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# Articles



# MEANINGFUL CONNECTEDNESS: A FOUNDATION FOR EFFECTIVE LEGAL TEACHING

Christina Do\* and Aidan Ricciardo\*\*

## ABSTRACT

*Teaching in higher education is complex – there is no singular method to being a successful educator given the many components of effective teaching. Through the lens of academic literature and the perspectives of four nationally acclaimed legal academics, whose teaching has been recognised through the Australian Awards for University Teaching (‘AAUT’), this paper explores the concept of effective legal teaching and the characteristics and approaches that make an engaging legal educator. Each of the four academics was interviewed, and analysis of their responses identified a recurrent theme – namely the importance of establishing meaningful connections with students as a basis for effective teaching. The benefits associated with the establishment of meaningful connections by academics with students in the teaching of law in higher education are identified and discussed in this paper.*

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## I INTRODUCTION

Research has indicated that an ‘engaging lecturer’ is a leading contributory factor that motivates students to attend class, in particular lectures.<sup>1</sup> Whilst there is extensive academic literature written on the subject, those works have not identified a set of universal characteristics that guarantee that a lecturer will be engaging.<sup>2</sup> The effectiveness of an educator can vary depending on the discipline, subject matter and, principally, the preferences and personality of the stakeholder in question.<sup>3</sup>

Despite the highly subjective nature of effective teaching, universities and governments worldwide have nevertheless sought to recognise and reward teaching excellence through teaching award schemes.<sup>4</sup> In Australia, the Australian Awards for University Teaching (AAUT) is one such initiative that seeks to promote and reward teaching excellence.<sup>5</sup> In order to objectively measure and assess the teaching quality of applicants, the AAUT established a set of criteria that awardees must address when demonstrating how they achieve teaching excellence.<sup>6</sup> These descriptors and metrics set by learning and teaching institutions often form the default definition of what constitutes teaching excellence.<sup>7</sup>

This paper explores the concept of effective legal teaching and the characteristics and approaches that make an engaging legal educator. Part II of the paper provides a brief overview of the academic literature on effective teaching in higher education, and the AAUT. Part III of the paper sets out four AAUT-award winning legal educators’ views on effective teaching. AAUT recipients are leading academics whose teaching strategies and approaches have been assessed as teaching excellence, reflecting best practices in their respective fields. To

<sup>1</sup> Christina Do, ‘The Effect of Lecture Recordings on Lecture Attendance: Law Academics’ Misconceptions and Law Students’ Reality’ (2017) *Journal of Australasian Law Teachers Association* 41, 50.

<sup>2</sup> See eg Paul Ramsden, *Learning to Teach in Higher Education* (New York: Routledge, 1992) 88–9.

<sup>3</sup> Sandeep Gakhal, ‘What is Teaching Excellence?’ in Christine Broughan, Graham Steventon and Lynn Clouder (eds), *Global Perspectives on Teaching Excellence: A New Era for Higher Education* (Abingdon: Routledge, 2018) 6, 13.

<sup>4</sup> Ibid 6. See also Paul Ramsden et al, *Recognising and Rewarding Good Teaching in Australian Higher Education: A Project Commissioned by the Committee for the Advancement of University Teaching* (Australian Government Publishing Service, 1995).

<sup>5</sup> Universities Australia, *Australian Awards for University Teaching* (Web Page) <<https://www.universitiesaustralia.edu.au/policy-submissions/teaching-learning-funding/australian-awards-for-university-teaching/>>.

<sup>6</sup> Ibid.

<sup>7</sup> Gakhal (n 3) 8.

clarify their subjective knowledge on effective legal teaching, they participated in standardised semi-structured interviews. Whilst all legal educators offered unique insights about their teaching philosophies and approaches, common themes and practices emerged when discussing the characteristics that they believed made an effective legal educator – namely, creating meaningful connections with students. Part IV of the paper discusses the concept of meaningful connectedness: what it is, the benefits associated with building meaningful connections with students in the teaching of law in higher education, and the ways in which legal academics can forge such connections with their students.

In light of the academic literature and common responses from the legal academics interviewed, it is contended that whilst technical legal knowledge is critical to teach effectively in the discipline of law, establishing meaningful connections with students is a basis for effective legal teaching from which numerous benefits can flow, and arguably a foundation from which teaching excellence can be built.

## II EFFECTIVE TEACHING IN HIGHER EDUCATION

‘The aim of teaching is simple: it is to make student learning possible’.<sup>8</sup> Therefore at its simplest, teaching is technically achieved when learning has taken place. But the concept of effective teaching in the context of higher education is not so easily defined as there is no general consensus as to what constitutes effective teaching.<sup>9</sup> The difficulty in defining effective teaching is largely attributed to the fact that there are multiple stakeholders in the higher education framework (ie students, academics, institutions, industry and government), and given the subjective nature of the subject matter, the perceptions of teaching effectiveness and quality varies substantially between each stakeholder.<sup>10</sup>

Whilst there is extensive literature written on the subject of effective teaching in higher education, it is generally accepted that there is ‘no single “right” way to be a good teacher ... [as] good teaching may take a variety of forms’.<sup>11</sup>

<sup>8</sup> Paul Ramsden, *Learning to Teach in Higher Education* (Routledge, 2nd ed, 2003) 7.

<sup>9</sup> See generally David Greatbatch and Jane Holland Gunn, ‘Teaching Quality in Higher Education: Literature Review and Qualitative Research’ (Report, 19 May 2016) 5 <<https://www.gov.uk/government/publications/teaching-quality-in-higher-education-literature-review-and-qualitative-research>>; Vicky Gunn and Anna Fisk, ‘Considering Teaching Excellence in Higher Education: 2007–2013’ (Report, October 2013) <<http://eprints.gla.ac.uk/87987/1/87987.pdf>>; Gakhal (n 3).

<sup>10</sup> Gakhal (n 3) 16.

<sup>11</sup> Ramsden, Margetson, Martin and Clarke (n 4) 23.



As suggested by Paul Ramsden:

[A] great deal is known about the characteristics of effective university teaching. It is undoubtedly a complicated matter; there is no indication of one ‘best way’; but our understanding of its essential nature is both broad and deep. Research from several different standpoints, including studies of schools of teaching, has led to similar conclusions.<sup>12</sup>

Whilst there is no definitive approach to ensure effective teaching, there are key traits that have emerged from the literature as essential to good teaching practices. It has been suggested that making student learning possible ‘involves being interested in and knowing your students, having a comprehensive grasp of your subject and professional knowledge, understanding how learning happens, developing a wide repertoire of approaches to teaching, engaging with your colleagues and continually reflecting on, evaluating and developing your practice’.<sup>13</sup> Whilst there is extensive literature written about effective teaching in higher education, what can be drawn from the literature is that effective teachers use varying approaches and techniques that best serve the learning needs of their students – which vary depending on the subject matter, discipline, and preferences and personalities of the academic, and ultimately the students.

Specifically within the discipline of law, there have been a number of reviews and reports commissioned for the purposes of reviewing and assessing the legal education landscape within Australia.<sup>14</sup> A handful of these inquiries have reviewed the standards of teaching in law schools across Australia, and in turn have either directly or indirectly discussed the concept of effective legal teaching.<sup>15</sup>

The Pearce Report (commissioned by the Commonwealth Tertiary Education Commission in 1985 assessing tertiary legal education) outlined that Australian legal educators are expected to:

- (a) be able to communicate effectively with their students;
- (b) present class material in a manner that is intellectually rigorous and stimulating;

<sup>12</sup> Ramsden (n 2).

<sup>13</sup> Lynne Hunt, Denise Chalmers and Randal Macdonald, ‘Effective Classroom Teaching’ in Lynne Hunt and Denise Chalmers (eds), *University Teaching in Focus: A Learning-Centred Approach* (ACER Press, 2012) 3, 22.

<sup>14</sup> For an overview of the reviews and reports that have been conducted on legal education in Australia, see David Barker, *A History of Australian Legal Education* (The Federation Press, 2017) 20–1.

<sup>15</sup> See eg Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987); Richard Johnstone and Samitra Vignaendra, ‘Learning Outcomes and Curriculum Development in Law (A Report Commissioned by the Australian Universities Teaching Committee)’ (Report, January 2003) <[https://cald.asn.au/wp-content/uploads/2017/11/AUTC-Threshold-Learning-Outcomes-Report\\_2003\\_Johnstone-Vignaendra1.pdf](https://cald.asn.au/wp-content/uploads/2017/11/AUTC-Threshold-Learning-Outcomes-Report_2003_Johnstone-Vignaendra1.pdf)>.

- (c) prepare for all their classes thoroughly and ensure that the subject matter thereof is current;
- (d) be available on a regular basis for consultation with their students;
- (e) other than in exceptional circumstances, commence and conclude classes on time;
- (f) where appropriate, develop helpful student materials.<sup>16</sup>

In contrast, the Johnstone Report (commissioned by the Australian Universities Teaching Committee in 2001 exploring the ‘changes to legal education in Australia over the past 15 years’) outlined an extensive list of characteristics describing an effective legal educator.<sup>17</sup> The characteristics identified in the Report were drawn from legal education scholarship, with supporting statements from Law School participants.<sup>18</sup> Nick James, in summarising the characteristics outlined in the Report, described an effective teacher as:

enthusiastic about sharing a love of the law subject with others; motivates students to feel the need to learn the law subject material; makes the material of the law subject genuinely interesting; shows concern and respect for students, recognising the diversity within the student body; is available to students; makes it clear to students what they are expected to be able to do; provides clear explanations, using a variety of appropriate techniques; focuses on key concepts and students’ misunderstanding of them, rather than on trying to cover a lot of ground; uses a variety of valid methods for assessment that focus on the key areas that students need to master; encourages students to engage deeply with the task; avoids forcing students to rote learn or merely reproduce detail, and avoids unnecessary anxiety; enables students to work collaboratively; engages in a dialogue with the learner and seeks evidence of student understanding and misunderstanding; gives timely and high quality feedback on student work; engages with students at their level of understanding; ensures that student workload is appropriate to allow students to explore the main ideas in the law subject; encourages student independence; uses methods that demand student activity, problem solving and cooperative learning; is aware that good learning and teaching are dependent on the context within which learning is to take place; constantly monitors what students are experiencing in their learning situations; and tries to find out about the effects of teaching on student learning, modifying their approach to teaching in the light of the evidence collected.<sup>19</sup>

These characteristics inform the basis by which the legal educators’ teaching effectiveness is assessed and measured by their students, institution and, if they elect to apply, teaching award schemes.<sup>20</sup>

<sup>16</sup> Pearce, Campbell and Harding (n 15) vol. 1, 194.

<sup>17</sup> Johnstone and Vignaendra (n 15) 278–81.

<sup>18</sup> Ibid.

<sup>19</sup> Nick James, ‘The Good Law Teacher: *The Propagation of Pedagogicalism in Australian Legal Education*’ (2004) 27(1) *University of New South Wales Law Journal* 147, 150–1.

<sup>20</sup> Ibid 151.

## A Recognition of Teaching Excellence

The descriptors that form the basis for institutional and national teaching awards assessment criteria are underpinned by pedagogical theory of effective teaching.<sup>21</sup> As the assessment criteria for these awards are relied upon as indicators of teaching excellence, the descriptors are often used as default definitions and measures of effective teaching.<sup>22</sup> However, relying on the set criteria and metrics used by award schemes as indicators of effective teaching and teaching excellence is not without its limitations and criticisms.<sup>23</sup> For example, placing over-reliance on the assessment criteria of teaching awards may result in a narrow understanding of teaching and may in turn inhibit innovation in higher education.<sup>24</sup> In order to ensure that teaching in higher education continues to be innovative and dynamic, it has been proposed that the criteria for teaching awards should be revised regularly to respond to changes in higher education.<sup>25</sup>

### 1 Australian Awards for University Teaching ('AAUT')

In 1997, the Australian Universities Teaching Committee, a federally-funded government body, established the 'Australian Awards for University Teaching' to recognise and reward teaching excellence that has made an outstanding contribution to student learning.<sup>26</sup> In addition to recognising the positive sustained impact that educators have on the learning experiences of university students,<sup>27</sup> the AAUT award scheme was also intended to elevate the status of teaching in higher education.<sup>28</sup> The AAUT 'have become a valued form of recognition for university educators Australia wide'.<sup>29</sup>

Since its inception, the administration, title and assessment criteria of the Awards have changed on a number of occasions – however the essence of the Awards has remained unchanged. Most recently and notably, in 2018 the Australian Government

<sup>21</sup> Ibid.

<sup>22</sup> Gakhal (n 3) 16.

<sup>23</sup> See generally Kerry Shephard et al, 'Preparing an Application for a Higher-Education Teaching-Excellence Award: Whose Foot Fits Cinderella's Shoe?' (2011) 33(1) *Journal of Higher Education Policy and Management* 47, 48.

<sup>24</sup> Ibid.

<sup>25</sup> Gakhal (n 3) 9; Greatbatch and Holland Gunn (n 9) 4.

<sup>26</sup> Janice Gray, 'Teaching Excellence in the New Millennium – Interviews with Professor Adams and Ms Irene Nemes' (2001) 3 *The University of Technology Sydney Law Review* 147, 147.

<sup>27</sup> Universities Australia, *Australian Awards for University Teaching* (Web Page) <<https://www.universitiesaustralia.edu.au/uni-participation-quality/AAUT>>.

<sup>28</sup> Mark Israel and Dawn Bennett, 'National Teaching Awards and the Pursuit of Teaching Excellence' in Christine Broughan, Graham Steventon and Lynn Clouder (eds), *Global Perspectives on Teaching Excellence: A New Era for Higher Education* (Abingdon: Routledge, 2018) 106, 107.

<sup>29</sup> Universities Australia (n 27).

transferred the administration of the AAUT to ‘Universities Australia’,<sup>30</sup> a peak body representing the university sector.<sup>31</sup> In 2019, there were four AAUT award categories:

- Citations for Outstanding Contributions to Student Learning (‘Citations’);
- Awards for Programs that Enhance Learning (‘Program Awards’);
- Awards for Teaching Excellence (‘Teaching Awards’);
- Award for Australian University Teacher of the Year.<sup>32</sup>

Only staff of institutions listed or approved as a higher education provider under the *Higher Education Support Act 2003* (Cth) are eligible to nominate for the AAUT.<sup>33</sup> As a part of the nomination process, each nominee is required to prepare a written statement addressing the assessment criteria for the award for which they are nominating. The written statement is expected to describe the nominee’s contribution to student learning, with supporting evidence to substantiate their claims.<sup>34</sup>

All award nominations undergo a rigorous multi-stage assessment process. Nominations are first subjected to a peer assessment by either academics and/or professional staff from the higher education sector.<sup>35</sup> The peer assessors are generally senior staff with ‘extensive experience in learning and teaching best practice and innovation’,<sup>36</sup> who are not necessarily from the same discipline or teaching specialisation as the nominee.<sup>37</sup> The peer assessors assess nominations against the

<sup>30</sup> Australian Government, Department of Education and Training, *Improving the sustainability of higher education* (Web page, 21 December 2017) <<https://www.education.gov.au/improving-sustainability-higher-education>>.

<sup>31</sup> Universities Australia, About Us (Web Page) <<https://www.universitiesaustralia.edu.au/about-us#.XNT8KJWP5RB>>.

<sup>32</sup> Universities Australia, *Australian Awards for University Teaching* (Web Page) <<https://www.universitiesaustralia.edu.au/policy-submissions/teaching-learning-funding/australian-awards-for-university-teaching/>>.

<sup>33</sup> *Higher Education Support Act 2003* (Cth) ss 16.10–16.20; Universities Australia, ‘2019 Australian Awards for University Teaching (AAUT): AAUT Program Overview’ *Australian Awards for University Teaching* (Program Overview, 2019) 2 <<https://www.universitiesaustralia.edu.au/wp-content/uploads/2019/06/2019-AAUT-Program-Overview-6-Jun.pdf>>.

<sup>34</sup> Universities Australia, ‘2019 Citations for Outstanding Contributions to Student Learning: Citation Nomination Instructions’ *Australian Awards for University Teaching* (Instructions, 2019) 5 <<https://www.universitiesaustralia.edu.au/wp-content/uploads/2019/06/2019-CITATIONS-Nomination-Instructions-v1-6Jun.pdf>> (‘Citation Nomination Instructions’); Universities Australia, ‘2019 Awards for Teaching Excellence: Teaching Award Nomination Instructions’ *Australian Awards for University Teaching* (Instructions, 2019) 4 <<https://www.universitiesaustralia.edu.au/wp-content/uploads/2019/06/2019-TCH-Nomination-Instructions-v1-4Jun.pdf>> (‘Teaching Award Nomination Instructions’).

<sup>35</sup> Universities Australia (n 33) 9.

<sup>36</sup> Australian Government, Department of Education and Training, *Higher Education Policy changes – Providers FAQs* (Web Page, 19 September 2018) <<https://www.education.gov.au/higher-education-policy-changes-provider-faqs#improving-the-sustainability-of>>.

<sup>37</sup> Citation Nomination Instructions (n 34) 7; Teaching Award Nomination Instructions (n 34) 6.

relevant assessment criteria using a matrix – all assessments are subjected to a moderation process.<sup>38</sup> In 2019, the assessors submitted joint recommendations to an Awards Committee for consideration, who then put forward their recommendation to Universities Australia Board of Directors, who ultimately made the final decision on the award recipients.<sup>39</sup> Prior to 2018 (before Universities Australia was responsible for the administration of the AAUT), a similar assessment process was conducted – the assessors’ recommendations were made to the Awards Peer Oversight Group, who in turn advised the Minister for Education and Training, who made the final decision on the award recipients.<sup>40</sup>

## 2 Assessment Criteria

Only AAUT Citation and Teaching Award recipients who teach in the discipline of law (‘AAUT law recipients’) were interviewed as part of the present research project. As a result, this paper will only consider the assessment criteria for the AAUT Citations and Teaching Awards.

AAUT Citations and Teaching Awards are two distinct award categories. The primary difference between the two awards is the scope and reach of the educators’ impact within the higher education sector. Citations are ‘awarded to individuals or teams who have contributed to the quality of student learning, in a specific area of responsibility over a sustained period’.<sup>41</sup> Generally, Citations recognise the contributions that educators have made with respect to their distinctive institutional learning and teaching missions, values and priorities,<sup>42</sup> whereas Teaching Awards ‘recognise Australia’s most outstanding university teachers or teaching teams who have demonstrated excellence, leadership and sustained commitment to teaching and learning in higher education’.<sup>43</sup> Teaching Awards recognise the works of educators who have made a ‘broad and deep contribution to enhancing the quality of learning and teaching in higher education’.<sup>44</sup>

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<sup>38</sup> Universities Australia (n 33) 4.

<sup>39</sup> Ibid.

<sup>40</sup> Australian Government, Department of Education and Training, 2017 Australian Awards for University Teaching Program Information and Nomination Instructions (Instructions, 20 January 2017) <<https://docs.education.gov.au/node/42936>>.

<sup>41</sup> Universities Australia (n 33) 4.

<sup>42</sup> Australian Government, Department of Education and Training, Australian Awards for University Teaching (Web Page, 14 September 2017) <<https://www.education.gov.au/australian-awards-university-teaching>>.

<sup>43</sup> Universities Australia (n 33) 5.

<sup>44</sup> Australian Government, Department of Education and Training (n 42).

Although the Citations and Teaching Awards are distinct, the assessment criteria for each of the two awards use the same descriptors. For the 2019 AAUT Awards, the descriptors were as follows:

- Approaches to teaching and/or the support of learning that influence, motivate and inspire students to learn;
- Development of curricula, resources or services that reflect a command of the field of study;
- Evaluation practices that bring about improvements in teaching and learning; and
- Innovation, leadership or scholarship that has influenced and enhanced learning and teaching and/or student experience.<sup>45</sup>

Citation nominees are required to select one of the four assessment criteria to form the basis of their four-page written statement,<sup>46</sup> whereas Teaching Award nominees are required to address all four criteria in their eight-page written statement.<sup>47</sup>

### III AAUT LAW RECIPIENTS' VIEWS ON EFFECTIVE LEGAL TEACHING

The objective of the present research was to explore the concept of effective teaching through the lens of academic literature and legal educators whose teaching excellence has gained national recognition through the receipt of an AAUT award. The project team sought to determine if there is any correlation or commonality between the teaching philosophies and practices of AAUT law recipients. By interviewing nationally-acclaimed legal educators and drawing on their subjective knowledge and expertise, the project team sought to uncover underlying themes in teaching approaches that have been assessed and recognised as teaching excellence. The project team aimed to contribute to the scholarship of teaching and learning by disseminating practical teaching strategies and techniques that have been recognised to be effective in legal education.

The project received human research ethics approval.<sup>48</sup> Prior to being involved in the project, all participants were provided with an information statement explaining the nature of the project and express consent to be involved was obtained. All interviews were conducted and finalised in 2018.

<sup>45</sup> Citation Nomination Instructions (n 34) 3–4; Teaching Award Nomination Instructions (n 34) 3–4.

<sup>46</sup> Citation Nomination Instructions (n 34) 3.

<sup>47</sup> Teaching Award Nomination Instructions (n 34) 3. In addition to the written statement, Teaching Excellence Award nominees are required to submit their curriculum vitae and prescribed supporting materials to provide evidence to support the claims made in the written statement.

<sup>48</sup> Curtin University Human Research Ethics Office approval number: HRE2018-0175.

## A Methodology

The research method that was employed for this project was qualitative interviews. Interviewees were asked to participate in a semi-structured interview. A standardised open-ended interview was conducted with all interviewees.<sup>49</sup> The same open-ended questions were asked of all participants. All interviewees were provided with the questions prior to the interview, in order for the interviewees to reflect and formulate their responses.

The rationale for conducting interviews was so that detailed responses<sup>50</sup> and in-depth information could be extracted from the interviewees. For example, if necessary, follow up questions were asked providing interviewees an opportunity to elaborate on their answers. Whilst adopting a survey research approach would have allowed for a larger sample, the survey method would have likely resulted in more generalised responses, which would have been inapt for this project given its nature.

As this project was not theory-testing in nature, the interview questions asked were generally exploratory and descriptive.<sup>51</sup> The questions that were asked of the interviewees included:

- general questions about their teaching experience (for example, length of time teaching in higher education);
- formal teaching recognition they have received (for example, the basis for their AAUT Citation or/and Teaching Award);
- teaching philosophy (for example, the principles and values that underpin their teaching approach);
- subjective teaching observations (for example, characteristics that make an effective legal educator);
- teaching qualifications (for example, whether the interviewee had formal education or training in learning and teaching in higher education); and
- scholarship of teaching (for example, whether the interviewee relied on pedagogical literature to inform their teaching).

All the interviews conducted were recorded and transcribed. The quantitative data collected from the interviews was collated into a single Microsoft Word document in a table format. The data was categorised according to the interview questions asked, with the corresponding responses from each interviewee adjacent. Given the project sample size, the use of qualitative data analysis software (such as NVivo) was not used for the purpose of analysing the data.

<sup>49</sup> Satnam Choongh, 'Doing Ethnographic Research: Lessons from a Case Study' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2nd ed, 2017) 72, 79.

<sup>50</sup> W Paul Vogt, Dianne C Gardner and Lynne M Haefele, *When to Use What Research Design* (Guilford Press, 2012) 47.

<sup>51</sup> Ibid 37; Wing Hong Chui, 'Quantitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2nd ed, 2017) 48, 53.

## B Interviewees

Given the project objective was to extract the subjective knowledge and experiences of AAUT law recipients, a stratified sampling method was used to recruit interviewees.<sup>52</sup> The research team first identified legal academics who are recipients of an AAUT Citation, Teaching Award or both. These recipients were contacted via email and asked to be involved in the project. During the initial contact, the interviewees were provided with an information statement about the project and the questions that would form part of the interview. For the recipients who agreed to be involved in the project, the members of the project team arranged a suitable time to conduct and record the interview. In order to obtain candid and honest responses from interviewees, they were assured that their identity would be kept confidential and any identifiable information would be anonymised.

Between 2009 to 2018, a total of 1,374 AAUT Citations and 158 AAUT Teaching Awards have been awarded.<sup>53</sup> Of the 1,374 Citations, 65 of the Citations have been awarded to academics who teach in the discipline of law (approximately 4.73%) (See Table 1 below). Of the 158 Teaching Awards, 9 of the Awards have been awarded to academics who teach in the discipline of law (approximately 5.7%) (See Table 1 below). It must be noted that five of the Teaching Award recipients have also been the recipients of a Citation. When determining the number of Citations and Teaching Awards that were awarded to law academics, it was not possible to distinguish if the academic taught in law, business law (for example, as a part of a Bachelor of Commerce) or socio-legal studies (for example, as a part of a Bachelor of Arts). A number of the successful Citation descriptions and Teaching Award synopses were not specific enough to determine with certainty which area of law the academic specialised in (See Appendix 1 and 2 for the AAUT Citation and Teaching Award descriptors of law academic recipients between 2009 to 2018). As a result, for the purposes of this project, the project team categorised a 'legal educator' as an academic who teaches units of a legal nature in higher education, including law units which form part of a Bachelor of Arts, Bachelor of Commerce, Bachelor of Laws (LLB), Juris Doctor (JD), Master of Laws (LLM) or Graduate Diploma in Legal Practice (GradDip Leg Prac).

<sup>52</sup> Chui (n 51) 57.

<sup>53</sup> Data and details of the AAUT Citations and Teaching Awards that were conferred between 2009 to 2018 were extracted from the National Library of Australia online archive. Information regarding the AAUT Citations and Teaching Awards conferred prior to 2009 were not available at the time this paper was prepared. See Australian Government, Office for Learning and Teaching, 'Office for Learning Teaching [Electronic Resource]' *National Library of Australia Catalogue* (Web Page) <<https://catalogue.nla.gov.au/Record/5970084?lookfor=office%20for%20learning%20and%20teaching&offset=1&max=709104>>.



**Table 1:** The number of AAUT Citations and Teaching Awards conferred between 2009 to 2018.<sup>54</sup>

Year	Number of Citations conferred	Citations awarded to Law academics	Number of Teaching Awards conferred	Teaching Awards awarded to Law academics
2009	206	8	24	2
2010	193	10	21	2
2011	210	12	22	1
2012	152	4	10	0
2013	148	6	12	0
2014	110	4	16	2
2015	96	6	14	1
2016	109	4	18	0
2017	89	6	15	1
2018	61	5	6	0
TOTAL	1,374	65 (4.73%)	158	9 (5.7%)

Four AAUT award recipients who teach in the discipline of law agreed to be involved in the project. This represents approximately 5.41% of the AAUT Citation and Teaching Award recipients who teach in the discipline of law. It must be noted that this statistic is not truly accurate, as it does not account for the recipients who have been awarded both an AAUT Citation and Teaching Award. Furthermore, the statistic cannot factor in if the interviewees are the recipient of both a Citation and Teaching Award as disclosing this information will reveal identifiable information about the interviewees.

**C     Results**

This project aim was to uncover any common patterns of thinking and approaches between the legal educators interviewed. Upon conducting all the interviews, it was immediately apparent that each interviewee had extensive experience in the higher education sector – each interviewee had at least 10 years or more teaching experience.

The project team identified common themes that arose from two broad questions that were asked of the interviewees.

<sup>54</sup> Ibid.

### **1 In your opinion what are the top three characteristics that make an effective lecturer?**

Although no interviewees suggested the same three characteristics, common themes did emerge in each of the interviewees' responses. All interviewees identified the importance of the teaching content and materials as a factor of effective teaching. Three of the four interviewees believed that it was critical to ensure that the content covered was academically rigorous and up to date. This response is unsurprising as it is well established in academic literature that the curriculum design, teaching content and materials are essential to effective teaching.<sup>55</sup> The fourth interviewee's response varied slightly, focusing more on the teaching methodology – this interviewee raised the importance of the teaching materials being constructively aligned to the unit and course learning outcomes.

Most notably, all interviewees emphasised that establishing meaningful connections with students is an essential characteristic of effective teaching. The following are extracts from each of the four interviewees on this matter:

I just think if you actually care, then that's a quality of being a good lecturer ... Care for your students, and then ... care about what they're learning. Care about them as people as well and what they're going through, but also care, of course, care that they're getting a good experience.

An ability to connect ... whether for some staff it's about being approachable, some staff are very good at engaging – have an engaging manner, so there is generally some personal quality or trait that connects that person to their students.

The first thing that comes to mind is actually kindness ... Kindness is very important because what you want to do is create an atmosphere where learning can occur, and if people are scared of you that's not going to happen. So maybe that's accessibility, fairness, those kind of traits that people can feel they can trust you and that they can be vulnerable and then they can do the hard work of learning because they're not going to be exposed – it's got to be a positive experience ... So kindness in terms of ... building class culture.

It's always tough because you can think of so many things that could be. I would like to say 'challenging' because it captures an assumption that you have engaged them already. To be challenged you need to be interested enough so that's a bit of a capstone there. It's got to be engaging.

Although all interviewees phrased the characteristic differently – 'care', 'connection', 'kindness', 'challenge' and 'engagement' – the common theme that can be drawn from the interviewees' responses is that a key characteristic of effective teaching is the need to centre teaching around the students through forging meaningful

<sup>55</sup> See eg Lynne Hunt and Denise Chalmers (eds), *University Teaching in Focus: A Learning-Centred Approach* (ACER Press, 2012) pt 2; Ramsden (n 7) 123–5.

connections. This characteristic has been acknowledged in academic literature as a key characteristic to facilitating learning.<sup>56</sup> The benefits of establishing meaningful connections with students in teaching in higher education, specifically in the discipline of law, will be further explored in Part IV of this paper.

## **2 Explain your teaching philosophy, including any principles or values you employ in your approach to encourage learning**

A similar theme arose when the interviewees were asked to explain their teaching philosophy. All the responses alluded to how the academic builds meaningful connections with their students:

I don't really see myself as necessarily having a role in teaching anyone anything as such, it's more just about helping students to learn and that's just through the whole context so whether it's the curriculum or the delivery ... it's sort of about creating an enabling environment, encouraging students obviously to be independent, but also to connect with – I think it has to be relatable, so to connect between what we're teaching and the materials and either their personal experiences, or things that are going to happen in the workplace or even sharing our own personal experiences, so making it relatable.

I believe that a friendly, accessible, non-threatening environment will assist students to learn. That's a pretty important key part of my philosophy.

[C]reating a learning environment that is really encouraging and nurturing and challenging. To me that's really fundamental, that it's really an environment to learn ... The best person able to create the right environment is probably the teacher. It's not a one-way street ... it's a reciprocal thing.

Three of the four interviewees explicitly highlighted the importance of facilitating a learning environment that was conducive for student learning. Arguably, through facilitating a nurturing and engaging environment, the academic is not only able to forge meaningful connections with the students, but able to facilitate opportunities for the students to connect with the materials and their peers. The recognition of building nurturing and engaging environments in order to facilitate effective learning is consistent with the body of academic literature on effective teaching in higher education supporting this proposition.<sup>57</sup>

<sup>56</sup> See eg Ken Bain, *What The Best College Teachers Do* (Harvard University Press, 2004) 18; Feng Su and Margaret Wood, 'What Makes a Good University Lecturer? Students' Perceptions of Teaching Excellence' (2012) 4(2) *Journal of Applied Research in Higher Education* 142, 151; Ramsden et al (n 4) 24; Ramsden (n 8) 94; Hunt, Chalmers and Macdonald (n 13) 22; Johnstone and Vignaendra (n 15) 279; James (n 19) 165.

<sup>57</sup> See eg Nikki Bromberger, 'Enhancing Law Student Learning – The Nurturing Teacher' (2010) 20 *Legal Education Review* 45, 51; Hunt, Chalmers and Macdonald (n 13) 22; Bain (n 56) 18.

The interviewees’ responses about their teaching philosophies and approaches were generally consistent with academic literature on the conception of effective teaching in higher education. This outcome is unsurprising as it is generally expected that when applying for teaching awards, such as the AAUT, nominees based their written statement describing their teaching practices on the scholarship of learning and teaching.<sup>58</sup> This indicates that the interviewees’ learning and teaching practices are informed and rooted in academic literature and teaching pedagogy.

D     *Implications*

The consistency between the interviewees’ responses and body of literature on teaching pedagogy in higher education suggests that building meaningful connections with students through nurturing and engaging learning environments is a basis for effective teaching, and arguably teaching excellence. To determine the extent by which this view is shared by other AAUT award recipients who teach in the discipline of law, the project team analysed the AAUT Citations and Teaching Awards descriptors of successful law academics between 2009 to 2018, to determine how many award descriptors use the terms: ‘care’, ‘connection’, ‘kind’, ‘challenge’, ‘engage’ and ‘environment’ (See Appendix 1 and 2). The Citations and Teaching Awards descriptors outline the recipient’s teaching discipline, methods and experience – it represents the basis for each recipient’s award.

**Table 2:** Proportion of AAUT Citations and Teaching Awards awarded to Law academics between 2009 to 2018 that incorporated the terms ‘care’, ‘connection’, ‘kind’, ‘challenge’, ‘engage’ and ‘environment’ in the award description.

Descriptor	Citations awarded to Law academics (65 Citations conferred between 2009 to 2018)	Teaching Award awarded to Law academics (9 Teaching Awards conferred between 2009 to 2018)
Care/Caring	0	1
Connect/Connection	1	1
Kind/Kindness	0	0
Challenge/Challenging	2	2
Engage/Engaging/ Engagement	20	5
Environment	8	0

<sup>58</sup> James (n 19) 165.

Of the characteristics that were identified by the interviewees as effective teaching traits, engagement is the adjective that is the most commonly cited in the descriptors of the AAUT Citations and Teaching Awards conferred to legal academics. Appropriately 55.56% of the AAUT Teaching Awards awarded to legal academics incorporated the term ‘engagement’; similarly 30.7% of the AAUT Citations awarded to legal academics incorporated the term. The other characteristics were not used as frequently.

Upon analysing the AAUT Citations and Teaching Awards descriptors of legal academic recipients, it appears that the establishment of meaningful connections with students was not the primary reason for which they were conferred their awards. However, the importance of establishing meaningful connections with students in order to teach effectively should not be dismissed. The authors contend that nurturing meaningful connections with students is an aspect of effective teaching and arguably, a foundation upon which teaching excellence can be built. By establishing meaningful connections, a legal academic is able to first encourage students to engage in deep learning, and through innovative and unique teaching approaches and programs that represent command in the field, they are arguably able to achieve teaching excellence.

Supporting this proposition is that in 2015 the AAUT assessment criteria changed from five to four – the following criteria was removed:<sup>59</sup>

**Respect and support for the development of students as individuals.** This may include participating in the effective and empathetic guidance and advising of students; assisting students from equity and other demographic subgroups to participate and achieve success in their courses; and influencing the overall academic, social and cultural experience of higher education.<sup>60</sup>

It appears that building meaningful connections with students underpins this criterion. It is through establishing meaningful connections with students that an academic can facilitate ‘support for the development of students as individuals’

<sup>59</sup> Australian Government, Office for Learning and Teaching, ‘2015 Australian Awards for University Teaching: Programme Information and Nomination Instructions’ *Citations for Outstanding Contributions to Student Learning* (Instructions, December 2014) 3 <<http://pandora.nla.gov.au/pan/133238/20150508-0140/www.olt.gov.au/awards/citations.html>>.

<sup>60</sup> Australian Government, Office for Learning and Teaching, ‘2014 Australian Awards for University Teaching: Nomination Instructions and Supporting Information’ *Citations for Outstanding Contributions to Student Learning* (Instructions) 3 <<http://pandora.nla.gov.au/pan/133238/20140505-1402/www.olt.gov.au/awards/citations.html>>.

through their teaching. The rationale for the AAUT assessment criteria change was not explained. However, it is arguable that this criterion no longer represented teaching excellence in a distinctive sense, but instead was recognised as an aspect for teaching effectively that would be considered common practice, and arguably expected of most academics. This proposition is supported by the body of literature which emphasises the importance of revising the criteria and metrics used to assess teaching award nominations so as to ensure that they reflect the changing definitions of teaching excellence.<sup>61</sup>

### **E     *Limitations and Further Research***

The major limitation associated with this project is that only the views and experiences of four AAUT law recipients were explored – representing only 5.41% of the number of AAUT law academic recipients between 2009 to 2018. Furthermore, only the recipients of AAUT Citations and Teaching Awards were considered. To obtain a larger sample, and to determine if other AAUT law recipients share the same opinions as the interviewees who participated in this project, further research utilising a survey approach could be conducted. The characteristics of effective teaching that have been identified in this project could be used as a basis for the design of a survey. Such a project would lend itself to a statistical analysis of quantitative data collected.

Also this project only considered AAUT Citations and Teaching Awards conferred between 2009 to 2018. For a more accurate representation of the number of AAUT awards conferred on legal academics, further research should be conducted on the AAUT awards conferred between 1997 (inception of the AAUT Awards) to 2008.

## **IV MEANINGFUL CONNECTEDNESS**

The broad value of teachers being able to connect with their students is put eloquently by Parker J Palmer in his book *The Courage to Teach*: ‘Good teachers possess a capacity for connectedness. They are able to weave a complex web of connections among themselves, their subjects, and their students so that students can learn to weave a world for themselves’.<sup>62</sup>

This Part navigates the existing literature to demonstrate the importance of developing meaningful connections with students in teaching law. This is done in an attempt to understand why meaningful connectedness, as cited by the interviewees,

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<sup>61</sup> Gakhal (n 3) 9; Greatbatch and Holland Gunn (n 9) 4.

<sup>62</sup> Parker J Palmer, *The Courage to Teach* (Jossey-Bass, 1998) 11.

is an aspect of effective legal teaching. It is contended that building meaningful connections with students is important because it:

- creates the right environment for learning to take place;
- likely has a beneficial impact on student wellbeing; and
- assists with developing students' emotional intelligence.

Whilst these benefits may be important in teaching within any context, it is argued that there are reasons why they are of particular importance in the teaching of law. After discussion of these benefits and their importance, this Part considers how law teachers can and should form meaningful connections with their students.

## **A     *The Importance of Connecting with Students in Teaching Law***

### **1     *Learning environments***

The beneficial impact on student learning as a result of teachers connecting with students has been acknowledged in the literature on teaching in higher education generally.<sup>63</sup> Similarly, and in-line with the interviewees' responses in this project, Nikki Bromberger suggests that the techniques and philosophies of a 'nurturing teacher' are essential to teaching in law schools.<sup>64</sup> Bromberger proposes that 'a nurturing teacher believes that the best way to stretch the intellectual capabilities of individual students is to promote a climate of caring and trust in the classroom' as this approach has a positive effect on students' emotions and their ability to learn.<sup>65</sup> Part of this approach requires the creation of a 'trusting, supportive environment' that is 'essential for meaningful learning'.<sup>66</sup> There are numerous strategies and techniques that a teacher can employ to create this type of environment – for example, learning students' names, smiling, and allowing time to engage in informal discussion with students.<sup>67</sup> These strategies can enable a law teacher to make students feel safe, supported and consequently more willing to participate in classes.<sup>68</sup>

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<sup>63</sup> See eg Vathsala Sagayadevan and Senthur Jeyaraj, 'The Role of Emotional Engagement in Lecturer-Student Interaction and the Impact on Academic Outcomes of Student Achievement and Learning' (2012) 12(3) *Journal of the Scholarship of Teaching and Learning* 1; Kerri-Lee Krause et al, *The First Year Experience in Australian Universities: Findings From a Decade of National Studies* (Centre for the Study of Higher Education, 2005) 36–8; Su and Wood (n 56) 151.

<sup>64</sup> Bromberger (n 57) 45.

<sup>65</sup> Ibid 46.

<sup>66</sup> Ibid 53.

<sup>67</sup> Ibid 53–4.

<sup>68</sup> Ibid.

Furthermore, a trusting and supportive environment may arise as an extension of a law teacher developing meaningful connections with their students. Teachers who feel connected to their students may be more likely to consciously and subconsciously support students, and both teachers and students may be more likely to be trusting if student-teacher connections exist to form a foundation for that trust.

From another perspective, it is also possible that teachers who have built meaningful connections with their students will be more willing and therefore more likely to intuitively employ the appropriate strategies in their teaching. For example, a law teacher who feels connected to the students will want to learn the students' names, will naturally smile when in class, and will make the time to speak with students informally because they genuinely value that engagement.

Either way, meaningful connectedness between a teacher and their students can *itself* enhance learning because it helps to create the right environment for learning to take place.

This sort of environment may be essential to meaningful and effective learning in any learning context,<sup>69</sup> but it is especially so in studying law.<sup>70</sup> As put by Mary Heath et al: 'Learning about the law can involve bruising encounters with injustice that the law does not always adequately redress. Many students find this distressing.'<sup>71</sup> Heath et al also note that 'challenging and sensitive material' is 'embedded across the law curriculum', pointing to colonisation, human rights abuses, family breakdown, domestic violence, and interpersonal violence as some examples.<sup>72</sup> As such, the discussion of challenging and sensitive material is often inevitable in teaching law subjects.

In the context of teaching this content, a safe and respectful learning environment underpinned by the meaningful connection between each student and the law teacher is of heightened importance. This environment can help students to confidently navigate such challenging and sensitive material whilst feeling safe and supported.<sup>73</sup> In the absence of this safe environment students may be more likely

<sup>69</sup> See eg Sarah Moore and Nyiel Kuol, 'Matters of the Heart: Exploring the Emotional Dimensions of Educational Experience in Recollected Accounts of Excellent Teaching' (2007) 12(2) *International Journal of Academic Development* 8.

<sup>70</sup> Gerald F Hess, 'Heads and Hearts: The Teaching and Learning Environment in Law School' (2002) 52(1) *Journal of Legal Education* 75, 87.

<sup>71</sup> Mary Heath et al, 'Learning to Feel Like a Lawyer: Law Teachers, Sessional Teaching and Emotional Labour in Legal Education' (2017) 26(3) *Griffith Law Review* 430, 433.

<sup>72</sup> Ibid 437.

<sup>73</sup> Mary Heath et al, 'Teaching Sensitive Material: A Multi-Disciplinary Perspective' (2017) 4 *Ergo* 5, 8.



to feel uneasy, uncomfortable, or otherwise inhibited from engaging with sensitive and challenging material, thereby preventing effective and meaningful learning from taking place.<sup>74</sup>

## 2 Student wellbeing

Fostering meaningful connections with students in teaching law is also likely to have a beneficial impact on student wellbeing. It is widely researched that university students experience psychological distress at higher rates than the general population does,<sup>75</sup> and that there are both academic and non-academic stressors that contribute to this psychological distress.<sup>76</sup> Some research also suggests that law students experience higher levels of stress, anxiety and depression than other university students.<sup>77</sup> There are likely a number of factors that contribute to the high rates of psychological distress in law students,<sup>78</sup> and there is no doubt that any approach taken by law schools and law teachers to promote good mental health in students needs to be comprehensive and multifaceted.

Connecting with law students can help to address and prevent the wellbeing issues experienced by law students by promoting social connectedness. The possible causes of psychological distress in university students are numerous and diverse.<sup>79</sup> However, research in this area has shown that factors such as isolation and loneliness are strong predictors of poor mental health for students, where as social connectedness can be protective against poor mental health.<sup>80</sup> This is also true for law students. Natalie Skead and Shane L Rogers have shown that law students who ‘have a greater sense of belonging to their year group and institution

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<sup>74</sup> Ibid 8–10.

<sup>75</sup> See eg Helen M Stallman, ‘Psychological Distress in University Students: A Comparison with General Population Data’ (2010) *Australian Psychologist* 249; Jason C McIntyre et al, ‘Academic and Non-Academic Predictors of Student Psychological Distress: The Role of Social Identity and Loneliness’ (2018) 27(3) *Journal of Mental Health* 230.

<sup>76</sup> McIntyre et al (n 75) 230.

<sup>77</sup> See eg Natalie Skead and Shane L Rogers, ‘Do Law Students Stand Apart from Other University Students in Their Quest for Mental Health: A Comparative Study on Wellbeing and Associated Behaviours in Law and Psychology Students’ (2015) 41–42 *International Journal of Law and Psychiatry* 81.

<sup>78</sup> Ibid 88.

<sup>79</sup> See eg McIntyre et al (n 75); Shannon Ross et al, ‘Sources of Stress Among College Students’ (1999) 33(2) *College Student Journal* 312; David Lester, ‘College Student Stressors, Depression, and Suicidal Ideation’ (2014) 114 *Psychological Reports* 293; Carrie Hurst, Lisa Baranik and Francis Daniel, ‘College Student Stressors: A Review of the Qualitative Research’ (2013) 29(4) *Stress and Health* 275.

<sup>80</sup> See eg McIntyre et al (n 75) 237. See also Edward Deci and Richard Ryan, ‘The “What” and “Why” of Goal Pursuits: Human Needs and the Self-Determination of Behavior’ (2000) 11 *Psychological Inquiry* 227.

generally have lower levels of stress, anxiety and depression'.<sup>81</sup> This supports the understanding that a lack of social connectedness is a primary cause of heightened psychological distress in law students.<sup>82</sup> Given that the high levels of psychological distress in law students has been characterised as a teaching and learning issue,<sup>83</sup> it has been suggested that law schools must 'foster a sense of belongingness' in students through teaching and learning methods.<sup>84</sup>

Unsurprisingly, law teachers establishing meaningful connections with their students can promote social connectedness and a sense of belonging. The initial and obvious connection is the connection between teacher and student. This teacher-student connection is valuable and important because the teacher represents the law school and the university. As such, this connection can help the student to feel a greater sense of belonging to the institution generally – one of the protective factors pointed out by Skead and Rogers.<sup>85</sup> However, the type of social connectedness that is often called for is connectedness between students, and a greater sense of belonging to their cohort.<sup>86</sup> It is likely that connectedness between teacher and student can have flow-on benefits of promoting and fostering relatedness between students – increasing student-student connectedness, not just teacher-student connectedness. This view is broadly supported by Kate Galloway et al, who draw on the work of Patricia Easteal to suggest that support for students in student-teacher interactions 'forms the basis not only for individual support, but also connectedness within the cohort'.<sup>87</sup>

Meaningful connectedness between a law teacher and their students also has the potential to promote student wellbeing in other ways. A law teacher who fosters meaningful connections through empathy with their students is likely to demonstrate care and concern for students and their learning, because it is likely that they *do* care about students and their learning. In response to the high levels of

<sup>81</sup> Natalie Skead and Shane L Rogers, 'Stress, Anxiety and Depression in Law Students: How Student Behaviours Affect Student Wellbeing' (2014) 40(2) *Monash University Law Review* 564, 575.

<sup>82</sup> *Ibid* 574–6.

<sup>83</sup> Lara Dresser, 'Promoting Psychological Health in Law Students' (2005) 24(1-2) *Legal Reference Services Quarterly* 41, 42–8.

<sup>84</sup> Skead and Rogers (n 81) 575.

<sup>85</sup> *Ibid*.

<sup>86</sup> See eg McIntyre et al (n 75) 231; Skead and Rogers (n 81) 574–5.

<sup>87</sup> Kate Galloway et al, 'Approaches to Student Support in the First Year of Law School' (2011) 21 *Legal Education Review* 235, 237. See also Skead and Rogers (n 81) 585–6; Kate Offer, Natalie Skead and Angelyn Seen, "'You Must Be Joking": The Role of Humour in the Law Classroom' (2017) 52(2) *The Law Teacher* 135, 144.

psychological distress experienced by law students, James Duffy, Rachael Field and Melinda Shirley argue that ‘Student engagement is a key to the promotion of good mental health in law students’.<sup>88</sup> They suggest that ‘demonstrating care and concern for students and their learning has the potential to promote student engagement, and thereby support the psychological wellbeing of students’.<sup>89</sup> As such, developing meaningful connections with students can be seen as a key to demonstrating care and concern for them. That care and concern is then a key to promoting student engagement, and student engagement is a key to the promotion of law student wellbeing.

Working towards reducing the levels of psychological distress in law students in these ways would not only enhance wellbeing for the sake of doing so. The resultant improvements in wellbeing can in turn enhance students’ capacity to engage in learning, leading to more effective learning.<sup>90</sup>

### 3 Emotional intelligence

Building meaningful connections with students can also assist law teachers to develop the emotional intelligence of their students. The importance of developing the emotional intelligence of law students during their studies has been widely acknowledged in the legal education literature, especially over the past two decades.<sup>91</sup> Recognition of the need for law graduates to have emotional intelligence is also reflected within the Threshold Learning Outcomes (‘TLOs’), which ‘encourage the development of emotional intelligence by attending to both self awareness ... and the need to communicate and work with others’.<sup>92</sup> In-line with the TLOs, much of

<sup>88</sup> James Duffy, Rachael Field and Melinda Shirley, ‘Engaging Law Students to Promote Psychological Health’ (2011) 36(4) *Alternative Law Journal* 250, 250. See also Rachael Field and James Duffy, ‘Better to Light a Single Candle than to Curse the Darkness: Promoting Law Student Well-Being Through a First Year Law Subject’ (2012) 12(1) *QUT Law & Justice Journal* 133, 146.

<sup>89</sup> Duffy, Field and Shirley (n 88) 252.

<sup>90</sup> Bromberger (n 57) 50; Colin Beard, Sue Clegg and Karen Smith, ‘Acknowledging the Affective in Higher Education’ (2007) 33(2) *British Educational Research Journal* 235, 236, 250; Galloway et al (n 87) 237; Dresser (n 83) 64.

<sup>91</sup> See eg Colin James, ‘Law Student Wellbeing: Benefits of Promoting Psychological Literacy and Self-Awareness Using Mindfulness, Strengths Theory and Emotional Intelligence’ (2011) 21(1-2) *Legal Education Review* 217, 226–32; Emma Jones, ‘Transforming Legal Education Through Emotions’ (2018) 38(3) *Legal Studies* 450; Heath et al (n 71) 441; Galloway et al (n 87) 247.

<sup>92</sup> Sally Kift, Mark Israel and Rachael Field, *Bachelor of Laws Learning and Teaching Academic Standards Statement* (Australian Learning and Teaching Council, 2010) 22–3.

the literature in this area rightly focusses on how law school curriculums can be adjusted to develop emotional intelligence.<sup>93</sup>

Arguably though, if the law teacher does not ‘practice as they preach’ by acting in an emotionally intelligent way in interactions with students, the curriculum adjustments may be less effective than they could otherwise be.<sup>94</sup> Colin James suggests that law teachers ‘are always modelling a sub-curriculum of behaviours, values and attitudes’,<sup>95</sup> and that ‘Academics likely have significant modelling influence on students’.<sup>96</sup> Similarly, Ann Juergens contends that law teachers ‘teach also by personal example, not only by explicit instruction’ and that they are ‘powerful models for students, whether [they] wish to be or not’.<sup>97</sup> Put simply, this means that the way law teachers interact with students and the way they behave in front of students *matters*.

How then can a law teacher use this modelling power to positively develop the emotional intelligence of their students, and how can this be achieved by developing meaningful connections with students?

As outlined above, a law teacher who has forged meaningful connections with their students is likely to demonstrate care and empathy for them. In doing so the teacher might, for example, encourage and support students who encounter difficulties; reward and recognise students who are trying their best; and generally make students feel appreciated, acknowledged, and respected.<sup>98</sup> In addition to the other benefits of practicing care and concern that have already been discussed, acting in this way allows law teachers to lead by example and model emotionally intelligent responses to the range of highs and lows experienced by law students throughout their studies. Students who have observed and experienced the law teacher modelling emotionally intelligent responses can learn from these examples by way of that observation and direct experience.<sup>99</sup> In this way, the meaningfully

<sup>93</sup> See eg Rachael Field, ‘Harnessing the Law Curriculum to Promote Law Student Well-Being, Particularly in the First Year of Legal Education’ in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 214, 217–19.

<sup>94</sup> See generally Ann Juergens, ‘Practicing What We Teach: The Importance of Emotion and Community Connection in Law Work and Law Teaching’ (2005) 11(2) *Clinical Law Review* 413. James (n 91) 232.

<sup>95</sup> Ibid 231.

<sup>96</sup> Juergens (n 94) 415–16.

<sup>97</sup> See generally Bromberger (n 57) 52; Zipora Shechtman and Judy Leichtenritt, ‘Affective Teaching: A Method to Enhance Classroom Management’ (2004) 27(3) *European Journal of Teacher Education* 323.

<sup>98</sup> James (n 91) 231–2; Juergens (n 94) 415–16.

connected law teacher's actions are able to operate in conjunction with the curriculum to develop students' emotional intelligence.

Whilst emotional intelligence is comprised of a number of abilities,<sup>100</sup> in this context the aspects that relate to demonstrating an awareness and understanding for others and their emotions are of particular relevance. Law students who have experienced and observed their teachers demonstrating an awareness and understanding for their emotions might be better-equipped to do as they observed in their future interactions with classmates, colleagues, and clients. In this way, the meaningful connection between law teacher and student can help the student to develop the soft skills that are valuable, if not essential, in legal practice.<sup>101</sup>

## **B Can this Skill be Taught?**

Arguably, any skill can be taught and learned – good teaching practice is no exception.<sup>102</sup> In fact, many institutions now offer professional development courses on effective teaching skills to enhance the quality of teaching within their institution.<sup>103</sup> Effective teaching approaches and techniques have been well-explored in the literature on teaching in higher education, and this includes some literature that broadly relates to strategies for building meaningful connections with students. For example, the literature on 'teacher immediacy' offers verbal and non-verbal techniques that can be employed to reduce the perceived barriers between the academic and their students. The literature on teacher immediacy contends that by connecting with students and reducing the perceived barriers, academics are better placed to influence their students' learning.<sup>104</sup> Relating specifically to the legal discipline, Bromberger offered general 'nurturing teacher' techniques that can be used to create an environment that best facilitates effective learning for law students.<sup>105</sup>

<sup>100</sup> Colin James, 'Resilient Lawyers: Maximizing Well-Being in Legal Education and Practice' in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 135, 140.

<sup>101</sup> Kate Galloway and Peter Jones, 'Guarding our Identities: the Dilemma of Transformation in the Legal Academy' (2014) 14(1) *QUT Law Review* 15, 18–19.

<sup>102</sup> Bain (n 56) 21.

<sup>103</sup> Gakhal (n 3) 6.

<sup>104</sup> See especially Albert Mehrabian, *Silent Messages* (Wadsworth, 1971). See also Lanette Pogue and Kimo Ahyun, 'The Effect of Teacher Nonverbal Immediacy and Credibility on Student Motivation and Affective Learning' (2006) 55(3) *Communication Education* 331, 334; Sarah Nixon, Philip Vickerman and Carol Maynard, 'Teacher Immediacy: Reflections on a Peer Review of Teaching Scheme' (2010) 34(4) *Journal of Further and Higher Education* 491, 492–4.

<sup>105</sup> Bromberger (n 57) 53–7.

However, despite the breadth of academic literature on strategies and techniques that can be employed to facilitate effective teaching, when discussing the ability of an academic to build meaningful connections with their students, an interviewee pondered if such a skill can be taught:

I actually think one of the reasons why it's hard to teach teachers how to teach well, or how to measure good teaching is because it's an intuitive thing, it's a characteristic ...

[M]aybe it's that part of the emotion that connects with the students.

Similarly, another interviewee suggested that an element of authenticity and sincerity is needed in interacting with students because without it, the interviewee was of the opinion that: 'I think it shows. I think if you think "this is stupid and a waste of time" ... students pick up on it'. Whilst various teaching techniques (including 'teacher immediacy' strategies and the approach of a 'nurturing teacher') can likely assist teachers with developing and demonstrating meaningful connections with their students, it is contended that ideally the connections would in fact be genuine and authentic – not just the product of strategies and techniques.<sup>106</sup>

There is much support for teaching with authenticity,<sup>107</sup> with the relevant literature citing benefits for both the teacher and for the quality of students' learning.<sup>108</sup> In relation to teaching law, Melissa J Marlow notes that:

It is difficult to do our best as teachers if we are not coming from a place of integrity and transparency ... As law teachers, we have to be "real" and genuine in our dealing with students. They deserve to know us, and we deserve to experience passionate, related, and authentic teaching.<sup>109</sup>

Authenticity in teaching is a 'multifaceted concept' that has been construed in various ways.<sup>110</sup> Amongst other things, it includes genuineness and acting in

<sup>106</sup> Note that the authors are not suggesting that a teacher who employs strategies and techniques is inauthentic. The authors firmly believe that a teacher can be genuine and authentic whilst also using effective teaching strategies.

<sup>107</sup> See eg Carolin Kreber, 'Academics' Teacher Identities, Authenticity and Pedagogy' (2010) 35(2) *Studies in Higher Education* 171; Angus Brook, 'The Potentiality of Authenticity in Becoming a Teacher' (2009) 41(1) *Educational Philosophy and Theory* 46; Arthur W Chickering, Jon C Dalton, and Liesa Stamm, *Encouraging Authenticity and Spirituality in Higher Education* (Jossey-Bass, 2006); Patricia Cranton, *Becoming an Authentic Teacher in Higher Education* (Krieger, 2001).

<sup>108</sup> For an analysis of the benefits of teaching with authenticity for teachers and students see, eg, Kreber (n 107). See also Carolin Kreber and Monika Klampfleitner, 'Lecturers' and Students' Conceptions of Authenticity in Teaching and Actual Teacher Actions and Attributes Students Perceive as Helpful' (2013) 66(4) *Higher Education* 463.

<sup>109</sup> Melissa J Marlow, 'Does Kingsfield Live? Teaching with Authenticity in Today's Law Schools' (2015) 65(1) *Journal of Legal Education* 229, 241.

<sup>110</sup> Ibid 230–1; Patricia Cranton and Ellen Carusetta, 'Perspectives on Authenticity in Teaching' (2004) 55(1) *Adult Education Quarterly* 5, 7–8; Lauren Bialystok, 'Should Teachers be Authentic?' (2016) 10(3) *Ethics and Education* 313, 316–18.

a way that is consistent with one's values, beliefs, and feelings.<sup>111</sup> It may then be considered 'inauthentic' for a law teacher to feign a meaningful connection when that connection is not actually and genuinely felt. In this situation the law teacher and their students may not experience the same benefits that arise when the meaningful connection is actually developed and felt in an authentic way.

Further, it may even be detrimental to the law teacher's wellbeing and performance if meaningful connections are feigned when not actually felt. As acknowledged by Heath et al, many aspects of academic work – including teaching – could be characterised as emotional labour.<sup>112</sup>

Emotional labour is a term used to describe professions and occupations in which emotional work is exchanged for wages or another form of valuable compensation.<sup>113</sup> Such professions and occupations require workers to express only certain 'appropriate' emotions,<sup>114</sup> and involve the need to manage other people's feelings (typically those of clients and customers).<sup>115</sup> There is obvious scope for application of this concept to the expectation that teachers should appear to develop meaningful connections with students in universities and law schools that are increasingly corporatised. As explained by Heath et al: 'academics are routinely expected to manage their own feelings so as to provide the customer service demanded by universities and law students ... and to generate particular emotions in others (students, for example)'.<sup>116</sup>

Whilst some aspects of emotional labour may be rewarding and enjoyable for workers,<sup>117</sup> research has also indicated that it is exhausting, is considered to be stressful, and can lead to psychological distress.<sup>118</sup> 'Emotional dissonance', a

<sup>111</sup> Marlow (n 109) 231; Cranton and Carusetta (n 110) 7.

<sup>112</sup> Heath et al (n 71) 433. See also Emmanuel Ogbonna and Lloyd C Harris, 'Work Intensification and Emotional Labour among UK University Lecturers: An Exploratory Study' (2004) 25(7) *Organization Studies* 1185, 1188–93.

<sup>113</sup> Da-Yee Jeung, Changsoo Kim, and Sei-Jin Chang, 'Emotional Labor and Burnout: A Review of the Literature' (2018) 59(2) *Yonsei Medical Journal* 187, 187–8.

<sup>114</sup> Blake Ashforth and Ronald Humphrey, 'Emotional Labor in Service Roles: The Influence of Identity' (1993) 18(1) *The Academy of Management Review* 88, 90. See also Alicia A Grandey, 'Emotion Regulation in the Workplace: A New Way to Conceptualize Emotional Labor' (2000) 5(1) *Journal of Occupational Health Psychology* 95.

<sup>115</sup> Heath et al (n 71) 433. See also Amy S Wharton, 'The Affective Consequences of Service Work: Managing Emotions on the Job' (1993) 20(2) *Work and Occupations* 205.

<sup>116</sup> Heath et al (n 71) 433. See also Ogbonna and Harris (n 112) 1188–93.

<sup>117</sup> Heath et al (n 71) 434.

<sup>118</sup> See eg Wharton (n 115); Amy S Wharton, 'Service With a Smile: Understanding the Consequences of Emotional Labor' in Cameron Lynne Macdonald and Carmen Sirianni (eds), *Working in the Service Society* (Temple University Press, 1996) 91; Karen Pugliesi and Scott L Shook, 'Gender, Jobs and Emotional Labor in a Complex Organization' in Rebecca J Erickson and Beverley Cuthbertson-Johnson (eds), *Social Perspectives on Emotion* Volume 4 (Emerald Group Publishing, 1997) 283.

term used to describe conflict between felt and displayed emotions, is of particular concern.<sup>119</sup> This is because the faking or suppressing of one's genuine emotions has been found to lead to increased levels of stress and increased risk of experiencing burnout and emotional exhaustion.<sup>120</sup> It follows from this that a law teacher who feigns the existence of meaningful connections with their students may experience greater risks to their wellbeing and performance than if those connections were actually felt, not just expressed.<sup>121</sup>

There are however still risks that may be faced by law teachers who do genuinely develop meaningful connections with their students. For example, emotional exhaustion and burnout may still occur as a consequence of this emotional labour, even without the presence of emotional dissonance.<sup>122</sup>

Indeed, there are also a number of difficulties and competing obligations that may prevent a law teacher from being able to develop meaningful connections with their students. These factors include heavy workloads, research and service expectations, increasing class sizes, and the fact that some law teachers may be teaching many hundreds of students during any given teaching period.<sup>123</sup> Some of these difficulties may be borne disproportionately by legal academics who are employed on a teaching-intensive or teaching-only basis, sessional law teachers, and early career teachers.<sup>124</sup>

### 1 *How should law teachers proceed?*

If, as contended, the existence of meaningful connections between a law teacher and their students is a foundation for effective teaching from which a number of important benefits can flow, and ideally these connections would be genuinely felt and not feigned, how should law teachers proceed? In particular, how should they proceed in light of the difficulties faced by academics who do try to forge genuine meaningful connections with their students?

In terms of the appropriate approach for academics, there is likely truth to the interviewee's observation that it is 'an intuitive thing ... a characteristic' – something

<sup>119</sup> J Andrew Morris and Daniel Feldman, 'The Dimensions, Antecedents, and Consequences of Emotional Labor' (1996) 21(4) *The Academy of Management Review* 986, 987.

<sup>120</sup> Jeung, Kim, and Chang (n 113) 188-9, citing Dieter Zapf, 'Emotion Work and Psychological Well-Being: A Review of the Literature and Some Conceptual Considerations' (2002) 12(2) *Human Resource Management Review* 237.

<sup>121</sup> See generally Heath et al (n 71) 434.

<sup>122</sup> Jeung, Kim, and Chang (n 113). Note though that some theorists consider emotional dissonance to be an inevitable or central part of emotional labour – see, eg Alicia Grandey, James Diefendorff and Deborah E Rupp (eds), *Emotional Labor in the 21st Century: Diverse Perspectives on Emotion Regulation at Work* (Routledge, 2013) 135.

<sup>123</sup> Johnstone and Vignaendra (n 15) 321–44.

<sup>124</sup> See generally Heath et al (n 71) in relation to the particular difficulties faced by sessional law teachers.



Su and Wood describe as 'hard to pin down',<sup>125</sup> and therefore something that is difficult to provide a 'how to' guide for. It is likely that there is no one-size-fits-all approach given that each teacher and student is different, and therefore each potential connection is different. An initial and perhaps trite, but important, piece of advice for law teachers is to be open-minded and willing to connect with students; moving beyond the conception that relatedness between student and teacher is transgressive, inappropriate, or unhelpful.<sup>126</sup>

Su and Wood suggest that meaningful connectedness with students can be forged 'through empathy and, some would argue, love'.<sup>127</sup> They also suggest that the capacity for this meaningful connectedness may be rooted in having a passion for teaching, and feeling that teaching is a meaningful part of one's life.<sup>128</sup> They go on to link this capacity for 'felt' meaningful connectedness with a teacher's outlook and attitude towards students, quoting Daniel Liston and Jim Garrison to propose that connectedness involves 'Seeing the students before us as whole human beings in search of meaning'.<sup>129</sup> Perhaps then a starting point for developing meaningful connections with students is developing a passion for teaching and coming to see students in this empathetic, understanding way. This approach is somewhat corroborated by research indicating that students recall the demonstration of passion and empathy as traits of university teachers who had the most positive effect on their learning.<sup>130</sup>

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<sup>125</sup> Su and Wood (n 56) 151.

<sup>126</sup> Allan Patience 'The Art of Loving in the Classroom: A Defence of Affective Pedagogy' (2008) 33(2) *Australian Journal of Teacher Education* 55, 58.

<sup>127</sup> Su and Wood (n 56) 151.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid, quoting Daniel Liston and Jim Garrison, 'Love Revived and Examined' in Daniel Liston and Jim Garrison (eds), *Teaching, Learning and Loving: Reclaiming Passion in Educational Practice* (RoutledgeFalmer, 2004) 1, 2.

<sup>130</sup> Sarah Moore and Nyiel Kuol, 'Matters of the Heart: Exploring the Emotional Dimensions of Educational Experience in Recollected Accounts of Excellent Teaching' (2007) 12(2) *International Journal for Academic Development* 87. See also Jones (n 91) 474.

## V CONCLUSION

Despite the vast academic literature written on ‘effective teaching’ and ‘teaching excellence’ in higher education, there is no singular definition as to what constitutes excellence in teaching. Instead the research reveals an extensive list of qualities and traits that are agreed to be essential to good teaching. Whilst the academic literature provides a compelling perspective on effective teaching practices, the research presented in this paper seeks to progress the scholarship on the subject through the knowledge and opinions of four AAUT law recipients whose teaching practices have been recognised as leading in the field.

Although the four AAUT law recipients offered differing perspectives on their conceptualisation of effective legal teaching, key themes did emerge from their responses. All four AAUT law recipients identified the importance of forging meaningful connections with students as a basis for effective legal teaching. Whilst those recipients interviewed had varied teaching approaches and philosophies, it appeared that building meaningful connections with their students was the foundation upon which they crafted their teaching, and arguably a central element of their teaching excellence.

It is contended that through building and facilitating meaningful connections with students, a legal academic is able to establish learning environments that are more conducive to student learning, improve student wellbeing and develop students’ emotional intelligence. Although the ability to establish meaningful connections is likely an intuitive characteristic, there are techniques and approaches that can be employed to assist in facilitating such connections. The authors propose that perhaps the most helpful approach is to have an open mind and a willingness to connect with students.

Importantly, the authors are not advocating for the abandonment or disregard of other evidence-based practices in the teaching of law. Whilst the authors contend that meaningful connectedness is a foundation of effective teaching from which numerous benefits might flow, it alone does not necessarily provide a comprehensive approach to effective legal teaching. Even for meaningfully connected teachers, the utilisation of other evidence-based pedagogical strategies, techniques, and approaches will be required, as evidenced by the responses of the AAUT law recipients who were interviewed.



## APPENDIX 1:

### AAUT CITATION DESCRIPTORS OF LAW ACADEMIC RECIPIENTS BETWEEN 2009 TO 2018<sup>131</sup>

#### 2009

##### **Ms Claire Macken**

For an imaginative, creative and engaging approach to the first-year experience in implementing a successful engagement transition strategy and embedded skills program in law.

##### **Dr Derek Dalton**

For turning law on its head: stimulating deep learning at the interface of law and criminology and fostering independent learning via individually tailored research projects.

##### **Ms Kate Galloway**

For outstanding leadership in developing a flexible learning environment in teaching Law, based on critical reflection and in response to evidence of student needs.

##### **Ms Anne Hewitt, Mr Andrew Ligertwood, Ms Margaret Castles, Ms Cornelia Koch and Mr Matthew Stubbs**

For the development of a suite of law courses designed to facilitate student learning of legal theory by immersion in simulated legal practice .

##### **Winthrop Professor Neil Morgan**

For inspiring law and criminology students across cultures, backgrounds and levels of study through scholarships, fun and real-world relevance.

##### **Mr Michael Blissenden**

For instilling in tax law students motivation for life long learning through the use of narrative and storytelling.

##### **Ms Julie Clarke**

For improving access to legal education through an innovative approach to the use of online technology, exemplary student support and contemporary curriculum resources.

##### **Ms Donna Cooper**

For the development of innovative curricula and authentic assessment that engages students in legal study and links them to their future professional work.

<sup>131</sup> Australian Government, Office of Learning and Teaching (n 53); Universities Australia, 'Australian Awards for University Teaching 2018' Australian Awards for University Teaching (Award Ceremony Booklet) <<https://www.universitiesaustralia.edu.au/wp-content/uploads/2019/06/AAUT-Booklet-v9.pdf>> Note: The information that appears in this appendix is publicly available via the National Library of Australia online archive and the Universities Australia web page.

## 2010

**Ms Lisa Goldacre**

For the innovative, engaging and flexible delivery of an introduction to law course to first year business students in large classes in a transnational setting.

**Dr Julie Cassidy**

For pioneering innovative and engaging teaching methodologies and technologies to support inclusive experiential learning that facilitates practical legal skills development and promotes inter-cultural competencies.

**Ms Julie De Rooy**

For excellence in teaching law, including engaging multidisciplinary and culturally diverse students, using targeted real world scenarios, extensive feedback and transition workshops.

**Associate Professor Molly Townes O'Brien**

For using media creatively in large group law teaching to excite interest, promote engagement and inspire deep learning.

**Ms Sunita Jogarajan**

For ongoing dedication and innovation in engaging and enthusing widely diverse cohorts of students in their study of the traditionally daunting subject of taxation law.

**Ms Anna Cody, Ms Emma Golledge, Ms Anna Hartree and Ms Denise Wasley**

For innovative clinical legal education which inspires law students to connect legal practice, theory and justice issues while working with disadvantaged communities.

**Ms Claire Kaylock**

For using active student-centred approaches to promote student engagement within a constructivist model of legal learning.

**Mr Brendon Murphy**

For responding to the unique needs of students in transition by developing and embedding innovative teaching strategies in the study of criminal law.

**Ms Patty Kamvounias**

For sustained commitment to enhancing student learning in business law through an integrated approach to assessment and feedback.

**Associate Professor Ian McCall and Mr John Littrich**

For introducing law graduates to the challenges of professional practice in an authentic and supportive blended learning environment.

## 2011

**Associate Professor Joseph Fernandez**

For excellence, innovation and dedication to enriching the learning experience of media law students through inspired teaching practice and a command of the discipline.

**Mrs Tania Leiman**

For sustained excellence in teaching that supports, empowers and inspires first year law students to engage with law.

**Mr Craig Cameron**

For creating a stimulating learning environment that enhances the learning of accountancy students in company law.

**Dr Paula Gerber**

For sustained development of imaginative, practice-based pedagogies that inspire enthusiastic, independent learners of law.

**Ms Carolyn Sutherland**

For developing innovative multi-media teaching resources that engage diverse cohorts of business students and enrich their understanding of workplace law.

**Ms Sonia Walker**

For providing learning experiences in the areas of legal problem solving and research that inspire students and allow them to become effective future legal professionals.

**Dr Wendy Larcombe**

Sustained innovation and achievement in development of learning support services for law students, and excellence in classroom teaching and curriculum design in law.

**Associate Professor John Tobin**

For ongoing dedication to developing innovative and collaborative approaches to student learning and engagement in human rights law both in and beyond the classroom.

**Associate Professor Tania Voon**

For excellence in curriculum design and the provision of innovative, authentic learning experiences in the field of international law.

**Associate Professor Natalie Skead**

Bringing Law to Life and Life to Law through relevant and interactive skills-based teaching, graduating inspired and inspiring lawyers with a love for law.

**Mrs Julia Werren**

For bringing law to life for students by incorporating research, social policy and 'skills-based' approaches in an easy to understand manner.

**Ms Marina Nehme**

Motivating, Inspiring and Positively Influencing Students' Learning in Interdisciplinary Law Units by an Early Career Academic.

**2012****Associate Professor Leon Wolff**

For the pioneering use of narrative methodology in a first year law course to provide an authentic, inquiry-based entry into the discipline of law.

**Mr Matthew Bell**

For sustained excellence in curriculum design and teaching of subjects and programs at the nexus of law and construction, designed to develop outstanding interdisciplinary professionals.

**Mr Giuseppe Carabetta**

For sustained excellence in experiential and collaborative learning experiences for business law students at both foundation and senior levels.

**Assistant Professor Ambelin Kwaymullina**

For excellence in teaching and innovative curriculum development in the area of Indigenous peoples and the law.

**2013****Ms Anna Bunn**

For the development of innovative, engaging and contemporary public relations law curricula and resources, resulting in graduates with a strong industry focus.

**Mrs Lorraine Finley and Mr Phil Evans**

For inspiring and motivating students through developing a world class moot program that provides advanced advocacy training and develops practical legal skills.

**Dr Matthew Stubbs**

For respect and support for Aboriginal and Torres Strait Islander law students, achieving individual student development, improved academic experiences and outcomes, and increased social awareness.

**Associate Professor Jeremy Gans and Associate Professor Andrew Palmer**

For radically transforming the ability of students to understand evidence law through innovation in curriculum and pedagogy.

**Dr Tim Connor**

For developing creative in-class activities and establishing supportive learning environments to motivate diverse student cohorts to master and critically reflect on complex business law topics.

**Dr Wendy Bonython**

For integrating professional communication and resilience skills into mental health law curriculum through experiential learning to empower students to manage client and personal psychological distress.

**2014****Assistant Professor Danielle Ireland-Piper**

For inspiring and motivating law students through the use of social media, creative performance, interactive and self-directed assessment, and internationalisation.

**Dr Kylie Burns**

For creating a learning environment where students actively engage, take responsibility for their own learning, and emerge as empathic and ethical legal professionals.

**Dr Becky Batagol**

For addressing the mental health needs of law students and helping students to successfully complete their studies and transition into legal practice.

**Dr Penny Crofts**

For developing authentic, sustained and transformative experiences of 'law in action' that inspire students with a passion for justice and integrity.

**2015****Assistant Professor Francina Cantatore**

For developing experiential learning curricula, resources and services through a legal clinic and formal subjects to enhance the law student experience and employability skills.

**Assistant Professor Louise Parsons**

For a nurturing, influential and motivational teaching approach that enhances the learning experience of law students and inspires them to excel in competitive advocacy.

**Associate Professor Tony Foley**

For innovation in the field of clinical legal education that provides students with a capstone experience that prepares them as future legal professionals.

**Professor Alexander Steel**

For enhancing the quality of legal education through national leadership in the development of educational standards, assessment methods and curriculum frameworks.

**Ms Kate Offer**

For motivating and inspiring law students with a combination of innovative strategies which enhance learning and encourage a love of the law.

**UOW First Year Law Integration Team, Dr Cassandra Sharp, Ms Margaret Bond, Dr Trish Mundy, Ms Karina Murray and Dr Julia Quilter**

For the implementation and sustained development of an integrated first year law curriculum that heightens student engagement.

**2016**

**Flinders Legal Advice Clinic, Ms Deborah Ankor, Mrs Tania Leiman, Dr Susannah Sage-Jacobson and Ms Jocelyn Milne**

For creating inspirational and transformative clinical legal education that motivates students to develop an ethical professional identity, while acquiring high quality practical skills.

**Ms Penny Carruthers**

For creating engaging, challenging, contemporary and inspirational learning environments and for supporting learning for all law students by promoting broader student experiences.

**Dr Tristan Taylor**

For developing innovative teaching approaches that support and motivate students who are learning challenging and unfamiliar material in blended and online learning environments in law and classical languages.

**Dr Susan Bartie**

For creating well-crafted and imaginative resources that facilitate student-centred and highly interactive learning in law.

**2017**

**Mr Shaun McCarthy**

For infusing a live client and experiential learning ethos into the study of law and enhancing student work integrated skills as they transition to the workplace.

**Ms Christina Do**

For creating engaging learning environments that motivate and inspire first year Commerce and Law students to think critically, analytically and reflectively about the law.

**Professor Anthony Cassimatis**

For leadership, innovation, scholarship and the creation of a global network of international lawyers to guide and inspire students to achieve excellence and career success.

**Associate Professor Nicolas Suzor**

For inspiring teaching and transformational mentoring that helps law students flourish through real-world engagement, meaningful choices and knowledge co-creation shared as accessible resources.

**Associate Professor Kelley Burton**

For leadership in designing innovative resources that demonstrate a strong command of criminal law education and fulfil the future needs of budding lawyers.

**Dr Jamie Walvisch**

For the creation of technologically augmented, student-centric teaching approaches that enhance the learning and engagement of law students.



**2018****Dr Amy Maguire**

For leadership, innovation and scholarship that engages students in real-world human rights practice and empowers students to pursue law reform and social justice.

**Flinders Corporate Law Teaching Team, Associate Professor Vivienne Brand and Dr Sulette Lombard**

For excellence in design and sustained delivery of dynamic, inclusive and engaging corporate law curricula, integrating authentic legal tasks, collaborations with industry and research-led perspectives.

**Associate Professor Mary Anne Kenny**

For using situated learning experiences that link to the practice of Law and motivate students to use the law for positive social change.

**Mr James Duffy**

For helping first-year law students become happy, healthy, competent professionals through innovative teaching and technology-based resource development, informed by the disciplines of law and psychology.

**Dr Toni Chardon**

For overcoming challenges in learning Taxation Law and bringing it to life to develop Taxation Literacy: Fostering passionate and enthusiastic teaching practice through situated learning.

## APPENDIX 2:

### AAUT TEACHING AWARD SYNOPSIS OF LAW ACADEMIC RECIPIENTS BETWEEN 2009 TO 2018

#### 2009

##### **Dr Claire Macken**

Claire Macken is a lecturer in the School of Law, and 'joint appointee' between the Faculty of Business and Law and the Institute of Teaching and Learning. Claire is an accomplished early career academic. In her six years as a tertiary educator, she has successfully developed a research-led engagement strategy for the purpose of developing generic and professional skills, high quality learning and an overall positive student experience. Claire's teaching is imaginative, creative and energetic and draws on her research, experiences and inspiration from her three children. Claire's engagement strategy has been successfully adapted from face-to-face large first year class lectures to teaching online and off-campus students in later year law.

She has presented at many conferences and showcases, at Deakin, nationally and in the UK. Since 2006, Claire has won several university teaching awards, and in 2008 was Australasian Law Teacher of the Year runner-up and highly commended for excellence and innovation in teaching law. Claire is currently engaged in the scholarship of learning and teaching on effective engagement strategies, in documenting exemplars of excellence in teaching and in law curriculum renewal.

##### **Mr Mel Thomas, Winthrop Professor Jill Milroy, Winthrop Professor Richard Bartlett, Winthrop Professor Neil Morgan**

The law program for Indigenous peoples has been a most effective equity initiative for Indigenous people to qualify from one of the most demanding degree courses in higher education. Initially one or two Indigenous students deemed likely to succeed in law were given provisional entry into the program in the late 1980s. In 1991 the Australian Law Teachers Association passed a resolution supporting the establishment of an intensive short course bridging program of legal studies for Aboriginal and Islander peoples to address the chronic failure to include Indigenous people in this area. In the ensuing discussions it became clear that a regional program based in Western Australia was favoured by Aboriginal representatives from Western Australia and the Northern Territory.

In 1994, the Pre-Law Program established a joint initiative between the School of Indigenous Studies and the Faculty of Law. The program was based on the model developed in Canada where an Indigenous pre-law program had been in place since 1973, and in which Richard Bartlett had taught. The law program at UWA, which now

supports Indigenous students throughout their entire four-year degree, has enabled 41 Indigenous people to qualify as lawyers: the largest number in the country. These graduates have gone on to work as barristers, solicitors, academics, policy advisors, judges' associates and members of the three arms of government.

## 2010

### **Associate Professor John Anderson**

Associate Professor John Anderson has been teaching undergraduate law students and professional programs at The University of Newcastle for 14 years, and is currently Deputy Head of Newcastle Law School. Associate Professor Anderson uses a constructivist framework in teaching criminal law, evidence and trial process courses. His students actively construct their own knowledge through an incremental process of learning by observing, planning and doing. Problem-based and experiential learning techniques are used to combine learning of legal concepts with practical legal skills. These skills are developed incrementally beginning with observations in courts and of client interviews. They are followed later by participation in simulated exercises and mock court cases, culminating in the live client experience on placement in legal practice. Associate Professor Anderson's criminal practice experience underpins the realistic and challenging problems used in the classroom to develop the skills of analysis, synthesis and evaluation, which students can seamlessly transfer into legal practice and other facets of life. This is showcased in his recent publication, the *Criminal Law Guidebook*. Associate Professor Anderson's research scholarship is focussed on the criminal justice system, particularly sentencing of offenders and the principle of equal application of the law.

### **Mr Michael Blissenden**

Michael Blissenden is a senior lecturer in law and teaches at the University of Western Sydney. He has taught widely within the university sector for the past 13 years and is regularly invited to give guest lectures at the University of Sydney, the University of NSW and CQUniversity in the complex and ever-changing area of taxation law.

His unique and engaging style of teaching not only stimulates the learning process for students, but also provides a motivating platform for them to connect with the principles of lifelong learning. A particular success story includes one of his tax students being appointed as the last Associate to Justice Michael Kirby of the High Court. His innovative approach has been recognised both nationally and internationally with an extensive peer reviewed publication record in leading teaching journals, invitations to contribute to special issues on legal education and presentations at academic staff seminars, both in Australia and overseas.

## 2011

### **Lisa Goldacre**

Lisa Goldacre is a lecturer in the School of Business Law and Taxation in the Curtin Business School (CBS) at Curtin University. She has worked as a solicitor in a national law firm as well as in-house counsel for one of Australia's major companies. Lisa has taught across a range of subjects, and for the past four years has been the unit coordinator for the first year unit 'Business Law 100'. This unit is one of eight common core units in

CBS and an annual enrolment of over 3000 students delivered in various modes to many locations in metropolitan and regional Australia and offshore. This requires effective management of a large teaching team to ensure high quality delivery in all locations. Lisa is committed to ensuring that her students' learning experience is a valuable one for their future careers. Her teaching is characterised by the use of engaging, accessible, interactive, innovative teaching strategies and materials that are well supported by teaching resources. The teaching methods employed provide flexibility for students and encourage independent, self-directed learning. Lisa's research interests lie in the various areas of the law which afford protection to students as consumers of education.

## 2014

### **Professor Stephen Colbran**

For 25 years Professor Stephen Colbran has demonstrated an extraordinary capacity to engage, inspire and motivate undergraduate law students and teachers. He is well known across Australia for his passionate advocacy for online legal education, the scholarship of e-learning and teaching, and as a specialist in Civil Procedure (litigation). He has spent his career overcoming challenges faced by online learners, transforming legal education for the twenty-first century and engaging with students in preparation for their contemporary legal careers. Stephen has created the 'ReMarks' e-grading system; conducted research and published findings; delivered conference papers, workshops, and training at most Australian Universities; and transferred the system to educational institutions worldwide. He has a passion for developing interactive visual methods of legal education and effective learning resources, and providing better feedback and assessment as a driver for student learning. His research interests include Civil Procedure, podcasting, postgraduate research and supervision networks, e-grading systems, MOOCs, iTunesU, branching animation, digital flashcards and e-learning. In 2012, under his leadership the CQU Law degree became the first open access accredited law degree available via iTunesU. Stephen is recognised as an outstanding teacher achieving widespread recognition for his contribution to textbooks, electronic teaching resources and educational software.

### **Associate Professor Rachael Field**

Associate Professor Rachael Field has made a significant and positive difference to the learning experience of law students at the Queensland University of Technology (QUT) and to law student learning nationally. She has achieved national and international standing in the academy as a law teacher and scholar of legal education who is dedicated to promoting law students' success and psychological wellbeing. Rachael supports students to develop a positive professional legal identity, particularly through the teaching of dispute resolution knowledge, skills and attitudes. Her innovative use of a conversational approach models authentic legal practice; challenges and supports students through dynamic classroom discussion; and develops important legal communication skills and positive professional attitudes. Rachael's teaching is informed by her significant portfolio of scholarly research and outputs. She has made important contributions to more than ten national learning and teaching projects, including the development of the Law Threshold Learning Outcomes. Through her Teaching Fellowship, Rachael developed strategies to promote the psychological wellbeing of law

students, and established the national Wellness Network for Law. Her important and sustained contribution to legal education has been recognised at faculty, institutional, state and national levels, culminating in 2013 with the award of the title of Queensland Woman Lawyer of the Year.

## **2015**

### **Dr Asmi Wood**

Dr Asmi Wood has transformed the ANU's Indigenous Law Program, moving it from a zero percentage graduation rate to a 94% graduation rate. Dr Wood has a great ability to inspire and motivate his students. His academic support is matched by the care he takes in supporting them beyond the classroom, including involvement with their families, schools and their cultural activities.

## **2017**

### **Associate Professor Natalie Skead**

Associate Professor Natalie Skead transforms students through innovative and reflective teaching that focuses on interaction, engagement and skills development. Associate Professor Skead inspires graduates to be highly skilled and knowledgeable, to demonstrate ethical and professional conduct and be committed to justice.

Learning through problem-solving is an important feature of Associate Professor Skead's teaching, in both small and large groups. These classes synthesise and contextualise students' understanding, build students' higher order thinking and analysis, and involve them in actively constructing and optimising their own learning.

In solving problems, students grapple with newly learned legal concepts, principles, issues and facts which allow them to learn with and from each other. Students are encouraged to explore their ideas, express different opinions and critically analyse and critique cases, commentary, and the views of teachers and their peers, as well as their own views.

# **REVIEW AND APPEALS: ADJUDICATION DETERMINATIONS UNDER THE CONSTRUCTION CONTRACTS ACT 2004 (WA) FROM 2005 TO 2018**

Auke Steensma\*

Philip Evans\*\*

Gabriël Moens\*\*\*

## **ABSTRACT**

*Construction Contracts Act 2004 (WA) – Statistical analysis of the application and effectiveness of legislation – State Administrative Tribunal – District Court of Western Australia – Supreme Court of Western Australia – Adjudication and Adjudicators – Adjudicators’ Determinations – Cases – West Coast Model – East Coast Model*

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## INTRODUCTION

The *Construction Contracts Act 2004* WA (the CCA) was introduced in 2005 with the principal aim of ‘keeping the money flowing’ to assist contractor cash flow in the construction industry in Western Australia. A significant provision in the CCA allows the resolution of payment disputes through a low-cost rapid adjudication process. This article discusses the incidence of adjudication reviews by reviewing the statistical data relative to the operation of the CCA from the information obtained from the Annual Reports of the Building Commissioner over the period commencing with the introduction of the CCA in 2005 and the last available Building Commission Report in 2018<sup>1</sup> together with the Discussion Paper on the Operation of the *Construction Contracts Act*<sup>2</sup> and the 2016 Independent Statutory Review of the *Construction Contracts Act*,<sup>3</sup> and reports from the State Administrative Tribunal of Western Australia (SAT) and the Western Australian Courts. The research revealed that most of the applications for review related to jurisdiction (79), or enforcement of adjudication determinations (19 in the District Court and 19 in the Supreme Court) rather than the criteria associated with judicial review or the grant of certiorari. The statistics relating to both the low number of applications for review of adjudication determinations and the upholding of the adjudication determinations by the SAT and the WA courts do not support the recommendations that the East Coast Model security of payment legislation should be preferred over the CCA.

### 1. THE *CONSTRUCTION CONTRACTS ACT 2004* WA: BACKGROUND AND OBJECTIVES

The *Construction Contracts Act 2004* WA (the CCA) was introduced with the principal aim of ‘keeping the money flowing’ to assist contractors in the construction industry in Western Australia. A significant provision in the CCA provides for security of payment to parties through a low-cost rapid adjudication process to determine payment disputes. The CCA applies to both written and oral contracts and implies terms where these contracts are silent on terms relating to payment for construction work. The CCA also prohibits parties from including certain clauses relating to payment and payment periods in construction contracts. In summary,

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<sup>1</sup> The Annual Reports of the Building Commissioner may be found at; <https://www.commerce.wa.gov.au/publications/construction-contracts-act-annual-reports>

<sup>2</sup> [http://www.commerce.wa.gov.au/sites/default/files/atoms/files/constructionactdiscusspaper\\_0.pdf](http://www.commerce.wa.gov.au/sites/default/files/atoms/files/constructionactdiscusspaper_0.pdf)

<sup>3</sup> [https://www.commerce.wa.gov.au/sites/default/files/atoms/files/cca\\_review\\_report.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/cca_review_report.pdf)

the objectives of the Act are to:

- prohibit or modify certain provisions in construction contracts;
- imply provisions in construction contracts about certain matters if there are no written provisions about the matters in these contracts; and
- provide a means for adjudicating payment disputes arising under construction contracts.

A significant feature of adjudication is that the adjudicator is to determine the dispute fairly and as quickly, informally and inexpensively as possible.<sup>4</sup>

The term ‘construction contract’ is construed broadly. The CCA defines a construction contract as a contract where a person carries out any one or more of the listed obligations, which can be construction work, supplying goods, providing professional services and on-site services that are related to the construction work. It does not include legal services associated with construction work. This definition applies to written and oral contracts.

Similarly, ‘construction work’ is also broadly defined in the CCA to include all activities associated with civil works such as roads, railways and marine facilities, and pipelines for electricity, gas, water and sanitation. It also includes activities such as repairing, restoring, demolishing, cleaning, painting, landscaping and other works associated with construction. The CCA excludes some mining-related activities<sup>5</sup> which would generally be considered to fall within the definition, specifically the:

- drilling for the purposes of discovering or extracting oil or natural gas;
- constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance; and
- constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance.

Part 2 Division 1 of the CCA prohibits various provisions in relation to payment in construction contracts. For example, the CCA prohibits the parties to the contract from including the following provisions in any construction contract:

- Requiring a party to pay money under the contract to the other party contingent on the first party being paid by another person. Specifically, a provision stating that a subcontractor will be paid when the contractor is paid by the principal or the owner will be prohibited by the Act (described as ‘paid when paid’ clauses).
- A provision that purports to require a payment to be made more than 42 days after the payment is claimed. In such a circumstance, it will be read as a requirement for the payment to be made within 42 days after it is claimed.

It is also prohibited to contract out of the provisions of the CCA.

<sup>4</sup> CCA s 30.

<sup>5</sup> *Conneq Infrastructure Services (Australia) Pty Ltd v Sino Iron Pty Ltd* [2012] WASAT 13.



Additionally, Part 2 Division 2 of the CCA establishes implied provisions in the contract where the terms are silent with respect to matters such as variations, payment entitlements, progress payments or the mode and manner of making payment claims. In these situations, the implied provisions in the CCA will be read into the construction contracts.

What might be described as the ‘core’ of the CCA are the provisions in Part 3 of the CCA which provides for a rapid adjudication process for payment disputes, with either party to the contract having a right to apply to have a payment dispute adjudicated by a registered adjudicator unless:

- an application for adjudication has already been made by a party whether or not a determination has been made; or
- the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract.

An application for adjudication of a payment dispute must be made by a party to the contract within 90 days after the dispute arises. The Respondent, however, has only 10 business days to lodge its response with the adjudicator and serve it on the applicant.<sup>6</sup>

The adjudicator can call a conference of the parties, but is not required to do so, and nearly all payment adjudications are determined on the written submissions by the parties. The adjudicator can also request further submissions or information but is not obliged to do so.

Unless the parties agree to a longer timeframe, the adjudicator has another 10 business days from receipt of the Respondent’s materials to make a determination. The adjudicator may extend the time, but only with the consent of the parties.<sup>7</sup> The parties must bear their own costs of the dispute unless the adjudicator determines that one party has engaged in frivolous or vexatious conduct or made an unsubstantiated submission.<sup>8</sup> The parties are liable to pay the costs of the adjudicator in equal shares.<sup>9</sup> The adjudicator is not bound by the rules of evidence and must determine the application on the balance of probabilities as to whether the Respondent is liable to make any payment to the contractor.<sup>10</sup>

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<sup>6</sup> CCA s 27(1).

<sup>7</sup> CCA s 32(3).

<sup>8</sup> CCA s 34.

<sup>9</sup> CCA s 44(6).

<sup>10</sup> CCA s 31(2)(b).

Amendments to the CCA in 2016 removed the requirement for parties to seek leave from the courts to enforce an adjudication determination as a judgment of the court. Now, upon filing a copy of a determination certified by the Building Commissioner as a true copy and an affidavit as to the amount not paid, a determination will be taken to be an order of the court.<sup>11</sup>

It should be remembered, however, that the CCA was never intended as a panacea for all construction-related issues. The purpose of the rapid adjudication process was more expansively noted by the Hon. Alanah MacTiernan MLA, the then Minister for Planning and Infrastructure, in the Second Reading Speech of the *Construction Contracts Bill 2004* (WA) in 2004:

The rapid adjudication process allows an experienced and independent adjudicator to review the claim and, when satisfied that some payment is due, make a binding determination for money to be paid. The rapid adjudication process is a trade-off between speed and efficiency on the one hand and contractual and legal precision on the other. Its primary aim is to keep the money flowing in the contractual chain by enforcing timely payment and side-lining protracted or complex disputes. The process is kept simple, and therefore cheap and accessible, even for small claims. In most cases the parties will be satisfied by an independent determination and will get on with the job. If the party is not satisfied, it retains full rights to go to court or use any other dispute resolution mechanism available under the contract. In the meantime, the determination stands, and any payments ordered must be made on account pending an award under the more formal and precise process.<sup>12</sup>

Similarly, whilst relative to the NSW legislation, in *Brodyn Pty Limited t/as Time Cost and Quality* (ACN 001 998 830) v *Philip Davenport & Ors*,<sup>13</sup> Einstein J stated that, ‘What the legislature has provided is no more or no less than an interim quick solution to progress payment disputes which solution critically does not determine the parties’ rights per se’.

With respect to overturning an adjudication determination, the adjudication process was never intended to be a dry run to litigation. Under the CCA, once a payment dispute has been adjudicated, ss 38 and 41 provide that any determination is final and binding on the parties and payment of the amount due under the determination must be made. However, s 46 of the CCA provides a limited right for a person aggrieved by a determination to seek a review of the adjudicator’s

<sup>11</sup> CCA section 43.

<sup>12</sup> *Second Reading Speech*, Legislative Council, 8 April 2004, 1934b–1935a.

<sup>13</sup> [2003] NSWSC 1019 at [14].

decision by the SAT. This right of review is only available where the adjudicator has dismissed the application under s 31(2)(a) without determining the merits. Where the adjudicator has made a determination under s 31(2)(b) on the merits of the payment dispute, the adjudicator's determination is not reviewable by the SAT. Only the Supreme Court has the power to review the adjudicator's determination under s 31(2)(b); this review is limited to jurisdictional grounds.

Where a person who is aggrieved by the adjudicator's determination to dismiss the application for adjudication under s 31(2)(a) applies to the SAT for a review, s 46(2) of the CCA provides that, if the adjudicator's determination is set aside by the SAT and reversed, the adjudicator must, within 14 days of the SAT's decision make a determination under s 31(2)(b).

Part 2 of this article provides an outline of the legal framework with regards to a review of adjudication determinations. Part 3 focuses on statistical results relative to the review of adjudicator determinations in the State Administrative Tribunal (SAT), the District Court of Western Australia (DCWA), and the Supreme Court of Western Australia (SCWA), including its Court of Appeal Division. Part 4 attempts to draw some conclusions from the statistical information and, in particular, it relies on these conclusions to rebut the claim that the East Coast Model of adjudication is superior to the CCA, which represents the West Coast Model. The article also offers some concluding comments in Part 5.

## 2. REVIEW OF ADJUDICATION DETERMINATIONS

The origins and rationale for the introduction of the CCA, and security of payment generally, have been well documented,<sup>14</sup> but to date there has been no definitive statistical analysis with respect to the review of adjudication determinations under the CCA. It has been the experience of the authors that, unfortunately, comments in relation to the incidence of, and reasons for, review have often been anecdotal and conjectural and unsupported by factual evidence.

For example, some of the oral submissions to the 2016 CCA Review merely focused on how to stop interference with adjudication determinations. In this context, in his submission, the Rev. Peter Abetz, MLA, referred to the case of *WQube Port of Dampier and Loots of Kahlia Nominees*:<sup>15</sup>

<sup>14</sup> See Coggins J, Davie T, Earls T, and Evans P. Understanding Constructions Law. Lexis Nexis 2016, 32–67; Moens G and Evans P, *Arbitration and Dispute Resolution in the Resources Sector: An Australian Perspective*, Springer, 2015, chapter 8, 125–151.

<sup>15</sup> *WQube Port of Dampier and Loots of Kahlia Nominees* [2014] WASC 331.

The fact that an aggrieved person can still apply to the Supreme Court for a judicial review of the decision effectively creates a right of appeal, which as this case shows, is often blatantly exploited by unscrupulous operators.

Apart from the above submission, this was an issue that, in the absence of specific submissions supported by parties' evidence, required further research and reference to case law in order for it to be adequately addressed.

The Supreme Court of Western Australia has held that the right of review by the State Administrative Tribunal under the Act is limited to a decision to dismiss an adjudication application.<sup>16</sup> Where an adjudicator decides not to dismiss an application and makes a determination on the merits, the respondent does not have a right to apply to the SAT for review of the determination. However, a determination on the merits can be challenged by either a judicial review by the Supreme Court on the ground of jurisdictional error, or where an application is made to a court of competent jurisdiction to enforce the adjudicator's determination on the grounds that the determination exceeded the jurisdiction of the adjudicator and, consequently, there was no determination under the Act.

Earlier, the Wallace Report into the operation of the Queensland security of payment legislation identified the rationale for judicial review in the security of payment context:

Given that an adjudicator's decision is an interim one and given that it is often made in a "pressure cooker" environment under extremely tight timeframes, it is entirely appropriate that adjudicators' decisions are subject to the supervisory control of the Supreme Court.<sup>17</sup>

A complete exclusion of judicial review from the security of payment system is not possible since, under the Commonwealth Constitution, the state Supreme Courts have an entrenched jurisdiction to grant relief for jurisdictional error. The High Court has made clear that, under the Commonwealth Constitution, a privative clause may validly deny judicial review by the state Supreme Court of non-jurisdictional errors by decision-makers under state law. However, a privative clause may not

<sup>16</sup> *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319; [2011] WASCA 217.

<sup>17</sup> Andrew Wallace, *Final Report of the Review of the Discussion Paper – Payment Dispute Resolution in the Queensland Building and Construction Industry* (Building Services Authority, 2013). Wallace Report, 221.

validly deny judicial review of jurisdictional errors by decision-makers under state law. These constitutional strictures apply to the adjudication process under the state security of payment laws.<sup>18</sup>

It is not possible in this article to provide a comprehensive discussion on the topic of jurisdictional error.<sup>19</sup> However, briefly, the High Court has held that jurisdictional error includes:

- erroneous assertion or denial of jurisdiction,
- misunderstanding or disregard of the limits of jurisdiction,
- decision-making wholly or partially beyond the limits of a power,
- conducting proceedings where a jurisdictional fact is absent,
- disregarding a condition of jurisdiction,
- considering a matter that is required to be ignored; and
- incorrect interpretation of a statute leading to a misunderstanding of function.<sup>20</sup>

### 3. FORUMS FOR REVIEW OF ADJUDICATION DETERMINATIONS

#### 3.1.1 WA STATE ADMINISTRATIVE TRIBUNAL (SAT)

The first forum for review of adjudication determinations is the Western Australian State Administrative Tribunal (SAT) which was established in January 2005, in response to reforms of the Western Australian justice system. In terms of composition as at 10 April 2019, the SAT had four full-time Senior Members, 18 full-time Members, 93 Sessional Members – Senior (as required), and 49 Sessional Members – Ordinary (as required).<sup>21</sup>

The *State Administrative Tribunal Act 2004* (WA) states pursuant to s 5, ‘If there is any inconsistency between this Act and an enabling Act,<sup>22</sup> the enabling Act prevails’. Pursuant to s 9 of the SAT Act, the objectives of the Tribunal are:

<sup>18</sup> Security of payment legislation has also been unsuccessfully challenged as inconsistent with the *Kable* principle (*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51). See Birdon Pty Ltd v Houben Marine Pty Ltd (2011) 197 FCR 25, [48]–[69]; [2011] FCAFC 126; Brian Mason, ‘Why the Sound and Fury? Enforcing Security of Payment Adjudication Determinations.’ (2013) 29 *Building and Construction Law Journal* 372. For another argument based on *Kable*, see Jean M Hamilton-Smith, ‘*Kable* and the Validity of s 15 of the Building and Construction Industry Security of Payment Act 1999 (NSW).’ (2013) 29 *Building and Construction Law Journal* 452.

<sup>19</sup> Kirk [71].

<sup>20</sup> *Craig v South Australia* (1995) 184 CLR 163, 177–178, cited in Kirk [72].

<sup>21</sup> The State Administrative Tribunal – Website – SAT Members <[https://www.sat.justice.wa.gov.au/S/structure\\_of\\_sat.aspx](https://www.sat.justice.wa.gov.au/S/structure_of_sat.aspx)>

<sup>22</sup> The CCA is classified as an enabling Act

- (a) to achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case; and
- (b) to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties; and
- (c) to make appropriate use of the knowledge and experience of Tribunal members.

Evans and Steensma<sup>23</sup> noted that, whilst a decision by an adjudicator will not be set aside where a non-jurisdictional error has been made by the adjudicator, ‘the SAT may set aside an adjudicator’s decision if the adjudicator has not acted honestly or has substantially breached the requirements of natural justice’, as held by Mason P, Giles JA and Hodgson JA in *Brodyn*.<sup>24</sup>

Once an aggrieved party decides to pursue s 46 of the *Construction Contracts Act 2004* (WA) and that grievance pertains to a decision made by an adjudicator under s 31(2)(a),<sup>25</sup> the SAT has the jurisdiction to review that decision in accordance with s 17(1) of the SAT Act,<sup>26</sup> which states that, ‘If the matter that an enabling Act gives the Tribunal jurisdiction to deal with is a matter that expressly or necessarily involves a review of a decision, the matter comes within the Tribunal’s review jurisdiction’.

Pursuant to s 21 of the SAT Act, an aggrieved party to a payment dispute has a right under an enabling act, in this case, the *Construction Contracts Act 2004* (WA), to have a decision reviewed. The request must be made in writing and must be made ‘at any time within the period of 28 days after the day on which the decision was made’.<sup>27</sup>

The SAT Act states, pursuant to s 27, that:

- (1) The review of a reviewable decision is to be by way of a hearing de novo, and it is not confined to matters that were before the decision maker but may involve the consideration of new material whether or not it existed at the time the decision was made.
- (2) The purpose of the review is to produce the correct and preferable decision at the time of the decision upon the review.
- (3) The reasons for decision provided by the decision maker, or any grounds for review set out in the application, do not limit the Tribunal in conducting a proceeding for the review of a decision.

<sup>23</sup> Philip Evans and Auke Steensma, ‘The Construction Contracts Act 2004 (WA); Its Application and Effectiveness’ (2013) 79(4) *Arbitration*, Chartered Institute of Arbitrators 5, 380.

<sup>24</sup> *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2004] NSWCA 394.

<sup>25</sup> *Ibid* s 31.

<sup>26</sup> *State Administrative Tribunal Act 2004* (WA), s 17(1).

<sup>27</sup> *State Administrative Tribunal Act 2004* (WA), s 21(3)(a).

The SAT has under the Act power to exercise its review jurisdiction pursuant to s 29:

- (1) The Tribunal has, when dealing with a matter in the exercise of its review jurisdiction, functions and discretions corresponding to those exercisable by the decision maker in making the reviewable decision.
- (2) Subsection (1) does not limit the powers given by this Act or the enabling Act to the Tribunal.
- (3) The Tribunal may —
  - (a) affirm the decision that is being reviewed; or
  - (b) vary the decision that is being reviewed; or
  - (c) set aside the decision that is being reviewed and —
    - (i) substitute its own decision; or
    - (ii) send the matter back to the decision maker for reconsideration in accordance with any directions or recommendations that the Tribunal considers appropriate,

and, in any case, may make any order the Tribunal considers appropriate.

Steensma noted that the SAT will only set aside an adjudication determination where there has been a failure to comply with the provisions of s 31(2)(a) and will not review a decision ‘on the merits only on jurisdiction’.<sup>28</sup>

### 3.1.2 SAT Reviews of Adjudicators’ Determinations

The first issue with respect to determining the incidence of adjudication reviews is to consider the overall number of adjudications carried out over the period from the commencement of the CCA until the last recording period of the Building Commissioner in 2018. Since the commencement of the CCA in 2005, there have been a total 1987<sup>29</sup> applications for adjudication of payment claims. In 2005, there were 29 applications for adjudication of payment claims which increased to 197 in the 2010–11 reporting period and then declined to 178 the following year in 2012–2013. During 2014–15, applications increased to their highest, with 235 applications for adjudication of payment claims. Recently, there has been a declining trend during the 2017–2018 period. Figure 1 below graphically indicates the application number history.

<sup>28</sup> Auke Steensma, ‘A statutory review of adjudicators’ determinations under the *Construction Contracts Act 2004* (WA) by the State Administrative Tribunal and the Courts of Western Australia’ (PhD Thesis, Curtin University, 2018), 170.

<sup>29</sup> All data and statistics, unless otherwise cited, are a statistical analysis of the Building Commission’s ‘Report of the Building Commissioner *Construction Contracts Act 2004* (WA), (since 2005 – 2016) by Auke Steensma as part of his PhD candidacy. Dr Steensma has assisted the Building Commission in the development and drafting of the annual reports for the periods 2011–12, 2012–13, 2013–14, 2014–15, and 2015–16.

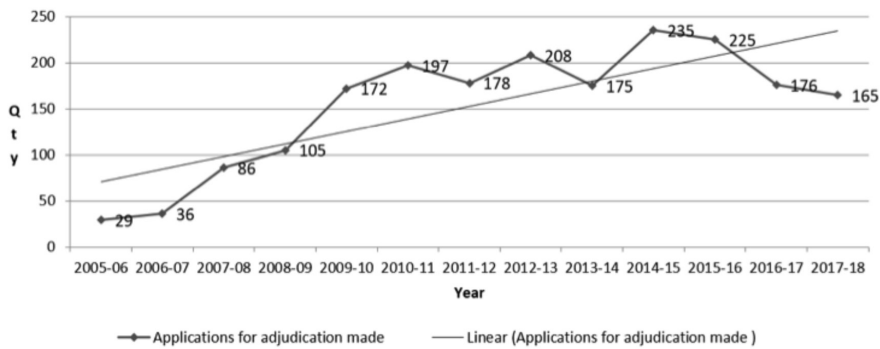


Figure 1 – Linear trend analysis – Applications for payment claims – 2005–18

The decrease in the number of adjudications in the last two reporting periods, whilst perhaps incidental to the issues of determination reviews, requires further research beyond the confines of this article. It suffices for the purposes of this article to refer to Perth Construction Lawyers, Jackson McDonald, which has suggested the following:<sup>30</sup>

The drop in major project work, which means there is generally less construction activity, and that which is going on, is fraught with tension (it's a principal's market) such that everyone is terrified of their next job, so unwilling to rock the boat via adjudications. There has been a similar drop in Queensland adjudications, coinciding with their drop off in activity.

Additionally there are still huge levels of ignorance as to the process. That is how to do it, and the costs. Also the 90 day length of time an applicant now has to commence an adjudication and the ability to recycle means applicants can technically keep refreshing and improving their claim with information in the claims process rather than having to put their best foot forward and then refer to adjudication upon first presentation of the claim. Finally there is some uncertainty surrounding the changes in the law following the 2017 amendments to the CCA

In comparing the number of determinations against the applications for review as noted above since the commencement of the CCA in 2005, there have been 1987 adjudicators' determinations. Of these only 79 (or 3.98%) were submitted to the SAT for review. To date, the highest number of applications for review has been 11 in both 2011–12 and 2014–15. The lowest number was in 2017–18, where only two reviews were conducted.

<sup>30</sup> Personal Communication. T Jacobs, Jackson McDonald, Perth (16 October 2019).



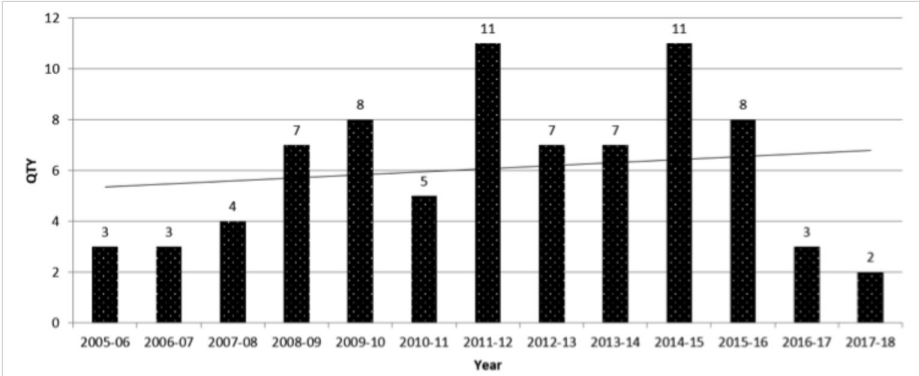


Figure 2 – Number of Appeals (2005–2018)

3.1.3 Determination reviews upheld, dismissed or withdrawn

Since 2005, of the 79 reviews conducted on adjudication determinations, 15 (19%) were overturned by the SAT. Some 44 (or 56%) were dismissed. The first review application to be dismissed was on 9 January 2006 in *Crouch Developments Pty Ltd ACN 008 897 676, Christian White & Angie Marik T/AS Christian Kane’s Business Services*.<sup>31</sup> The highest number of determinations overturned was three in both 2013–14 and 2014–15. The highest number of dismissals was seven in both 2014–15 and 2015–16.

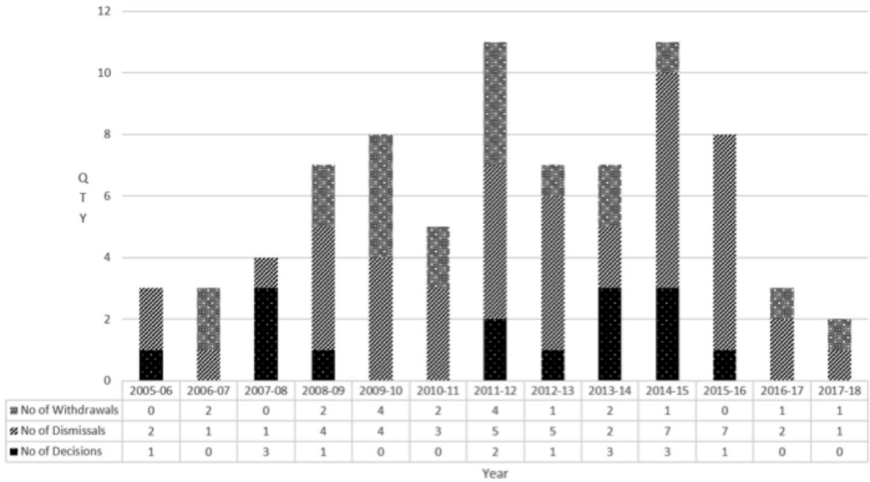


Figure 3 – Decisions, Dismissals and Withdrawals (2005–2017)

<sup>31</sup> CC:3773/2005.

In summary, over the period of review (2005–18) 3.98% of determinations were overturned.

A number of applications for review were also withdrawn by the parties.<sup>32</sup> The *State Administrative Tribunal Act 2004* (WA), pursuant to s 46, provides that a party or the parties may agree to withdraw proceedings in the SAT. Specifically:

- (1) If the Tribunal gives leave, the applicant may withdraw or agree to the withdrawal of a proceeding or a part of a proceeding.
- (2) The Tribunal may make an order dismissing or striking out all, or any part, of a proceeding before it if the applicant withdraws or agrees to the withdrawal of the proceeding or that part of it.

Since 2005, of the 79 reviews conducted by the SAT, 20 (or 25%) of these reviews were withdrawn by agreement between the parties. As we can see below, in 2009–10 and 2011–12, in both years, four applications for review were withdrawn. No statistics are available for the reasons for withdrawal.

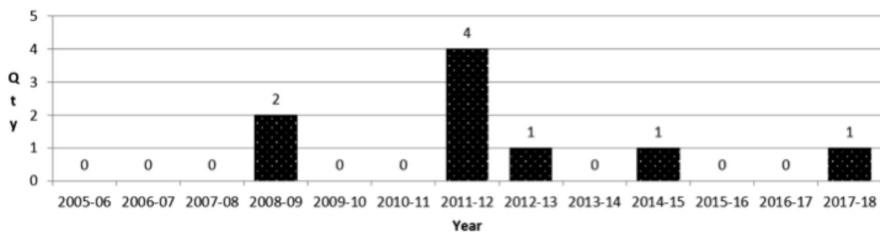


Figure 4 – SAT Withdrawals (2005–2018)

### 3.1.4 Authorities

With respect to precedent, the SAT has referred to 151 previous decisions when making determinations with respect to overturning, dismissal, or withdrawals.<sup>33</sup> The case most extensively used by members of the SAT is *Blackadder Scaffolding Services (Aust) Pty Ltd* and *Mirvac Homes (WA) Pty Ltd*,<sup>34</sup> and *Perrinepod Pty Ltd v Georgiou Building Pty Ltd*,<sup>35</sup> both of which have been cited as authority on ten occasions. The highest number of cases quoted in a decision, dismissal, and withdrawal is 16 by Chaney J, in *Match Projects Pty Ltd v Arcccon (WA) Pty Ltd*.<sup>36</sup>

<sup>32</sup> The first case in the SAT to be withdrawn was *Midwest Corporation Ltd, Merit Engineers Pty Ltd CC: 1734/2006* on 15 November 2006.

<sup>33</sup> Note however that a SAT Tribunal is not bound by previous SAT decisions.

<sup>34</sup> [2009] WASAT 133.

<sup>35</sup> [2011] WASCA 217.

<sup>36</sup> [2009] WASAT 134.

On 35 occasions, no cases were referred to in the decisions. In these cases, on the facts, there was a lack of jurisdiction on behalf of the adjudicator. The average number of cases referred to in a SAT CCA determination is three.

### **3.1.5 Which sections of the CCA have been the subject of SAT consideration?**

The most widely referred to section of the CCA other than s 46<sup>37</sup> is s 26,<sup>38</sup> which is referred to in the legislation component of the document on 38 (or 48%) of the 79 reviews. The next is s 31<sup>39</sup> of the Act, which was referred in 37 (or 47%) of the 79 reviews. Section 29<sup>40</sup> was the most widely quoted section of the *State Administrative Tribunal Act 2004* (WA), which was quoted in 17 (or 22%) of the decisions, dismissals, and withdrawals, followed by s 27,<sup>41</sup> which was quoted in 12 (or 15%).

### **3.1.6 Review times**

On 33 occasions, the SAT determination was made in one day consistent with the objectives of the SAT as noted in s 27 of the Act. Arguably, this result was influenced by the withdrawal of 19 of the applications for review. The longest review time taken by the SAT was 183 days in the case of *Tormaz Pty Ltd v High Rise Painting Contractors Pty Ltd*.<sup>42</sup> The application was subsequently dismissed. The average time taken to review an adjudicator's determination, from hearing to publishing the decision, dismissal, or withdrawal was 43 days which is again consistent with the objectives of a SAT review.

### **3.1.7 SAT Review Summary**

The above statistics reveal that the SAT reviews appear to be carried out as expeditiously as possible in accordance with SAT objectives. Also, there was no definitive data available suggesting that the time taken by SAT to review a determination was an impediment to a review application.

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<sup>37</sup> The Limited Right of Review.

<sup>38</sup> Applying for Adjudication.

<sup>39</sup> Adjudicators' Functions.

<sup>40</sup> Adjudicators' conflict of interest.

<sup>41</sup> Responding to Application for Adjudication.

<sup>42</sup> [2012] WASAT 166.

### 3.2 THE DISTRICT COURT OF WESTERN AUSTRALIA (DCWA)

The District Court of Western Australia (DCWA) has had only a limited role with respect to the review of an adjudication determination under the CCA.<sup>43</sup> By way of background, the DCWA consists of 24 Judges,<sup>44</sup> with some roles and responsibilities entrusted to five Registrars. The DCWA has a jurisdictional limit of \$750,000.<sup>45</sup>

To date, the role of the DCWA with respect to the CCA has been the enforcement of the adjudication determinations where the unsuccessful party has refused to make the payment as specified in the determination.

The CCA provides that, pursuant to s 43:

(1) In this section —

*Court of competent jurisdiction*, in relation to a determination, means a court with jurisdiction to deal with a claim for the recovery of a debt of the same amount as the amount that is payable under the determination.

(2) A determination may, with the leave of a court of competent jurisdiction, be enforced in the same manner as a judgment or order of the court to the same effect, and if such leave is given, judgment may be entered in terms of the determination.

(3) For the purposes of subsection (2), a determination signed by an adjudicator and certified by the Registrar as having been made by a Registered Adjudicator under this Part is to be taken as having been made under this Part.

The *District Court of Western Australia Act 1969* (WA), provides that, pursuant to s 50(1) of that Act, the Court is granted Civil Jurisdiction and declares that, ‘Subject to section 51 the Court has the same jurisdiction to hear and determine and may exercise all the powers and authority that the Supreme Court has and may exercise from time to time’.

Since the commencement of the *Construction Contracts Act 2004* (WA), there have been 8 applications to the DCWA to enforce the judgement of an adjudicator’s determination out of the 1987 adjudication determinations. The first application to the DCWA for enforcement of an adjudicator’s determination was made in 2008, some 3 years after the commencement of the CCA. The highest number of applications for enforcement was in 2011–2012 when 4 applications were made to the District Court.

<sup>43</sup> The DCWA was established as a result of the District Court of Western Australia Act 1969 (WA) which gained assent on 17 November 1969 and commenced operation on 1 April 1970.

<sup>44</sup> The District Court of Western Australia, Website – About the District Court < <http://www.districtcourt.wa.gov.au/A/aboutDistrictCourt.aspx?uid=7689-4890-3639-8152> >

<sup>45</sup> The District Court of Western Australia, About the District Court (2014) < <http://www.districtcourt.wa.gov.au/A/aboutDistrictCourt.aspx?uid=7689-4890-3639-8152> >.

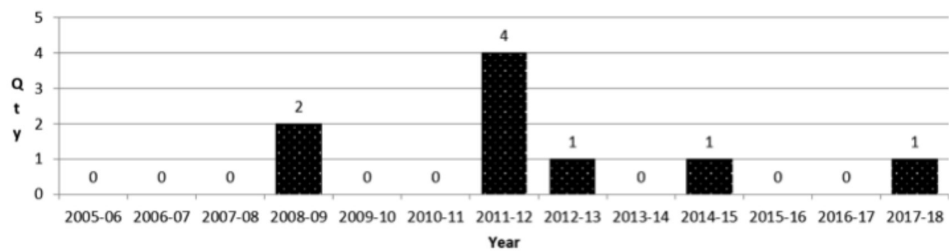


Figure 5 – Enforcement of s 43 and the DCWA

The first application to the DCWA was *Wormall Pty Ltd v Marchese Investments Pty Ltd*.<sup>46</sup> Two applications, *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*<sup>47</sup> and *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [No 2]*<sup>48</sup> were adjourned as the respondent had sought review by the Supreme Court of Western Australia. Both cases were discontinued because of the insolvency of the respondent.

The following figure shows graphically the history of the enforcement applications

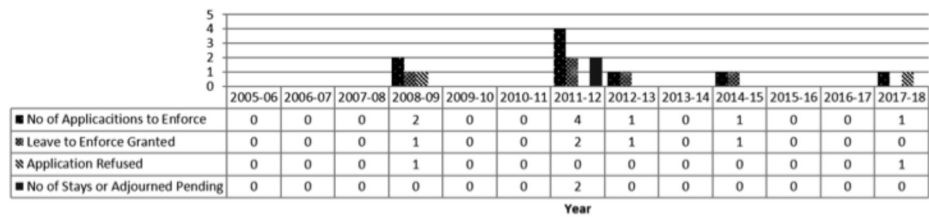


Figure 6 – Enforcement, Granted, Refused, stayed or Adjourned Pending

3.2.1 Authorities and Review time

The most widely referred to authority was *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*,<sup>49</sup> which was used on 7 occasions. The only two sections of the *Construction Contracts Act 2004* (WA) used were ss 26 and 43. The shortest time taken to enforce an adjudicator’s determination by the DCWA was 8 days. The longest time was 67 days in the case of *Kulleen Pty Ltd as trustee for the Gismondi Family Trust trading as Italsteel Structural Engineering WA v Rostruct Pty Ltd*.<sup>50</sup>

<sup>46</sup> [2008] WADC 140.  
<sup>47</sup> [2012] WADC 27.  
<sup>48</sup> [2012] WADC 60.  
<sup>49</sup> [2008] WASC 58.  
<sup>50</sup> [2013] WADC 172.

### 3.2.2 The 2016 Amendments to the CCA

The above review is now somewhat historical because, in 2016,<sup>51</sup> the CCA was amended to remove the previous requirement in s 43 of the Act to obtain leave of the court to enforce a determination as a judgment. Now, a party receiving an adjudication determination in its favour can simply file in a court of competent jurisdiction a copy of the determination certified by the Building Commission and an affidavit that the amount has not been paid. Once filed, the determination will be taken to be an order of the court and may be enforced accordingly. Any interest owed under the determination will continue to accrue up to the date of filing with the appropriate court.

## 3.3 THE SUPREME COURT OF WESTERN AUSTRALIA (WASC)

The Supreme Court of Western Australia (WASC) has ‘unlimited jurisdiction in civil matters’.<sup>52</sup> With respect to the CCA, an error of jurisdiction made by an adjudicator in the determination, by virtue of the *Rules of the Supreme Courts 1971* (WA), is a reviewable decision. The Rules provide that, pursuant to Rule 1 to Order 56 – judicial review; reviewable decision means ‘any decision that the Court, under the common law or in equity, has jurisdiction to review and to grant relief in respect of by way of a writ, a declaration or an injunction’.

Pursuant to Rule 1 to Order 56, an application for review must be made within a specified time;

- (a) for an application for judicial review of a reviewable decision, means 6 months after the later of —
  - (i) the date on which the decision is made; or
  - (ii) the date on which the applicant became aware of it;

At common law, the availability and scope of judicial review is a consequence of the judicial remedy sought. These remedies are the prerogative writs of habeas corpus, quo warranto, mandamus, certiorari, and prohibio as well as the equitable remedies of injunction and declaration. The usual remedy sought in connection with an adjudication determination is a writ of certiorari setting aside (‘quashing’) a determination made contrary to the law.

In considering who is amenable to these remedies, both government and domestic tribunals will be subject to judicial review if the powers they exercise can be described as public powers.<sup>53</sup> In this sense, ‘public power’ means the

<sup>51</sup> [Section 43 amended: No. 16 of 2011 s. 128(6); No. 55 of 2016 s. 17.]

<sup>52</sup> The Supreme Court of Western Australia, website – Court Structure, [http://www.supremecourt.wa.gov.au/C/court\\_structure.aspx?uid=7989-8647-2900-2500](http://www.supremecourt.wa.gov.au/C/court_structure.aspx?uid=7989-8647-2900-2500)

<sup>53</sup> *Forbes v NSW Trotting Club* (1979) 143 CLR 242.

power vested in a person as an agent or instrument of the state in performing the legislative, judicial, and executive functions of the state. Where a power is derived from a statute (such as the CCA), the courts will examine the exercise of the power granted to a public body or tribunal and determine whether that exercise is within the scope of the grant.<sup>54</sup>

Whilst it is beyond the scope of this article to discuss in detail the categories of review, broadly, it can be said that they are available where someone other than the authorised decision-maker has decided the issue; the decision-maker has either answered a question not entrusted to it or has failed to answer the question which is entrusted to it for decision; where the decision is unreasonable; where a body has merely applied an inflexible policy without consideration of the merits of the case, or there has been a failure to observe the rules of natural justice.

However, relative to the usual application under the CCA for the quashing of the adjudication determination, it is only in relation to certiorari that a decision may be reviewed simply for an error of law, provided that the error appears on the ‘face of the record’. It is for the court undertaking the review to determine what constitutes the record in any specific case, but normally the record will comprise the documentation which initiates the proceedings. Typically, this will include the application for, and response to, the adjudication application and the adjudication determination, but not any evidence.

Again, it is beyond the scope of this article to discuss the complex definitions and application as to what is an error of law but, put simply, an error of law is an erroneous determination of the legal rules governing procedure, evidence or the matters at issue between the parties.<sup>55</sup>

### **3.3.1 Applications to the Supreme Court.**

To date, there have been 53 applications to the Supreme Court under the provisions of the CCA. These comprised applications seeking to overturn adjudication determinations, or applications seeking enforcement of a determination. The graph below shows the number of applications to the SCWA relative to the Building Commission reporting periods.

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<sup>54</sup> *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170.

<sup>55</sup> For a helpful discussion see Lane, WB, Young S, *Administrative Law in Australia*, LawBook Co., 2017.

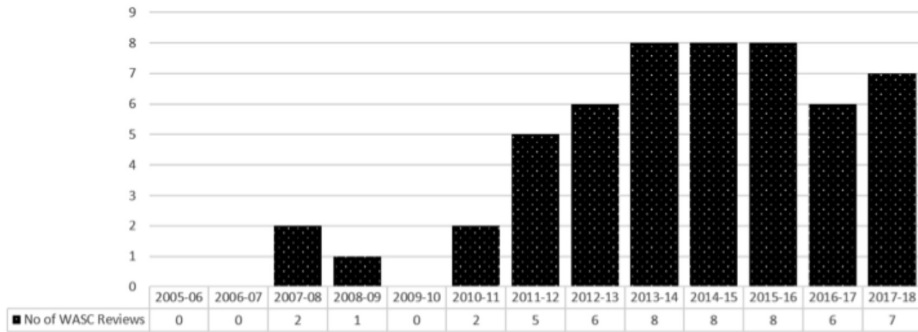


Figure 7 – The number of WASC reviews (2005–2018)

Of the 53 applications, 19 did not seek a review of the determinations but rather sought enforcement of the adjudicators' determinations, pursuant to s 43 of the CCA. Of these 19, 12 were granted and 5 were denied, and 2 stayed. These are shown graphically in the figure below.

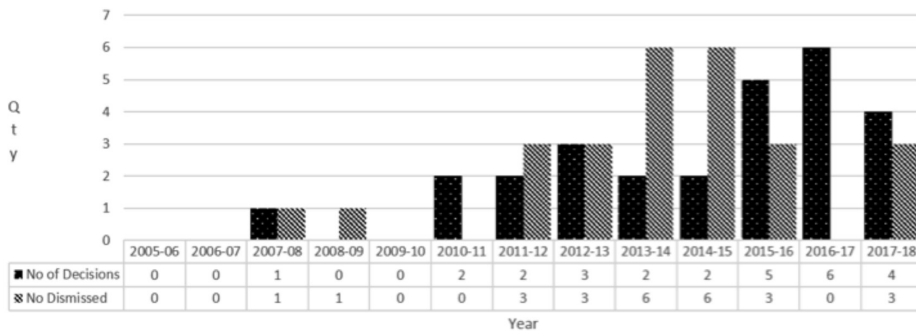


Figure 8 – The breakdown of WASC reviews (2005–2018)

### 3.3.2 Other Causes of Action; Authorities and Review time

The first case before the Supreme Court of Western Australia for review was *O'Donnell Griffin Pty Ltd v Davis & Ors*.<sup>56</sup> In this case, the plaintiff sought an application for an interlocutory injunction with respect to the determination. The original payment claim dispute arose when the second defendant sought 'entitlement to damages to compensate it for the cost of delays in the project for which the second defendant contends it was not responsible'.<sup>57</sup> The claim was subsequently dismissed.

<sup>56</sup> [2007] WASC 215. The first defendant was the adjudicator Roger Davis, Barrister, Arbitrator, Mediator.

<sup>57</sup> Ibid 4 [5].



The most cited case in the SCWA is *Perrinepod Pty Ltd v Georgiou Building Pty Ltd*,<sup>58</sup> which has been used on 25 occasions. On 4 occasions, no cases were cited in the judgments.

The most widely cited section of the CCA was s 31 (adjudicators' functions), which was referred to in the legislation component of the document in 24 of the 53 reviews. The next was s 43 (determinations may be enforced as orders of court) of the Act, which arose in 19 of the 53 reviews.

With respect to times taken to determine the application by the Court, the shortest time taken to review an adjudicator's determination was one day (this happened on 5 occasions). The cases were Templeman J in *O'Donnell Griffin Pty Ltd v Davis & Ors*,<sup>59</sup> Hall J in *Hire Access Pty Ltd v Michael Ebbott T/as South Coast Scaffolding and Rigging*,<sup>60</sup> EM Heenan J in *Triple M Mechanical Services Pty Ltd v Ellis, Mitchell*<sup>61</sup> J in *Field Deployment Solutions Pty Ltd v Jones*,<sup>62</sup> and Pritchard J in *Total Eden Pty Ltd v ECA Systems Pty Ltd*.<sup>63</sup> The longest time taken by the WASC was 322 days in the case of *Total Eden Pty Ltd v Charteris*.<sup>64</sup> The average time taken to review an adjudicator's determination, from hearing to publishing the decision, was 62 days.

### **3.3.3 The Supreme Court of Western Australia – Court of Appeal Division: Background**

The WA Court of Appeal (COAWA) is delegated to hear all the appeals from decisions made by a 'single Judge of the Supreme Court and from Judges of the District Court as well as various other courts and tribunals'.<sup>65</sup> In the Court of Appeal Division, matters are customarily heard and determined by a panel of three Judges, although some matters will be heard by two Judges or by a single Judge,<sup>66</sup> pursuant to s 57 of the *Supreme Court Act 1935*.

The Court of Appeal Division obtains its jurisdiction pursuant to s 58 of the *Supreme Court Act 1935*. In terms of this research, the cases before the Court of Appeal Division relating to the *Construction Contracts Act 2004* (WA), have come, more specifically, pursuant to s 58(1)(a) of the *Supreme Court Act 1935*, which states:

<sup>58</sup> (2011) WASCA 217.

<sup>59</sup> [2007] WASC 215.

<sup>60</sup> [2012] WASC 108.

<sup>61</sup> [2013] WASC 67.

<sup>62</sup> [2015] WASC 136.

<sup>63</sup> [2017] WASC 58.

<sup>64</sup> [2018] WASC 60.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

- (1) Subject as otherwise provided in this Act and to the rules of court, the Court of Appeal shall have and shall be deemed since the coming into operation of this Act always to have had jurisdiction to hear and determine —
- (a) applications for a new trial or rehearing of any cause or matter, or to set aside or vary any verdict, finding or judgment found given or made in any cause or matter tried or heard by a judge or before a judge and jury;

### 3.3.4 COAWA Determination Appeals

Over the period of review, the following cases have been determined by the COAWA; They were:

- *Perrinepod Pty Ltd v Georgiou Building Pty Ltd*,<sup>67</sup>
- *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd*,<sup>68</sup>
- *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation*,<sup>69</sup>
- *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd*,<sup>70</sup> and
- *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation*.<sup>71</sup>

*Perrinepod Pty Ltd v Georgiou Building Pty Ltd*<sup>72</sup> was an appeal from a decision of the SAT. In *Perrinepod Pty Ltd v Georgiou Building Pty Ltd*, the SAT dismissed the application sought by the applicant as to whether 'the adjudicator ought to have dismissed the application on the ground that the application was too complex. The adjudicator declined to dismiss the application and went on to make a determination on the merits'.<sup>73</sup> The SAT had inferred 'that its right of review was limited to a review of a decision of an adjudicator to dismiss an application without making a determination on the merits'.<sup>74</sup> The COAWA granted leave to appeal, but ultimately dismissed the appeal.

The appeal in *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* was dismissed. In *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation*, and *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd*, the appeal was allowed in part. In *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation*, the Court held that the appeal should be allowed, and that the notice of contention in appeal be allowed in part. Appeals to the COAWA are shown graphically below.

<sup>67</sup> [2011] WASCA 217.

<sup>68</sup> [2014] WASCA 91.

<sup>69</sup> [2016] WASCA 130.

<sup>70</sup> [2018] WASCA 27.

<sup>71</sup> [2018] WASCA 28.

<sup>72</sup> *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2010] WASAT 136.

<sup>73</sup> *Ibid* 3 [1].

<sup>74</sup> *Ibid* 3 [2].

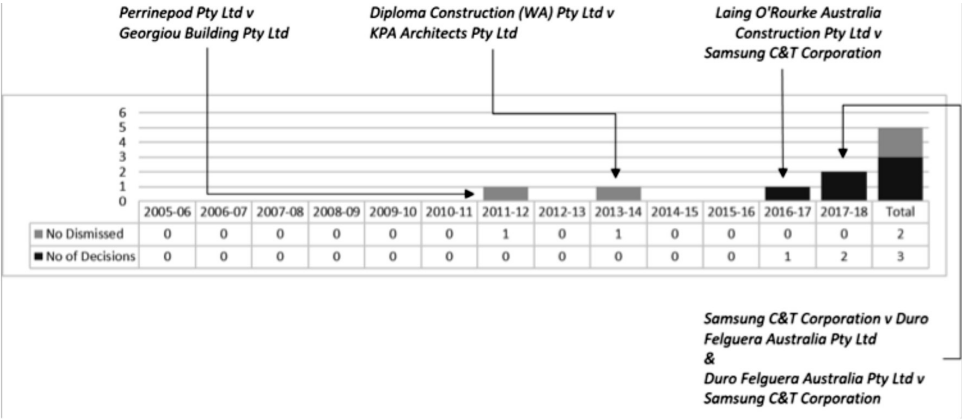


Figure 9 – Appeals in the COAWA

3.3.5 Authorites and Review time

The WASCA has referred to 168 precedents in making their decisions. The most widely cited cases were the High Court of Australia cases of *Kirk v Industrial Court of New South Wales*,<sup>75</sup> the WASCA case of *Perrinepod Pty Ltd v Georgiou Building Pty Ltd*,<sup>76</sup> *Re Refugee Review Tribunal; Ex parte Aala*,<sup>77</sup> and the Queensland Court of Appeal case of *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd*,<sup>78</sup> all of which were used in three appeals.

The highest number of cases quoted in a decision/dismissal of an appeal is 52 by the quorum of Martin CJ, Buss P, and Murphy JA in *Perrinepod Pty Ltd v Georgiou Building Pty Ltd*.<sup>79</sup> The least amount is 22 quoted cases in *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation*.<sup>80</sup>

With respect to times taken in the COAWA, the shortest time taken for an appeal was 92 days in *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd*.<sup>81</sup> The longest time taken was *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd*<sup>82</sup> and *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation*.<sup>83</sup> Both cases took 204 days to make decisions. The average time taken for an appeal, from hearing to publishing, was 161 days.

<sup>75</sup> [2010] HCA 1; (2010) 239 CLR 531.  
<sup>76</sup> [2011] WASCA 217.  
<sup>77</sup> [2000] HCA 57; (2000) 204 CLR 82.  
<sup>78</sup> [2012] QCA 276; [2013] 2 Qd R 75.  
<sup>79</sup> [2011] WASCA 217.  
<sup>80</sup> [2018] WASCA 28.  
<sup>81</sup> [2014] WASCA 91.  
<sup>82</sup> [2018] WASCA 27.  
<sup>83</sup> [2018] WASCA 28.

## 4. DISCUSSION OF RESEARCH FINDINGS

### 4.1 *The low level of applications for review of determinations*

As noted above, over the period 2005 to 2018, 1987 adjudication determinations were made by Western Australian registered adjudicators. Of these 138 were subsequently referred to tribunals or higher courts for enforcement or review. Seventy-nine were submitted to the SAT for review on the basis of lack of jurisdiction and there have been 9 applications to the DCWA to enforce the adjudicator's determination as a judgment of the court. To date, there have been 53 applications to the Supreme Court under the provisions of the CCA. These comprised applications seeking to overturn adjudication determinations or applications seeking enforcement of a determination. Finally, 5 cases were referred to the COAWA for determination. Over the forums for review, 20 applications were subsequently withdrawn by the parties.

In commenting on the relatively low level of applications for review (apart from enforcement application), one of the main objectives of the CCA is to vest in an adjudicator the interim entitlement to construe construction contracts at a practical level. It has been noted that niceties of interpretation to which a court may have regard may be misplaced in an adjudication environment.<sup>84</sup>

The CCA, and indeed none of the security of legislation schemes, was ever intended to create a judicial process; that is clearly stated in the reference to the Second Reading speeches as indicated above. Adjudication was never intended to replace the jurisdiction of the courts or arbitration to make final and binding determinations. As stated in s 45(1) of the CCA, 'This Part does not prevent a party to a construction contract from instituting proceedings before an arbitrator or other person or a court or other body in relation to a dispute or other matter arising under the contract'. Put simply, the CCA intended the adjudication process to act in addition to any other rights in relation to any matter arising under a construction contract. Also, as noted in s 30 of the CCA, the object of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible. Adjudication with respect to each of the state's security of payment legislation was never intended to be a perfect system. In *Brodyn Pty Limited T/as Time Cost and Quality (ACN 001 998 830) v Philip Davenport & Ors*<sup>85</sup> it was stated:

<sup>84</sup> Gzell J in *Abacus Funds Management v Davenport* [2003] NSWSC 935 (20 October 2003) at [30]-[32].

<sup>85</sup> [2003] NSWSC 1019 (6 November 2003 at [14]:

What the legislature has effectively achieved is a fast track interim progress payment adjudication vehicle. That vehicle must necessarily give rise to many adjudication determinations which will simply be incorrect. That is because the adjudicator in some instances cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided upon a full curial hearing. It is also because of the constraints imposed upon the adjudicator by section 21, and in particular by section 21(4A) denying the parties any legal representation at any conference which may be called. But primarily it is because the nature and range of issues legitimate to be raised, particularly in the case of large construction contracts, are such that it often could simply never be expected that the adjudicator would produce the correct decision. What the legislature has provided for is no more or no less than an interim quick solution to progress payment disputes which solution critically does not determine the parties rights inter se. Those rights may be determined by curial proceedings, the Court then having available to it the usual range of relief, most importantly including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication determination procedures. That clawback route expressly includes the making of restitution orders.

Consequently, in the absence of any definitive data, whilst acknowledging that this comment is somewhat conjectural, it may be concluded that, rather than appeal the determination as intended in the CCA, it is more expeditious to have the matter reassessed in an arbitral or judicial forum. This is an aspect that does require further research.

#### **4.2 Judicial perceptions of applications for review**

It is interesting to note the contradiction of the research results with respect to the comments made by Martin J, who stated:

The *Construction Contracts Act 2004* (WA) appears to be a somewhat unexpected, but bountiful, source of work for the Supreme Court in recent times, particularly by applications for prerogative relief to quash decisions by adjudicators. From my perspective as a Commercial and Managed Cases (CMC) List judge, there appear to be plentiful challenges against decisions of adjudicators.<sup>86</sup>

With respect, this contention is not evidenced on the statistics above in relation to applications for review of adjudicator's determinations under the CCA (West Coast Model). The majority of the applications related to jurisdiction (79) or enforcement of adjudication determinations (9 in the District Court and 19 in the Supreme Court),<sup>87</sup> rather than the criteria associated with judicial review.

<sup>86</sup> Kenneth Martin J, 'Speaking Points', Institute of Arbitrators and Mediators of Australia, St Catherine's College, Wednesday 14 May 2014, 1.

<sup>87</sup> The larger number in the Supreme Court is as a consequence of the amount of the determination exceeding \$750,000.

Additionally, on 21 May 2018, the Turnbull Government released the final report of the *Review of Security of Payment Laws*, undertaken by Mr John Murray AM.<sup>88</sup> The Murray Report made 86 recommendations to improve consistency in security of payment legislation and enhance protections to ensure subcontractors get paid on time for work they have done, regardless of which state or territory they operate in. One of the main recommendations was to make security of payment laws nationally consistent with what is commonly known as the East Coast Model, which is based on the NSW security of payment legislation. The Report states that, ‘The enactment of the various security of payment legislative regimes (particularly with those jurisdictions that adopted the East Coast Model) have “spawned” hundreds of court challenges of adjudicators’ determinations/decisions’.<sup>89</sup>

However, the research for this article has revealed that these comments do not apply to the to court challenges of adjudicator’s decisions under the CCA (West Coast Model). The East Coast model operates a ‘dual payment’ system progress payment claims, creating a statutory payment system which runs alongside any contractual regime. In order to engage the statutory payment system, a claimant must endorse its payment claim as being made under the Act and serve it upon the respondent; this creates an administrative burden for payers.<sup>90</sup> The East Coast Model has also generated far more litigation than has arisen under the West Coast schemes.<sup>91</sup> The SOCLA Report states that the East Coast Model has failed to provide the necessary quality assurance as demonstrated by the frequency with which adjudications are set aside on the basis of jurisdictional error.<sup>92</sup> Adjudication determinations under the East Coast Model have also been subject to widespread applications for review for what might be described as other than substantial breaches of the rules of natural justice.<sup>93</sup> In contrast, in both SAT and the Western Australian courts, the reviews appear to be carried out as expeditiously as possible in accordance with SAT and court objectives and there was no definitive data available to suggest that the time taken to review a determination was an impediment to a review application.

<sup>88</sup> The report is available at [www.jobs.gov.au/review-security-payment-laws](http://www.jobs.gov.au/review-security-payment-laws).

<sup>89</sup> Society of Construction Law Australia, Australian Legislative Reform Sub-Committee, *Report on Security of Payment and Adjudication in the Australian Construction Industry*, February 2014, 49. .

<sup>90</sup> Coggins, Elliot and Bell, 28.

<sup>91</sup> Coggins, Elliot and Bell, above 30–31.

<sup>92</sup> Above n 91.

<sup>93</sup> See *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394 (3 November 2004) [55]

## 5. CONCLUSION

This review of the Building Commissioner's Annual Reports since the commencement of the CCA in 2005 has provided valuable definitive information with respect to the reviews or appeals of adjudication determinations arising out of the operation of the CCA. It has, at least in part, dispelled a number of the conjectural and anecdotal submissions made with respect to applications for adjudication review.

The overall stakeholder consensus<sup>94</sup> is that the CCA is an extremely important piece of legislation which has radically improved the traditional risk allocation between parties contracting in the construction industries; providing contractors, suppliers and consultants with rights and protection which were not previously available under the common law. Consequently the Act has had a very positive influence on payment practices and associated issues in the construction industry.

The CCA has been successful both as a statutory scheme for the evaluation of payment claims and in providing a quick and uncomplicated dispute resolution process, as evidenced by the low number of appeals.<sup>95</sup>

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<sup>94</sup> [https://www.commerce.wa.gov.au/sites/default/files/atoms/files/cca\\_review\\_report.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/cca_review_report.pdf)

<sup>95</sup> A further issue is possibly that the legal costs associated with the lodging of an appeal may be a deterrent to an applicant but no definitive information is available and this should be the focus of further research.

# EFFECTIVENESS OF THE HONG KONG CONVENTION ON SHIP RECYCLING IN INDIA, BANGLADESH AND PAKISTAN

Zulfikar Ali\* and Prafula Pearce\*\*

## ABSTRACT

*Ship recycling or shipbreaking is the process of breaking up old ships mainly for their steel. International shipping companies own and use ships for their trade and ultimately sell them predominantly to Bangladesh, India, and Pakistan (South Asian Countries) for breaking up. As they have no iron ore to support their growing steel demand, these South Asian countries can offer attractive prices to shipowners. The activities in South Asian countries occur on open beaches using dangerous manual methods to save cost that actually pollute the environment, and cause deaths and injuries to workers in the ship recycling or shipbreaking industry.*

*Considering the global nature of the problem, the International Maritime Organisation (IMO) in 2006 decided to frame a comprehensive legally binding regime for regulating risks associated with ship-breaking activities.<sup>1</sup> Subsequently, the Convention for the Safe and Environmentally Sound Recycling of Ships (the Hong Kong Convention) was adopted at a diplomatic conference held in May 2009 in Hong Kong.<sup>2</sup> Prior to this, the only applicable international convention was the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal, 1989 (the Basel Convention).*

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<sup>1</sup> *New Legally Binding Instrument on Ship Recycling*, IMO Res A.981(24), Agenda Item 1, 54th Session, IMO Doc. A24/Res.981 I ( 6 Feb 2006) para 1 ('The IMO Document').

<sup>2</sup> *The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships*, opened for Signature 1 September 2009. IMO Doc. SR/CONF45 (not yet in force) ('The Hong Kong Convention').



*This article explains the deficiencies of the Basel Convention, explores the effectiveness of the Hong Kong Convention, and examines whether it has improved the shipbreaking practices in South Asia's developing countries. The article also evaluates the Hong Kong Convention's ability to regulate inter-State movement of contaminated ships in order to determine whether the 'cradle to grave' approach introduced by the Convention is sufficient to protect the marine environment and rights of workers at the recycling or shipbreaking facilities in the South Asian countries.*

## I INTRODUCTION

Shipbreaking or ship recycling is a process of removing reusable materials from old ships.<sup>3</sup> These materials, mainly steel scraps, furniture and electronic materials have a large market in India, Bangladesh and Pakistan. As a result, the shipbreaking industry has grown to become a multi-million dollar business in these countries. Despite the advantages gained by these countries from accessing these reusable materials, there are major concerns in connection with the use of unsafe practices in this industry.<sup>4</sup> With limited knowledge and resources to break ships safely and manage hazardous wastes, the South Asian nations risk their environment and human rights of workers. The primary beneficiaries are the shipowners who are able to dispose of their old ships for a good price even though they may include harmful waste.<sup>5</sup>

The International community is aware of the poor human rights and the environmental standards in the shipbreaking industry in South Asian countries. In order to combat some of these concerns, in 2009 the International Maritime Organisation (IMO) framed *The Convention for the Safe and Environmentally Sound Recycling of Ships* (the Hong Kong Convention). The aim of the Hong Kong Convention is to establish a comprehensive legally binding regime for regulating risks associated with shipbreaking activities.<sup>6</sup> The IMO Member States adopted the Hong Kong Convention at a diplomatic conference held in May 2009 in Hong Kong,

<sup>3</sup> ibid art 2.10.

<sup>4</sup> Gabriela Agguuiello Moncayo, 'International Law on Ship Recycling and its Interface with EU Law' (2016) 109 *Marine Pollution Bulletin*, 301.

<sup>5</sup> Shipowner means the person or persons or company registered as the owner of the ship, or in the absence of registration, the person or persons or company owning the ship or any other organisation or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship. The term also includes those who have ownership of the ship for a limited period pending its sale or handing over to a Ship recycling Facility: at *The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships*, opened for Signature 1 September 2009. IMO Doc. SR/CONF45 (not yet in force) annex (*Regulations for Safe and Environmentally Sound Recycling of Ships*) regulation 1.8 (*'Annex on Ship Recycling'*).

<sup>6</sup> *The IMO Document* (n 1).

but it is yet to enter into force.<sup>7</sup> The Convention will enter into force 24 months after it is ratified by 15 states (representing 40% of world merchant shipping by gross tonnage).<sup>8</sup> Until April 2019, only ten states representing 23% of the gross tonnage have ratified the Convention.<sup>9</sup>

Providing its entry into force, the Convention contemplates shipbreaking to become a green industry, and therefore one of its aims is to introduce green shipbreaking with an emphasis on safety whilst undertaking shipbreaking activities. Before 2009, the only international framework that could have been applicable in making shipping companies accountable for environmental issues within the shipbreaking industry is the *Basel Convention on the Control of Trans-boundary Movement of Hazardous Waste and their Disposal, 1989* (the Basel Convention).<sup>10</sup> However, the Basel Convention only deals with transfer of waste and due to the difficulty in determining the point in time when a ship turns from being 'a ship' to 'waste', it has not been successful in making the shipping companies accountable for the environmental issues within the shipbreaking industry.

The purpose of this article is to examine the effectiveness of the Hong Kong Convention on the shipbreaking practices in South Asian Countries. Following this brief introduction, the next part examines the practices in breaking the ships in South Asian countries and unveils the unsafe practices in this industry that leads to adverse consequences to coastal environment and human rights of workers. Part III explains the operation and deficiencies of the Basel Convention and the adoption of the Hong Kong Convention. Part IV critically analyses the deficiencies of the Hong Kong Convention in regulating the inter-State movement of hazardous ships and considers the principles and challenges of hazardous waste management system of the Convention. Part V examines whether the Hong Kong Convention complies with the Rio Declarations on the Environment and Development, such as the Polluter Pays Principle (PPP) and the Common but Differentiated Responsibility (CDRP) in order to determine whether the Hong Kong Convention can operate effectively in the context of shipbreaking. Part VI concludes with a discussion on what can be done to put a stop to the present unsafe practices within the shipbreaking industry.

<sup>7</sup> *The Hong Kong Convention* (n 2).

<sup>8</sup> Ibid art 17.1.

<sup>9</sup> Industrial Global Union, *Hong Kong Convention on Ship Recycling Boosted by Japanese Ratification* (Web Page, 2 April 2019) <<http://industrialall-union.org/hong-kong-convention-on-ship-recycling-or-shipbreaking-boosted-by-japanese-ratification>>

<sup>10</sup> *The Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal*, opened for signature 22 March 1989, 1673 UNTS 126 (entered into force 5 May 1992) ('*The Basel Convention*').

## II THE SOUTH ASIAN SHIPBREAKING INDUSTRY AND ITS UNSAFE PRACTICES

In the last two decades, India, Bangladesh and Pakistan have been the market leaders for breaking ships.<sup>11</sup> Before 2000, developed countries had their own shipbreaking industries. Due to risks involved in the process and the high level of safety standards under their established laws, it became too expensive to retain the shipbreaking industry in the developed countries. By the end of 20th century, shipbreaking was gradually shifted mainly to Turkey, China, India, Bangladesh and Pakistan.<sup>12</sup>

At present, China and Turkey have higher shipbreaking costs than South Asia and therefore Turkey and China have not been the preferred destinations for the last ten years. The reason for this is that Turkey's labour cost is twenty-five times higher than Bangladesh and India (around \$17.52 per day in Turkey compared to less than \$1 in Bangladesh per day).<sup>13</sup> China on the other hand has invested a large amount of capital in building dry docks for shipbreaking,<sup>14</sup> whereas India, Bangladesh and Pakistan have low cost of labour and they use the cheaper beaching method instead of dry dock.<sup>15</sup> Dry dock is expensive but causes less environmental damage as wastes can be removed safely from the ships.<sup>16</sup> In contrast, the beaching method of shipbreaking is cheaper in terms of establishment costs, but is a major concern for sustainable shipbreaking as it allows toxic substances to escape directly into the seawater.

<sup>11</sup> NGO Shipbreaking Platform, 'Platform Publishes List of Ships Dismantled Worldwide in 2018' (Press release, online at January 30, 2019) <https://www.shipbreakingplatform.org/platform-publishes-list-2018/> ('Press Release')

<sup>12</sup> Saiful Karim, *Shipbreaking in Developing Countries: A Requiem for Environmental Justice from the Perspectives of Bangladesh* (Taylor and Francis Group, 2018) 104.

<sup>13</sup> 'Turkey National Minimum Wage' Countryeconomy.com (online) <https://countryeconomy.com/national-minimum-wage/turkey>; 'Bangladesh Minimum Wage, Labour Law, and Rate 2019, Employment Data Sheet Bangladesh Minimum Wage' *Minimum-Wage.org* (online) <<https://www.minimum-wage.org/international/bangladesh>>

<sup>14</sup> Matt Miller, *Shipbreaking: Breaking Badly* (Web Page, April 23, 2018) <http://www.ajot.com/news/channel/maritime>.

<sup>15</sup> Beaching means breaking ships on open beaches without any built structure. During high tide, a crewmember runs a ship on an open beach at its top speed so that it reaches as far as possible to the top end of a beach. After this, the unskilled workers strip, and dismantle the ship. Since the method uses a beach to break a ship, it is not possible to install any modern equipment for breaking and therefore the internal materials are directly released into the seawater. On the other hand, dry dock means to break ships inside of a built structure with all modern facilities to release and manage the internal wastes of a ship.

<sup>16</sup> A dry dock is a built structure used for breaking ships so that hazardous substances can be managed in a sound way that stops such materials from mixing with sea water.

By using the cheaper beaching method and combined with the low cost of labour, the three South Asian countries control 90% the global shipbreaking business. In fact, the price offered to shipping companies by India, Bangladesh and Pakistan differs significantly from the price offered by Turkey and China.<sup>17</sup> A large container ship that weighs around 25,000 Light Displacement Tonnages (LDTs)<sup>18</sup> can earn a shipping company about \$11.80 million from a ship purchased by India, but only \$7 million from Turkey and \$5.25 million from China.<sup>19</sup> In 2018, the three South Asian countries jointly broke 518 ships out of total 744 ships that had been broken worldwide. In terms of LDT, this amounts to 90.4% of ships that required breaking.<sup>20</sup>

The shipbreaking industry is an economic necessity for the South Asian countries. These countries rely on the shipbreaking industry for their principal source of steel scraps and generate employment for their people. It contributes to 10-15% of overall steel production of India and Pakistan and 60% for Bangladesh.<sup>21</sup> The profit from breaking one ship in Pakistan is \$16,600 and \$921,400 in Bangladesh.<sup>22</sup> The high profit that is generated from the shipbreaking materials makes a significant contribution towards the government tax revenues. For example, the Bangladesh government earns about \$86 million per year as tax revenue from the shipbreaking industry.<sup>23</sup> In 2016, about 15% of the total tax revenue of Bangladesh came from their shipbreaking industry.<sup>24</sup>

A significant number of workers are also employed in the South Asian shipbreaking industry. A World Bank Report in 2010 identified that over 40,000

<sup>17</sup> Robin Des Bois, 'Shipbreaking Bulletin of Information and Analysis of Ship Demolition' (Report no. 52, July 31, 2018) 13.

<sup>18</sup> Dictionary meaning of Light Displacement Tonnage is the weight of a ship with all its permanent equipment excluding the weight of cargoes, persons, fuel, dunnage and ballast. It is also referred to as gross tonnage: at dictionary.com (online at 26 June, 2019) <https://www.dictionary.com/browse/light-displacement>; .

<sup>19</sup> Ibid.

<sup>20</sup> Press Release (n 10); NGO Shipbreaking Platform News, *Use of Polluting South Asia Scrap Yards Accelerating* (Web Page, 1 February 2017) <http://gcaptain.com/ngo-shipbreaking-platform-use-of-polluting-south-asia-scrap-yards-accelerating/>.

<sup>21</sup> Maria Sarraf et al, 'Ship Breaking and Recycling Industry in Bangladesh and Pakistan,' (Report No. 58275-SAS, World Bank, 2010) 1-5 ('*World Bank Report 2010*')

<sup>22</sup> Ibid.

<sup>23</sup> N. M. Golam Zakaria, Mir Tareque Ali and Khandakar Akhter Hossain, 'Underlying Problems of Ship Recycling Industries in Bangladesh and Way Forward' (2012) 9 (2) *Journal of Naval Architecture and Marine Engineering* 91, 98.

<sup>24</sup> Hasan Ruhan Rabbi and Avelina Rahman, 'Shipbreaking and Recycling Industries in Bangladesh; Issues and Challenges' (2017) 194 *Procedia Engineering* 254, 256.

workers were directly employed in the shipbreaking yards in Bangladesh and Pakistan. The Indian shipbreaking industry employs about 66,000 workers.<sup>25</sup> In 2017, more than 25,000 workers were directly employed in the Bangladesh shipbreaking industry.<sup>26</sup> In addition, more than one million people are employed in retail shops and re-rolling mills that are dependent on the shipbreaking industry. However, these economic benefits come at a cost to the environmental and human rights of workers. This is mainly due to their unsafe practices that are not appropriately regulated.

The workers employed in the South Asian shipbreaking industry have minimum experience on sound management and safety, and these workers undertake risky shipbreaking processes<sup>27</sup> without following the required high level of environmental and technical standards. According to the World Bank, there are three main unsafe practices within the South Asian shipbreaking industry.<sup>28</sup>

Firstly, the shipowners send their ships to India, Bangladesh or Pakistan without pre-cleaning the toxic materials that remain in the old ships.<sup>29</sup> They mainly use the practice of reflagging to avoid their national and international responsibility of pre-cleaning.<sup>30</sup> Reflagging means to change the flag of a state to some particular states using open registries.<sup>31</sup> Open registry of a state permits shipowners to register a vessel in a particular flag state without its own nationality. For example, the States of Panama and Liberia allow open registry for a fee. One report shows that 73% of world ships are registered under a country other than its beneficial and original owner.<sup>32</sup> These are referred to as Flag of Convenience states (FOCs). FOCs have poor legal requirement on pre-cleaning.<sup>33</sup> Therefore, these old vessels often fly a flag of FOCs before reaching the shipbreaking yard and often remain polluted with toxic substances, such as Polychlorinated Biphenyls (PCBs), asbestos, lead paints, mercury, fuel deposits, and other harmful substances.

<sup>25</sup> Amit B. Mahindrakar et al, 'Shipbreaking industry in India: Assessment of Opportunity and Challenges' (January 2008) *eLaw Journal: Journal of Air and Waste Management Association* 1.

<sup>26</sup> Hossain et al (n 14).

<sup>27</sup> Robert Scott Frey, 'Breaking Ships in the World-System: An Analysis of Two Ship Breaking Capitals, Alang-Sosiya, India and Chittagong, Bangladesh' (2015) 21 (1) *Journal of World Systems Research* 26, 28.

<sup>28</sup> *World Bank Report 2010* (n 20) 31–38.

<sup>29</sup> Pre-cleaning means the process of discharging all contaminated items of a ship by the shipping companies or the owners before sending them for dismantling.

<sup>30</sup> Juan Ignacio Alcadieta, Francisco Piniella and Emilio Rodriguez-Diaz, 'The Mirror Flags: Ship Registration in Globalised Shipbreaking Industry' (2016) 48 *Transportation Research Part D*, 378.

<sup>31</sup> Rhea Rogers, 'Ship Registration: A Critical Analysis' (LLM Dissertation, World Maritime University, 2010) 28.

<sup>32</sup> NGO Shipbreaking Platform, *Flag of Convenience* (Web Page) <https://www.shipbreakingplatform.org/issues-of-interest/focs/>

<sup>33</sup> *Ibid.*

Secondly, when the ships reach the territorial water, they are run aground on the beaches at full speed during high tide. After beaching, the ships are cleaned on shallow open beaches, often near mangrove swamps. By using this method, they discharge all toxic substances into the seawater,<sup>34</sup> resulting in air pollution, soil erosion, soil contamination and water pollution, contamination of coastal regions and loss of biodiversity. The release of toxic waste has an impact on mangrove forests and threatens the habitat.<sup>35</sup> Examples of such polluted locations of shipbreaking industry are the 'toxic hotspots' or 'sacrifice zones' in Alang of India, Sitakunda of Bangladesh and Gadani of Pakistan.<sup>36</sup>

Thirdly, ships are broken by using dangerous manual methods such as cutting ships with oxy-fuel torch and workers often carry steel plates on their shoulders. Such practices cause frequent accidents leading to death and injuries to the workers. Statistics show the following reasons as causes of accidents: fire explosions due to unseen gas in the ship chamber (49%); the fall of plates and parts of ships in the process of scrapping (25%); inhalation of toxic gas (16%) and workers falling from ships (8%).<sup>37</sup>

A report from International Metalworkers Federation states, 'Shipbreaking is one of the most dangerous occupations'.<sup>38</sup> This is also evident from various non-profit organisation (NGO) reports. In November 2016, at least 28 workers died and more than 50 workers suffered injuries due to explosion in a ship beached in Gadani, Pakistan. In 2016, 22 deaths and 29 serious injuries of workers were reported in Bangladesh. In India, two people died in a fatal accident.<sup>39</sup> In the first quarter of 2018, ten workers lost their lives, and two workers had severe injuries in

<sup>34</sup> Gopal Krishna, 'High on Hazard, Alang Poses Big Threat to Environment and Health of Local Communities, Migrant Workers', *Financial Chronicle* (online at 21 December 2012) <http://www.mydigitalfc.com/industry/high-hazard-463> provides that beaching means anchoring ships on sandy beaches for dismantling. It is a traditional method of bringing ships as close as possible to the intertidal zones of coastal areas. This helps them to cut ships without using built structures, except the hull of a ship.

<sup>35</sup> Mohammad Maruf Hussain and Mohammad Mahmudul Islam, 'Ship Breaking Activities and Its Impact on the Coastal Zone of Chittagong, Bangladesh: Towards Sustainable Development' (Research Report, Young Power in Social Action, Chittagong, Bangladesh, 2006); Federico Demaria, 'Shipbreaking at Alang-Sosiya (India): An Ecological Distribution Conflict' (2010) 70 *Ecological Economics* 250, 252–254.

<sup>36</sup> Frey (n 25) 27.

<sup>37</sup> Zakaria, Ali and Hossain (n 23) 98.

<sup>38</sup> International Metalworkers Federation, *Special Report- Cleaning Up Shipbreaking is the World's Most Dangerous Job* (Web Page, 15 December 2015) <http://www.industrial-union.org/cleaning-up-ship-breaking-the-worlds-most-dangerous-job>

<sup>39</sup> Michael Schuler, NGO *Shipbreaking Platform News: Use of Polluting South Asia Scrap Yards Accelerating* (Web Page, 1 February 2017) <http://gcaptain.com/ngo-shipbreaking-platform-use-of-polluting-south-asia-scrap-yards-accelerating/>.

Bangladesh. At a shipbreaking yard in Alang, India, at least two workers lost their lives due to a toxic gas leak.<sup>40</sup> Further, on 18th February 2019, two shipbreaking workers were killed at a shipbreaking yard in Bangladesh.<sup>41</sup>

Literature in this area indicates that neither the international community nor the shipping companies have taken responsibility of the problems caused in the shipbreaking industry.<sup>42</sup> Shipping companies do not want to bear the high cost of safe and proper disposal. Developing countries lack the resources required to upgrade their standards in shipbreaking. Thus, unless all parties involved in the shipbreaking industry are regulated through an international regulatory regime, the problems identified will remain. The next part explores the deficiencies of the Basel Convention that led to the adoption of the Hong Kong Convention. The basic operation of the Hong Kong Convention is also explained in the next part.

### III THE OPERATION AND DEFICIENCIES OF THE BASEL CONVENTION AND THE ADOPTION OF THE HONG KONG CONVENTION

In 2009, the Member States of the IMO adopted the Hong Kong Convention to regulate the shipbreaking practices. Before 2009, the only international framework that could apply to make shipping companies accountable for environmental issues within the shipbreaking industry was the Basel Convention. The objective of the Basel Convention is to reduce the generation of wastes and restrict their movement, ie by keeping it closest to the place of production.

The requirements of the Basel Convention that are essential in meeting the objectives within the shipbreaking industry are found in Article 4.2.d of that Convention. This article requires the state of export or exporter of waste to reduce the wastes to a minimum point. This article also requires a written confirmation of sound management capacity from the state of import.<sup>43</sup> Sound management under

<sup>40</sup> NGO Shipbreaking Platform, *Waste Management World- Europe's Toxic Ships: How Poor Recycling Practices are Poisoning Asian Beaches* (Web Page, 16 August 2013) < <http://www.shipbreakingplatform.org/waste-management-world-europes-toxic-ships-how-poor-recycling-or-shipbreaking-practices-are-poisoning-asian-beaches/> >.

<sup>41</sup> NGO Shipbreaking Platform, 'Fire on Board Greek Tanker Kills two Shipbreaking Workers in Bangladesh' (Press Release, 18 February 2019) 1.

<sup>42</sup> Karim (n 12) 25.

<sup>43</sup> *The Basel Convention* (n 10) art 6.



Article 2.8 of the Basel Convention means the ability of an importing state to take all practicable steps to manage hazardous waste in a way that will protect human health and environment. Article 6.1 of the Basel Convention imposes a duty on the exporter of waste to obtain a Prior Informed Consent (PIC) from the state of import. This is in addition to the supply of a waste movement document. By granting a PIC, the state of import gives consent to the intended waste transfer.<sup>44</sup> The waste movement document requires information on 14 specific items including names of the exporter, generator, carrier and nature and quantity of the wastes.<sup>45</sup> This PIC is considered an effective mechanism in case of transboundary movement of wastes since government of an importing state can have full knowledge of the waste along with the authority to reject any waste transfer.

The central problem with the Basel Convention is a definitional one, namely, whether ships can be defined as wastes. The shipowners circumvent the Convention by arguing that the Basel Convention only applies to transfer of wastes and a ship is not waste at the time of their export.<sup>46</sup> Article 2.1 of the Convention defines 'waste' as substances or objects, which are disposed of, are intended to be disposed of, or are required to be disposed of by the provisions of national law.<sup>47</sup> It means, to transform a ship to waste depends on whether the owner or the management company 'intends' the ship to be 'waste'. Thus, the onus is on the owner or the management company to declare that the ship is on its last journey for dismantling. It is the 'subjective quality' of the last owner's intention that creates a problem in regulating the shipbreaking businesses within the Basel framework. The intention has to be interpreted from the express or implied activities of the immediate owner.

Without any express or implied activity of an owner presenting an intention to dismantle a ship, it is difficult to identify the intention required under article 2.1. For

<sup>44</sup> Ibid art 6.2.

<sup>45</sup> "A document accompanied with the list of hazardous wastes or other wastes which are moving from one country to other. It is issued from the point of trans-boundary movement to the of disposal point. This document works as the total picture of the wastes that are moving to keep the transit state and state of import informed about the wastes and their consequences": at *The Basel Convention* (n 40) art 4.7.c. The items should include the name of the Exporter, Generator, Carrier, site of the wastes, subject of general or single notification, date of the start of trans-boundary movement, means of transport, description of the wastes, special handling information, type and number of packages, quantity in weight or volume, declaration and certification: at *The Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal*, opened for signature 22 March 1989, 1673 UNTS 126 (entered into force 5 May 1992) annex V B.

<sup>46</sup> International Chamber of Shipping, Communication to the Use of Basel Convention in the Context of Shipbreaking, 9 January 2004.

<sup>47</sup> *The Basel Convention* (n 10) art 2.1.



example, if the owner has taken the ship from traffic and awaiting an arrangement for dismantling or deleting from the ship registry, then the owner has shown an intention to dismantle the ship. An inference of intention is difficult to be drawn without any such activity. It is even more difficult to interpret the intention as ships are often loaded with cargo, even if on their final journey for breaking. In short, it is very difficult to determine the point in time when a ship turns from being 'a ship' to 'waste'.<sup>48</sup> Shipowners can therefore easily escape their responsibilities arising from the Basel Convention by concealing the fact that the ship is not on its last voyage from the state of export.

One of the notable examples of such concealment was the transfer of a ship called *North Sea Producer* from London to Bangladesh in August 2016. The original owner Maersk (a UK based shipping company) sold the ship to a post box company of Saint Kitts relying on a false claim that the ship was going to be used in Nigeria for commercial purposes. In fact, the ship sailed to Chittagong, Bangladesh for breaking.<sup>49</sup> Although the owner contended having no knowledge of shipbreaking, an investigation revealed that the owner actually initiated the process and used the post box company to bypass the Basel Convention.<sup>50</sup>

The International community has been aware of such practices and problems in implementing the Basel Convention. The Conference of Parties (COP) to the Basel Convention by decision VII/26 started the process to enact a specific law on shipbreaking in 2004.<sup>51</sup> The Conference requested the Open-ended Working Group (the Working Group) to draft a Convention considering 'the practical, legal and technical aspects of dismantling ships in the context of achieving a practical

<sup>48</sup> H Edwin Anderson, 'The Nationality of Ships and Flags of Convenience: Economic, Politics and Alternatives' (1996) 21 *Tulane Maritime Law Journal* 139, 163.

<sup>49</sup> According to investigation of the NGO Shipbreaking Platform, *North Sea Producer* was primarily used in transporting oil in a North Sea Oil Extracting field. It was used for oil transport for more than 17 years. After that, it was sold with a false claim that it was going to be used for commercial operation in Nigeria. Under the Basel Convention, it was illegal to sell a ship for breaking without informing her flag states. The original owner had knowledge about the ultimate destination of the ship but due to huge profit, used the fraud practice. The issue is still under investigation by the UK government: at Shipbreaking Platform, *Spotlight North Sea Producer Case* (Web Page) <http://www.shipbreakingplatform.org/spotlight-north-sea-producer-case>.

<sup>50</sup> Ibid.

<sup>51</sup> Saurabh Bhattachargee, 'From Basel to Hong Kong: International Environment Regulation of Ship-Recycling Takes One Step Forward and Two Steps Back,' 2009 (2) *Trade Law and Development* 193, 214–215.

approach to the issue of shipbreaking'.<sup>52</sup> Five years later, the Working Group finalised the Convention and in May 2009, the IMO Member States signed the Convention at a Diplomatic Conference held in Hong Kong. The final text of the Hong Kong Convention was a combined effort of the IMO Member States, non-government organisations (NGOs), International Labour Organisation (ILO) and the Parties to the Basel Convention. Unlike the Basel Convention, the Hong Kong Convention is specific to shipbreaking that has introduced an international legal mechanism based on national notification and waste management system in order to restrict unsafe shipbreaking practices.

The national notification system under the Hong Kong Convention makes it a mandatory requirement for the shipowners and recycling facilities to notify their own State about their intention to recycle a ship.<sup>53</sup> The notification enables the administration of a flag State to prepare for necessary survey of a ship's Inventory of Hazardous Materials (IHM)<sup>54</sup> before issuing an International Ready for Recycling Certificate (IRRC).<sup>55</sup> Notification from a shipowner follows survey of an IHM and the survey follows the IRRC to authorise recycling of a ship by a flag State.

Like a shipowner, the recycling company is required to notify a competent authority of its own state in three stages. Firstly, about the intention to recycle a ship when preparing to receive a ship,<sup>56</sup> secondly, about the planned start of ship recycling after the ship recycling facility has obtained the IRRC, and thirdly,<sup>57</sup> about the completion of the intended recycling activity when the recycling of a ship is completed following the requirements of the Convention.<sup>58</sup>

For sound management, the Convention provides that a recycling facility cannot accept a ship which is not free from the toxic substances (for example, asbestos, PCBs and ozone depleting substances) listed in the Appendix I of the Convention.<sup>59</sup>

<sup>52</sup> Decision VII/26 on Environmentally Sound Management of Ship Dismantling, UN Doc. UNEP/CHW.7/33 (October 2004).

<sup>53</sup> *Annex on Ship Recycling* (n 5) regulation 24.1.

<sup>54</sup> The IHM is specific to each ship and shall at least identify as Part I, Hazardous Materials listed in Appendices 1 and 2 to the *Hong Kong Convention* and contained in ship's structure or equipment, their location and approximate quantities: at *ibid* regulation 5.1.

<sup>55</sup> *Annex on Ship Recycling* (n 5) regulation 24.1.

<sup>56</sup> *Annex on Ship Recycling* provides the detail information that has to be included in the notification: at *Annex on Ship Recycling* (n 5) regulation 24.2; the Hong Kong Convention provides that 'Competent Authority(ies)' means a governmental authority or authorities designated by a Party as responsible, within specified geographical area(s) or area(s) of expertise, for duties related to Ship recycling Facilities operating within the jurisdiction of that Party as specified in this Convention: at the *Hong Kong Convention* art 2.3.

<sup>57</sup> *Annex on Ship Recycling* (n 5) regulation 24.3.

<sup>58</sup> *Ibid* regulation 25.

<sup>59</sup> *Ibid* regulation 17.

Importantly, the Convention introduces a “cradle to grave”<sup>60</sup> approach, meaning that ships must protect the marine environment throughout its lifetime and a recycling plant cannot receive a ship that does not comply with such requirements.<sup>61</sup> This leads to a number of surveys that are required to be undertaken before the recycling can commence. The first survey is required prior to putting into business of transportation, or before the International Certificate on IHM is issued.<sup>62</sup> Each new ship is to maintain a certificate of IHM since its operation. Secondly, a periodic survey is required every five years.<sup>63</sup> Thirdly, an additional survey is required upon the request of the ship owner in case of any change, replacement or significant repair of the structure,<sup>64</sup> and finally, a survey is to be conducted before recycling or shipbreaking commences.<sup>65</sup> A flag state can issue an IRRC following the final report before a ship ends up to a recycling facility.<sup>66</sup> The IRRC proves that a ship is free from any hazardous materials listed in the Convention.<sup>67</sup> These requirements are intended to ensure improved health, safety, and better environmental protection in recycling facilities.

In order to accept a ship, a recycling facility must obtain survey reports from the owner,<sup>68</sup> and improve its physical and technical capacity to manage the reported hazardous materials in a sound manner.<sup>69</sup> Under Regulation 15, it is the duty of each Party to establish proper legal mechanism to enforce this requirement in a recycling facility.<sup>70</sup>

Enforcement of the sound management system under the Convention can be a problem in South East Asia countries like India, Bangladesh and Pakistan because of their technical and financial inability. These countries still have a high rate of illiteracy, unemployment, and lack of communication infrastructure, sanitary

<sup>60</sup> Under the Hong Kong Convention both ‘ship recycling facilities operating under the jurisdiction of a party’ and ‘ships entitled to fly the flag of a party’ are under the purview of the Convention: at the *Hong Kong Convention* (n 2) art 3.1.

<sup>61</sup> *Annex on Ship Recycling* (n 5) regulation 17.2. and regulation 4.

<sup>62</sup> *Ibid* regulation 10.1.1.

<sup>63</sup> *Ibid* regulation 10.1.2

<sup>64</sup> *Ibid* regulation 10.1.3

<sup>65</sup> *Ibid* regulation 10.1.4

<sup>66</sup> *Ibid* regulation 11.11.

<sup>67</sup> It means to comply with the conditions of safety as laid down in the Convention like proper oxygen and removal of explosive substances: at *ibid* regulation 1.6 – 1.7.

<sup>68</sup> *Annex on Ship recycling* (n 5) regulation 17. 1 and 17. 1.3.

<sup>69</sup> *The Hong Kong Convention* (n 2) art 6 read with *Annex on Ship recycling* (n 5) regulation 8.1.

<sup>70</sup> *Annex on Ship Recycling* provides that a Party is required to establish effective use of inspection, monitoring and enforcement provisions, including powers of entry and sampling. Such a mechanism may include an audit scheme to be carried out by the competent authority or an organisation recognised by the Party: at *Annex on Ship recycling* (n 5) regulation 15.1–2.

facilities and lack of other necessities due to poverty. The governments of these countries have therefore preferred to invest their state budget in these areas rather than in the shipbreaking industry. With full knowledge of large shipping nations, they accept the toxic ships and risk their environment and human rights over the economic benefit they receive from this industry.

The Convention could have introduced a mandatory fund mechanism for financial assistance from large shipping countries to be spent for improving recycling facilities of these shipbreaking countries. Instead of such a system, the convention merely relies on the willingness of industrialised nations,<sup>71</sup> to support the recycling facilities. There is no guarantee that every request for assistance from the recycling state will be accepted. The next part therefore evaluates these operational systems and identifies the problems and their implications on the South Asian shipbreaking industry.

#### IV CRITICAL EVALUATION OF THE SYSTEM THROUGH THE LENS OF THE SOUTH ASIAN COUNTRIES

As explained above, the Hong Kong Convention has introduced some innovative approaches to notification and waste management system, yet there are some serious weaknesses in the provisions of the Hong Kong Convention. These weaknesses may hinder the provisions of the Convention from being practically applied within the shipbreaking industry of India, Bangladesh and Pakistan.

##### **A     *Problem with the Hong Kong Convention Notification System***

A major weakness of the notification system is that it does not impose an obligation on a recycling State to restrict export and entry of a ship unless a recycling facility follows the reporting requirements voluntarily. The reason is that the reporting under the Convention requires no state-to-state notification and authorisation. The notification system is intended to make the companies accountable to their own State, but provides no mechanism to enforce the requirement. It provides no legal or other consequence in case of failure to comply with the reporting requirement. Because of this substantial gap, the reporting merely becomes a directory rather than a mandatory criterion. The Convention imposes no mandatory obligation on a State Party to enforce the notification requirement. Consequently, the recycling States may be reluctant to impose the reporting obligations as long as their industries are providing employment and greater revenues for their government.

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<sup>71</sup>     *The Hong Kong Convention* (n 2) art 13.

Due to this regulatory gap in enforcing the reporting obligations, it can be presumed that toxic ships will continue to beach in India, Bangladesh and Pakistan for recycling. The Hong Kong Convention could have incorporated the widely used PIC system of the Basel Convention that would require a recycling State to give consent to receive the ship. This would then put the obligation on the recycling state to check for hazardous contaminants against the ship's IHM.<sup>72</sup> The PIC is distinguishable from the reporting system under the Hong Kong Convention. The PIC would require consent from the recycling State before the ship could be received whereas the reporting system does not require such consent to stop the transfer of the ship into the recycling State, even though the recycling company has not notified the relevant authority in the recycling State. As a result, recycling companies may be able to accept for recycling a ship that has toxic materials without any intervention from their government.<sup>73</sup> Such entry of a ship for scrapping into a State may continue to become a *fait accompli* for shipbreaking States.<sup>74</sup>

## **B     *The Problem with Satisfying the Requirement of Sound Waste Management***

The uncontrolled entry of old ships into developing countries may also not comply with the Hong Kong Convention's requirement of sound management. Under the Hong Kong Convention, a competent authority of a State Party has the power to monitor proper infrastructural development for the sound management of wastes, and impose sophisticated training requirements in a shipbreaking facility in accordance with their national legislation. These requirements may not be followed as the South Asian countries do not have proper legislation in their own countries requiring them to do so. The Convention is silent on how to monitor a recycling facility or impose the obligations on the State Party. This gap poses a serious

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<sup>72</sup> Some of the international environmental agreements are: *The Convention on Biological Diversity* opened for Signature 5 June 1992. 1760 UNTS 79 (entered into force 29 December 1993). *The Stockholm Convention on Persistent Organic Pollutants* opened for Signature 23 May 2001, UNEP/POPS/CONF/4 (Appendix II) (entered into force 17 May 2004); *The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* opened for signature 10 September 1998, UNEP/FAO/PIC/CONF/5 (entered into force 24 February 2004); *The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* opened for signature 22 March 1989, 1673 UNTS 126 (entered into force 5 May 1992) ('the Basel Convention').

<sup>73</sup> According to the Hong Kong Convention a recycling or shipbreaking Company means the owner of the ship recycling or shipbreaking facility or any other organisation that is under the authority to operate the recycling or shipbreaking facilities: at the *Hong Kong Convention* art 2.12.

<sup>74</sup> Battacharjee (n 50) 224.

doubt as to whether the shipbreaking countries will keep up with the international standards stated in the Hong Kong Convention.

It is evident that South Asian countries are unlikely to adhere to the Convention's sound management principles, as they are yet to enact appropriate legislation for improving their shipbreaking facilities.<sup>75</sup> Evidence also shows that the unsafe recycling industries have in fact increased dramatically in these countries since 2009 with widespread use of beaching practice.<sup>76</sup> There does not appear to be any urgency in these facilities to upgrade the standard since the South Asian countries are dependent upon a funding mechanism from large shipping nations to improve the standard. The reason to argue for funding is acceptable as shipping nations are the beneficiary of the unsafe practices, such as beaching.<sup>77</sup> They are not only able to externalise their high cost of decontamination of their toxic substances, but also earn on an average four to five million more USD from a ship dismantled in South Asian countries than anywhere else in the world.<sup>78</sup>

The cost of establishing a standard method such as a dry dock is high. One estimate suggests that roughly an investment of .97 million USD to 1.7 million USD per ship is required to shift from beaching to dry dock.<sup>79</sup> This increasing cost will add to the cost of shipbreaking in South Asia. A South Asian shipbreaking company spends around 82% of the total shipbreaking cost to purchase a ship<sup>80</sup> this additional cost may eventually decrease the purchase price of a ship and face the risk of fewer ships sent to South Asian countries for shipbreaking. This creates a tough choice for South Asia countries that are required to balance between the profit interest of shipping nations and the safety of their own workers and the environmental standard of the Hong Kong Convention.

Ironically, the Hong Kong Convention only considers safety of workers and environmental standard whereas it ignores the technical ability and lack of financial capability of the major shipbreaking countries. For this practical reason, this article argues that these countries need international funding to comply with the Hong

<sup>75</sup> Saiful Karim (n 12), 104–105.

<sup>76</sup> According to the United Nations report, beaching is mainly responsible for the degradation of the coastal environment because with beaching it is not possible to stop toxic substances from directly mixing with seawater: at Okechukwu Ibeanu, Special Rapporteur, *Report on the Adverse effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights*, UN Doc A/HRC/15/22/Add.3 (2 September 2010).

<sup>77</sup> S.M Mizanur Rahman and Audrey L. Mayer, Policy Compliance Recommendations for International Shipbreaking Treaties for Bangladesh (2016) 73 *Marine Policy Journal* 122–129, 126.

<sup>78</sup> See for detail about shipowner's sale's profit in page 4 of this article.

<sup>79</sup> Ibid, 128

<sup>80</sup> *World Bank Report 2010* (n 21).

Kong standards. It appears that the Convention overlooks this imperative subject.<sup>81</sup> Without financial support to change the practices, the Convention may become a ‘paper tiger’.<sup>82</sup> This could easily eventuate if the major shipbreaking countries have failed to follow the environmental and safety standards after ratifying the Convention in future and hence it may be a reason why the shipbreaking countries have shown little interest in ratifying the Convention.<sup>83</sup>

### **C    *Lack of Compulsion for the Shipbreaking States to Ratify the Hong Kong Convention***

As of April 2019, none of the three South Asian countries had ratified the Convention and the Convention is yet to come into force.<sup>84</sup> It could be because the Convention does not stop the ships being sent to these countries if they are not a party to the Convention. There is no express bar in the Hong Kong Convention from sending ships to Non-Party States from Party States.<sup>85</sup> Whether the South Asian countries ratify and adopt the Hong Kong Convention or not, they may continue to be preferred destinations as long as they can offer high price to shipowners. No compulsion to ratify or accede to the Hong Kong Convention for lack of standards is a major drawback of the Convention.<sup>86</sup> Their non-party status has no impact on their unsafe practices of breaking ships.<sup>87</sup>

The next part examines whether the Hong Kong Convention complies with the global environment and development principles such as the Common but Differentiate Responsibility Principle (CDRP) and the Polluter Pays Principle (PPP).

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<sup>81</sup> Tony George Puthucherril, ‘Limitations of a National Response to Regulate Global Shipbreaking Industry – A Study of the Indian Experience’ in David Freestone (ed), *From Shipbreaking to Sustainable Ship Recycling: Evolution of a Legal Regime* (Martinus Nijhoff Publishers, 2010) 325.

<sup>82</sup> Md. Saiful Karim, ‘Environmental Pollution from the Shipbreaking Industry: International and National Legal Response’ (2010) 22 *Georgetown International Environmental Law Review* 185, 224.

<sup>83</sup> Puthucherril (n 81) 314.

<sup>84</sup> See above in Part I. See also Global Union (n 9).

<sup>85</sup> Bhattachargee (n 51) 230.

<sup>86</sup> *ibid.*

<sup>87</sup> Puthucherril, (n 81) 320.

## V COMPLIANCE WITH THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT

The CDRP recognises the difference of economic and social cost between developed and developing countries. Standard of legal application of training and sound management by developing countries may not be perfect for industrialised countries, so it requires law to reflect the financial and technological weakness of developing countries. According to Principle 11 of the Rio Declaration on Environment and Development, 'legislation must look into the environmental and developmental context of the place of application because standards applied by some states may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries'.<sup>88</sup>

The Hong Kong Convention requires a Party to improve their recycling standards by spending their national budget. It does not address how government of a State Party, such as Bangladesh, can demand internalisation of the cost from shipowners. The Convention requires the State Parties to improve their existing national recycling practice mainly in the area of planning and operation, including facility design to operate in an environmentally sound manner,<sup>89</sup> and training of workers on emergency operation, and preparedness for accidents and spills. Although such planning and operational requirements are crucial for sound environment and safety, they are too costly for a recycling State, such as Bangladesh, due to their budgetary constraints, including unemployment.<sup>90</sup> This requires funding from rich nations. Without any explicit provision of funding, it is not clear how a financially capable shipowner shares the cost.<sup>91</sup>

Therefore, the article argues that the Convention does not apply the CDRP. This principle has a high practical and historical importance to shipbreaking of India, Bangladesh and Pakistan since one of the main reasons of shifting the challenging shipbreaking process to the South Asian countries has been to transfer the pollution burden from large shipping nations. Yet, the Hong Kong Convention adds more burden on these recycling countries. As a State Party to the Convention, only a recycling State like Bangladesh or Pakistan is required to develop modern

<sup>88</sup> Report of the United Nations Conference on Environment and Development UN Doc A/CONF.151/26 (Vol. I) (13 June 1992) ('*Rio Declaration*').

<sup>89</sup> Puthurcherill (n 81) 151.

<sup>90</sup> According to Puthurcherill's research finding, priority areas include education for all, infrastructural development, unemployment, foreign loan, proper sanitation for all, reducing population growth and many others: at *ibid* 156–160.

<sup>91</sup> See above Part III. See also Gabriela Aguiello Moncayo, 'International Law on Ship recycling and Its Interface with EU Law' (2016) 109 *Marine Pollution Bulletin* 301.



infrastructure by costing her national budget. It appears to be a biased mechanism as the Convention targets 'equality of non-equals'.<sup>92</sup> The Convention establishes no fund from the contribution of shipowners to support facility development in recycling States. Due to this, the Convention fails to recognise and apply that the management of decommissioned ships is a common responsibility of all interested parties.

Ignoring Principle 11 of the Rio Declaration on Environment and Development also leads to the denial of PPP. Objectively the PPP extends liability to polluters for any cost related to compliance with pollution control laws.<sup>93</sup> Specifically, Principle 16 of the Rio Declaration on Environment and Development provides that the law must identify polluters and propose a mechanism for cost sharing between the polluter and victim states.<sup>94</sup> It is evident that the real polluters are the shipowners whose commercial use contributes to the wastes generation,<sup>95</sup> but the Convention does not recognise this and therefore proposes no fund mechanism.

Such a gap in the Hong Kong Convention allows the shipowners to escape liability under the PPP.<sup>96</sup> The shipping companies may also escape their state and international liability of pre-cleaning by the common use of FOCs. For example, if the United States (US) is a flag state, a US shipping company can reflag the ship to Panama. Panama will then be referred to as the FOC. By reflagging, the nationality of a ship is changed, and the identity of the last shipowner and its state of incorporation is not exposed.<sup>97</sup> FOC states control 73% of the total tonnage of sea going vessels.<sup>98</sup> In such cases, the genuine link between the real owner of a vessel and the flag the vessel flies is difficult to find.<sup>99</sup> Nevertheless, the Convention

<sup>92</sup> Nikos Mikelis analysed the Convention's common principles for recycling in all countries: see more at Nikos Mikelis, *Developments and Issues on Recycling of Ships 3* (Web Page, 16 December 2006) [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D17980/Developments.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D17980/Developments.pdf).

<sup>93</sup> Astrid Kalkbrenner, 'Compensating for Catastrophic Harm: Civil Liability Regimes and Compensation Fund' (PhD Thesis, University of Calgary, 2015) 27.

<sup>94</sup> Principle 16 of *Rio Declaration* provides that National authorities should endeavour to promote the internalisation of environmental cost and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment: at *Rio Declaration* Principle 16.

<sup>95</sup> NGO Shipbreaking Platform, *Annual Report 2017* (Web Page) <https://www.shipbreakingplatform.org/wp-content/uploads/2018/07/Annual-Report-2017-Final-Spreads.pdf>

<sup>96</sup> See above Part II.

<sup>97</sup> Carlos Felipe Linas Negret, Pretending to be Liberian and Panamanian, Flag of Convenience and the Weakening of the Nation State on the High Seas, (2016) 47 (1) *Journal of Maritime Law and Commerce* 1, 4.

<sup>98</sup> NGO Shipbreaking Platform, *Flag of Convenience* (Web Page) <<https://www.shipbreakingplatform.org/issues-of-interest/focs/>>.

<sup>99</sup> Ibid.

does not provide any mechanism to control this practice. This could eventually affect the use of correct IHM and IRRC as flag States have the power to issue the IHM and IRRC before recycling. Shipowners may reflag their ships if their state of incorporation denies issuing an IHM and IRRC.

## VI CONCLUSION

As discussed in this paper, the Hong Kong Convention has a number of fundamental flaws that may limit its capacity to change the unsafe shipbreaking practices in Bangladesh, Pakistan and India. The Hong Kong Convention also does not address the social and economic context of each Party, but exceedingly depends on the facility developed by an individual State irrespective of her capacity. Indeed such method has an economic consequence and would be too difficult to enforce by a recycling State, such as Bangladesh.

The article argued that the mechanisms proposed by the Hong Kong Convention might not be sufficient to stop ongoing unsafe practices as identified by the World Bank in 2010.<sup>100</sup> As no system of mandatory fund mechanism for financial assistance from shipping countries is proposed, any possibility to influence the sophisticated ship breaking practice in developing countries may remain a far-fetched idea. Though the Convention canvasses the idea that its primary concern is to protect occupational health and safety of workers, the Convention does not have sufficient mechanisms for accomplishing this goal. The principles of sustainable development (considering ship breaking as a green activity by emphasising an inventory for containing hazardous materials) and training of workers, introduced by the Hong Kong Convention, portrays that safety is an important issue in shipbreaking. However, this paper argues that the Hong Kong Convention fails to accomplish its goal of promoting safe recycling because the onus of safety and enforcement is left in the hands of under-resourced ship recycling States and their under-resourced shipbreaking facilities.<sup>101</sup>

The Hong Kong Convention does not appear to have achieved its intended objectives to promote safe and environmentally sound disposal of ships. This article therefore questions whether the Hong Kong Convention's ability to regulate inter-State movement of contaminated ships by introducing the 'cradle to grave' approach is sufficient to protect the rights of workers at the recycling or shipbreaking facilities in the South Asian countries, and their marine environment.

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<sup>100</sup> *World Bank Report 2010* (n 21) 1–5.

<sup>101</sup> *Ibid.*



# RUSSIA'S CONTROLLED FOREIGN COMPANY RULES – A DISCUSSION OF EFFECTIVENESS IN LIGHT OF THE OECD'S RECOMMENDATIONS

Donovan Castelyn\*

## ABSTRACT

*This article assesses the effectiveness of Russia's recently introduced controlled foreign company ('CFC') rules against the recommendations for the Design of Effective Controlled Foreign Company Rules as prescribed by the Organisation for Economic Co-operation and Development ('OECD'). This article, through the lens of comparative analysis, endeavours to respond to the question of whether the Russian CFC rules are effective given their current construction. The article responds affirmatively to the research question and notes that the CFC rules are broadly effective given Russia's political and economic directives although not beyond reproach.*

## I INTRODUCTION

Extensive tax reform has seen the Russian economic and tax landscape change significantly over the past 18 years.<sup>1</sup> Targeted reform measures have, by and large, endeavoured to improve procedural tax rules, reduce the number of taxes, and minimise the overall tax burden in Russia in an attempt to cultivate a more favourable economic environment for taxpayers and investors.<sup>2</sup>

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<sup>1</sup> Consider Baker & McKenzie, *Doing Business in Russia* (2018) Baker & McKenzie – CIS Limited, 122.

<sup>2</sup> For an excellent overview of the development of the Russian taxation system, consider Alexander Pogorletskiy and Nadezhda Bashkistrova, 'The Dynamics of Tax System and Tax Administration Development in the Russian Federation' (2015) 1(1) *Journal of Tax Reform* 4.

Recent legislative enactments have seen substantial modifications to the rules governing the reporting and taxation of participation interests by Russian tax residents in controlled foreign companies ('CFCs') and further refinements to the concepts surrounding tax residency and beneficial ownership.<sup>3</sup> These measures codify Russian President Vladimir Putin's commitment to protecting the Russian tax base by combatting the use of offshore jurisdictions to minimise tax liabilities and are indicative of Russia's further commitment to harmonising its domestic tax law with international best practice.<sup>4</sup>

Whilst it may be premature to draw definitive conclusions as to the utility of these measures given their limited existence in the *Tax Code of the Russian Federation* ('TC RF'), this article will nonetheless consider the effectiveness of these measures in the context of their intended purpose and contrast the relative strengths and weaknesses of these provisions against the Organisation for Economic Co-operation and Development ('OECD') recommendations for the Design of Effective Controlled Foreign Company Rules.<sup>5</sup>

The next part will therefore proceed to consider the policy objectives associated with the introduction of CFC rules and broadly discuss their operation as purported by the TC RF. The article will then consider an appropriate theoretical framework to measure the effectiveness of these rules. In this part, the article will primarily concern itself with the notion of effectiveness as purported by the OECD. In applying this framework to the provisions, the article will then resolve the question of whether the rules may be considered effective, before offering some concluding remarks.

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<sup>3</sup> As a result of extensive consultation and discussion in 2014, the Russian Government passed new tax anti-avoidance legislation introducing rules targeting the taxation of the profits of controlled foreign companies, effective 1 January 2015. See Federal Law N 376-FZ 'On amendments to Parts I and II of the Russian Tax Code' (in respect of taxation of the profits of controlled foreign companies and profits of foreign organizations) dated 24 November 2014.; *Tax Code of the Russian Federation* ('TC RF'), Chapter 3.4.

<sup>4</sup> See, Vladimir Putin, *The List of Instructions on the Implementation of the Message of the Federal Assembly*, 27 December 2013 (President of Russia), 1.31; Rustem Ahmetshin, 'Taxes in 2014: Attention on Cross-Border Transactions' (2014) *Globe Business Media Group* 1.

<sup>5</sup> OECD, *Designing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final report* (OECD Publishing, 2015) ('OECD DECFRC')

## II CONTROLLED FOREIGN COMPANY RULES

This part considers the high level policy framework for CFC rules. Given CFC rules traverse a jurisdiction's overall system of tax, the design and objectives of CFC rules can differ significantly from one jurisdiction to another as a consequence of policy objectives.<sup>6</sup> This part therefore assesses the policy considerations that broadly underlie all CFC rules, and where necessary, considers parallels with Russia's political and economic objectives.

### A *Object of CFC Rules*

While the construction of CFC legislation may vary considerably, a common and consistent feature of these rules is that they enable a state to tax its residents on undistributed income attributable to their participation as a foreign tax resident.<sup>7</sup> The manner in which this result is achieved largely coincides with the broader fiscal policy objectives of the relevant state.<sup>8</sup>

Russia, as the relevant jurisdiction considered in this article, achieves this objective through including the undistributed profits earned by a CFC in the tax base of the Russian tax resident, pro-rata to its participation.<sup>9</sup> The Russian tax resident is then subject to tax at its applicable entity rate, subject to certain exemptions.<sup>10</sup> Under Russia's domestic legislation and tax treaties, a credit may be granted for income taxes paid abroad.<sup>11</sup>

These measures clearly advance Russian President Vladimir Putin's broader policy intentions by facilitating the reversion of capital back to Russia through the imposition of reporting requirements and tax liabilities on Russian residents who have established or who control or influence offshore companies, trusts and other holding vehicles.<sup>12</sup> The effectiveness of these measures however, will be examined in detail later in this article.

<sup>6</sup> OECD DECFR, 13.

<sup>7</sup> Daniele Canè, 'Controlled Foreign Corporations as Fiscally Transparent Entities. The Application of CFC Rules in Tax Treaties' (2017) 9(4) *World Tax Journal* 521.

<sup>8</sup> An exceptional insight into the various theories that frame the technical mechanisms of CFC rules is provided by Canè, above n 7 at 528 – 530.

<sup>9</sup> This measure broadly accords with the 'attribution' approach discussed by Canè, above n 7 at 529. See also, TC RF Chapter 3.4. Note, Article 246.2 TC RF addresses the concepts associated with Russian tax residency. An assessment of these concepts is beyond the scope of this article.

<sup>10</sup> Generally, 20% if the entity is a company: TC RF, Article 284; 13% if the entity is an individual: TC RF, Article 224.

<sup>11</sup> TC RF Article 311.

<sup>12</sup> Putin, above n 4.

## **B Policy considerations of CFC Rules**

Commensurate with the broad objectives of these measures, all CFC rules share some general policy considerations, which include but are not limited to: (i) their role as a deterrent measure; (ii) their ability to prevent or eliminate double taxation; and (iii) their ability to reduce administrative or compliance burdens.

These considerations are discussed in turn below.

### **1 Deterrent effect**

CFC rules are generally designed to act as a deterrent, which intends to protect tax revenue by ensuring that profits of a CFC remain within the tax base of the shareholder or parent in their resident country.<sup>13</sup>

Rules concerning CFC's tend to transcend the 'separate entity doctrine'<sup>14</sup> by providing that, in defined circumstances, profits directed to an affiliate of a resident taxpayer in a low-tax jurisdiction can be attributed to its parent and taxed by the resident country.<sup>15</sup>

In the Russian context, the rules apply to foreign companies (or foreign legal structures) which meet the definition of a CFC.<sup>16</sup> Broadly, the Russian CFC rules will capture entities which are controlled by legal entities and/or individuals that are recognised as Russian tax residents pursuant to the TC RF, but are not Russian tax residents themselves.<sup>17</sup>

The notion of control is widely defined in this context. Subject to certain limited exceptions,<sup>18</sup> a Russian tax resident is considered to be a controlling person of a foreign entity if they own, directly or indirectly: (1) more than 25% of the shares;<sup>19</sup> or (2) more than 10% of the shares if the Russian tax resident in total owns more than 50%;<sup>20</sup> or (3) exercises, or has the power to exercise, a decisive influence on decisions regarding the distribution of profits of the foreign entity regardless of legal basis for control.<sup>21</sup>

<sup>13</sup> Accordingly, CFC rules are not primarily designed to raise tax on the income of the CFC, although this is often the practical consequence. See, OECD DECFRCR, 13.

<sup>14</sup> This doctrine recognizes that, at law, a corporation is a distinct person with its own personality separate and independent from the persons who formed it. See, *Salomon v Salomon & Co Ltd* [1897] AC 22.

<sup>15</sup> OECD, *Comments Received on Public Discussion Draft – BEPS Action 3: Strengthening of CFC Rules* (OECD Publishing, 2015), 84.

<sup>16</sup> TC RF Chapter 3.4.

<sup>17</sup> TC RF Article 25.13-1(1)-(2).

<sup>18</sup> TC RF Article 25.13.

<sup>19</sup> TC RF Article 25.13(3)(1).

<sup>20</sup> TC RF Article 25.13(3)(2).

<sup>21</sup> TC RF Article 25.13(8).

Arguably, this mechanism creates a disincentive for Russian controlled entities to relocate profits offshore and in so doing, deters the use of contrived tax arrangements to facilitate tax benefits and thus protects the Russian tax base.<sup>22</sup>

## **2 Prevention or elimination of double taxation**

An additional consideration apparent within the design and subsequent implementation of CFC rules is how to avoid double taxation.<sup>23</sup> As CFC rules subject the income of a foreign entity to taxation in the parent jurisdiction, they can, and often do, lead to double taxation if, for example, the entity is also subject to taxation in the CFC jurisdiction.<sup>24</sup>

In the Russian context, relief for foreign tax paid may only be available if such relief is provided for in a ratified double tax treaty and the amount of the relief does not exceed the Russian tax corresponding to that income.<sup>25</sup>

## **3 Compliance**

A final policy consideration seeks to achieve balance between the implementation and administration of CFC rules and their associated compliance burdens.<sup>26</sup>

Arguably, the benefit of CFC rules is that they can operate relatively mechanically.<sup>27</sup> However, CFC rules that are entirely mechanical may not be as effective as rules that allow more flexibility.<sup>28</sup> Flexibility, however, may create uncertainty, ultimately affecting the increasing compliance burdens associated with CFC rules.<sup>29</sup> Hence, CFC rules must seek to harmonise the reduced complexity inherent in mechanical rules and the enhanced effectiveness of more subjective measures.<sup>30</sup>

<sup>22</sup> OECD above n 15, 84.

<sup>23</sup> OECD DECFRCR, 13.

<sup>24</sup> OECD DECFRCR, 13. This is particularly evident in the context where the parent jurisdiction implements a worldwide jurisdictional tax base.

<sup>25</sup> Special rules apply to items such as dividends, interest, royalties and rent. Under Russia's domestic legislation and tax treaties, a credit may also be granted for income taxes paid abroad on these items on the proviso that documentary proof of taxes paid abroad is provided. If, however, the treaty provides for a lower withholding rate, no credit will be granted in excess of the treaty rate: see TC RF Article 311.

<sup>26</sup> OECD DECFRCR, 13.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> OECD, above n 15. For an excellent evaluation of the trade-offs inherent within tax policy design, see: Nicole Wilson-Rogers and Dale Pinto, 'Tax Reform: A Matter of Principle? An Integrated Framework for the Review of Australian Taxes' (2009) 7(1) *eJournal of Tax Research* 72.

<sup>30</sup> Wilson-Rogers and Pinto, above n 29.



This policy consideration is most clearly demonstrated in the context of defining CFC income.<sup>31</sup> Arguably, a definition which attributes income based entirely on its formal classification may be ineffective and unduly burdensome in its approach, despite reducing administrative and compliance burdens.<sup>32</sup> Conversely, a definition which favours a less mechanical, substance analysis to ensure income that is attributed arises from base erosion and profit shifting activities may be more administratively burdensome and less streamlined despite increasing effectiveness.<sup>33</sup>

The Russian CFC provisions endeavour to reduce compliance burdens whilst increasing effectiveness through a modified approach in which CFC income is broadly defined and in favour of legal form,<sup>34</sup> while simultaneously offering a multitude of exclusions for particular CFC's and their income.<sup>35</sup> The effectiveness of this approach will be evaluated later in this article.

### III THEORETICAL FRAMEWORK

Against this background, this part considers an appropriate framework on which to evaluate the effectiveness of Russia's CFC rules. This article relies greatly on the 2015 work of the OECD entitled, 'Designing Effective Controlled Foreign Company Rules, Action 3 - 2015 Final Report' ('Report')<sup>36</sup> which provides contemporaneous guidance and direction for the creation and adaptation of CFC rules.<sup>37</sup> The Report considers all constituent elements of CFC rules and classifies them into six (6) categories that are, in the view of the OECD, necessary for the effective design or CFC rules.<sup>38</sup> These categories inform subsequent discussion below.

Effectiveness, as expounded by the Report broadly accords with the formative works of Sadler<sup>39</sup> and Baker and McLelland<sup>40</sup> in the field of political and environmental policy assessment, where effectiveness is evaluated by reference to four generic

<sup>31</sup> OECD DECFRC, 13.

<sup>32</sup> Wilson-Rogers and Pinto, above n 29; OECD DECFRC.

<sup>33</sup> Ibid. Concerns about the administrative burden of substance-based rules can, however, be reduced by including suitably targeted CFC exemptions such as an exemption for companies that are not subject to a lower rate of tax.

<sup>34</sup> TC RF Article 25.15(3).

<sup>35</sup> TC RF Article 25.15(13).

<sup>36</sup> OECD DECFRC, above n 5.

<sup>37</sup> Ibid, 13.

<sup>38</sup> Ibid.

<sup>39</sup> See, Barry Sadler, *Environmental Assessment in a Changing World. Evaluating Practice to Improve Performance – Final Report* (Canadian Environmental Assessment Agency, 1996).

<sup>40</sup> Douglas Baker and James McLelland, 'Evaluating the Effectiveness of British Columbia's Environmental Assessment Process for First Nations' Participation in Mining Development' (2003) 23(5) *Environmental Impact Assessment Review* 581.

criteria: (1) procedural effectiveness – where policy is considered broadly effective if it meets accepted principles and provisions;<sup>41</sup> (2) substantive effectiveness – where policy is considered broadly effective if it meets its established purposes and objectives;<sup>42</sup> (3) transactive effectiveness – where policy is considered broadly effective if the time and cost associated with achieving its purported outcomes is relatively low;<sup>43</sup> and (4) normative effectiveness – where policy is broadly effective if it is resilient towards societal, economic and political change.<sup>44</sup> Overall, policy effectiveness is thus reflected by the extent to which a policy adheres to all four aspects of the effectiveness paradigm.<sup>46</sup>

Noting the prevalence of the OECD's work in the field of international tax policy and administration and recognising the rigor with which the categories in the Report have been assessed and adopted, it is both practical and appropriate to measure Russia's recently enacted CFC rules against the OECD's benchmarks.

## A Methodology

This article endeavours to respond to the question<sup>47</sup> of whether the Russian CFC rules are effective given their current construction. Comparative analysis is undertaken to respond to the research question. This analysis is two-fold in its approach. Initially, the article will review each component of the Russian CFC rules against the six categories ascribed by the OECD. Arguably, where the particular constituents of the Russian CFC rules are fundamentally similar in construction to those ascribed by the OECD, they may be considered effective. Where however, the Russian CFC rules diverge from the OECD recommendations, the effectiveness of the component is subject to scrutiny. Secondly, the article will seek to review the effectiveness of the Russian CFC rules in the context of their construction as a whole, in an attempt to address any ambiguity in the initial analysis, prior to resolving the research question.

<sup>41</sup> Sadler, above n 39.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Baker and McLelland, above n 40.

<sup>45</sup> See Neera Shrestha Pradhan, Yufang Su, Yao Fu, Liyun Zhang and Yongping Yang, 'Analyzing the Effectiveness of Policy Implementation at the Local Level: A Case Study of Management of the 2009–2010 Drought in Yunnan Province, China' (2017) 8(1) *International Journal of Disaster Risk Science* 64.

<sup>46</sup> See Sadler, above n 39; Baker and McLelland, above n 40; Pradham et al, above n 45.

<sup>47</sup> Consider Frank Esser and Rens Vliegthart, 'Comparative Research Methods' in Jörg Matthes, Christine S. Davis and Robert F. Potter (eds), *The International Encyclopedia of Communication Research Methods* (John Wiley & Sons, Inc., 2017).

## B Criteria for evaluation

The following criteria have been extracted from the Report and will inform subsequent analysis:

1. *Definition of a CFC.* The Report recognises two salient features which need to be addressed when defining a CFC:<sup>48</sup> (1) what entities should be considered CFCs; and (2) whether the parent entity had sufficient influence or control over the foreign entity for the foreign entity to be considered a CFC. In response to (1), the Report recommends that the term CFC be broadly defined to include both corporate and non-corporate foreign entities that are controlled by shareholders in the parent jurisdiction.<sup>49</sup> In response to (2), the Report endorses the use of both legal and economic tests to determine when shareholders have the requisite influence or control over a foreign entity for the purposes of recognising a CFC, and encourages an evaluation of control based on indirect and direct participation in an entity.<sup>50</sup>
2. *CFC exemptions and threshold requirements.* The Report encourages the use of exemption and threshold requirements to exclude certain entities from CFC rules, where those entities pose little risk to base erosion and profit shifting activities, or where, in the interest of remaining economically competitive, it would be appropriate to do so.<sup>51</sup> The Report recommends that CFC rules only apply to CFC's that are subject to effective tax rates that are significantly lower than those applied in the parent jurisdiction.<sup>52</sup>
3. *Definition of CFC income.* The Report recommends that CFC rules include a definition of CFC income that ensures income that raises tax base erosion concerns is attributed to controlling shareholders in the parent jurisdiction.<sup>53</sup>
4. *Computation of CFC income.* The Report recommends that CFC rules use the rules of the parent jurisdiction to compute the CFC income to be attributed to shareholders.<sup>54</sup> It also recommends that, to the extent legally permitted, jurisdictions should adopt specific rules limiting the offset of CFC losses, so that they can only be applied against the profits of the same CFC or against the profits of other CFCs in the same jurisdiction.<sup>55</sup>
5. *Attribution of CFC income.* The Report recommends that, when possible, the attribution threshold should coincide with the control threshold and that the amount of income to be attributed should be calculated pro-rata to the proportionate ownership or influence of the controlling entity.<sup>56</sup>

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<sup>48</sup> OECD DECFER, 21.

<sup>49</sup> OECD DECFER, 21.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid, 33.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid, 43.

<sup>54</sup> Ibid, 57.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid, 61.

6. *Prevention and elimination of double taxation.* The Report emphasises the importance of both preventing and eliminating double taxation, and recommends jurisdictions with CFC rules allow a credit for foreign taxes actually paid, including any tax assessed on intermediate parent companies under a CFC regime.<sup>57</sup>

These criteria, in conjunction with the findings of this article, have been tabularised and included for reference purposes at Appendix A.

### **C     *Limitations***

As the scope of this article is confined to assessing the effectiveness of these measures, there are a number of limitations which need to be addressed and which ultimately impact upon the validity of this approach and the framework. These include but are not limited to: (1) the lack of publicly available empirical data; (2) the lack of reliably translated Russian academic and political literature; and (3) the general limitations and restrictions associated with comparative analysis.<sup>58</sup> This work nonetheless, advances the academic literature in this field through the creation of scholarly arguments and perspectives despite these inherent impediments.

## **IV DISCUSSION**

This part analyses the key design features of the Russian CFC regime against the adopted theoretical framework.

### **1     *Definition of CFC***

The initial design feature which requires assessment considers the entities which may constitute a CFC.

#### **(a) *Entities subject to the CFC rules***

With regard to the Russian CFC rules we note that the regime applies broadly to both foreign corporations and entities without legal personality.<sup>59</sup> A foreign entity without legal personality is defined as an entity established under the law of a foreign country that does not have a legal personality (eg funds and partnerships) but which can engage in commercial activity aimed at generating income for the benefit of its participants (eg beneficiaries, stakeholders, principals and other persons).<sup>60</sup>

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<sup>57</sup> Ibid, 65.

<sup>58</sup> See Esser and Vliegenthart, above n 47.

<sup>59</sup> TC RF Article 11.2(7).

<sup>60</sup> TC RF Article 11.2(7).

These provisions have arguably been drafted broadly to avoid scoping issues apparent in comparative regimes,<sup>61</sup> and, in so doing, endeavour to deal with all offshore base erosion and profit shifting activities engendered by any entity.<sup>62</sup>

A fundamental issue with this approach ironically concerns the breadth with which the CFC definition is drafted. Such a wide definition creates uncertainty in respect of the application of the CFC rules to offshore entities, and debatably avails an opportunity for manipulation or exploitation.<sup>63</sup> Conversely, these features also support the effectiveness of the regime as through the wide and uncertain manner in which these provisions are drafted they become a powerful tool in the Russian tax authority's avoidance armoury.<sup>64</sup>

Hence, whilst favourable, and arguably effective in the context of the Report to employ a broad CFC definition, which the Russian CFC rules achieve, the practical implication of this approach remain to be seen.

### **(b) Control and influence**

As a corollary to the CFC definition, the next critical design feature regards the level of control a Russian tax resident needs to exert in order for the CFC regime to apply. As noted, the notion of control is widely defined in the Russian CFC rules and deems a Russian tax resident a controlling person of a foreign entity if they own, directly or indirectly: (1) more than 25% of the participation shares;<sup>65</sup> or (2) more than 10% of the shares if the Russian tax resident in total owns more than 50%;<sup>66</sup> or (3) exercises, or has the power to exercise, a decisive influence on decisions regarding the distribution of profits of the foreign entity regardless of legal basis for control.<sup>67</sup>

Conceptually the tests mirror the rudimentary design features purported by the Report. However, the nature of control conceived by the first two tests extends far

<sup>61</sup> Consider Australia's CFC regime, which applies exclusively to entities considered companies pursuant to Australian taxation law. This in turn has led to conceptual and legal challenges to the application of these rules, where for example, a foreign entity fails to meet the requisite definition for the rules to apply. See, *Income Tax Assessment Act 1936* (Cth) ('ITAA36') Part X.

<sup>62</sup> See, Nolan Sharkey and Evgeny Guglyuvatyy, 'The New Russian Controlled Foreign Company Regime: Review and Comparison with the Australian Regime' (2016) 70(11) *Bulletin for International Taxation* 661.

<sup>63</sup> Sharkey and Guglyuvatyy, above n 62.

<sup>64</sup> Ibid.

<sup>65</sup> TC RF Article 25.13(3)(1).

<sup>66</sup> TC RF Article 25.13(3)(2). This requirement looks to the participation interests of all associates including spouses or minors in the case of individuals.

<sup>67</sup> TC RF Article 25.13(8).

beyond the Report and comparative regimes.<sup>68</sup> The Report,<sup>69</sup> Norway,<sup>70</sup> Iceland<sup>71</sup> and Finland<sup>72</sup> as examples, emphasise that the resident taxpayers own at least 50% of the capital or hold at least 50% of the voting rights in the foreign entity as the fundamental legal and economic benchmarks.<sup>73</sup> Notably however, the Report endorses the use of lower control thresholds where a country seeks to achieve broader policy goals or wishes to prevent the circumvention of the CFC rules.<sup>74</sup> Hence, the Russian approach may be best understood as a reaction to the diverse strategies adopted by those who seek to avoid Russian tax and arguably serve as an effective deterrent.<sup>75</sup>

The third test which emulates the Reports *de facto* control recommendation is broadly consistent with comparative regimes.<sup>76</sup> However, the lack of clarity surrounding concepts of influence and power may raise uncertainty, ultimately impeding compliance, giving rise to costs and inefficacies.<sup>77</sup> Additionally, adopting such a broad and uncertain approach compounds the possibility of double taxation, in the absence of appropriate exclusions, as different jurisdictions may also seek to tax the same foreign entity.<sup>78</sup>

## 2 Exemptions and threshold requirements

Commensurate with the recommendations of the Report, the Russian CFC regime offers a number of concessional exclusions which may absolve a CFC and their income from taxation.<sup>79</sup> Generally, these exclusions will apply in circumstances where the actions of the CFC pose little risk to the Russian tax base,<sup>80</sup> or where Russian authorities have deemed certain activities appropriate to exclude in order

<sup>68</sup> Sharkey and Guglyuvatyy, above n 62.

<sup>69</sup> OECD DECFRC, 21.

<sup>70</sup> Skatteloven (SKTL) (*Norwegian Tax Act*) ss 10 – 68.

<sup>71</sup> Lög um tekjuskatt (TSKL) (*Icelandic Income Tax Act*) Art. 57a

<sup>72</sup> Laki ulkomaisten väliyhteisöjen osakkaiden verotuksesta (VYL) (*Finnish Act on Taxation of Shareholders in Controlled Foreign Companies*).

<sup>73</sup> The Finnish rules also apply if Finnish taxpayers are entitled to at least 50% of the yield. See, SKTL ss 10-62, TSKL Art. 57a(3) and VYL s 3. Little emphasis in this respect is placed on the influence of associates in contrast to the Russian position.

<sup>74</sup> OECD DECFRC, 21.

<sup>75</sup> Sharkey and Guglyuvatyy, above n 62, 664; Putin, above n 4.

<sup>76</sup> Consider, SKTL ss 10-62, TSKL Art. 57a(3) and VYL s 3.

<sup>77</sup> Peter Koerver Schmidt, 'Taxation of Controlled Foreign Companies in Context of the OECD/G20 Project on Base Erosion and Profit Shifting as well as the EU Proposal for the Anti-Tax Avoidance Directive – An Interim Nordic Assessment' (2016) 2 *Nordic Tax Journal* 87.

<sup>78</sup> Sharkey and Guglyuvatyy, above n 62, 664.

<sup>79</sup> TC RF Article 25(13). A comprehensive list of the criteria for exclusion may be found in Sharkey and Guglyuvatyy, above n 62, 667. OECD DECFRC, 33.

<sup>80</sup> As can be seen in the context of non-profit organisations, active foreign companies and jurisdictions with a sufficiently high tax rate. See, TC RF Article 25(13).

to preserve capital exportation and economic competitiveness.<sup>81</sup> A *de minimis* threshold of 10 million rubles is employed as a further measure to ensure that CFC income is not included in the taxable income of the parent company if it falls under that threshold.<sup>82</sup> In this way, the Russian CFC rules harmonise further with the Report,<sup>83</sup> and lower administrative compliances, arguably increasing their effectiveness.

A final measure in pursuit of protecting the Russian tax base is through the use of an objective list which determines when CFC exemptions would automatically not apply.<sup>84</sup> This approach achieves broadly the same purpose of the recommendation in the Report, notwithstanding that the Report endorses the use of a list which would recognise when CFC exceptions apply.<sup>85</sup>

Against this background, and in strict application of the framework, Russia's CFC rules may be considered effective. Notably however, given the volume of exclusions available to Russian taxpayers,<sup>86</sup> and the associated complexity of the provisions, there exists a genuine possibility for continued exploitation of low-tax jurisdictions, notwithstanding the Russian authority's intention to deter this behaviour.<sup>87</sup> The exclusions are also likely to create challenges for administration and could result in significant compliance costs which further affects foreign investment or exportation, thereby limiting their effectiveness.<sup>88</sup>

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<sup>81</sup> As is apparent from the exclusion of organisations involved in projects relating the extractions of minerals or in the field of banking and insurance. See, TC RF Article 25(13). See also, Olga Boltenko and Ayshat Gaydarovay, 'Russia's 'de-offshorization' rules and the new taxation of controlled foreign companies' (2015) 21(6) *Trusts & Trustees* 605.

<sup>82</sup> TC RF Article 25(13).

<sup>83</sup> OECD DECFRCR, 33.

<sup>84</sup> The current list includes 109 countries and 19 territories. See, Russian Federal Tax Service, S Order No.-7-17/527 of 30 September 2016.

<sup>85</sup> OECD DECFRCR, 33.

<sup>86</sup> Exclusions which far exceed a number of comparative regimes. See as example, SKTL ss 10-62, TSKL Art. 57a(3) and VYL s 3, ITAA36 Part X.

<sup>87</sup> Olga Boltenko and Ayshat Gaydarovay, above n 81; Sharkey and Guglyuvatyy, above n 62, 667.

<sup>88</sup> *Ibid.*

### 3 *CFC income*

This part jointly considers criteria 3 through 5 of the Report. As noted by the Report, CFC regimes must be able to identify what income of the foreign entity is attributable to the controlling person as well as addressing issues regarding how to calculate the income of a foreign entity.<sup>89</sup>

In this context, the Russian CFC rules widely define CFC income to include both active and passive income derived by the foreign entity.<sup>90</sup> CFC income is attributed to the controlling person, proportionally to their interest in the entity and included in their Russian tax base.<sup>91</sup> Where the income of a CFC is derived in a state that has concluded an effective double tax treaty with Russia, CFC income will be computed on the basis of its financial statements.<sup>92</sup> In the alternative, where the income of a CFC is derived in a state which has not concluded a double tax treaty with Russia, the CFC provisions may not apply and consequentially the income is calculated by way of reference to the Russian tax rules.<sup>93</sup>

Insofar as measures identified in the Report are concerned, it may again be argued that in strict application of the framework, the Russian rules are an effective legislative device. Again, however, the application of the Russian CFC regime remains uncertain. There is immediate concern in respect of the fact that Russian CFC rules attribute all CFC income and not just passive and tainted income, as is the case in many comparable regimes.<sup>94</sup> In this context, contrasted with the broad exclusions engendered by the provisions, there is a significant likelihood of the rules solely encompassing non-treaty partner countries and not others.<sup>95</sup> Consequentially, this may give rise to increased administration costs and inadvertently provide for unwarranted tax planning activities.

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<sup>89</sup> OECD DECFR, 44.

<sup>90</sup> TC RF Article 25.15.

<sup>91</sup> Ibid.

<sup>92</sup> TC RF Article 309.1. According to Russian tax law, the income of a CFC is reduced by the amount of dividends paid by that entity. In addition, the dividends paid from Russian companies to the CFC are not included to the income of the entity, subject to the provisions of article 312 of the TC RF. Similarly, the income of a foreign structure that is not a legal entity is also reduced by the amount of the distributed income. See, TC RF Article 25.15. CFC losses may also be quarantined and offset against future CFC income.

<sup>93</sup> TC RF Article 312.

<sup>94</sup> Consider, SKTL ss 10-62, TSKL Art. 57a(3) and VYL s 3, ITAA36 Part X.

<sup>95</sup> Olga Boltenko and Ayshat Gaydarovay, above n 81; Sharkey and Guglyuvatyy, above n 62, 668.



#### 4 *Prevention and elimination of double taxation*

As noted, in the Russian context, relief for foreign tax paid may only be available if such relief is provided for in a ratified double tax treaty and the amount of the relief does not exceed the Russian tax corresponding to that income, and on the proviso that documentary proof of taxes paid abroad is provided.<sup>96</sup>

Notably, there are no identifiable provisions within the Russian CFC rules which specifically provide for double tax relief through either a credit or exemption mechanism. To this end, the rules themselves do not accord with the criteria within the Report nor comparative regimes,<sup>97</sup> notwithstanding the relief mechanism identified above. Accordingly, the application of the Russian CFC rules creates a real and likely possibility of double taxation, particularly in the context of CFC income derived by CFCs in non-treaty states. It follows therefore that there exists a greater prospect for increased avoidance activities which limits the effectiveness of the provisions. Hence, review of these provisions in future iterations of the Russian CFC rules with this criteria in mind would be recommended.

### V CONCLUSION

It follows from the preceding analysis that, in strict application of the framework, and acknowledging the political and economic directives of the Russian administration, the Russian CFC rules may be considered an effective legislative measure. As demonstrated, the Russian CFC rules are broadly similar in principle and operation to a number of comparative regimes and exhibit the hallmarks of each criteria addressed in the Report notwithstanding their subtle departures.

The Russian CFC rules are however, not beyond reproach. The wide ambit and inherent uncertainty associated with both the operation and application of these rules raises significant concerns for capital exportation and foreign investment and avails further tax planning opportunities for resourceful parties.

Given the infancy of these rules, and Russia's vested commitment to the protection of its tax base,<sup>98</sup> it is expected that that these rules will be refined over time, with each iteration primed to avert ambiguity and further develop their effectiveness.<sup>99</sup>

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<sup>96</sup> TC RF Article 311.

<sup>97</sup> OECD DECFR, 65. Consider, SKTL ss 10-62, TSKL Art. 57a(3) and VYL s 3, ITAA36 Part X.

<sup>98</sup> Putin, above n 4.

<sup>99</sup> As was the case with the formative amendments in June 2015. See, Federal Law 150-FZ 'On Amendments to Parts One and Two of the Tax Code of the Russian Federation and Article 3 of the Federal Law'.

## VI APPENDIX A

OECD Criteria	Russian CFC Rules	Effectiveness assessment
1. Definition of CFC - Broadly defined. - Control test incorporating both economic and legal concepts.	1. CFC broadly defined to include both foreign corporations and entities without legal personality. 2. Control assessed in respect of legal and economic concepts.	1. On strict application of the criteria: effective. However, given the broader geopolitical and economic climate, may be considered ineffective as shrouded in uncertainty. 2. Broadly mirrors approach of the Report: effective at achieving domestic policy. May however give rise to inefficiencies thereby increasing compliance costs and the prospect of double taxation.
2. Exemption and threshold requirements: - Exemption based on effective tax rate. - Optional use of lists ie 'whitelists'.	1. Broad exemptions over a number of categories. 2. Additional use of blacklist to limit or remove exemptions.	1. On strict application of the criteria: effective. However, given the broader geopolitical and economic climate, may give rise to unintended consequences given breadth and uncertainty.
3. Definition of CFC income: - Targeted definition of income should be included.	1. CFC income is broadly defined to include both active and passive income of foreign entity. Subject to any applicable exemptions.	1. On strict application of the criteria: effective. However, uncertainty and breadth may give rise to unintended consequences.
4. Computation rules - Tax rules of parent jurisdiction apply. - Losses only deductible against profits of the same CFC or other CFCs in the same jurisdiction.	1. Applicable Russian tax rates apply to CFC income. 2. CFC losses quarantined and may be offset against future CFC income.	1. On strict application of the criteria: effective. However, uncertainty and breadth may give rise to unintended consequences.
5. Attribution rules - Attribution threshold tied to the control threshold. - Attribution based on the proportion of ownership. - Apply tax rate of the parent jurisdiction.	1. CFC income is attributed to the controlling person proportionate to their ownership interest. 2. The CFC income is included in the controlling person's Russian tax base and tax at the applicable corporate or individual rate.	1. On strict application of the criteria: effective. However, uncertainty and breadth may give rise to unintended consequences.
6. Prevention and elimination of double taxation - Ordinary indirect credit relief. - Exemptions for dividends/gains on shareholdings in CFC.	1. Credit available only where effective double tax treaty has been concluded.	1. On strict application of the criteria: ineffective. Scope for review.



**Case Notes**



***DENMARK COMMUNITY WINDFARM LTD v  
COMMISSIONER OF TAXATION:  
CHARACTERISATION OF ASSESSABLE  
RECOUPMENTS – GOVERNMENT GRANTS***

Ann Sofie Sentow\*

## I INTRODUCTION

The Denmark Community Windfarm project commenced in 2003 and has been the supplier of approximately 55% of the annual domestic clean electricity demand in the Shire of Denmark, Western Australia. In May 2011, the Denmark Community Windfarm Ltd ('Denmark Community Windfarm') and the Western Australian Coordinator of Energy made an agreement for the payment of a grant for the 'Eligible Project Costs'<sup>1</sup> to be incurred by Denmark Community Windfarm for the construction of two wind turbines. *Denmark Community Windfarm Ltd v Commissioner of Taxation*<sup>2</sup> was brought before Justices Gilmour, Jagot and Moshinsky in the Full Court of the Federal Court of Australia on appeal.<sup>3</sup> The issue of appeal was whether the grant received should be considered as an 'assessable recoupments' subject to Section 20-20 of the *Income Tax Assessment Act 1997* (Cth) (*ITAA 1997*) as contended by the Commissioner of Taxation ('Commissioner'). An

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<sup>1</sup> Note that 'Eligible Project Costs' was defined in the agreement as being 'the capital costs of the equipment and services, exclusive of GST, that are essential for the implementation of the Project'; *Denmark Community Windfarm Ltd v Commissioner of Taxation* [2018] FCAFC 11 [5].

<sup>2</sup> [2018] FCAFC 11.

<sup>3</sup> Note that the first hearing of the matter was *Denmark Community Windfarm Ltd v Commissioner of Taxation* [2017] FCA 478.

assessable recoupment is an amount received for a loss or outgoing when received by way of insurance or indemnity and deducted in the current or earlier income years under the provisions of the ITAA 1997.<sup>4</sup> The Court dismissed the appeal in February 2018 and upheld the decision made in the first instance.<sup>5</sup> This case note sets out the procedural history, facts and joint judgment of *Denmark Community Windfarm Ltd v Commissioner of Taxation*.<sup>6</sup>

## II FACTS

Denmark Community Windfarm received a Grant of \$2,487,800 from the Commonwealth Government for the part funding (50%) of the 'Eligible Project Costs' of constructing two wind turbines in Denmark, Western Australia.<sup>7</sup> The Grant was received as part of the Commonwealth Renewable Power Generation Program which was a rebate initiative to support renewable power generation in remote areas.<sup>8</sup> The Eligible Project Costs were treated as outgoings on the capital account by Denmark Community Windfarm.

Denmark Community Windfarm was a Small Business Entity pursuant to Subdivision 328-110 of the ITAA 1997. Consequently Denmark Community Windfarm made diminishing value basis deductions for depreciating assets of the two wind turbines for the 2013 and 2014 income years.

Denmark Community Windfarm was uncertain as to the treatment of the Grant for income tax purposes. In response to this uncertainty, an application was made for an Australian Taxation Office ('ATO') Private Ruling by Denmark Community Windfarm's firm of accountants RSM Bird Cameron.<sup>9</sup> The application was based on determining whether the Grant would be categorised as assessable income.<sup>10</sup> The response was negative, rather the Commissioner ruled that the Grant was an assessable recoupment as per Section 20-20 ITAA97.<sup>11</sup>

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<sup>4</sup> *Income Tax Assessment Act 1997* (Cth) s20-20(2).

<sup>5</sup> [2017] FCA 478 (McKerracher J).

<sup>6</sup> [2018] FCAFC 11.

<sup>7</sup> *Ibid* [4].

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid* [10].

<sup>10</sup> *Denmark Community Windfarm Ltd v Commissioner of Taxation* [2018] FCAFC [11]; *Income Tax Assessment Act 1997* (Cth) under s 6-5, 15-10.

<sup>11</sup> *Denmark Community Windfarm Ltd v Commissioner of Taxation* [2018] FCAFC [11]-[12].

### III PROCEDURAL HISTORY

#### A *Pre-Trial History*

The Private Ruling received provided that the Grant was not subject to either Sections 6-5 or 15-10 of the ITAA 1997 as assessable income.<sup>12</sup> However, the Grant was deemed to be an assessable recoupment as under Section 20-20 of the ITAA 1997.<sup>13</sup>

Denmark Community Windfarm lodged its income tax returns for the 2013 and 2014 income years where the amounts were included as assessable recoupments in line with the Private Ruling received from the ATO.<sup>14</sup> However, Denmark Community Windfarm objected to the assessment that the amounts from the respective income years were assessable income as well as assessable recoupments.<sup>15</sup>

The objection was disallowed in full by the Commissioner on the basis that the Grant amounts were assessable recoupments by virtue of Section 20-20(2) of the ITAA 1997 as the amounts were received by way of indemnity or by way of Section 20-20(3) as the amounts were received in respect of a loss or outgoing incurred and amounts deductible under Division 40 of the ITAA 1997.<sup>16</sup>

#### B *Trial at First Hearing*

The matter between Denmark Community Windfarm and the Commissioner was heard at first instance in the Federal Court of Australia.<sup>17</sup> The decision made by Justice McKerracher was in favour of the Commissioner, that the amounts received by way of the Grant were assessable recoupments under section 20-20 of the ITAA 1997.

Denmark Community Windfarm contended that none of the amounts incurred with relation to the Eligible Project Costs could be deducted as losses or outgoings as the amounts were expenditure on the capital accounts.<sup>18</sup> Furthermore, they argued that the funding received were for the land, equipment, services, design, construction, installation and ancillary services in relation to the Eligible Project Costs.<sup>19</sup> Finally, the Denmark Community Windfarm argued that there was

<sup>12</sup> Ibid [11].

<sup>13</sup> Ibid [12].

<sup>14</sup> Ibid [13].

<sup>15</sup> Ibid [13]-[14].

<sup>16</sup> Ibid [16].

<sup>17</sup> *Denmark Community Windfarm Ltd v Commissioner of Taxation* [2017] FCA 478.

<sup>18</sup> *Denmark Community Windfarm Ltd v Commissioner of Taxation* [2018] FCAFC [27].

<sup>19</sup> Ibid [31(a)].



no indemnity, rather the Grant received was a refund of expenses incurred in carrying out the project.<sup>20</sup> Denmark Community Windfarm argued that there was an alternative available in deducting the amounts related to the Grant. Denmark Community Windfarm contended it was permissible for them to deduct under Subdivision 328-D as such a deduction was not specified in the table provided for in Section 20-30.<sup>21</sup>

The arguments of Denmark Community Windfarm were rejected as found by the emphasis in the phrase ‘can deduct’ in Section 20-20(3).<sup>22</sup> The Court found that this would not limit Denmark Community Windfarm only to a Division 40 deduction but would be wide enough to include a deduction under Subdivision 328-D.

Denmark Community Windfarm contended that there is a significant distinction between ‘for the outgoing’ and ‘in respect of the outgoing’. The distinction put forward by Denmark Community Windfarm aimed to remove the association of a deduction related to the Grant. In doing so, Denmark Community Windfarm held that the deductions claimed were not ‘for’ the Grant assets but rather associated ‘with respect to’ the decline in value of the assets of the Grant Project. McKerracher J held that such an exercise would be unduly technical and would provide a ‘narrow distinction in the present situation’.<sup>23</sup> Furthermore, such an interpretation would remove the effect of Division 40 which is expressly contained within Section 20-30(3).<sup>24</sup>

McKerracher J also noted that Denmark Community Windfarm had and could receive the Grant as a recoupment for loss or outgoing, despite being on the capital account.<sup>25</sup> His Honour agreed with the Commissioner that the Grant received was not an insurance but rather an indemnity.<sup>26</sup> The definition of indemnity was determined by the ordinary meaning being a ‘sum paid to a person in respect of an outgoing incurred’,<sup>27</sup> as well as the dictionary definition of ‘a sum of money paid to compensate a person for liability, loss or expense incurred by the person’.<sup>28</sup> His Honour concluded that the specific requirements Denmark Community Windfarm were required to undertake fell within the meaning and scope of indemnity.<sup>29</sup>

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<sup>20</sup> Ibid [31(b)].

<sup>21</sup> Ibid [9].

<sup>22</sup> *Denmark Community Windfarm Ltd v Commissioner of Taxation* [2017] FCA 478 [58].

<sup>23</sup> Ibid [63].

<sup>24</sup> Ibid.

<sup>25</sup> Ibid [46].

<sup>26</sup> Ibid [48].

<sup>27</sup> Ibid [49].

<sup>28</sup> Ibid [50].

<sup>29</sup> Ibid [52].

The decision made by McKerracher J was that the Grant received was an assessable recoupment. However, if for any reason that should fail, the Grant would also satisfy the other recoupments category under Section 20-30 of the ITAA 1997.<sup>30</sup>

The case was dismissed by McKerracher J. This was a significant loss not only to Denmark Community Windfarm but also to other potential litigants as it was tried on a test case basis.<sup>31</sup>

#### IV GROUNDS OF APPEAL

Denmark Community Windfarm appealed on the basis that the Court erred in law in the first instance.<sup>32</sup> Specifically the conclusions of the Court on which the Denmark Community Windfarm claimed were erred were, firstly, that the Grant was paid to and received by Denmark Community Windfarm as indemnity to compensate for outgoing as either compensation for 'liability, loss or expense' as such it would 'properly be characterised, is a Federal Government subsidy on account of a non-deductible capital expense'.<sup>33</sup> Secondly, that the amount provided under the grant was deducted by Denmark Community Windfarm.<sup>34</sup> Thirdly, that the Grant was characterised as being paid and received by Denmark as a reimbursement of depreciation subject to Division 40.<sup>35</sup> Finally, that a deduction could be claimed for the Grant as an allowance for decline in value of the capital assets.<sup>36</sup>

Denmark Community Windfarm contended that it did not receive the Grant by way of indemnity, so it did not deduct the Grant in association with 'for the loss or outgoing'. Denmark Community Windfarm noted a distinction in the deductions and emphasised that the deductions made were not for the relevant outgoing associated with the Grant but were rather for the decline in value of the assets.<sup>37</sup> Furthermore, in relation to other recoupments, Denmark Community Windfarm argued that it did not and could not deduct an amount for the 'loss or outgoings', arguing that the deductions were not for relevant outgoings but for decline in value of relevant assets.<sup>38</sup> The overall argument was based on the wording and distinction between 'for the loss or outgoing' and 'in respect of the outgoing'.<sup>39</sup> The Commissioner maintained that the Grant was correctly characterised as an assessable recoupment as upheld by McKerracher J.<sup>40</sup>

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<sup>30</sup> Ibid [56].

<sup>31</sup> *Denmark Community Windfarm Ltd v Commissioner of Taxation* [2018] FCAFC [27].

<sup>32</sup> Ibid [28].

<sup>33</sup> Ibid [28 (1.1)].

<sup>34</sup> Ibid [28 (1.2)].

<sup>35</sup> Ibid [28 (1.3)].

<sup>36</sup> Ibid [28 (1.4)].

<sup>37</sup> Ibid [31].

<sup>38</sup> Ibid [31(b)].

<sup>39</sup> Ibid.

<sup>40</sup> Ibid [30].

## V JUDGMENT

### A Assessable Recoupments

Section 20-20 of the ITAA 1997 provides that when an assessable recoupment is included in a taxpayer's assessable income, it is an amount which is received as a 'recoupment' for a loss or outgoing by way of insurance or indemnity.<sup>41</sup> The loss or outgoing amount can be claimed as a deduction by the taxpayer.<sup>42</sup>

In general terms, a recoupment is defined as being 'any kind of recoupment, reimbursement, refund, insurance, indemnity or recovery however described and a grant in respect of the loss or outgoing'.<sup>43</sup> The Grant received by Denmark Community Windfarm was deemed as being a recoupment or reimbursement for the part (50%) loss or outgoing incurred in the construction of the wind turbines.<sup>44</sup>

The issue of insurance was quickly disposed of by the Court as it was not applicable to the Grant in question.<sup>45</sup> Rather, the Grant received by Denmark Community Windfarm aligned more with that of an indemnity.<sup>46</sup> The Court turned to the interpretation of the words 'by way of insurance or indemnity' as considered by Justices Edmonds and Pagone in *Batchelor v Federal Commissioner of Taxation*.<sup>47</sup> Edmonds and Pagone JJ stated that there was a clear intention of the legislature that the section in question be applied broadly.<sup>48</sup> Furthermore, their Honours found a generally applicable characteristic of indemnity being an entitlement which precedes the event of which the amounts were paid.<sup>49</sup>

In the case at hand, the Court found that the agreement for the Grant was for payment in instalments to be made on completion of certain milestones in the agreement. This not only satisfied the general principle in *Batchelor v Federal Commissioner of Taxation*<sup>50</sup> but also met the general meaning of indemnity so as to 'compensate a person for liability, loss or expense incurred by the person'.<sup>51</sup> The fact that the Grant was a Government subsidy or rebate did not affect the Court's view that the amount received by Denmark is indemnity.<sup>52</sup>

<sup>41</sup> *Income Tax Assessment Act 1997* (Cth) s20-20(2)(a).

<sup>42</sup> *Ibid* s20-20(2)(b).

<sup>43</sup> *Ibid* s20-25(1).

<sup>44</sup> *Denmark Community Windfarm Ltd v Commissioner of Taxation* [2018] FCAFC [35].

<sup>45</sup> *Ibid* [36].

<sup>46</sup> *Ibid*.

<sup>47</sup> (2014) 219 FCR 453.

<sup>48</sup> *Denmark Community Windfarm Ltd v Commissioner of Taxation* [2018] FCAFC [37].

<sup>49</sup> *Ibid*.

<sup>50</sup> (2014) 219 FCR 453.

<sup>51</sup> *Denmark Community Windfarm Ltd v Commissioner of Taxation* [2018] FCAFC [39].

<sup>52</sup> *Ibid*.

## B Other Recoupments

As it was established by the Court that the Grant received by Denmark Community Windfarm was an ‘assessable recoupment’ it was unnecessary for the Court to consider other recoupments under Section 20-20(3) of the ITAA 1997.<sup>53</sup> However, the Court decided to make a few comments on the subject.

Other recoupments were considered as being amounts received for loss or outgoings which are not insurance or indemnity.<sup>54</sup> Two elements must be satisfied for ‘other assessable recoupment’. Firstly the amount must be received as a recoupment for the loss or outgoing.<sup>55</sup> Secondly, the taxpayer can, has or is able to deduct amounts in relation to the table in Section 20-30 of the ITAA 1997.<sup>56</sup> The Court found that Denmark Community Windfarm satisfied both elements of the section and consequently the Grant could alternatively be regarded as an ‘other recoupment’.<sup>57</sup>

## C Deductions

Denmark Community Windfarm submitted that the wording of ‘for the loss or outgoing’ should be interpreted as having a narrow effect.<sup>58</sup> The contention was that the phrase should only relate to the loss or outgoing as a ‘definite article’ and not encompass other aspects such as depreciation as per Division 40 and Subdivision 328-D of the ITAA 1997.<sup>59</sup> Denmark Community Windfarm argued that if a broader interpretation of ‘for the loss or outgoing’ was intended, then the phrase used in the *Income Tax Assessment Act 1936* (Cth) ‘for or in respect of’ should have been the phrase used in Section 20-20(2) of the ITAA 1997.<sup>60</sup>

The Court found three reasons for dismissing Denmark Community Windfarm’s contentions.<sup>61</sup> Firstly, the words ‘for the loss or outgoing’ were deemed to be sufficiently broad in construction. The Court held that it was clear that the amount of the Grant was in relation to the asset cost of the wind turbines which were related to that loss or outgoing in question.<sup>62</sup> Secondly, the Court dismissed the

<sup>53</sup> Ibid [47].

<sup>54</sup> *Income Tax Assessment Act 1997* (Cth) s20-20(3).

<sup>55</sup> *Denmark Community Windfarm Ltd v Commissioner of Taxation* [2018] FCAFC [48].

<sup>56</sup> Ibid [48].

<sup>57</sup> Ibid [48]-[49].

<sup>58</sup> Ibid [41].

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid [42].

<sup>62</sup> Ibid [43].

notion that Division 40 was not applicable to assessable recoupments. Division 40 deductions are expressly legislated for in Section 20-20, and the finding in favour of Denmark Community Windfarm in this circumstances would render Division 40 ineffective.<sup>63</sup> Thirdly, the broad construction of the provision reflected the purpose and design intended by the Legislature for assessable recoupments to be claimed as deductions by taxpayers, those deductions being Subdivision 328-D and Division 40 of the ITAA 1997.<sup>64</sup>

The appeal was dismissed by the Court as it was deemed that McKerracher J had not erred in his judgment. Denmark Community Windfarm was ordered to pay the costs of the appeal.

## VI IMPLICATIONS

### A *Legal Effect of Judgment*

The decision of this case established that the correct means of claiming a deduction for Denmark Community Windfarm was to include the assessable recoupment as assessable income and thereby make deductions in line with Division 40 or Subdivision 328-D of the ITAA 1997. Had the arguments of Denmark Community Windfarm been successful, they would not have had a deduction which would not have aligned with the requirement in Section 20-20 of the ITAA 1997. The effect of this would be that the Grant received would not have met the definition of an assessable recoupment under Section 20-20. Consequently, there would be no tax liability on the Grant amount. However, the broad interpretation applied by the Court rejected the contentions of Denmark Community Windfarm and found that the narrow view of Denmark Community Windfarm went against the intentions and purpose of the provision.

### B *Australian Taxation Office*

The decision reached in this case proved that there is a consistency between the understanding and application of taxation law by the ATO and the Federal Courts. The case demonstrated that the ATO had correctly assessed the taxpayer's tax position from the first interaction between Denmark Community Windfarm in the Private Ruling.

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<sup>63</sup> Ibid [44].

<sup>64</sup> Ibid [45].

To reaffirm the position, the ATO have provided a Decision Impact Statement so as to provide a clear and concise statement of the law and application regarding assessable recoupments.<sup>65</sup> Furthermore, ATO Tax Determination 2006/31 is currently under review to reflect the decision reached in the Full Court of the Federal Court of Australia.<sup>66</sup>

### **C     *Denmark Community Windfarm and Industry***

This case was brought to the Federal Court to determine where the law stands on Government Grants and characterisation of assessable recoupments. The case was a test case for other parties who had the same question of law. The shared uncertainty of this area of income tax law was clarified not only for Denmark Community Windfarm but for many other similarly positioned businesses and cases. The judgment provided by the Court was firm, broad in interpretation and protective of the law as it stands today. The reason for this is that there was great potential for change and further litigation from other applicants.

## **VII CONCLUSION**

*Denmark Community Windfarm Ltd v Commissioner of Taxation*<sup>67</sup> was a significant case because of the fact that it was a test case. The result of the judgment would not only impact the Denmark Community Windfarm but also similarly positioned prospective applicants. However, the Court found that the arguments raised by the Appellant were narrow and unduly technical, resulting in a disregard for the provisions in the ITAA 1997. The Court rightfully found in favour of the Commissioner, deeming the Grant to be an assessable recoupment and followed that deductions for the assessable recoupments could be claimed by Denmark Community Windfarm.

The procedural history of this matter is extensive. The result continuously provided by the Commissioner was upheld by both the Federal Court of Australia and the Full Court of the Federal Court of Australia. The decision demonstrates that the Court does not lightly embrace challenges to the interpretation of taxation law.

<sup>65</sup> Australian Taxation Office, Decision Impact Statement (Web Page) <<https://www.ato.gov.au/law/view/document?docid=%22LIT%2FICD%2FWAD113of2016%2F00001%22>>.

<sup>66</sup> Australian Taxation Office, Taxation Determination – TD 2006/31 (Web Page) <<https://www.ato.gov.au/law/view/document?LocID=%22TXD%2FTD200631%2FNAT%2FATO%22&PiT=20190611000000>>.

<sup>67</sup> [2018] FCAFC 11.



# ***UBER B.V. v COMMISSIONER OF TAXATION:***

## **CLASSIFICATION OF RIDE-SOURCING SERVICES UNDER SPECIAL RULES FOR GST REGISTRATION**

Ann Sofie Sentow\*

### **I INTRODUCTION**

Ride-sourcing is a relatively new means of transportation supply. The process involves drivers who use their private vehicles to provide transportation to members of the public for a fare.<sup>1</sup> The case of *Uber B.V. v Commissioner of Taxation*<sup>2</sup> demonstrated how new technologies and innovations can challenge the law which has existed long prior to the inception of new practices.

For GST ('Goods and Services Tax') purposes, a taxable supply is made where there is a supply for consideration, carrying on of an enterprise which is connected to Australia and a taxpayer is registered or required to be registered for GST.<sup>3</sup> Generally, registration for GST is required in the carrying on of an enterprise which has a GST turnover within the threshold.<sup>4</sup> The GST threshold is \$75,000.<sup>5</sup> The special rules for registration which include exemptions to the general GST registration rule are contained within Part 4-5 of *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* ('GST Act'). Within Part 4-5 is a special rule specific to taxis.<sup>6</sup> The special rule requires all taxi operators to be registered for GST regardless of the

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<sup>1</sup> Australian Taxation Office, *Ride-Sourcing and Tax* (Web Page 4 July 2018) <<https://www.ato.gov.au/general/ride-sourcing-and-tax/>>.

<sup>2</sup> [2017] FCA 110.

<sup>3</sup> *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* s9-5.

<sup>4</sup> *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* s23-5.

<sup>5</sup> *A New Tax System (Goods and Services Tax) Regulations 1999 (Cth)*, s23.15(1) (b).

<sup>6</sup> *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*, Div 144.



turnover threshold.<sup>7</sup> There is no definition of ‘taxi’ in the GST Act however the definition section does provide a meaning of ‘taxi travel’. ‘Taxi travel’<sup>8</sup> is defined as ‘travel that involves transporting passengers, by taxi or limousine, for fares’.<sup>9</sup>

Uber B.V. (‘Uber’) is a ride-sourcing application which many people around the world are familiar with. In 2017, proceedings were initiated in the Federal Court of Australia to determine whether the UberX services supplied by Mr Brian Colin Fine could be regarded as taxi travel services as defined in Section 195-1 of the GST Act. If so, all UberX drivers would be required to pay GST pursuant to Section 144-1 of the GST Act. UberX sought a declaratory order to reaffirm that Mr Fine was not a supplier of ‘taxi travel’ services. However, after considerable statutory interpretation Justice Griffiths ruled that a declaratory order should be made with the effect that the UberX supply was within the meaning of ‘taxi travel’. This case note sets out the facts, submissions, statutory interpretation and judgment of Griffiths J.

## II FACTS

### A *UberX Service*

UberX is one branch of the Uber transportation services available to passengers, otherwise known as UberX Riders. The services carried out by individual UberX Partners are known as UberX Partners. The services are provided through free smartphone applications.<sup>10</sup> The key features of the UberX service are that the fees are calculated based on a Service Fee Schedule,<sup>11</sup> the cost of service is credited to the UberX Rider after completion of the service,<sup>12</sup> the UberX services are provided in private vehicles,<sup>13</sup> there is no requirement for a taxi or hire car licence,<sup>14</sup> bookings can only be made through the UberX smartphone application,<sup>15</sup> and finally, the cost of service is calculated based on time and distance.<sup>16</sup>

Mr Fine submitted to the Court that UberX Partners differ from ‘taxi travel’ supply providers on the following features; UberX Partners do not wait in taxi ranks or specific locations, accept street or kerbside hails, drive in bus or transit lanes, operate a taximeter, display fare schedules, wear a uniform or display signage and are not obligated to serve everyone.<sup>17</sup>

<sup>7</sup> *A New Tax System (Goods and Services Tax) Act 1999* (Cth), s144-1.

<sup>8</sup> *A New Tax System (Goods and Services Tax) Act 1999* (Cth), s195-1.

<sup>9</sup> *A New Tax System (Goods and Services Tax) Act 1999* (Cth)s195-1.

<sup>10</sup> *Ibid* [5].

<sup>11</sup> *Ibid* [9].

<sup>12</sup> *Ibid* [10].

<sup>13</sup> *Ibid* [11(a)].

<sup>14</sup> *Ibid* [11(b)].

<sup>15</sup> *Ibid* [11(d)].

<sup>16</sup> *Ibid* [11(e)].

<sup>17</sup> *Ibid* [12].

## B *Applicants' Submissions*

The first submission of the Applicant related to the statutory construction of Section 144-1 of the GST Act, the reason being that the legislature did not consider and provide for other industries or any other form of point to point transportation providers for fares to form part of the special rules. Therefore, ride-sourcing services such as UberX were not intended to be defined as 'taxi travel'.<sup>18</sup> The Applicant contended that an anterior question of whether a particular expression ought to be construed as actually extending to some new state of affairs to which it might arguably extend needed to be addressed.<sup>19</sup> Such an extension, the Applicant submitted, was not intended to create a specific exception for ride-sourcing travel.<sup>20</sup>

The Applicant submitted that the meaning of 'taxi' and 'limousine' should be an industry and non-legal meaning,<sup>21</sup> the meaning being taken from the inherent operation of the taxi industry regulated by State and Territory laws.<sup>22</sup> They further proposed that the use of a disjunctive in the provision suggested that there were different meanings attributable to 'taxi' and 'limousine' as opposed to a generally shared meaning.<sup>23</sup>

The second submission made by the Applicant was that the services of UberX were not travel which involved transporting passengers by taxi. The Applicant put forward the following differences. Firstly UberX vehicles are unlike taxis, they are private vehicles which do not have any signage or taximeters.<sup>24</sup> Secondly, the only acceptance of passengers made by UberX Partners are those using the Uber Application of which UberX Partners are not required to accept passengers or hold taxi licences as taxi services require.<sup>25</sup> Thirdly, UberX Partners do not enjoy the perks and privileges which taxi travel service providers obtain.<sup>26</sup> Fourthly, the calculation of the fare is different from that of a taxi service.<sup>27</sup> Fifthly, the estimated cost of a fare provided before the journey is made on the Uber Application.<sup>28</sup> Finally, the Uber Application features dual feedback ratings of Partners and Riders.

The final submission made by the Applicant was that the services of UberX were not travel which involved transporting passengers by limousine. The Applicant

<sup>18</sup> Ibid [19].

<sup>19</sup> *Hore v Albury Radio Taxis Co-Op Society Ltd* [2002] NSWSC 1130, [43] (Campbell J).

<sup>20</sup> *Uber B.V. v Commissioner of Taxation* [2017] FCA 110 [23].

<sup>21</sup> Ibid [24].

<sup>22</sup> Ibid [28].

<sup>23</sup> Ibid [26].

<sup>24</sup> Ibid [31(a)].

<sup>25</sup> Ibid [31(b)].

<sup>26</sup> Ibid [31(c)].

<sup>27</sup> Ibid [31(d)].

<sup>28</sup> Ibid [31(e)].

submitted that the ordinary meaning of limousine should be applied to the case at hand.<sup>29</sup> The case of *Dreamtech International Pty Ltd v Federal Commissioner of Taxation*<sup>30</sup> held that there is no technical legal meaning of limousine.<sup>31</sup>

The characteristics of an ordinary meaning of limousine were put forward by the Applicant. Firstly, a limousine was considered as being a large, luxury hire vehicle for special occasions.<sup>32</sup> Secondly, there were notions of prestige, luxury, quality, special dimensions, high end travel.<sup>33</sup> Thirdly, the type of vehicle would be selected at the time of making a booking.<sup>34</sup> Fourthly, there would be fixed fares, advances and minimum payments are a standard.<sup>35</sup> Fifthly, pre-booking is an essential feature.<sup>36</sup> Sixthly, the prices for fares are significant and very expensive when compared to fares from taxis and Uber.<sup>37</sup> Finally, the vehicles for limousine travel are kept for a commercial purpose.<sup>38</sup>

The Applicant highlighted the key differences of UberX services to those of a limousine as being that Uber is not a luxury service, rather it is marketed and operated as a low-cost option of travel.<sup>39</sup> There is no choice in the vehicle make or model and the vehicles are not kept for commercial purposes but rather are privately owned or leased by UberX Partners.<sup>40</sup> Furthermore, there is no prepayment of fares or reservation of the vehicles, bookings of UberX services are followed by near immediate pick up.<sup>41</sup> Finally, the Applicant contended that UberX is less expensive than the services provided by a taxi or limousine.<sup>42</sup>

## C Commissioners Submissions

The Commissioner submitted that the definition of ‘taxi travel’ should be considered as a whole and connotes ‘the transportation, by a person driving a private vehicle, of a passenger from one point to another at the passenger’s discretion and for a fare, irrespective of whether the fare is calculated by reference to a taximeter’.<sup>43</sup> The

<sup>29</sup> Ibid [40].

<sup>30</sup> [2010] FCAFC 103.

<sup>31</sup> Ibid [41].

<sup>32</sup> Ibid [42(a)].

<sup>33</sup> Ibid [42(b)].

<sup>34</sup> Ibid [42(c)].

<sup>35</sup> Ibid [42(d)].

<sup>36</sup> Ibid [42(e)].

<sup>37</sup> Ibid [42(f)].

<sup>38</sup> Ibid [42(g)].

<sup>39</sup> Ibid [43].

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid [45].

Commissioner contended that Mr Fine had made supplies which had the essential features of both transportation via taxi and limousine.<sup>44</sup>

The Commissioner disagreed with the notion brought forward by the Applicant, of relying on State and Territory regulatory schemes in ascertaining the meaning of 'taxi travel'.<sup>45</sup> This was due to the fact that the GST Act is a Commonwealth uniform taxation statute and as such it would be rather unlikely that the Federal Parliament intended for the Act to deal with State and Territory regimes.<sup>46</sup>

In looking to the statutory construction of the Section 144-1 of the GST Act, the Commissioner submitted five principles which were said to be relevant in the matter. Firstly, in determining the statutory construction, there must be consideration of the text itself.<sup>47</sup> This involves the general purpose of the statute and well as policy considerations.<sup>48</sup> Secondly, where there are two or more constructions of a provision in statute, the Court is to favour the construction which provides the most sensible operation of the provision.<sup>49</sup> Due to the nature of GST and the vast variety of transactions which attract GST, it is necessary for the GST Act to remain general to allow for application in a practical manner.<sup>50</sup> The construction of a revenue statute may require the consideration of the provision in a number of ways, including natural and ordinary meaning, commercial effect or an intermediate way.<sup>51</sup> Statute is generally regarded as being 'always speaking' unless there is evidence to the contrary.<sup>52</sup>

The Commissioner submitted that it would be wrong to construe the provision as being a composite expression, by separating the meanings of 'taxi' and 'limousine'.<sup>53</sup> By keeping the items together, this reflects the intention of Parliament to cover the category of transportation with passengers from point to point for a fare.<sup>54</sup>

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<sup>44</sup> Ibid [46].

<sup>45</sup> Ibid.

<sup>46</sup> Ibid [47].

<sup>47</sup> Ibid [48].

<sup>48</sup> Ibid.

<sup>49</sup> Ibid [49].

<sup>50</sup> Ibid [50].

<sup>51</sup> Ibid [51].

<sup>52</sup> Ibid [52].

<sup>53</sup> Ibid [53].

<sup>54</sup> Ibid.

### III JUDGMENT

The general principles for the statutory construction which were applied by Griffiths J were to draw a distinction between legal meaning and grammatical construction of the provision. There is a duty of the Court to give words the meaning which was intended by the Legislature.<sup>55</sup> In doing so, the context of the statute, literal and grammatical construction, purpose and cannons of construction should result in the words being construed in a certain way.<sup>56</sup> In considering the text, there must be consideration of the context of the Statute.<sup>57</sup> Griffiths J agreed with the Commissioner in that the Explanatory Memorandum to the GST Act provided the reason for the insertion of the taxi travels.<sup>58</sup> The rationale for the taxi travel special rules was based on the reporting from international jurisdictions of systemic difficulties with the registration of taxi service providers and, with that, a failure to remit GST to tax authorities.<sup>59</sup> This is why a broader construction of the statute is favoured.<sup>60</sup>

Griffiths J noted that although there is a favoured presumption that revenue statutes should exercise a trade meaning, this is not necessarily always the case as an ordinary meaning has not been denied.<sup>61</sup> There is a need for broad, non-technical construction. This should be exercised by the Court for a practical, common sense way as opposed to interpretations which are unduly technical, meticulous or literal.<sup>62</sup> *Project Blue Sky Inc v Australian Broadcasting Authority*.<sup>63</sup> reaffirmed the need to look to the context of the language of a statute as a whole.<sup>64</sup>

His Honour further noted that the software and technology used by UberX was likely not available at the time the GST Act was legislated or when the insertion was made.

Griffiths J held that the law is ‘always speaking’.<sup>65</sup> By constructing the provision in broad terms, this allows for the inclusion of enterprises which were not considered at drafting to be within the scope of the GST Act.

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<sup>55</sup> Ibid [119].

<sup>56</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28.

<sup>57</sup> *Uber B.V. v Commissioner of Taxation* [2017] FCA 110 [122].

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid [123].

<sup>61</sup> Ibid [124].

<sup>62</sup> *HP Mercantile v FCT* [2005] FCAFC 126 [41]-[53] (Hill J).

<sup>63</sup> [1998] HCA 28.

<sup>64</sup> *Uber B.V. v Commissioner of Taxation* [2017] FCA 110 [131].

<sup>65</sup> *Uber B.V. v Commissioner of Taxation* [2017] FCA 110 [130].

The definition of ‘taxi travel’ was deemed to be a composite phrase.<sup>66</sup> His Honour referenced *St George Bank Ltd v Federal Commissioner of Taxation*.<sup>67</sup> where it was emphasised that the construction of the statute of a whole must be considered rather than the individual words.<sup>68</sup> Furthermore, Griffiths stated the importance of not pulling apart, selecting, divorcing and reassembling parts of provisions.<sup>69</sup>

Finally, Griffiths J urged caution in using dictionary meanings in the mechanical examination of words within a provision.<sup>70</sup> Rather the use of dictionary definitions for the ascertainment and support of meanings was advised and accepted in this case.<sup>71</sup>

The words explaining the meaning of ‘taxi travel’ definition contained in Section 195-1 of the GST Act were interpreted by Griffiths J through a construction of their natural, ordinary meaning as opposed to a trade or specialised meaning.<sup>72</sup> The natural, ordinary meaning was further supported by dictionary meanings.<sup>73</sup>

Griffiths J rejected the Commissioner’s stance that the meaning of ‘limousine’ should be not be defined with reference to notions of luxury or prestige.<sup>74</sup> Furthermore, Griffiths J also opposed the Applicants’ ‘level of granularity’ with reference to the essential features of a ‘limousine’.<sup>75</sup> In determining the meaning of ‘limousine’, Griffiths J held that ‘limousine’ should be interpreted through its ordinary, natural meaning as well as being supported through the dictionary definition of ‘any large, luxurious car, especially a chauffeur-driven one, often with a glass division between the passengers and the driver’.<sup>76</sup> Following this, Griffiths J found that the common difference between a ‘taxi’ and ‘limousine’ was invariably the luxury feature associated with a limousine.<sup>77</sup>

Mr Fine was held to be operating a ‘taxi travel’ service pursuant to Section 144-1 of the GST Act.<sup>78</sup> Griffiths J was satisfied that the Honda Civic used by Mr Fine in his UberX services would not amount to a limousine.<sup>79</sup> However, it was noted that

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<sup>66</sup> Ibid.

<sup>67</sup> [2009] FCAFC 62.

<sup>68</sup> *Uber B.V. v Commissioner of Taxation* [2017] FCA 110 [131].

<sup>69</sup> Ibid.

<sup>70</sup> Ibid [133].

<sup>71</sup> Ibid [134].

<sup>72</sup> Ibid [135].

<sup>73</sup> Ibid.

<sup>74</sup> Ibid [137].

<sup>75</sup> Ibid.

<sup>76</sup> Ibid [136].

<sup>77</sup> Ibid [137].

<sup>78</sup> Ibid [138].

<sup>79</sup> Ibid [139].

there could be a different outcome had Mr Fine engaged in services provided for under the more luxurious UberBlack option available on the Uber Application.<sup>80</sup>

The amended application brought to the Court by UberX was dismissed.<sup>81</sup> The Court ordered that a declaratory order be made stating that the UberX services were ‘taxi travel’.<sup>82</sup>

## IV IMPLICATIONS

### A *Legal Effect of Judgment*

Although this decision related to a declaratory order for Mr Fine alone, the effect of the decision reaches far beyond the one UberX Partner. This is because the circumstances and characteristics of the UberX service delivered by Mr Fine are identical to those of other UberX Partners in Australia. This means that all UberX Partners will be required to be registered for GST in Australia pursuant to Division 144 of the GST Act. Consequently, all UberX Partners will be liable to charge, report and remit GST to the Australian Taxation Office.

This decision, albeit briefly, touched on the likelihood of UberBlack being characterised as a limousine. Consequently, it is highly likely that all UberBlack Partners will be required to register for GST pursuant to the special rules for limousines under Division 144-1 of the GST Act.

### B *Ride-Sourcing Industry*

The decision reached in this case will have a ripple effect on other ride-sourcing enterprises and transactions. This is because the essential features of a taxi have been laid down and an example set of UberX. If other ride-sourcing businesses share those similar features, they too will be required to register for GST as they will be providing a taxable ‘taxi travel’ service supply.

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<sup>80</sup> Ibid.

<sup>81</sup> Ibid [144].

<sup>82</sup> Ibid.

## V CONCLUSION

Ride-sourcing is a relatively new mode of transportation supply service. It is an innovation which was not available and therefore not in the minds of drafters when the GST Act and relevant insertions were made. The case of *Uber v Commissioner of Taxation*<sup>83</sup> established that new methods and technologies can still fall within the ambit of the special rules of registration despite not being in consideration by the legislature at drafting of law. Griffiths J favoured a broad construction of the provisions discussed as the practice would properly effectuate the intentions of Parliament, that being capturing a wide range of enterprises for GST registrability.

This case proved that the law is living and adaptable to developments in technology and enterprises. The case has reached further than the UberX Partner Mr Fine, it reaches all UberX Partners in Australia and further alludes to GST registration liability of UberBlack Partners. Furthermore, the decision made by Griffiths J affects the large and competitive ride-sourcing industry in Australia as the essential characteristics are commonly held.

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<sup>83</sup> [2017] FCA 110.





# ***COMMISSIONER OF TAXATION v BHP BILLITON LIMITED [2019] FCAFC 4***

Julien Wong\*

## **INTRODUCTION**

This case is significant as it provides further clarity to the definition of ‘associate’ in s 318(2) of the *Income Tax Assessment Act 1936* (Cth) (‘ITAA 1936’) focussing on the meaning an effect of the phrase ‘sufficiently influenced’.

The phrase ‘sufficiently influenced’ has the meaning given by s 318(6)(b), which provides that for the purposes of the section:

A company is sufficiently influenced by an entity or entities if the company, or its directors, are accustomed or under an obligation (whether formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the entity or entities (whether those directions, instructions or wishes are, or might reasonably be expected to be, communicated directly or through interposed companies, partnerships or trusts) ...<sup>1</sup>

The appellant is the Federal Commissioner of Taxation (‘Commissioner’) and the respondent is BHP Billiton Limited (‘Ltd’). The legal issue in this case is whether the Administrative Appeals Tribunal (‘AAT’) applied the meaning of ‘associate’ under s 318 of the ITAA 1936 correctly.

The case was decided by Justices Allsop (CJ), Thawley and Davies in the Full Federal Court of Australia and the judgment was handed down on 29 January 2019.

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<sup>1</sup> *Income Tax Assessment Act 1936* (Cth) s 318(6)(b).

## FACTS

The case was first heard on 31 May 2018 and was an appeal from *MWYS v Commissioner of Taxation*.<sup>2</sup> The AAT held that the taxpayer's taxable income should not include certain profits, relating to the purchase of commodities by a Swiss controlled foreign company (CFC), as 'tainted sales income'.<sup>3</sup>

BHP Billiton Marketing AG ('BMAG') is a Swiss company and a controlled foreign corporation ('CFC') of Ltd as Ltd indirectly holds 58% of the shares in BMAG. BHP Billiton Plc ('Plc') indirectly holds the other 42%.<sup>4</sup>

Ltd and Plc have been parties to a Dual-Listed Company arrangement ('DLC Arrangement') since 2001 and, under the terms of the DLC Arrangement, they each carry on a global resource business through their respective subsidiaries.<sup>5</sup>

BMAG is the main company conducting BHP's Singapore marketing business<sup>6</sup> under which it purchases commodities from Ltd's Australian subsidiaries and also from Plc's Australian entities. BMAG then on-sold those commodities and derived income from the sale of those commodities at a profit. Ltd and Plc both made sales of commodities to BMAG through their wholly owned Australian subsidiaries.<sup>7</sup>

Ltd did not dispute that the income that BMAG derived from the sale of the commodities it purchased from Ltd's wholly owned Australian subsidiaries was 'tainted sales income' of BMAG within the meaning of s 447(1) of the ITAA 1936 to be included in the calculation of the 'attributable income' of BMAG on which Ltd is liable to tax under the provisions of Part X.

As such, Ltd included, in its tax returns, income derived by BMAG from the sale of commodities which had been purchased from Ltd's Australian subsidiaries as 'tainted sales income'. This tainted sales income was included in the assessable income of Ltd.

Ltd also did not dispute that the income that BMAG derived from Plc's Australian subsidiaries was 'tainted sales income' of BMAG attributable to Ltd under the provisions of Part X if Plc's wholly owned Australian subsidiaries were 'associates' of BMAG within the meaning of s 318. Ltd, however, disputed that Plc's wholly owned Australian subsidiaries were 'associates' of BMAG within the meaning of s 318.

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<sup>2</sup> *MWYS v Commissioner of Taxation* [2017] AATA 3037.

<sup>3</sup> Income Tax Assessment Act 1936 (Cth) s 447 - Tainted sales income

<sup>4</sup> *Commissioner of Taxation v BHP Billiton Limited* [2019] FCAFC 4, [21].

<sup>5</sup> Ibid.

<sup>6</sup> 'Cecilia Jamasmie', BHP hit with \$59 million tax bill on Singapore profits (Web Page, 29 January 2019) <http://www.mining.com/bhp-hit-59-million-tax-bill-singapore-profits/>.

<sup>7</sup> *Commissioner of Taxation v BHP Billiton Limited* [2019] FCAFC 4, [21].

Ltd did not include income derived by BMAG from the sale of commodities it purchased from Plc's Australian entities as 'tainted sales income', on the basis that those entities were not 'associates' of BMAG.

The case primarily turned on a detailed factual analysis of the 'DLC Structure Sharing Agreement'<sup>8</sup> under which Ltd and Plc followed certain 'DLC Structure Principles' and 'DLC Equalisation Principles', including that:

1. Ltd and Plc must operate as if they were a 'single unified economic entity' through common boards of directors and a 'unified senior executive management'; clause 2(a);
2. The directors of each entity, in addition to their duties to the company concerned, shall have regard to the interests of the holders of the ordinary shares in each entity as if Ltd and Plc were a 'single unified economic entity' and 'for that purpose the directors of each company shall take into account in the the exercise of their powers the interests of the shareholders of the other'; clause 2(b); and
3. The 'DLC Equalisation Principles' must be observed clause 2(c); where those principles were designed to ensure that the economic and voting rights of the respective shareholders in Ltd and Plc would be in proportion to the 'Equalisation Ratio' from time to time. The 'Equalisation Ratio' is the ratio of the dividend, capital and (in relation to Joint Electorate Actions) voting rights of Ltd ordinary shares to Plc ordinary shares in the Combined Group.

A critical aspect of the DLC Arrangement was the Special Voting Share ('SVS') arrangement where a resolution could still be passed by one of the companies even where its own shareholders voted against the resolution.

Each of Ltd and Plc has issued a SVS. The SVS in Ltd is held by BHP SVC Pty Limited ('BHPSCV'), an Australian resident company.<sup>9</sup>

The SVS in Plc is held by Billiton SVC Ltd ('BillitonSVC'), a company resident in the United Kingdom.

The shares in those two entities are held by the Law Debenture Trust Corporation Plc ('Law Debenture Trust'), which is unrelated to Ltd or Plc.

Ltd and BHPSVC, PLC and BillitonSVC and the Law Debenture Trust are all parties to the SVC Special Voting Shares Deed ('SVS Deed').<sup>10</sup>

The activities of BHPSVC and BillitonSVC are relevantly limited to performing, and enforcing the performance by Ltd and Plc, of their respective obligations under the SVS Deed, the Ltd Constitution and the Plc Articles.

<sup>8</sup> Ibid [34].

<sup>9</sup> Ibid [112].

<sup>10</sup> Ibid [113].

Ltd and Plc agreed, in respect of ‘Joint Electorate Actions’ and ‘Class Rights Actions’, to hold general meetings on dates as close together as was practicable: clause 6.1(b) of the Sharing Agreement. Such meetings are referred to as Parallel General Meetings: rule 2(1) of the Ltd Constitution and the Plc Articles.

BHPSVC and BillitonSVC, as holders of the special voting shares, have specific voting rights in respect of such resolutions. The holders of the SVS must vote in the manner prescribed in the SVS Deed and the Sharing Agreement: clauses 2 and 4 of the SVS Deed; clause 4.3 of the Sharing Agreement.

Any poll on which the holder of a SVS is entitled to vote must be kept open long enough for the Parallel General Meeting of the other company to be held and the votes attaching to the SVS (if any) to be calculated and cast: clause 6.3 of the Sharing Agreement.<sup>11</sup>

### JOINT ELECTORATE ACTIONS

Joint Electorate Actions must be approved by an ordinary resolution (or in particular circumstances, a special resolution) of the votes cast by both the holders of the Ltd ordinary shares and the holder of the SVS in Ltd (voting as a single class), and the holders of the Plc ordinary shares and the holder of the SVS in Plc (voting as a single class). This was referred to as the ‘Joint Electorate Procedure’ in clause 5.2 of the Sharing Agreement.<sup>12</sup>

On a resolution for a Joint Electorate Action, the ‘Specified Number’ of votes carried by (and required to be cast by the holder of) each SVS is equal to the total number of votes validly cast on the poll on the equivalent resolution at the other entity’s Parallel General Meeting.<sup>13</sup>

Under clause 2 of the SVS Deed, Ltd undertook to notify Plc and BillitonSVC (and Plc undertook to notify Ltd and BHPSVC) of the number of votes cast in their respective meetings for and against each resolution in relation to a ‘Joint Electorate Action at the Parallel General Meeting’ and its calculation of the number of votes Billiton SVC (and BHP SVC) would carry in the meeting of the other. Clause 2 of the SVS Deed provides:

Ltd gave the following worked example of the Joint Electorate Action:<sup>14</sup>

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<sup>11</sup> Ibid [120].

<sup>12</sup> Ibid [121].

<sup>13</sup> Ibid [122].

<sup>14</sup> Ibid [127].

Assume the following votes are cast by ordinary shareholders on a motion to appoint an auditor (a Joint Electorate Action):

Company	Shareholders	For	Against
Ltd	Ordinary	5,000,000	800,000
Plc	Ordinary	200,000	4,000,000

Under the Sharing Agreement and the SVS Deed, the special voting shareholder must mirror the votes cast by the ordinary shareholders in the other company's general meeting. Accordingly, votes will be cast as follows:

Company	Shareholders	For	Against
Ltd	Ordinary	5,000,000	800,000
	BHP SVC	200,000	4,000,000
<b>TOTAL</b>		<b>5,200,000</b>	<b>4,800,000</b>
Plc	Ordinary	200,000	4,000,000
	Billiton SVC	5,000,000	800,000
<b>TOTAL</b>		<b>5,200,000</b>	<b>4,800,000</b>

From this example we can see that without the SVS arrangement, Plc would have voted against the resolution. Since the SVS arrangement required the number of the ordinary shareholders' votes in Ltd to be voted in the Plc meeting by BillitonSVC as holder of the Billiton SVS, Plc in fact passed the resolution, notwithstanding the wishes of its ordinary shareholders.

The basis of the peculiarities of these arrangements were analysed to determine if Ltd, Plc and BMAG were associates.

## HOLDINGS

The Full Federal Court allowed the Commissioner's appeal against the decision of the AAT.<sup>15</sup> The majority of the court, Allsop CJ and Thawley J with Davies J dissenting, allowed the Commissioner to take the position that Plc's Australian entities were 'associates' of BMAG because:

1. Ltd was 'sufficiently influenced' by Plc for the purposes of s318(2)(d)(i)(A) ITAA 1936;
2. Plc was 'sufficiently influenced' by Ltd for the purposes of s318(2)(e)(i)(A) ITAA 1936;

and

3. BMAG was 'sufficiently influenced' by Ltd and Plc for the purposes of s318(2)(d)(i)(B) ITAA 1936.<sup>16 17</sup>

<sup>15</sup> Ibid [2].

<sup>16</sup> Ibid [58].

<sup>17</sup> Ibid [174].

## JUDGMENT

### *Majority opinion*

Allsop CJ agreed with Thawley J's judgment. Thawley J rejected the legal reasoning reached in the AAT and also analysed the DLC arrangement in further detail, especially the voting arrangement. Thawley J found that:

- Section 318(6)(b) is not engaged only where decisions actually made elsewhere are 'rubber-stamped';<sup>18,19</sup>
- Section 318(6)(b) does not necessarily require conceding of control for example a board of a company (A) only considered taking a particular course because another entity (B) expressed its wish to do so and if it was in its best interest;<sup>20</sup>
- Section 318(6)(b) may be satisfied where there is something less than legal control and does not necessarily require 'the imposition by one of its wishes on the other' (Tribunal at [32]), or 'subservience'<sup>21</sup> (Tribunal at [31]).<sup>22</sup>

Thawley J also noted that although Ltd and Plc may be seen to be 'joint venturers' as they both have influence or control under the DLC Arrangement on a day-to-day basis, this does not alter the fact that the relationship, as disclosed by the voting arrangements, is one of which it is appropriate to say that one is 'sufficiently influenced' by the other.<sup>23</sup>

Thawley J found that BMAG was 'sufficiently influenced' by Ltd and Plc on the basis that the AAT held a too high threshold for 'sufficient influence'. The bar to determine 'sufficient influence' is lower than the subservience or abdication of responsibility as group-wide standards suggested that BMAG was likely to follow the wishes of Ltd and Plc.

### *The dissent*

Davies J analysed the statutory meaning of 'sufficiently influenced' to suggest that, contrary to Thawley J's view, all three elements of the definition must be present, that is:

1. A direction, instruction or wish communicated or expressed by an entity to the company or its directors;
2. For the company or its directors to act 'in accordance with' that direction, instruction or wish, that direction, instruction or wish must relate to how the company is to act, and the action which the company takes must be consistent with that direction, instruction or wish; and

<sup>18</sup> *Macquarie Dictionary* (online at 6 August 2019) 'rubber stamp' (def 2).

<sup>19</sup> *Commissioner of Taxation v BHP Billiton Limited* [2019] FCAFC 4 [96].

<sup>20</sup> *Ibid* [97].

<sup>21</sup> *Macquarie Dictionary* (online at 6 August 2019) 'subservient'.

<sup>22</sup> *Commissioner of Taxation v BHP Billiton Limited* [2019] FCAFC 4 [106].

<sup>23</sup> *Ibid* [155].

3. The company or its directors must be ‘accustomed’ or ‘under an obligation’ or ‘might reasonably be expected’ to act in accordance with the directions, instructions or wishes communicated or expressed by that entity.<sup>24</sup>

The difference between Thawley J’s opinion and Davies J’s dissent is this interpretation of subsection 318(6)(b):

A company is sufficiently influenced by an entity or entities if the company, or its directors, are accustomed or under an obligation (whether formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the entity or entities (whether those directions, instructions or wishes are, or might reasonably be expected to be, communicated directly or through interposed companies, partnerships or trusts).

Thawley J held that the provision comprises three matters with different considerations, each of which when independently considered could attract the conclusion that a company or its directors are ‘sufficiently influenced’.<sup>25</sup>

The provision is not a composite phrase denoting a single test<sup>26</sup> whereas Davies J cautions that it is ‘important to read s318(6)(b) as a whole’ and then turned to corporations law cases *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd*<sup>27</sup> to define ‘accustomed to act’ and *Federal Commissioner of Taxation v Peabody*<sup>28</sup> to define ‘might be reasonably expected to act’.<sup>29</sup>

In this respect, Davies J supports the conclusion of Logan J in his AAT decision.

Davies J suggested that the special voting arrangements are simply:

‘each company giving effect to the contractual terms governing the DLC Arrangement pursuant to which the companies act jointly with a mutuality of interest’,<sup>30</sup>

and not a means by which one company will act ‘in accordance with’ the direction, instruction or wishes of the other company.

<sup>24</sup> Ibid [28].

<sup>25</sup> Ibid [85].

<sup>26</sup> Ibid.

<sup>27</sup> *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2011) 81 NSWLR 47.

<sup>28</sup> *Federal Commissioner of Taxation v Peabody* (1994) 181 CLR 359.

<sup>29</sup> *Commissioner of Taxation v BHP Billiton Limited* [2019] FCAFC 4, [29].

<sup>30</sup> [2019] FCAFC 4, [41].



## CONCLUSION

In respect of the meaning of ‘sufficient influence’ the majority concluded that:

- Sufficient influence is a lower threshold than control. Sufficient influence does not require dominance and subservience or an abrogation of duties by directors.
- A company can be influenced by more than one entity, or indeed can be influenced by one entity when it is controlled by another and is not limited to a unidirectional analysis of control.
- The adoption of a course of action by a company considering the wishes by another entity may be evidence that the company is likely to act in accordance with the directions, instructions or wishes of another or others.
- Moreover, in this case “sufficient influence” can be exercised when one company can control the votes of a general meeting of another.

It may also be noted that the definition of “associate” in s318 ITAA 1936 is the standard definition for the purposes of the ITAA 1936 and the *Income Tax Assessment Act 1997* (Cth). Therefore this decision might be relevant to other provisions.

# ***FEDERAL COMMISSIONER OF TAXATION v SHARPCAN PTY LTD [2018] FCAFC 163***

Julien Wong\*

## **INTRODUCTION**

The case is interesting as it has both a factual issue and an interpretive issue. The case deals with the acquisition of gaming licences (gaming machine entitlements – GMEs) as a consequence of a change to the statutory regime in Victoria which is the *Gambling Regulation Act 2003* (Vic) ('The Act').<sup>1</sup>

The appellant is the Federal Commissioner of Taxation ('Commissioner') and the respondent is Sharpcan Pty Ltd ('Sharpcan'). The two legal issues of this case were as follows:

1. Were the outgoings of a capital nature or outgoings of capital?
2. If it was not a revenue expenditure, could Section 40-880 of the *Income Tax Assessment Act 1997* (Business related costs) apply?

In the Administrative Appeals Tribunal ('AAT'), DP Pagone J ruled that the expenditure is of a revenue nature and is deductible under s8-1 of the *Income Tax Assessment Act 1997* ('ITAA 1997').<sup>2</sup> DP Pagone stated that the outgoings reflected the expected income stream from the use of the gaming assets which the GMEs permitted. Moreover, DP Pagone went on to consider s40-880 ITAA 1997 and found that because the GMEs enhanced the value of goodwill, s40-880 could not apply.<sup>3</sup> The commissioner appealed the decision.<sup>4</sup>

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<sup>1</sup> *Federal Commissioner of Taxation v Sharpcan Pty Ltd* [2018] FCAFC 163, [4].

<sup>2</sup> *Sharpcan Pty Ltd v Federal Commissioner of Taxation* [2017] AATA 2948.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Federal Commissioner of Taxation v Sharpcan Pty Ltd* [2018] FCAFC 163.

The judges for the appeal were Justices Greenwood (ACJ), Thawley and McKerracher in the Full Federal Court of Australia and the judgment was handed down on 27 September 2018.

## FACTS

Sharpcan Pty Ltd was the corporate beneficiary of the Daylesford Royal Hotel Trust ('Trust'), presently entitled to 100% of the income of the Trust in the year of income ended 30 June 2012.

Amendments were made to the Act in 2009 by the *Gambling Regulation Amendment (Licensing) Act 2009* (Vic) (the '2009 Amending Act'). The 'main purpose' of the 2009 Amending Act is recited in s 1 of that Act as including amendments to 'substantially restructure the gaming industry' by providing for the creation and allocation of 'gaming machine entitlements ("GMEs") under which gaming by means of gaming machines will be authorised' and by 'providing for a new licence for the monitoring of the conduct of gaming' and by 'imposing certain ownership and related person restrictions in relation to licensees and persons registered on the relevant Roll'.<sup>5</sup>

As a result of these amendments, Spazor Pty Ltd, the Trustee of the Trust incurred an amount of \$600,300, payable by instalments, to acquire 18 GMEs in the year ended 30 June 2010 for 18 gaming machines on the site of the Royal Hotel.<sup>6</sup> As such, onsite gaming was then conducted by the Trustee.

Prior to the Trustee acquiring the GMEs, it was Tattersalls Gaming Pty Ltd ('Tattersalls') that owned and operated the 18 gaming machines at the Royal Hotel under a licence provided for under s 3.4.2(d) of the *Gambling Regulation Act 2003* (Vic).<sup>7</sup> Tattersalls paid an average commission of 24.7% of the daily gaming revenue to the Trustee.<sup>8</sup>

The 18 GMEs were acquired through a competitive auction process held in May 2010.<sup>9</sup>

The Taxpayer engaged an analyst to advise the maximum price that should be paid to acquire the GMEs while maintaining a reasonable rate of return during the bidding process. The GMEs were valid for 10 years.<sup>10</sup>

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<sup>5</sup> Ibid [19].

<sup>6</sup> Ibid [30].

<sup>7</sup> Ibid [264].

<sup>8</sup> Ibid [8].

<sup>9</sup> Ibid [268].

<sup>10</sup> Ibid [267].

In the absence of the GMEs, the Trustee cannot conduct gaming and as a result could not generate income as part of the Royal Hotel business.<sup>11</sup> The Royal Hotel derived revenue from a number of integrated activities including: providing accommodation in its 11 guest rooms; sales of food and drink at its restaurant, café and public bar; gaming on 18 electronic gaming machines onsite; and wagering (on racing and keno – a lottery style gambling).<sup>12</sup>

Before 9 May 2010, the Trustee was conducting the business of a hotel deriving ‘commissions’ income from gaming activities onsite and deriving income from all of the other activities conducted at the hotel made, in part at least, more robust by reason of the presence of gaming machines onsite.<sup>13</sup>

As a result of the auction on 10 May 2010, the Trustee became the gaming operator, from 16 August 2012 and was required to pay \$600,300 for the 18 new ‘GMEs’ which would enable it to ‘operate’ the gaming machines.<sup>14</sup>

It was the same 18 machines on the same site albeit for a 10 year period commencing on 16 August 2012 under the new regime.<sup>15</sup>

It was noted that from statistical evidence, each segment of the business was enhanced by the presence of gaming machines and in the period of the new regime, enhanced by the presence of GMEs and thus of gaming machines. In that sense, the business undertaking of the Royal Hotel was an integrated interdependent business operation.<sup>16</sup>

On 9 November 2015, the Trustee sold the Royal Hotel to Jamco Pty Ltd (‘Jamco’) for \$2,453,000 plus \$40,000 for stock.<sup>17</sup>

### ***Holdings***

The Full Federal Court disallowed the Commissioner’s appeal against the decision of the AAT.<sup>18</sup> The majority of the court, Greenwood ACJ and McKerracher J with Thawley J dissenting, disallowed the Commissioner to take the position that the GMEs were capital expenditures and affirmed a position of the AAT that the expenditure is deductible under s8-1 of ITAA 1997. The majority also concluded that, s40-880 of ITAA 1997 would be available to the taxpayer should the expenses be of a capital nature.<sup>19</sup>

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<sup>11</sup> Ibid [284].

<sup>12</sup> Ibid [3].

<sup>13</sup> Ibid [31].

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid [65].

<sup>17</sup> Ibid [249].

<sup>18</sup> Ibid [255].

<sup>19</sup> Ibid [254].

## JUDGMENT

### *Majority opinion*

McKerracher J agreed with Greenwood ACJ's judgment.

### *Capital vs Revenue (Factual issue)*

Greenwood ACJ said that although he accepted that some factors would suggest that the outgoings are capital in nature, other factors led him to conclude that the outgoings are on revenue account.<sup>20</sup> There were three particular considerations:

1. The outgoing is an outgoing incurred in relation to a business properly understood as an integrated hotel business characterised by the various trading activities, including gaming, conducted by the Trustee.<sup>21</sup>

The Commissioner, looked 'through' and 'beyond' the integrated undertaking of the hotel business and 'excised' from it that part of it which relates to gaming.<sup>22</sup> The business is not the business of conducting gaming at a gaming parlour and as such, it is artificial to excise gaming from the integrated activities and then determine the 'character' of the outgoing by reference to that activity.<sup>23</sup>

2. The Trustee went on to incur the obligation to pay \$600,300 on 10 May 2010 as a result of winning the bidding for 18 GMEs. If the Trustee did not win the bidding on that, it would not have any income from gaming from 16 August 2012 and the business of the integrated hotel undertaking would have been significantly at risk.<sup>24</sup>

The Trustee incurred the outgoing to preserve the hotel business as a going concern. It incurred the outgoing to preserve revenue from gaming and to preserve the contribution gaming activities made to the derivation of revenue in every other aspect of the hotel business.<sup>25</sup>

3. It is important to understand the facts as circumstances which might characterise an outgoing as in the nature of capital in one set of circumstances may not necessarily lead to the same conclusion in the circumstances under consideration.<sup>26</sup>

In obiter, Greenwood ACJ said that 'the Trustee might have come along in another set of circumstances and have purchased the hotel business including GMEs which would have rendered the purchase an outgoing on capital account.'<sup>27</sup>

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<sup>20</sup> Ibid [184].

<sup>21</sup> Ibid [185].

<sup>22</sup> *Encyclopaedic Australian Legal Dictionary* (online at 6 August 2019) 'gaming'.

<sup>23</sup> *Federal Commissioner of Taxation v Sharpcan Pty Ltd* [2018] FCAFC 163, [185].

<sup>24</sup> Ibid [186].

<sup>25</sup> Ibid [187].

<sup>26</sup> Ibid [190].

<sup>27</sup> Ibid.

In this case, the acquisition of GMEs was not a normal acquisition in the sense of an arms-length sale and purchase by a willing buyer and a willing seller but the acquisition was due to the changed circumstances brought about by government intervention.<sup>28</sup>

Therefore, the Trustee had to respond to the possible loss of the right to derive revenue from gaming activities. The interdependence of gaming activities with other activities conducted in the business of the hotel was critical to the revenues and ultimately profitability.<sup>29</sup>

***Could s 40-880 of ITAA 1997 apply? (Interpretive issue)***

Greenwood ACJ considered the operation of s 40-880, if the outgoing is in the nature of capital, the second question in this appeal requires a determination.

Section 40-880(1) of the ITAA 1997 provides that the object of the section is to make certain business capital expenditure deductible over five years if not otherwise taken into account and not otherwise denied by a provision of the ITAA 1997.<sup>30</sup> Section 40-880(2)(a) provides that a taxpayer can deduct, in equal proportions over five income years starting in the year in which it is incurred, capital expenditure incurred in relation to the taxpayer's business.<sup>31</sup>

However, s 40-880(5) provides, among other things, that a person cannot deduct anything under the section for an amount of expenditure incurred to the extent that it could (apart from s 40-880) be taken into account in working out the amount of a capital gain or a capital loss from a 'CGT event': s 40-880(5)(f).<sup>32</sup>

Section 40-880(6), however, limits the application of the exception contained in s 40-880(5)(f) by providing that the exception does not:

... apply to expenditure you incur to preserve (but not enhance) the value of goodwill if the expenditure you incur is in relation to a legal or equitable right and the value to you of the right is solely attributable to the effect that the right has on goodwill.<sup>33</sup>

The interpretive issue here were the words 'to preserve (but not to enhance) the value of goodwill'.

Greenwood ACJ said that the words should be read, together with the qualification, in this way: 'to preserve (but not to enhance) the value of goodwill'.

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid [191].

<sup>30</sup> Ibid [194].

<sup>31</sup> Ibid [195].

<sup>32</sup> Ibid [196].

<sup>33</sup> Ibid [197].

The phrase is focused upon the purpose at the moment in time the expenditure is incurred.<sup>34</sup>

In other words, an ‘expenditure incurred to preserve (but not enhance) the value of goodwill’, is not to be considered as firstly whether the expenditure was incurred to preserve the value of goodwill and a second disqualifying test of whether the expenditure had the effect of enhancing goodwill.<sup>35</sup>

Greenwood ACJ said that:

If the Parliament had intended to introduce such a consideration, it would have used plain words in doing so. It would have adopted words such as: “the exceptions in paragraphs (5)(d) and (5)(f) do not apply to expenditure you incur to preserve, but not having the effect of, enhancing, the value of goodwill ...”<sup>36</sup>

In this case, when the Trustee sold the Royal Hotel to Jamco for \$2,453,000.00 plus \$40,000.00 for stock, the GMEs were transferred to Jamco to conduct gaming. Even though no consideration was attributed, Jamco assumed the liability for the remaining payments to be paid for the GMEs.<sup>37</sup>

From the evidence provided, there was little doubt that the net profit from gaming in the years 2013 to 2015 increased as compared with the years from 2006 to 2012 therefore, the effect or consequence of incurring the outgoing was to enhance the value of goodwill.<sup>38</sup>

However, Greenwood ACJ determined that the Trustee purpose of incurring the outgoing at the time was to preserve the value of goodwill, not to enhance it. As discussed before, the consequence that the value of goodwill increased or was enhanced, was solely because the Trustee preserved the gross revenue and net profit of the hotel business which, absent the expenditure, would have been significantly diminished.<sup>39</sup>

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<sup>34</sup> Ibid [219].

<sup>35</sup> Ibid [220].

<sup>36</sup> Ibid.

<sup>37</sup> Ibid [249].

<sup>38</sup> Ibid [254].

<sup>39</sup> Ibid [254].

### ***The dissent***

Thawley J disagreed with McKerracher J and Greenwood ACJ on both issues.

### ***Capital vs Revenue***

Thawley J considered the expenditure to be of a capital nature because of the following:

1. GMEs were capital assets enduring for a period of 10 years, forming part of the business structure and that the payments were made for those capital assets.<sup>40</sup>
2. The GMEs was a one-off expenditure which would secure for the Trustee the ability to conduct gaming for a period of 10 years. It was not expenditure which would need to be repeated over and again as a necessity of trade.<sup>41</sup>
3. There was a significant, one-off, structural change to the way the business operated.<sup>42</sup>
4. The new regime gave rise to a new business structure, with different rights, obligations and consequent risk.<sup>43</sup>

### ***Application of s40-880***

Thawley J stated that

The purpose of a statute resides in its text and structure, not outside of the statute. The Court is to give the words of the statute the meaning the legislature is taken to have intended them to mean. The task of construction will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials: *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573.<sup>44</sup>

Thawley J also mentioned that the inquiry into whether the expenditure was ‘incurred to preserve (but not enhance) the value of goodwill’ is an inquiry into the purpose of the expenditure, not the effect of it.<sup>45</sup>

However, Thawley J found that the expenditure here was incurred to acquire the GMEs. The Trustee purchased the GMEs so that it could commence lawfully conducting gaming activities at the Royal Hotel in August 2012 and to continue to do so for a period of 10 years, deriving roughly equivalent profit before the statutory amendments.<sup>46</sup>

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<sup>40</sup> Ibid [277].

<sup>41</sup> Ibid [299].

<sup>42</sup> Ibid.

<sup>43</sup> Ibid [286].

<sup>44</sup> Ibid [317].

<sup>45</sup> Ibid [321].

<sup>46</sup> Ibid [335].



Therefore the real purpose of the expenditure was to ‘acquire’ the GMEs as part of the profit making structure of the business, not to ‘preserve’ (but not enhance) the value of goodwill.<sup>47</sup>

Moreover, Thawley J asserted that the GMEs had a distinct value as they resulted in a taxable income stream. This income stream was different from that which had previously been earned and it was likely to be significantly more profitable after the last instalment was paid in 2016. The GMEs were also assets capable of transfer.<sup>48</sup>

### CONCLUSION

This case is significant as it emphasises the need for a holistic review of the business before categorising the expenditures as either revenue or capital.

Moreover, the case highlights that interpretive issues are still prevalent in taxation cases.

The Commissioner has filed an application for special leave to have this matter considered by the High Court of Australia. The special leave to appeal has been granted on 20 March 2019.<sup>49</sup>

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<sup>47</sup> Ibid [339].

<sup>48</sup> Ibid [343].

<sup>49</sup> *Commissioner of Taxation of the Commonwealth of Australia v Sharpcan Pty Ltd* [2019] HCAtrans 48.