14.

³⁸ Warner D, "Shale Gas in Australia: A Great Opportunity Comes with Significant Challenges", *Preview* (December 2011).

³⁹ United States Department of State, *Briefing on the Global Shale Gas Initiative Conference* (24 August 2010).

Ukraine, Jordan and other countries. Some authors now argue that energy, in particular unconventional gas, is becoming a foreign policy tool for the United States.⁴⁰

The remarkable growth of shale gas production in the United States has been the catalyst for the exploration of shale resources in other parts of the world. Only time will tell if the United States' success can be replicated in Australia. However, given the success of the CSG industry in Australia, the prospects are considered good.⁴¹

SHALE GAS – THE GLOBAL SCENE AND AUSTRALIA'S PLACE GLOBALLY

Global

Shale formations exist in almost every region of the world. As a consequence, the potential for shale gas development is global in scope and enormous in potential.⁴² While the United States is at the forefront of shale gas development, the strong winds blown by the technological advances in hydraulic fracturing and horizontal drilling are fanning the interest in shale gas worldwide.⁴³

In 2011, the EIA undertook an assessment of the shale gas resources in 48 major shale basins in 32 countries.⁴⁴ The EIA published a further assessment in June 2013.⁴⁵ The 2013 EIA report assessed 137 shale formations in 41 countries outside the United States. This assessment identified large shale gas resources outside the United States – in China, Canada, Mexico, Argentina and Australia. In the 2013 EIA report, the EIA estimated that there is 7,299 trillion cu ft of shale gas resources worldwide (see Table 1).

TABLE 1 Top 10 countries with technically recoverable shale gas resources

Rank	Country	Shale Gas (trillion cubic feet)
1	China	1,115
2	Argentina	802
3	Algeria	707
4	United States	665
5	Canada	573
6	Mexico	545
7	Australia	437
8	South Africa	390
9	Russia	285
10	Brazil	245
	World Total	7,299

⁴⁰ Kuhn M and Umbach F, "Unconventional Gas Resources: A Transatlantic Shale Alliance?" in Koranyi D (ed), *Transatlantic Energy Futures* (Centre for Transatlantic Relations, Johns Hopkins University, 2011).

⁴¹ Russell C, "Australia, Not China, the Next Great Shale Gas Hope", *Reuters* (17 September 2013).

⁴² Smith L and Jackson P, "Is Unconventional Gas Going Global?", *The Wall Street Journal* (10 March 2010) p A14.

⁴³ Sakmar, n 3.

⁴⁴ United States Energy Information Administration (EIA), *World Shale Gas Resources: An Initial Assessment of 14 Regions Outside the United States* (April 2011).

⁴⁵ EIA, *Technically Recoverable Shale Oil and Shale Gas Resources: An Assessment of 137 Shale Formations in 41 Countries outside the United States*, n 33.

While this estimate offers the promise of abundant shale gas reserves, the 2013 EIA report acknowledges that the estimates are “highly uncertain and will remain so until they are extensively tested with production wells”.⁴⁶

Further, it was acknowledged⁴⁷ in the 2013 EIA report that:

When considering the market implications of abundant shale resources, it is important to distinguish between a technically recoverable source, which is the focus of this report, and an economically recoverable resource. Technically recoverable resources represent the volumes of oil and natural gas that could be produced with current technology, regardless of oil and natural gas prices and production costs. Economically recoverable resources are resources that can be profitably produced under current market conditions. The economic recoverability of oil and gas resources depends on three factors: the costs of drilling and completing wells, the amount of oil or natural gas produced from an average well over its lifetime, and the price received for oil and gas production. Recent experience with shale gas in the United States and other countries suggests that economic recoverability can be significantly influenced by above-the-ground factors as well as by geology. Key positive above-the-ground advantages in the United States and Canada that may not apply in other locations include private ownership of subsurface rights that provide a strong incentive for development; availability of many independent operators and supporting contractors with critical expertise and suitable drilling rigs and, pre-existing gathering and pipeline infrastructure; and the availability of water resources for use in hydraulic fracturing.

(emphasis added)

Exploring the world’s vast resources of natural gas is said to hold the key to a golden age of gas. In May 2012, the International Energy Agency (IEA) issued a report called the *Golden Rules for a Golden Age of Gas*.⁴⁸ This report concluded that the key for a “golden age of gas” was for governments, industry and other stakeholders to work together to address legitimate public concerns about the associated environmental and social impacts.⁴⁹ The report identified a set of rules that can allow policy-makers, regulators, operators and others to address these environmental and social impacts. The report concludes that the application of the “Golden Rules” can bring a level of environmental performance and public acceptance that can maintain or earn the industry a “social licence to operate” (SLO) within a given jurisdiction, paving the way for the widespread development of unconventional gas resources on a large scale, boosting overall gas supply and making the golden age of gas a reality.⁵⁰

Surprisingly this report has received little commentary or acknowledgement by the relevant regulatory authorities in Australia.

Australia

No one knows the true extent of shale gas resources in Australia but there is no denying that the potential is enormous.⁵¹ The 2013 EIA report ranks Australia seventh in the world with a technically

⁴⁶ United States Energy Information Administration (EIA), “Shale Oil and Shale Gas Resources are Globally Abundant”, *Media Release* (10 June 2013).

⁴⁷ EIA, *Technically Recoverable Shale Oil and Shale Gas Resources: An Assessment of 137 Shale Formations in 41 Countries outside the United States*, n 33, pp 10-11.

⁴⁸ IEA, *World Energy Outlook 2012: Golden Rules for a Golden Age of Gas*, n 7.

⁴⁹ IEA, Press Release, *IEA Sets Out the “Golden Rules” Needed to Usher in a Golden Age of Gas* (29 May 2012).

⁵⁰ IEA, Press Release, n 49, p 10.

⁵¹ In 2010, the *Australian Energy Resource Assessment* was undertaken jointly by Geoscience Australia and the Australian Bureau of Agriculture and Resource Economics (ABARE). At that point it was concluded that “the current knowledge base ... for shale gas, is inadequate for assessment” – see Australian Government, Department of Resources, Energy and Tourism, Geoscience Australia, and Australian Bureau of Agriculture and Resource Economics, *Australian Energy Resource Assessment* (2010) p 120, available at <http://www.ga.au>.

recoverable resource of 437 trillion cu ft.⁵² One trillion cu ft is approximately equivalent to Australia's current annual gas usage.⁵³ The 2013 EIA assessment was not based on an assessment of all of Australia's sedimentary basins.

In 2012, Geoscience Australia and the Bureau of Resources and Energy Economics (BREE) undertook an assessment of the Australian gas resources.⁵⁴ This report offered a somewhat more sobering assessment of Australia's shale gas reserves. It acknowledged the 2011 EIA assessment of Australia's technical recoverable resource of 396 trillion cu ft but commented that given "it is based on limited data and little or no production history information, this initial estimate is likely to contract in the light of actual world performance data".⁵⁵

In May 2013, a three-year research program of shale gas in Australia was completed by the Australian Council of Learned Academies (ACOLA).⁵⁶ The ACOLA research group commissioned AWT International to undertake a resource assessment to gain an additional perspective on Australia's shale gas potential. Twenty-six basins were assessed and 19 individual shale gas plays were identified. The AWT prospective resource estimate for Australia's shale gas play was in excess of 1,000 trillion cu ft. This would place Australia's resource second in the world behind China. However, ACOLA concluded that Australia's prospective resource of shale gas are "considerable but have a high degree of uncertainty attached to them".⁵⁷

Notwithstanding this uncertainty, there exists buoyant research and optimism in the Australian shale gas potential.⁵⁸ Indeed, a driver for the launch of an Australian shale gas industry is that most of Australia's CSG reserves are committed to the LNG industry from 2015-2016 with the potential for domestic gas shortages in the Eastern States and the increase in gas prices.⁵⁹

Queensland

Eastern Australia has very large reserves of coal seam gas (CSG) in high permeability reservoirs.

The focus in Queensland in recent years has been on CSG.⁶⁰ Billions of dollars are being spent in Queensland alone in developing CSG wells, liquefied natural gas plants and export facilities.⁶¹ The majority of the CSG/LNG gas is already contracted for sale to Asian customers.⁶²

Queensland has a series of sedimentary basins⁶³ which are likely to be prospective

⁵² Australia's resource was estimated at 396 trillion cu ft in the 2011 EIA Report.

⁵³ CSIRO, *Australia's Shale Gas Resources* (2013).

⁵⁴ Geoscience Australia, *Australian Gas Resource Assessment 2012*, available at <http://www.ga.au>.

⁵⁵ Geoscience Australia, n 54, p 19.

⁵⁶ ACOLA, n 1.

⁵⁷ ACOLA, n 1 p 50.

⁵⁸ Leather et al, n 36; Australian Petroleum Production and Exploration Association (APPEA), *The Natural Gas Revolution: Natural Gas from Shale and Tight Rock* (2013); CSIRO, n 53; Bell Potter, *Australian Shale Overview: A Sleeping Giant* (9 December 2011); Sunjay, "Shale Gas, Potential Energy Resources with Future Prospects", Paper delivered at the 22nd International Geophysical Conference and Exhibition, 26-29 February 2012, Brisbane, Australia; ACOLA, n 1, Ch 3; Lannin S, "Australia: Sitting on Potential Shale Gas Jackpot, but More Regulation Needed", *ABC News* (5 June 2013) available at <http://www.abc.net.au/news/2013-06-05/Australia/sitting-on-potential-shale-gas-jackpot>.

⁵⁹ ACOLA, n 1, p 14.

⁶⁰ CSG took off in Queensland from 2000: See Manning P, *What the Frack? Everything You Need to Know about Coal Seam Gas* (New South Publishing, Sydney, Australia, 2012).

⁶¹ Manning P, "A \$200b Push to Become World's Biggest Gas Power", *Sydney Morning Herald* (17 March 2012).

⁶² Cooke D, "Coal Seam Gas, Shale Gas and Fracking in Australia", *The Conversation* (16 August 2011).

⁶³ The Laura Basin, Maryborough Basin, Eromonga Basin, Cooper Basin, Bowen Basin, Galilee Basin, Adavale Basin, Georgina Basin and the Isa Superbasin.

for shale gas.⁶⁴ However, shale gas exploration is at a very early stage in Queensland.⁶⁵ Only five shale gas exploration wells have been drilled in Queensland to date, all of which are located in the Cooper Basin.⁶⁶

There are a number of differences⁶⁷ between the CSG and shale gas resources in Australia, including:

- Location – the shale gas reservoirs in Australia are in more remote locations than the CSG plays. The one advantage of this difference is that the shale gas resource is away from cropping and grazing areas;⁶⁸
- Depth – Shale reservoirs are deeper than CSG reservoirs. The advantage of this is that shale plays are deeper and further away from the shallower surface aquifers on which many rural pursuits rely;⁶⁹
- Extent of fracking – shale reservoirs always require fracking while only about half of the CSG reservoirs require fracture stimulation;
- Production costs – shale gas is 20% to 30% more expensive to produce than CSG which raises questions as to whether large-scale production is likely to be economical in Australia in this decade;⁷⁰
- Water use – more water may be needed for shale gas fracturing than CSG extraction.⁷¹

These differences may hold back shale gas development in Queensland. This may also explain why there has been very little public statement by the Queensland State Government other than a recent newspaper report that Queensland could have its own shale gas industry within two years with operators advising that production will likely commence in 2015.⁷²

The Newman Queensland State Government, took power in a landslide victory in 2012 with a central plank to “grow a four pillar economy through agriculture, tourism, resources and construction”. The Newman Government has initiated a range of review and reform initiatives aimed at growing the resources sector. Recent examples include the announcement to resume uranium mining in Queensland and the lifting of the moratorium on shale oil exploration.⁷³

It is expected that the Newman Government will warmly embrace the shale gas industry. However, some predict it will not be until the next decade that shale gas gains the same attention in Queensland as currently “enjoyed” by CSG.⁷⁴

COMMERCIAL PLAYS IN AUSTRALIA

The shale gas industry in Australia has, to date, been largely pioneered by mid-tier and junior explorers. However, some senior players have started to farm into the market suggesting that the “shale gales” have hit Australian shores.

⁶⁴ Department of Natural Resources and Mines, *Queensland’s Unconventional Petroleum potential: Shale Oil and Gas, Tight Gas and Coal Seam Gas* (February 2013).

⁶⁵ *Queensland Government Mining Journal* (Autumn 2012) Vol 109.

⁶⁶ Gasfields Commission Queensland, “Commissioners Visit the Cooper Basin Where Shale Gas is in Its Infancy”, *Media Release* (9 September 2013).

⁶⁷ Refer generally to the ACOLA Report, n 1 and Leather et al, n 36 at 74.

⁶⁸ Da Silva M, “Shale Gas Revolution Heads Down Under”, *Ethical Investor* (Issue 99, April 2012).

⁶⁹ Ripple R, “There is More to the Coal Seam Gas Than Gasland”, *The Conversation* (26 May 2011).

⁷⁰ Manning P, “Why Shale is Gas is Still the Next Big Thing”, *Sydney Morning Herald* (19 May 2012).

⁷¹ Vivoda V and Hunt C, “Report Questions Economic Benefits of Shale Gas Extraction”, *The Conversation* (5 June 2013).

⁷² McCarthy J, “Newman Government Explores Establishing Shale Gas Industry in Queensland”, *The Courier-Mail* (16 July 2013).

⁷³ Walton M, “Environmental Assessment of Proposed Queensland On-Shore Mines: Are We at the Crossroads, and If so which Path Do We Take?” *QEPR* Vol 18 (2012/2013) Issue 84.

⁷⁴ “Australian Shale Still has a Long Way to Go”, *AAP* (27 May 2013); Manning, n 70.

The following media reports confirm that the shale gas industry is starting to gain some momentum:⁷⁵

- Chevron has purchased a controlling interest in two Beach Energy shale gas exploration licences in the Cooper Basin in exchange for US\$349 million in cash and exploration spending;⁷⁶
- BG farmed into Drillsearch which has exploration permits in the Cooper Basin;⁷⁷
- Santos announced, in October 2012, the start of commercial natural gas production from its Moomba 191 shale well in the Cooper Basin;⁷⁸
- the Chinese energy giant PetroChina has joined ConocoPhillips in its shale gas acreage;⁷⁹
- BHP Billiton is reported to be “studying every square inch” of Australia looking for shale gas;⁸⁰
- other international corporations that have farmed into Australia’s shale plays include France’s Total, Japan’s Mitsubishi Corp and India’s Bharet Petroleum.⁸¹

Shale gas investment in Australia amounted to an estimated US\$1.26 billion during the period 2009 to March 2013.⁸² Some commentators regard shale gas as risky but see the arrival of Chevron and other major players as confirmation of the arrival of the shale gale in Australia.⁸³

ISSUES AND RISKS

Shale gas offers an enormous opportunity in Australia but the risks are daunting. Shale gas exploration has not yet gained momentum⁸⁴ and there are a number of commercial, technical and environmental factors which may inhibit success in Australia:

- Geology uncertainty – very little is known about the geology of many of the deep Australian shale-bearing basins. Warner says:⁸⁵

While some of the older plays in Australia have source material that is marine (Type I and II) in origin, similar to all the US plays, Australia is rich in non-marine source rocks (Type II and III). Little is known about whether this will enhance or reduce the gas storage capacity and/or fraccability when compared with the marine shale gas plays in the US
- Technological uncertainty – it is unclear whether the existing technologies in the United States will work successfully in Australia although this is not expected to be a major hurdle;⁸⁶

⁷⁵ Molan L, “Australian Shale: What’s the Next Move?”, *Gas Today* (May 2012).

⁷⁶ “Chevron in \$349m Shale Gas Pursuit”, *The Australian* (26 February 2013); “Chevron’s Australian Gas Gamble”, *The Wall Street Journal*, Asia Edition (25 February 2013).

⁷⁷ “Shale Be Right as International Big Boys Arrive”, *The Australian* (1 April 2013).

⁷⁸ Santos (Firm), “Santos Announces Start of Australia’s First Commercial Shale Gas Production”, *Media Release* (19 December 2012).

⁷⁹ “Beach Makes Market Waves – a Gas-fired Future”, *The Australian* (25 March 2013).

⁸⁰ Manning, n 71.

⁸¹ Russell, n 41; Molan, n 75.

⁸² “Argentina, Australia and Poland Emerge as Key Markets for Shale Gas Investment”, *Investment Weekly News* (13 July 2013).

⁸³ *The Wall Street Journal*, n 76; Russell, n 41.

⁸⁴ Some experts advise that Australia should hasten slowly, “U.S. Shale Gas Expert says Australia Should Go Slow on Shale Gas Development”, *The Courier-Mail*, (9 August 2013).

⁸⁵ Warner,; ACOLA, n 1, Ch 4.

⁸⁶ ACOLA, n 1, Ch 4.

- Environmental uncertainty – because of the manner in which shale gas is produced and recovered it has the potential to impact on the landscape, ecosystems, surface and groundwater, the atmosphere, and communities/landowners (including native title owners), and rarely may result in minor induced seismicity;⁸⁷
- Uncertain economics – shale gas exploration involves large start-up costs. It is estimated that the cost of a well in Australia will be A\$7 million while in comparison, Texan wells are half that cost (US\$2 to US\$3 million).⁸⁸ Much of the prospective shale gas resource is in remote parts of Australia which is poorly serviced with infrastructure and with virtually no workforce. The lack of infrastructure (eg roads and pipelines) and the need for a large water supply (for hydraulic fracturing) will add to the cost and slow the development of the industry.⁸⁹ A single frack requires about 500,000 litres of water (equivalent to about 15 truckloads of water) and 10 to 20 fracks can be required per well.⁹⁰
- Industrial capacity uncertainty – there is little fracturing capacity, few rigs and experienced personnel capable of producing horizontal wells in Australia.⁹¹ A drilling rig can produce between 11 to 18 wells per year.⁹²
- Political uncertainties – there is a public perception, and it follows a political perception, that all gas sources have the same “gasland” problems. Shale gas development is seen as the same as coal seam gas with the same risks.⁹³ The significance of political attitudes is evident in Europe where France has banned the use of hydraulic fracturing but Poland has embraced it.⁹⁴

Even if public acceptability and environmental hurdles are overcome, Australia will require a substantial increase in its service sector capability, and the transfer of skills and technology from the United States, to achieve a successful shale gas industry.⁹⁵

QUEENSLAND REGULATORY FRAMEWORK

Overview of existing framework

The unconventional gas industry in Queensland is regulated by both State and Commonwealth legislation.

The focus in Queensland over the past 10 years has been on CSG. During this period, there has been extensive and somewhat ad hoc development of legislation to deal with a range of controversial CSG issues as they arise including overlapping tenements,⁹⁶ impacts on groundwater and aquifers,⁹⁷ and conflict with strategic cropping and land access issues.⁹⁸ As a consequence, the industry is now regulated by at least six government departments and seven main pieces of legislation. Hardly ideal.

⁸⁷ ACOLA, n 1.

⁸⁸ Da Silva, n 68.

⁸⁹ ACOLA, n 1, Ch 5.

⁹⁰ ACOLA, n 1, p 78.

⁹¹ Warner, n 38.

⁹² ACOLA, n 1, pp 74-77.

⁹³ Warner, n 38.

⁹⁴ Palmer B, Sheridan P, Kasatkina A, Keys V, and McKenna C, “Recent Developments in UK Shale Gas”, *Australian Environment Review* (April 2012).

⁹⁵ Rogers, n 20.

⁹⁶ Zillmann B and Atkinson C, “Changes to Queensland Coal Seam Gas Regime” (2002) 21 AMPLJ 145.

⁹⁷ Walton M, “The Queensland CSG Industry: Miners Versus Farmers – Do the 2010 Water Act Amendments for Underground Water Management Ease the Tension?” (2013) 32 ARELJ 19.

⁹⁸ Queensland Government, Department of Environment and Resource Management, *Protecting Queensland’s Strategic Cropping Land: A Policy Framework* (August 2010).

The Queensland statutory framework for CSG is summarized in Table 2.

TABLE 2 Queensland's Regulatory Framework

Legislation	Department	Purpose
<i>Petroleum and Gas (Production and Safety) Act 2004</i> and the <i>Petroleum Act 1923</i> and <i>Water Act 2000</i> (s 479)	Qld – Department of Natural Resources and Mines	To regulate petroleum and gas exploration tenures, safety, production and pipelines. In particular tenure approvals and dealings; regulation of the land access framework; coal seam gas compliance unit and cumulative assessment of impacts on groundwater.
<i>Water Supply (Safety and Reliability) Act 2008</i>	Qld – Department of Energy and Water Supply	To regulate the quality of drinking water where production has an impact on the drinking supply for an urban community.
<i>Gasfields Commission Act 2013</i> and the <i>State Development and Public Works Organisation Act 1971</i>	Qld – Department of State Development, Industry and Planning	To improve sustainable co-existence between landowners, regional communities and the onshore gas industry. The office of Coordinator-General is responsible for assessing and approving major projects under the <i>State Development and Public Works Organisation Act</i> .
<i>Public Works Organisation Act 1971</i> and <i>Water Act 2000</i> (Ch 3)	Qld – Department of Environment and Heritage Protection	To provide for environmental and groundwater regulation for the industry. The department assesses the environmental impacts and issues an environmental authority.
<i>Petroleum and Gas (Production and Safety) Act 2004</i> and <i>Forestry Act 1959</i>	Qld – Department of National Parks, Recreation, Sport and Racing	To regulate the use of State land eg State forests.
<i>Environment Protection and Biodiversity Conservation Act 1999</i>	Cth – Department of Sustainability, Environment, Water, Population and Communities	To protect and manage matters of national environmental significance including water resources.

Source: Various government agencies and publications, specifically the Queensland Competition Authority, *Coal Seam Gas Investigation* (July 2013).

There are also a large number of other Acts, subordinate legislation, codes and policy documents which directly or indirectly impact on the unconventional gas industry,⁹⁹ including the *Aboriginal Cultural Heritage Act 2003* (Qld), *Nature Conservation Act 1992* (Qld), *Strategic Cropping Land Act 2011* (Qld), *Work Health and Safety Act 2011* (Qld) and the *Native Title Act 1993* (Cth).

Queensland's regulatory approach to unconventional gas extraction has, in recent times, been based on the philosophy of adaptive environmental management.¹⁰⁰ This philosophy is essentially an approach of "learning by doing" which is heavily dependant on continuous monitoring, evaluation and enhancement of the regulatory framework.¹⁰¹ Underlying this approach is an admission that Queensland is in a learning phase and there remains uncertainty about the impact of the activities.¹⁰² Hardly encouraging for those concerned about the environmental and social impacts!

⁹⁹ Hunter T and Chandler J, *Petroleum Law in Australia* (1st ed, LexisNexis, 2013) Chs 7 and 8.

¹⁰⁰ Queensland Government, Department of Environment and Natural Resources, *Adaptive Environmental Management Regime for the Coal Seam Gas Industry* (2011).

¹⁰¹ Hunter and Chandler, n 99.

¹⁰² Swayne N, "Regulating Coal Seam Gas in Queensland: Lessons in an Adaptive Environmental Management Approach?" (2012) 29 EPLJ 163.

The Commonwealth and State Governments are continuing to develop policies for the regulation and governance of unconventional gas and this seems to be a reflection of the fact that the industry only enjoys, at best, weak social acceptance.

Is Queensland's regulatory framework ready to cope with this new energy resource?

Only a few shale gas wells have commenced production in Australia to date. In Queensland only a few exploration wells have been drilled. No specific monitoring or regulatory regime has been developed in Queensland for shale gas.

However over the past few years, Queensland has developed a comprehensive regulatory regime for CSG and it is considered that many features of these existing requirements will readily translate to shale gas production and its related activities.

Is it necessary to contemplate additional requirements for shale gas production?¹⁰³

Perhaps the one important lesson to learn from the rapid development of the CSG industry is that without community acceptance the industry will be hampered by opposition, heavy regulation (at both the Commonwealth and State levels of government) and distraction. There is no doubt that the development of the shale gas industry in Queensland will generate a high level of public interest and debate. It is fair to conclude that the acceptance of the shale gas industry is likely to be adversely affected by the negative view held about CSG.¹⁰⁴

While the relative remoteness of shale gas resources, compared to CSG, may eliminate or alleviate some of the potential sources of conflict, the shale gas stakeholders include groups who have much broader views and concerns.¹⁰⁵

There is no doubt that the success of the development of the shale gas industry in Queensland will be dependent on the industry, in conjunction with the governments, developing a "social licence to operate" (SLO). This proposition is at the heart of three major studies released over the last two years regarding the successful development of unconventional gas resources.¹⁰⁶

The use of the adaptive environmental management approach to the regulation of unconventional gas provides flexibility allowing the regulatory framework to adapt to new or changing environmental challenges. However, the use of the adaptive management approach provides little certainty and comfort to those stakeholders opposed or concerned about the expansion of the industry.¹⁰⁷ To address community concerns it is necessary for a robust and transparent regulatory framework to be established.¹⁰⁸

In 2013, the Standing Council on Energy and Resources (SCER) endorsed the *National Harmonised Regulatory Framework for Natural Gas from Coal Seam* (the Framework). The purpose of the Framework is to put in place a suite of leading practice principles to ensure the regulatory regimes in Australia are robust, consistent and transparent across all Australian jurisdictions. The Framework focused on four key areas of operation namely well integrity, water management, hydraulic fracturing and chemical use. It is argued that through this focus, the Framework will provide

¹⁰³ ACOLA, n 1, p 168.

¹⁰⁴ Manning, n 70, quoting Drew Hutton President of Lock the Gate Alliance; McCarthy, n 72, where Mr Hutton is quoted as saying that Lock the Gate Alliance has the same concerns with shale gas as it does with CSG.

¹⁰⁵ ACOLA, n 1, p 155.

¹⁰⁶ ACOLA, n 1, Ch 11, EIA, n 9; SCER, *National Harmonized Regulatory Framework for Coal Seam Gas* (2013).

¹⁰⁷ Hunter T, "Australia's Unconventional Gas Resources", *Australia's Unconventional Energy Options* (Committee for Economic Development of Australia, September 2012) Ch 4.

¹⁰⁸ Hunter T, "Shale Gas Resources in Western Australia: An Assessment of the Legal Framework for the Extraction of Onshore Shale Gas" (2011) 18 *Murdoch University Electronic Journal of Law* 29.

assurance to communities and landowners that their environmental and health concerns are being taken seriously and are being effectively regulated.¹⁰⁹

To develop a SLO for shale gas it is considered desirable to develop a framework for shale gas with the intention and expectation that the main Australian shale states of Western Australia, South Australia and Queensland implement the shale gas framework well before the industry gathers momentum.

CONCLUSION

The shale gale has hit the Australian shores. Shale gas offers Australia an energy revolution to rival the United States. However, there is no doubt that this opportunity will require major resource companies to inject massive capital and undertake careful management of the environmental and social impacts. It will also require political and community support which will only be possible with transparent, balanced and effective regulation.

The CSG industry developed in Queensland at such a “break neck” speed that the State Government was forced to take a reactive, rather than proactive, role in developing a SLO. Is Queensland’s regulatory framework ready to cope with this new resource?

There is ample opportunity in Queensland, given the lessons that can be learnt from CSG and the fact that the shale gas industry is still in its infancy, to build on the CSG regulatory framework and take a proactive role on shale gas. Moreover, the body of learning from international and national energy agencies provides a very helpful starting point to assist the Queensland Government to develop a framework which will enable the industry to achieve a SLO.

Only time will tell if this is an opportunity grasped by the Queensland Government.

¹⁰⁹ The Shale Gas Framework document should be developed also having regard to the ACOLA Report and the EIA “Golden Rules” report.

Insurance and trust: Lessons from the Christchurch Cathedral

Julie-Anne Tarr and Myles McGregor-Lowndes*

This article examines important insurance and trust law issues that may confront trustees charged with the governance and protection of unique properties with broad community and heritage significance. Often trustee roles are assumed by community leaders without full appreciation of the potential difficulties and consequences when unforeseen circumstances arise. Three recent New Zealand court decisions in relation to the deconstruction and repair of the Christchurch Cathedral and to the interim construction of a transitional “cardboard Cathedral” highlight how difficult – and legally exposed – the role of trustee can be. The Cathedral cases go to the heart of defining the core purpose for which a Trust is created and examine the scope of discretion in fulfilling this charge its Trustees carry. Arising in the wake of the devastating Christchurch earthquakes, the Cathedral’s Trustees were called upon to consider the best directions forward for a crippled and dangerous building subject to potential demolition, the wellbeing of the Cathedral’s direct community, and the broader heritage and identity factors that this “heart” of Christchurch represented. In the context of a seemingly grossly underinsured material damage cover – and faced with broader losses across the Diocese’s holdings – the Trustees found that their sense of mission failed to gel with that of a community-based heritage buildings preservation trust. The High Court had to consider how monies received under the material damage policy could be applied by the Trustee in deconstructing, reinstating or repairing the Cathedral and if monies could be partly deployed to create an interim solution in the form of a transitional cathedral – all this in the context of the site-specific purpose of the Cathedral trust. The cases emphasise further the need to assess professionally the nature and quantum of cover effected to protect against various risks. In addition, in the case of historic or unusual buildings extra care must be exercised to take account additional costs associated with reinstatement so as to substantially retain the character and intrinsic value of such properties.

INTRODUCTION

Two recent New Zealand High Court cases and a Court of Appeal decision arising out of severe damage caused to the historic Christchurch Cathedral in the series of earthquakes between September 2010 and December 2011 have highlighted and clarified important insurance and trust law issues.

Church properties in the Anglican Diocese of Christchurch are owned by the Church Property Trustees (the Trustees), a corporate trustee expressly recognised as such in the *Anglican (Diocese of Christchurch) Church Property Trust Act 2003*. In the aftermath of the earthquakes the Trustees were confronted with decisions as to the immediate and longer term future of the Cathedral as well as decisions impacting upon the immediate needs of the Cathedral community. These decisions were the subject of review and directions in the Cathedral cases.

THE CATHEDRAL CASES

The first case, *The Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045, was initiated by an incorporated charitable trust called the Great Christchurch Buildings Trust

* Professor Julie-Anne Tarr, QUT Business School, Queensland University of Technology.

Professor Myles McGregor-Lowndes OAM, Director of the Australian Centre of Philanthropy and Nonprofit Studies.

(the Buildings Trust). This Buildings Trust was established in August 2012 by a group of concerned Christchurch citizens with the principal objective of promoting the preservation of heritage buildings damaged in the earthquakes. The Buildings Trust sought judicial review of a decision by the Trustees to partially deconstruct the Cathedral to a level of approximately 2m to 3m in response to a hazard notice issued by the Canterbury Earthquake Authority.¹ Chisholm J upheld the Buildings Trust's challenge and ordered a stay of the Trustee's partial deconstruction decision. His Honour found that the Trustees held the Cathedral property for the purposes of an express trust created in 1858 and that these purposes "involve, first, the erection of a Cathedral on the site and secondly, the continued existence of a Cathedral on the site indefinitely thereafter".² While the Cathedral Trust required that there be a Cathedral on the Cathedral Square site the judge held further that the building did not necessarily have to replicate the Cathedral as it stood before the earthquakes. Accordingly unless the terms of the trust were varied, the structure that remained would have to be repaired or it would have to be replaced by another Cathedral. Chisholm J therefore concluded that in the absence of one of those steps the whole purpose of the trust would be defeated. Consequently any necessary deconstruction and/or demolition would come within the terms of the trust provided such deconstruction or demolition was for the purpose of repairing or replacing the existing structure.³ The Trustees were entitled to determine the timeframe for repair or replacement of the Cathedral but an unnecessary deferral would not be in the spirit of the trust.⁴ Chisholm J found that the decision of the Trustees to deconstruct the Cathedral down to a level of 2m to 3m was, at that juncture, "incomplete" rather than unlawful.⁵ He therefore granted the judicial review and stayed the Trustee's decision until further order of the court. This adjournment was designed to give the Trustee time to reconsider and complete its decision as to how it could comply with the "make-safe" directive from the Canterbury Earthquake Authority but in a manner congruent with the Trust's express purposes.⁶

This decision was appealed in *The Great Christchurch Buildings Trust v Church Property Trustees* [2013] NZCA 331 but the appeal was dismissed and the orders made in the High Court confirmed. The Court of Appeal directed that the Trustees are able to deconstruct the Cathedral for the purpose of building a new Cathedral, and that the new Cathedral need not replicate the original Cathedral. The Court of Appeal rejected the Buildings Trust's argument that the Cathedral Trust was a trust for the particular Cathedral building, not a trust for a cathedral, and as a consequence the Trustees had an obligation to preserve, protect and repair the Cathedral and was not free to deconstruct it to build a new cathedral. In giving the reasons of the court, O'Regan P found that the terms of the Cathedral Trust required only that there be a cathedral on the land on which the Cathedral stands and that the Trustees could replace the cathedral if they considered that to be the best way to ensure that the purpose of having a cathedral on the site continued.⁷ Also dismissed was the Building Trust's argument that as public subscriptions were raised for the building of the original Cathedral in the design chosen by the body to which donations were made, the Trustees were bound to preserve the Cathedral as erected from the funds donated by the public. However, as O'Regan P observed:

It seems to us to be quite unrealistic to say that those who contributed to the building of the Cathedral in the 1870s still have some say over what happens to the building 140 years later. While they would, of course, have hoped that it would continue to exist in the future, as the ancient cathedrals of Europe have, they must have accepted that if a natural disaster or war led to its destruction or to it being

¹ *Canterbury Earthquake Recovery Act 2011*, s 38.

² *The Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 at [134], [145].

³ *The Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 at [146].

⁴ *The Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 at [147].

⁵ *The Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 at [163].

⁶ Generally see Bennington D, "Christchurch Cathedral Trustees Required to 'Honour the Spirit of the Trust'", *NZ Lawyer Online*, Issue 198 (November 2012) available at <http://www.nzlawyeromagazine.co.nz/Archives/Issue198/198N3/tabid/4878/Default.aspx>.

⁷ *The Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 at [51]-[75].

severely damaged, what would happen then would be determined by the trustees of the Cathedral at the time, not by the terms on which the money had been raised a hundred or more years before.⁸

Accordingly the Court of Appeal held that once the Cathedral was constructed the contributors had no ongoing interest in the Cathedral and that the Cathedral was held subject to the terms of the Cathedral Trust which allowed the deconstruction and replacement of the Cathedral. A third argument by the Building Trust asserted that legislative enactments⁹ providing for the maintenance and repair of the Cathedral, but ostensibly not is deconstruction, constrained the Trustees from that course of action. The Court of Appeal rejected this argument as well stating that these Acts did not affect the terms of the Cathedral Trust and that in any event the court was not persuaded that there was such a legislative constraint.

In the second High Court case, *Church Property Trustees v Attorney-General* [2013] NZHC 678, the Trustees sought directions from the High Court concerning the legality of their actions in approving the expenditure of \$4.5 million towards the construction of a so-called transitional Cathedral, known locally as the cardboard Cathedral. This transitional Cathedral was under construction on the site of St John's Latimer Square Church which had had been destroyed by the earthquakes and subsequently demolished. These monies were a part of the proceeds of a \$38.8 million insurance pay out under a material damage insurance policy as a result of damage sustained by the Christchurch Cathedral. Key issues for resolution by the court were: (i) Is the construction of the transitional Cathedral within the purposes of the Cathedral trust?; (ii) If not, is there a separate insurance trust whereby the Trustees hold the insurance claim proceeds on trust for the Cathedral congregation and its purposes?; and (iii) Are the Trustees (if in breach of trust) entitled to relief from personal liability?¹⁰

In relation to the first question, Panckhurst J was not persuaded that the terms and purposes of the Cathedral trust were affected by the need to sustain the congregation and to improve the Cathedral's financial position (which had been severely affected by declining attendances at services and by visitors). The focus of the Cathedral trust was upon the "continued existence of the building itself" and the "material damage insurance policy was effected to ensure its ongoing existence".¹¹ On the second question the judge accepted that the Cathedral community, as an identifiable unincorporated association of people, had an insurable interest in the Cathedral arising out of their use and enjoyment of the Cathedral.¹² However, he did not accept that any beneficial interest that the community had in the material damage insurance proceeds were not subject to the terms of the trust applicable to the Cathedral trust, alternately put, there was not a separate and distinct insurance trust whereby the Trustees held the insurance policy and proceeds on trust for the Cathedral community and its purposes. Determination of the third question was deferred for further submissions and consideration.

Against this background this article now turns to a consideration of some important insurance law issues and principles that are spot lighted by these cases.

INSURABLE INTEREST

The primary purpose of property insurances is to protect the insured from the economic consequences of fortuitous events and it follows from this that the insured must have an interest in the subject matter of the insurance, for without such an interest, the insured cannot suffer a loss and hence can obtain no indemnity.¹³ At common law¹⁴ and pursuant to marine insurance legislation¹⁵ a strict proprietary

⁸ *The Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 at [88].

⁹ *Church Property Trust (Canterbury) Act 1879; Anglican (Diocese of Christchurch) Church Property Trust Act 2003*.

¹⁰ *Church Property Trustees v Attorney-General* [2013] NZHC 678 at [6].

¹¹ *Church Property Trustees v Attorney-General* [2013] NZHC 678 at [34].

¹² Discussed further below in the section, "Insurable interest" in this article.

¹³ See eg, *Davjoyda Estates Pty Ltd v National Insurance Co of New Zealand Ltd* (1965) 69 SR (NSW) 381 at 421.

¹⁴ *Macaura v Northern Assurance Co Ltd* [1925] AC 619; *Truran Earthmovers Pty Ltd v Norwich Union Fire Insurance Society Ltd* (1976) 17 SASR 1; *Constitution Insurance Co of Canada v Kosmopoulos* (1987) 34 DLR (4th) 208.

interest in, or some legal or equitable relation to, the subject matter of insurance must exist – it is not enough for the insured simply to demonstrate that he or she benefits or stands to benefit from the existence of the property or would suffer a loss by its destruction – the insured must establish that he or she has, in addition, a legally enforceable claim or right in respect of it, or some legal liability to make good its loss. However, in New Zealand the *Insurance Law Reform Act 1985*¹⁶ has relieved the insured from the obligation to demonstrate a legal or equitable interest in the subject matter of a non-marine contract of indemnity insurance. This does not mean that the insured is freed from the responsibility of showing he or she has suffered a pecuniary or economic loss by reason of the happening of the event insured against. Such insurance is indemnity insurance and, while the nature of the interest required has been changed by the *Insurance Law Reform Act 1985* the extent of the insured's interest operates as before to determine the amount recoverable.¹⁷ The drafting of this insurable interest provision in the *Insurance Law Reform Act 1985* is not as clear as it could be¹⁸ but the combined effect of this statutory provision and the general law of insurance is that in relation to contracts of indemnity insurance the validity of an indemnity policy does not depend upon the existence of an insurable interest, but the very nature of an indemnity policy dictates that an interest in the subject matter of insurance must be present before any compensation is payable.

In *Church Property Trustees v Attorney General* [2013] NZHC 678, Panckhurst J in considering the argument that an insurance trust existed, examined the nature and standing of the Cathedral community and its representative body, the Chapter. He concluded that this community being an identifiable and voluntary unincorporated group of individuals recognised under canon law as the representative body for that church, which maintained a bank account and kept audited accounts had an insurable interest in the Cathedral. He concluded further that this insurable interest in the Cathedral existed regardless of whether the test adopted is the existence of an unequivocal interest in the continued preservation of the insured property¹⁹ or the need for a legal or equitable relationship with the insured property.²⁰ He states:

The former is self-evident given the special relationship between the community and the Cathedral, formally recognised in canon law by the obligations upon the Chapter to administer the Cathedral in a prescribed manner. In legal or equitable terms, although a formal lease does not exist, the canon law duties imposed upon the Dean and the Chapter are such that the Cathedral community has at least a licence to possess and occupy the Cathedral.

Counsel for the Attorney-General had argued against such a conclusion pointing to the fact that the Chapter was not a legal person and could not, therefore, enter into an insurance contract and in any event did not have an insurable interest in the Cathedral given that the policy in question insured land and buildings owned by the Trustees.²¹ While not accepting Counsel's arguments Panckhurst J did concede that the existence of an insurable interest "may be more meaningful in relation to the contents and business interruptions policies, but a beneficial interest in the material damage policy and its proceeds also exists".²² In the circumstances the outcome did not turn on this insurable interest point as no resulting special insurance trust in relation to the proceeds from the material damage insurance pay-out was found to have been created. However, in passing, it is worth noting that the absence of any reference to the *Insurance Law Reform Act 1985* made deliberations on this matter more protracted than necessary.

¹⁵ See *Marine Insurance Act 1908* (NZ), s 6; *Marine Insurance Act 1909* (Cth), s 11.

¹⁶ *Insurance Law Reform Act 1985*, s 7.

¹⁷ See also *Insurance Contracts Act 1984* (Cth), s 16, substituting a test of pecuniary or economic loss for contracts of general insurance.

¹⁸ See eg, Tarr AA, and Kennedy JR, *Insurance Law in New Zealand* (2nd ed, Law Book Co, 1992) pp 38-41.

¹⁹ *Church Property Trustees v Attorney General* [2013] NZHC 678 at [37].

²⁰ *Church Property Trustees v Attorney General* [2013] NZHC 678 at [37].

²¹ *Church Property Trustees v Attorney General* [2013] NZHC 678 at [40].

²² *Church Property Trustees v Attorney General* [2013] NZHC 678 at [41].

THE COVER

A generic material damage policy arranged through the Anglican Insurance Board with Ansva Insurance was in place in relation to the Cathedral. The *Financial Regulations of the Diocese of Christchurch 2007* prescribe that all church property shall be held by the Trustees and that buildings and improvements will have material damage insurance cover for replacement value.²³ The Cathedral is described in *The Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 as being insured on a “functional replacement value basis”. In the context of active negotiations and unresolved litigation comments are of necessity restricted to information contained in the court documents and to general commentary. The Trustees of the Christchurch Cathedral received \$38.8 million from an insurance claim as a result of the damage sustained by the Cathedral in the earthquakes.

Three options for the Cathedral were considered. Option 1 is referred to as the Maximum Retention option. The cost of this option involving reconstruction of the Cathedral (without the proposed deconstruction down to 2m to 3m) was estimated by a Review Panel of three experienced structural engineers to be viable for an estimated cost of \$95 million plus GST.²⁴ The conclusion of the Review Panel was that this maximum retention option would meet or exceed New Zealand Building Code requirements. However, delay in implementing this option could increase the cost to \$187 million plus GST.²⁵ Option 2 was to deconstruct the building to sill level about 2m to 3m above the ground and then to erect a new Cathedral. The cost of this option was estimated in the range \$66 million to \$76 million plus GST.²⁶ An intermediate third option involving stabilising the eastern end of the Cathedral and deconstructing the western end was also considered but not pursued. The Building Trust strongly advocating the maximum retention option arguing that in reality the costs associated with deconstructing the building to 2m to 3m or sill level and then reconstructing would be higher than repairing the building in-situ.

Whatever the final definitive costs of these options it is abundantly clear that the insurance recovery of \$38.8 million is hopelessly inadequate to meet the costs of reinstating the Cathedral. This raises clearly questions as to replacement value and the expression used to describe the material damage insurance cover as being on a functional replacement value basis. Particular care is necessary in effecting cover in relation to unusual or historic buildings with close attention necessary to their nature and purpose. For example in *Marek v CGA Fire & Accident Insurance Co Ltd* (1985) 3 ANZ Insurance Cases 60-665 approximately 80% of a large historic house containing 42 rooms, Hans Heysen ceilings, special wood panelling and other unique features was destroyed by fire. One of the issues before the Supreme Court in South Australia was the quantum payable under a fire insurance policy. Legoe J held that the appropriate measure of indemnity for this unique building was the cost of repair to reinstate the building, and that the market value was irrelevant as it would not recompense the insured for his actual loss, the market value being much less than the reinstatement cost.²⁷ Of course the sum insured in this case was sufficient to cover the loss and the court’s focus was upon the appropriate methodology to apply in determining the amount payable. This would have been of no benefit to the insured had the sum insured been inadequate.

Another instructive case is *Reynolds and Anderson v Phoenix Insurance Co Ltd* [1978] 2 Lloyd’s Reports 440 where the insurance of an old maltings was in issue. A fire occurred which destroyed about 70% of the building and the appropriate measure of indemnity fell to be determined. During the course of the hearing three possible ways to gauge the appropriate indemnity were canvassed. The first was to use market value, which would be difficult to assess, there being no ready market for buildings such as maltings, but which would be considerably less than reinstatement. The second method was to

²³ Clause 13.2 of the *Financial Regulations of the Diocese of Christchurch 2007*.

²⁴ *The Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 at [46].

²⁵ *The Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 at [154].

²⁶ *The Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 at [36].

²⁷ See also *Lucas v New Zealand Insurance Co Ltd* [1983]1 VR 698 at 700.

look at the purpose for which the maltings were to be used and then to find out what alternative accommodation could be erected to fulfil that function. The court described this as equivalent modern replacement value – again this would involve a sum considerably less than reinstatement cost. The third was the cost of reinstatement which was the most expensive method. The court held that the true measure of indemnity involved the payment of sufficient funds to reinstate the building substantially as it was before the fire, as the insured in this case had a genuine intention to reinstate.

Unfortunately it appears that the cover taken out in relation to the Cathedral buildings clearly is inadequate to meet the costs of reinstatement even on a functional as opposed to maximum retention or restored basis. In considering this matter Panckhurst J noted that the Diocese’s financial regulations require replacement value cover “unless specifically agreed otherwise by the Church Property Trustees”.²⁸ He noted further that there was no evidence of any such agreement or any explanation concerning how the level of insurance cover for the Cathedral was assessed. This, in his opinion, raised questions as to whether the trustees would be entitled to relief from personal liability under s 73 of the *Trustee Act 1956* which affords relief where trustees act honestly and reasonably.²⁹ Negligence would, in his view, be relevant to any assessment of reasonableness. Regardless of the final resolution of these matters it is regrettable that a building like the Christchurch Cathedral may not have been insured for its replacement value with particular attention upon its historic and unique character.

CONCLUSION

The Cathedral cases illustrate the principle that when insurance money is received by a trustee it should be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.³⁰ Accordingly monies received under the material damage policy could be applied by the Trustee in rebuilding, reinstating or repairing the property lost or damaged but given the site-specific purpose of the Cathedral trust, insurance proceeds arising from the insurance cover on the Cathedral could not be used off-site to construct a cardboard interim substitute – no matter how meritorious the intentions were to serve the congregation. Even where Panckhurst J concluded that the Cathedral community had an insurable interest in the material damage policy, he nevertheless held that any beneficial interest it had in proceeds was subject to the terms of the trust applicable to the Cathedral Trust.

Accordingly the insurance proceeds from the material damage policy must be deployed by the Trustees to the repair or reconstruction of the Cathedral. Some latitude is afforded the Trustees in that the Cathedral does not, according to Chisholm J,³¹ have to replicate or be identical to the Cathedral that existed before the earthquakes occurred but “the structure would, of course, have to qualify as ‘a Cathedral’ in terms of the trust”.³²

Particularly vexing to the Diocese must be the fact that its own regulations contemplated material damage insurance cover for replacement value. Moreover, there was an intention ostensibly to insure on a “functional replacement value basis”. Why this did not occur or what constraints might exist beyond the pages of the published court reports and other publically available documents is not known. In any event these matters are beyond the scope of this article but the Cathedral cases highlight the unfortunate consequences of under and/or inadequate insurance. Given the inadequate recovery under the material damage policy and the very limited payout under a business interruption policy the Trustees could be said to have found themselves between a rock and a hard place. Immediate congregational and financial needs dictated a transitional cathedral but inadequacy of insurance recoveries led to decisions that were the subject of judicial review and directions in the cases discussed. These cases are a salutary reminder to all organisations of the need to assess professionally the nature and quantum of cover effected to protect against various risks. In addition, in

²⁸ *Church Property Trustees v Attorney General* [2013] NZHC 678 at [55].

²⁹ *Church Property Trustees v Attorney General* [2013] NZHC 678 at [55].

³⁰ See eg. *Trustee Act 1956* (NZ), s 25(3).

³¹ *The Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 at [148].

³² *The Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 at [148].

the case of historic or unusual buildings extra care must be exercised to take account additional costs associated with reinstatement so as to substantially retain the character and intrinsic value of such properties.

National competition policy: Coming of age

Professor Frederick G Hilmer AO*

Professor Frederick G Hilmer AO, President and Vice-Chancellor of the University of New South Wales delivered the following speech at the Fourth Annual Baxt Lecture on 19 September 2013.

It is now just over 20 years since the release of the Report by the Independent Committee of Inquiry into National Competition Policy (NCP).¹

While the recommendations were largely implemented, and produced significant benefits, after 20 years a fresh look at competition policy is warranted, particularly given the different economic and political environment today versus 20 years ago, and the insights provided by experience in implementing and applying the NCP.

My starting point is to recap the success of the reforms. NCP has been widely recognised as a model of both competition policy and its implementation by the OECD and many governments considering similar reforms. Examples include Canada, Mexico, India and a number of our South-East Asian neighbours.

The impact of NCP on Australian GDP growth, as assessed by the Productivity Commission² was that the reforms had lifted Australia's GDP by at least 2.5% over levels that would have otherwise prevailed. Australia's GDP growth – after years of sluggish performance – became one of the strongest in the OECD between 1993 and 2005. There was also a significant increase in productivity since the reforms were implemented. After the late 1980s period of negligible improvements in multifactor productivity (MFP), MFP jumped to almost 2.0% per annum, and held at this level into the 2000s.³ Many key infrastructure industries including power, gas, transport and telecommunications were restructured, and well over 1,000 anticompetitive regulations and laws were reformed.

This is the glass half full, or largely full, side of the story. While tangible results of the policy were evident into the early part of this century, since then progress has stalled. The need to lift productivity growth is back on the agenda as the rate of annual improvement in MFP dropped from almost 2% up to 2003 to below 0.5%. And the global financial crisis and rise of China and Asia have created new challenges and opportunities. Consequently, I welcome the opportunity to deliver the Baxt Lecture, to discuss the experience with NCP and over the last decade, and the lessons that have been learned.

My concern is not with the policy framework and overall intent, as set out in Exhibit 1 (see below). Rather, it is with the way in which the policy is supported and applied. More specifically, there are three areas where a new or reinvigorated approach may be warranted, each of which is discussed in turn. These are:

- The institutional framework, both political and administrative, for adapting and implementing competition policy.
- The process for removing actual and potential regulatory restrictions on competition.
- The regulation of access to essential facilities.

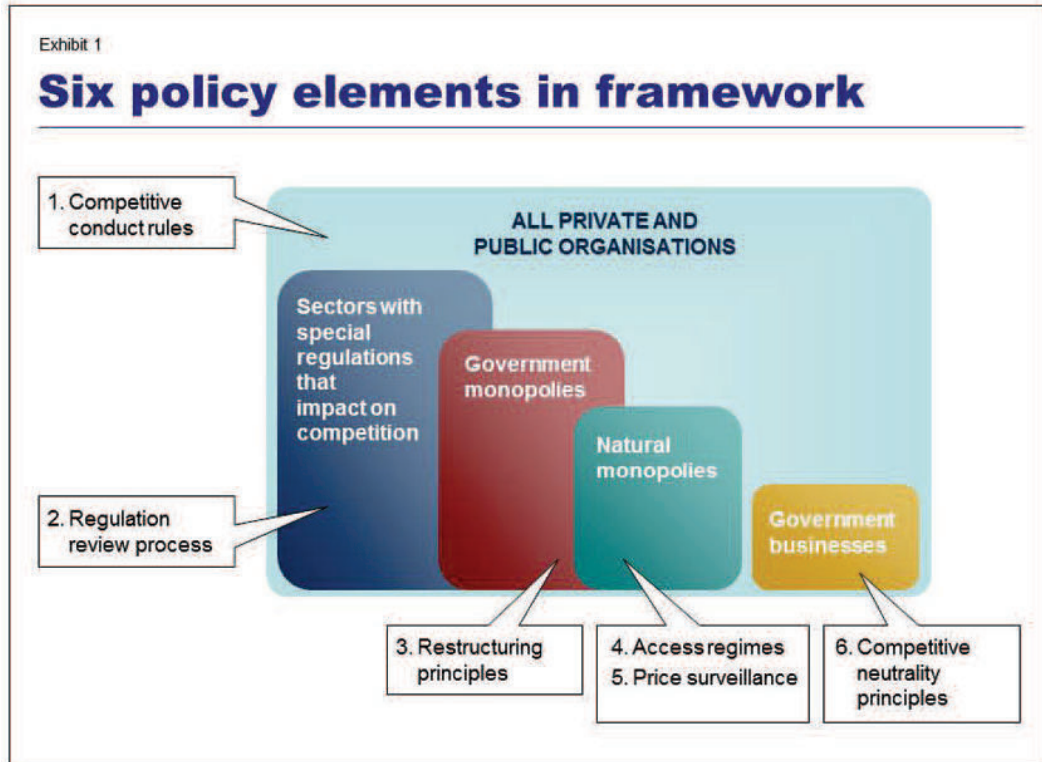
There are also areas of the economy that have become even more important and more difficult to deal with since the NCP was adopted. The role NCP may play in some of these areas is discussed in the final section.

* President and Vice-Chancellor, UNSW. Speech presented at the Annual Baxt Lecture in Competition Law on 19 September 2013.

¹ Hilmer FG, Rayner MR and Taperell GQ, *National Competition Policy: Report by the Independent Committee of Inquiry*, (Australian Government Publication Service, Canberra, 1993).

² Productivity Commission, *Review of the National Competition Policy Reforms*, Report Number 33 (Canberra, February 2005).

³ OECD, *Statextracts*, available at <http://stats.oecd.org/Index.aspx?DatasetCode=MFP>.



Source: Hilmer F, "Designing and Implementing an Effective Competition Policy: The Australian Experience", paper presented at the OECD Conference, "100 Meetings of the OECD Competition Committee" on 20 February 2008.

INSTITUTIONAL FRAMEWORK

There are three parts to the institutional framework for competition policy. First is the position in the ministry where political responsibility for implementing and updating the policy rests. Our report was relatively silent on this point. Second is the policy review structure that provides advice to the minister as the policy evolves. The National Competition Council (NCC) was the body recommended for this role. And, third, is the administrative structure that applies Competition Law and infrastructure regulation, the role of the Australian Competition and Consumer Commission. It is in the first two of these areas where I believe changes are now needed.

Ministerial responsibility

The impetus for the review of competition policy in 1992 came from the then Prime Minister's Department, and was strongly supported by State Governments of both major political parties. Throughout the inquiry involvement and support from all governments was strong, resulting in the Council of Australian Government endorsement in 1995 of substantially the entire report. Moreover, the recommendations were strengthened by the addition of substantial competition payments that the Commonwealth would make to the States for 10 years provided they implemented the recommendations.

So it did not occur to us, given the clearly evident success of NCP that political commitment would drift, particularly when the competition payments ceased in 2006. Yet this is what happened, evidenced by ministerial responsibility moving further and further away from the Prime Minister.

The 1992 report and its implementation were driven by Prime Minister Keating. Under the Howard Government, responsibility passed to the Treasurer. In 2009, responsibility moved from Cabinet Minister Bowen (Minister Assisting the Treasurer) to Minister Emerson, not then a member of

cabinet. As at August 2013, the Minister David Bradbury, holds the additional portfolios of Assistant Treasurer, Minister Assisting for Financial Services and Superannuation, and Minister Assisting for Deregulation.

Given the centrality of Competition Policy to productivity and economic performance, it is argued that the responsibility should rest with a senior minister who is a member of cabinet, preferably the Prime Minister or the Treasurer.

Following the 7 September 2013 election, I am encouraged that the Prime Minister, Tony Abbott, has announced responsibility for driving the Government's deregulation agenda will shift to the Department of Prime Minister and Cabinet.

Why did responsibility for competition policy drift away from the centre of government? One answer is "the global financial crisis (GFC)", which raised political concerns about market-based measures to drive productivity and economic growth. This development was not unique to Australia but resonated with political leaders at the time.

The then Prime Minister, Kevin Rudd, highlighted the concern in an article in *The Monthly* in February 2009. To quote, in light of the GFC

the intellectual challenge for social democrats is not just to repudiate the neo-liberal extremism that has landed us in this mess, but to advance the case that the social-democratic state offers the best guarantee of preserving the productive capacity of properly regulated markets while ensuring **government** is the regulator, that **government** is the funder or provider of public goods, and that **government** offsets the inevitable inequities of the market.⁴

Consequently, the productivity agenda moved from one emphasising incentives to one focussed almost entirely on enablers. The incentives most critical to encouraging productivity gain are:

- First, competitive markets (including product, service, capital and labour markets),
- Second, tax policy,
- And third, governance.

The enablers of productivity improvement are infrastructure, skills and the legal and institutional framework.

If a choice had to be made between an incentive-based versus an enablers-based policy to drive economic growth and productivity, incentives win hands down. The common sense reason is that just because someone can do something doesn't mean they will, at least not without some incentive to act. Moreover, this finding, and the primacy of competition as an incentive has been strongly supported by numerous studies.⁵

In the 1990s, the emphasis was clearly on incentives. But in the early part of this century, with concerns about market-based processes emerging, the emphasis shifted to enablers, as set out in Exhibit 2.

⁴ Rudd K, "The Global Financial Crisis", *The Monthly* (Issue No 42, February 2009) p 21.

⁵ Lewis WW, "The Power of Productivity", *The McKinsey Quarterly* (Issue No 2, 2004); Ahn S, "Competition, Innovation and Productivity Growth: A Review of Theory and Evidence" (Economics Department Working Papers No 317, OECD, 2002); Baily M and Gersbach H, "Efficiency in Manufacturing and the Need for Global Competition", *Brookings Papers on Economic Activity: Microeconomics* (1995) p 307; Okada Y, "Competition and Productivity in Japanese Manufacturing Industries", *NBER Working Paper Series*, WP 11540 (National Bureau of Economic Research, Cambridge, MA, 2005); Porter ME and Sakakibara M, "Competition in Japan" (2004) 18 *Journal of Economic Perspectives* 27.

Exhibit 2

FROM INCENTIVES TO ENABLERS . . .

Incentives	1990s	2000s
• Competition	• Actively encouraged	• Not central
• Labour market flexibility	• Increasing	• Decreasing
• Anti-competitive regulation	• Decreasing	• Increasing
• Taxation	• Decreasing	• Stable
• Governance focus	• Performance	• Conformance

Enablers	1990s	2000s
• Infrastructure	• Not central	• Importance emphasised
• Education and skills	• Gradual change	• Major focus
• Legal framework	• Assumed	• Little change

Given recent poor productivity performance, there needs to be an increasing recognition that each of the three areas of economic policy (monetary, fiscal and micro-economic) needs a strong champion in the inner cabinet. Micro-economic incentive structures, of which competition policy (as defined by the Committee of Inquiry) is a central component, have been the losers and need to regain their place.

Policy development

It became clear during the course of the inquiry that keeping track of the progress and impact of competition policy, particularly the policy elements other than the conduct rules of the *Trade Practices Act 1974* (Cth), was a complex and demanding task. These elements included regulation review, the structure of public monopolies, access to essential facilities, restraining monopoly pricing and fostering competitive neutrality. We also recognised that in most of these areas both State and Commonwealth interests were involved.

Consequently, we recommended the formation of the National Competition Council,

the objective is to provide a high level and independent analytical and advisory body in which all governments would have confidence. As well as participating in its formation and agreeing on its composition, all governments could give references to the body – either individually or collectively – on regulation review, structural reform of public monopolies, access regimes, monopoly pricing, and competitive neutrality.

Where it is proposed that a Commonwealth Minister could act unilaterally in certain circumstances – such as in relation to access regimes – a recommendation of the Council would be a necessary pre-condition to that action. The Council would also have a specific mandate to report on transitional issues associated with its recommendations.⁶

In the event, the Council was given a more limited role – in particular, in assessing the progress of regulation review and recommending competition payments – but it was not a key player in

⁶ Hilmer et al, n 1, p xxxvi.

monitoring and updating the overall competition policy. Once the competition payments were no longer being made, its role was restricted to recommending on access declarations for essential facilities. It has not been a significant voice on the failures of regulation review which are at the heart of current concerns with “red tape”. Nor has it driven the debate with respect to public monopolies where pricing, ownership and structural issues remain, for example, in electricity.

In my view there is an acute need for an independent, highly capable policy review and development group to support the responsible minister. What happened to regulation review when the NCC no longer operated in this field is the subject of the next section, and a strong example of the need for such a body. Moreover, the emphasis of competition policy needs to reflect the way our economy is changing. For example, the areas of health, education and welfare were not a focus of competition policy in 1992, but today pose major challenges in affordability and cost effectiveness. Extending competition policy, and a more general incentives framework to these areas could produce positive outcomes to what are seen as intractable areas of cost growth.

The policy body I have in mind could be established by reconstituting the NCC along the lines set out in our original report, and with a brief at least as broad as was recommended.

An alternative may be to widen the scope and modus operandi of the Productivity Commission so that it could initiate broad reviews of micro-economic policy, as well as respond to specific briefs from government. Either of these approaches would complement the suggestion for competition policy to have a stronger and more central role in Cabinet, as discussed earlier.

REGULATION REVIEW

One of the key findings that surprised the Committee was the persuasive, negative effect of regulation on competition. To quote

the greatest impediment to enhanced competition in many key sectors ... are the restrictions imposed through government regulation – whether in the form of statutes or subordinate legislation – or government ownership.⁷

If Australia is to take competition policy seriously a new mechanism is required to ensure that regulatory restrictions on completion do not exceed what is justified in the public interest.⁸

As long as the NCC drove the regulation review process, using the carrots and sticks of annual competition payments, regulation review was taken seriously by all Australian governments.

About 1,800 pieces of legislation were reviewed, and where governments were found not to have acted in accordance with the Competition Principles, the NCC reported accordingly and recommended payments be withheld. Examples of reform included dismantling legislated cartels in agricultural marketing, deregulating domestic aviation, and deregulating retail trading and liquor licensing.

Since 2007, with the NCC now out of the picture, the Council of Australian Governments broadened the scope of regulation review. The office of Best Practice Regulation Review was moved to the Department of Finance and given a set of principles and processes to administer. The principles of best practice regulation are set out in Exhibit 3.

⁷ Hilmer et al, n 1, p xxix.

⁸ Hilmer et al, n 1, p xxix.

Exhibit 3

Principles of best practice regulation

COAG has agreed that all governments will ensure that regulatory processes in their jurisdiction are consistent with the following principles:

1. Establishing a case for action before addressing a problem.
2. A range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed.
3. Adopting the option that generates the greatest net benefit for the community.
4. In accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that:
 - The benefits of the restrictions to the community as a whole outweigh the costs, and
 - The objectives of the regulation can only be achieved by restricting competition.
5. Providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear.
6. Ensuring that regulation remains relevant and effective over time.
7. Consulting effectively with affected key stakeholders at all stages of the regulatory cycle.
8. Government action should be effective and proportional to the issue being addressed.

What is wrong with these principles? While each of the eight may be laudable and desirable, together they are far too broad, attempting in one process to cover anticompetitive regulation as well as misguided or ineffective regulation and “red tape” generally. To access these three areas, competition impacts, effectiveness, and “red tape” effects requires quite different skills and processes. A competition review focuses on the impact of regulation on markets, barriers to entry, pricing and incentives. To do this requires a sound understanding of how businesses operate and compete, micro-economic literacy and legal training. To assess regulation effectiveness is different, requiring a background in policy analysis. To deal with “red tape”, expertise in process mapping and work flow analysis is critical.

The Productivity Commission⁹ in 2011 when evaluating regulation reforms, noted that all new regulations are intended to pass a review against the best practice principles. However, where this is not done via a ministerial or cabinet decision, a “Post Implementation Review” (PIR) is required to ensure the negative effect of regulations made in haste can be remedied. To quote:

It had originally been anticipated that there would be few “exceptions”. However, the numbers have been rising – reaching over 60 since the regime was introduced in 2007, with one half occurring in the past 12 months. They include important areas of regulation with significant potential impacts ... This suggests that the PIR route may be seen as a way to avoid or defer proper scrutiny of regulatory proposals.

Examples of bypassed reviews include the industrial relations changes of 2010, the minerals resource rent tax, and closer to home for me, the legislation establishing the Tertiary Education Quality and Standards Agency (TEQSA).

⁹ Productivity Commission, *Identifying and Evaluating Regulation Reforms* (Research Report, Canberra, 2011) Overview section, p xxi.