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mission statement:

‘The Queensland Law Society Journal is a publication containing peer-reviewed articles of high legal scholarship relevant to Queensland practitioners. Submissions from academic and non-academic writers are welcome.’
Alternative models for a Queensland charter or bill of rights

While there has been discussion on an Australian bill of rights, consideration of a Queensland charter or bill is also on the agenda. Ankush Sharma looks at interstate and overseas models.

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Salvaging insolvent mining companies

Chai Lim discusses how New Zealand's statutory management procedure could be applied in Australia to provide the Financial Investment Review Board and Treasury time to formulate a coordinated policy response to the global financial crisis.

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Gunland – Brat of Shevill

John-Paul Mould critically explores the logical underpinning and dire consequences associated with the application of principles in the domain of commercial leasing.

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Surveillance of Queensland private sector employees

Publicly accessible and affordable advances in information technology and a Big Brother culture have provided us with new legal and ethical challenges. John-Paul Mould discusses how the law, in relation to Queensland workplaces, still marches behind the technological revolution.

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Articles for the QLS Journal are selected for potential publication based on topicality and their relevance to practitioners.

Each article should be accompanied by a 50-100 word abstract summarising the main points and noting the relevance of the material included in the article for Queensland practitioners.

Writers should provide a head-and-shoulders photograph (jpg, tif or eps file) and biographical information with the article.

Feature articles should not exceed 5000 words, though longer articles may be considered. Case notes should not exceed 2500 words. Always write ‘less’ rather than ‘more’.

- Plain English style is required
- Articles should be in the third person
- Convert measures to metric, and money values to Australian dollars
- Italise the names of Acts, and names of cases
- Headings and subheadings should be in lower case; use bold to identify
- Use double quotation marks
- Use numerical (1,2,3...) endnotes rather than footnotes
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by Ankush Sharma

The International Law/Relations Section of the Queensland Law Society has prepared this information paper to inform members of the alternative models available for a proposed Queensland charter or bill of rights. It contains a brief summary of the key elements of established human rights instruments in the Australian Capital Territory, Victoria, New Zealand, Canada and the United Kingdom.

Members are invited to make submissions to the Society on:
(a) the model they consider most appropriate for Queensland, or
(b) which of the various elements from the models presented should form part of a Queensland charter or bill of rights.

Members should note that this paper presents only a summary of the various models and is not meant as a comprehensive study of all the possible forms a state charter or bill of rights could take.

(1) Australian Capital Territory – Human Rights Act 2004:
The ACT Human Rights Act 2004 (the ACTHRA) was the first “bill of rights” legislation in any Australian jurisdiction. It came into force on July 1, 2004, as an ordinary statute.

What human rights are protected?
Most of the rights protected by the ACTHRA are sourced from the International Covenant on Civil and Political Rights (ICCPR). Therefore, many of the legal principles applicable to the interpretation and operation of the ACTHRA are imported from international law (see for instance, s31).

The ACTHRA stipulates that it is not exhaustive of all the rights individuals may enjoy under domestic or international law (s7). A sample of the rights which do appear in Part 3 of the ACTHRA is as follows:
(a) The right to life (s9)
(b) The freedoms of movement (s13), expression (s16) and thought, conscience, religion and belief (s14)
(c) The right to a fair trial (s21)
(d) The right not to be tried or punished more than once (s24) and not to be subject to retrospective criminal laws (s25).

What (if any) limitations or restrictions of those rights are permitted?
The ACTHRA provides that human rights may only be subject to those limits which are reasonable, authorised by an ACT law and can be demonstrably justified in a free and democratic society (s28). This introduces the proportionality test. It requires that any proposed restriction of a human right is only to the extent necessary to achieve a legitimate aim.

Who is entitled to rights protection? And who is bound to observe human rights?
The ACTHRA states explicitly that it is only individuals who have human rights (s6). By implication, the ACTHRA applies only to natural persons and not to corporations or other incorporated bodies.

Whether the ACTHRA binds only public officials is not entirely clear. The extent of its reach is the subject of some debate. On the face of the statute, it appears the intention was to formally entrench a practice of interpreting ACT legislation consistently with human rights (s30). However, the ACTHRA’s reach may extend to capturing all conduct of public officials and, arguably, private conduct.

How are human rights protected?
As the ACTHRA is an ordinary statute, it does not override other legislation. It does, however, provide a wide range of mechanisms by which human rights are protected. The more important of these are as follows:
(a) As mentioned, the ACTHRA requires legislation be interpreted in a way that is compatible with human rights, so far as that is consistent with its purpose (s30). This rule of construction is applicable to the judiciary and public decision makers.
(b) Also as previously mentioned, the ACTHRA permits consideration of foreign and international jurisprudence when interpreting human rights (s31).
(c) The Supreme Court may make a declaration of incompatibility where it is satisfied that an ACT law is not consistent with a human right. However, such a declaration does not render the offending law invalid or affect its operation or enforcement, nor does it affect the rights or obligations of anyone (s32). The Attorney-General must prepare a written response to the declaration of incompatibility and present it to the Legislative Assembly (s33).
(d) The ACTHRA requires the Attorney-General to prepare a written compatibility statement for bills presented to the Legislative Assembly. The compatibility statement must state whether the bill is consistent with human rights and, if it is not, how it is inconsistent (s37). The ACTHRA also requires a standing committee to report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly (s38). However, a failure to comply with either of those procedures will not affect the validity, operation or enforcement of an ACT law.
(e) The ACTHRA establishes the office of the human rights commissioner (s40). The commission does not receive complaints about alleged human rights infringements. It does however, along with the Attorney-General, possess a right of intervention in a proceeding before a court that involves the application of the ACTHRA (s35 and 36).
(f) As of this year, the ACTHRA also permits individuals to commence proceedings against a public authority (as defined) where that person claims they are a victim of a contravention of the ACTHRA by the public authority (s40C).
A contravention occurs where the public authority:

(i) acts in a way which is incompatible with a human right,

or

(ii) when making a decision, fails to give proper consideration to a relevant human right (s40B).

Significantly, courts and the legislative assembly are not considered public authorities (except in their administrative capacities), although police and public employees are (s40).

Other than having the right to commence proceedings against the public authority, the affected individual may rely on their rights under the ACTHRA in other legal proceedings.

What remedies are available when human rights are denied or violated?

The ACTHRA contains no express remedy clause. However, in proceedings against a public authority for a contravention of the ACTHRA, the Supreme Court may grant the relief it considers appropriate except damages (unless there is a separate right to damages). Generally, it appears that the intention was for human rights arguments to be raised in proceedings and to provide fresh grounds on which a claim can be based. In this regard, it is expected that ACT courts will develop a remedial jurisdiction which may grant a range of remedies, such as injunctive relief, declaratory relief, mandamus and certiorari. Ascertaining the appropriate remedy is likely to depend on the nature of the proceedings and the breach in question.

What remedies are available when human rights are denied or violated?

The Victorian Charter provides that a human right may be permitted or restricted.

(2) Victoria – Charter of Human Rights and Responsibilities Act 2006


What human rights are protected?

The human rights protected by the Victorian Charter are based largely on those contained in the International Covenant on Civil and Political Rights (ICCPR). They are numerous and include:

(a) the right to life (s9)
(b) the right to protection from torture and cruel, inhuman or degrading treatment (s10)
(c) the freedoms of movement (s12), expression (s15) and thought, conscience, religion and belief (s14)
(d) cultural and property rights (ss19-20)
(e) the right to liberty and security of person (s21)
(f) rights concerning criminal proceedings and in respect of retrospective criminal laws (ss25-27).

What (if any) limitations or restrictions of those rights are permitted?

The Victorian Charter provides that a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors (s7). The provision goes on to list a number of factors which closely reflect elements of the internationally recognised test of proportionality. As is the case for the ACTHRA, the test in effect provides that restrictions on human rights are permissible so long as the extent of the limitation is proportionate to the permitted objective sought to be achieved. All the rights protected by the Victorian Charter are therefore subject to such reasonable limits. That is, there are no absolute rights.

Who is entitled to rights protection? And who is bound to observe human rights?

Only natural persons (and not legal entities such as corporations) receive the benefit of the human rights protected and promoted by the Victorian Charter (ss3 and 6).

The Victorian Charter binds the three branches of government – the legislature, the judiciary and the executive (s6). However, each branch must observe the provisions of the Victorian Charter in different ways. How this is achieved is discussed under the next subheading.

How are human rights protected?

The Victorian Charter binds each of the three branches of government to the protection and promotion of human rights.

The legislature must receive a “statement of compatibility” from the member of parliament who introduces a new bill (s28). The statement must state whether the bill is compatible with human rights and if so, how. Alternatively, if the member considers the bill is incompatible with human rights, the statement must state the nature and extent of that incompatibility. Significantly, a failure to provide a statement of compatibility does not affect the validity, operation or enforcement of the subject legislation (s29).

In addition to statements of compatibility, the Victorian Charter also requires a committee consider any proposed bill and report on whether it is compatible with human rights (s30).

Under the Victorian Charter, and so far as it is possible, courts and tribunals are required to interpret all statutory provisions in a way that is compatible with human rights. In doing so, consideration may be given to foreign and international jurisprudence (s32). Where the Supreme Court considers it cannot interpret a legislative provision consistently with a human right, it may make a declaration of inconsistent interpretation (s36). Where such a declaration is made, notice of it must be given to the Attorney-General and the Minister in charge of administering the affected statutory provision must prepare a written response for parliament within six months (s37). Significantly, a declaration of inconsistent interpretation does not affect the validity, operation or enforcement of the statutory provision in question, nor does it create any legal right or give rise to any civil cause of action (s36).

Where, in any proceeding, a question arises concerning the application of the Victorian Charter or the interpretation of a statutory provision in accordance with the Victorian Charter, the question may be referred to the Supreme Court for determination (s33). In the same circumstances, the Attorney-General has a right to intervene in the proceedings and be taken as a party to those proceedings (s35).

The third branch of government, the executive, is referred to in the Victorian Charter as “public authorities”. Its definition is broad enough to capture government Ministers, public servants, local councils, the Victoria Police and potentially a private corporation when exercising public functions on behalf of the state (s4). The Victorian Charter provides that it is unlawful for a public authority to act incompatibly with a human right or fail to give proper consideration to a relevant human right when making a decision (s38).
What human rights are protected?
The NZBRA largely reflects the content of the ICCPR. It is worth noting that the NZBRA does not affect any existing right or freedom, not having created any new rights. The NZBRA contains no express remedies clause for breaches of the protected rights and freedoms. However, the courts in New Zealand have applied a broad range of remedies, having taken the view that it is their positive duty to provide appropriate redress to persons whose rights have been infringed. The courts have therefore determined the most effective and appropriate remedy based on the individual circumstances of each case. As a result, courts have awarded a wide range of remedies, including:

(a) Excluding evidence obtained through an infringement of a protected right
(b) Issuing a stay of proceedings
(c) An award of compensation
(d) Referring a decision back to the original decision-maker
(e) Reducing the sentence of an offender, and
(f) Issuing injunctions requiring positive action or an order for return of property.

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The New Zealand Human Rights Act 1993 also provides a complaints mechanism (to the Human Rights Tribunal) for breaches of the freedom from discrimination provision in the NZBRA.

What remedies are available when human rights are denied or violated?
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What human rights are protected?
The Canadian Charter guarantees a wide range of freedoms and rights. It ensures protection of fundamental freedoms, which include the freedoms of religion, expression and peaceful assembly (s2). It also provides protection for:

(a) democratic rights, which guarantee Canadians a democratic government, such as the right to vote (ss3-5)
(b) mobility rights, which afford Canadians the right to move from place to place (s6)
(c) legal rights, which concern dealings with the justice system, such as the right not to be arbitrarily detained or imprisoned or various rights on arrest or detention (ss7-14), and
(d) equality rights, which are directed at ensuring equality before and under the law and preventing
discrimination (s15).

There are also provisions concerning the official languages of Canada (ss16-22) and minority language educational rights (s23).

The Canadian Charter does not contain all of the rights which are afforded legal protection in Canada (s26), there being a number of other federal, provincial and territorial laws which create and protect rights and freedoms.

The Canadian Charter allows the government to impose reasonable limits on the guaranteed rights and freedoms which can be demonstrably justified in a free and democratic society.

What (if any) limitations or restrictions of those rights are permitted?
The Canadian Charter allows the government to impose reasonable limits on the guaranteed rights and freedoms which can be demonstrably justified in a free and democratic society (s1). The government is also permitted to make laws which are exempt from those provisions of the Canadian Charter concerning the fundamental freedoms, legal rights and equality rights (s33). Where a law containing such an exemption is made, it will expire after five years (unless re-enacted).

The Canadian Charter may be amended only when seven out of the 10 provincial legislatures agree to it and the population of those seven provinces make up at least half of the total population of Canada.

Who is entitled to rights protection? And who is bound to observe human rights?
Any person in Canada is afforded the rights and freedoms contained in the Canadian Charter. This includes private corporations. However, some of the rights are available to Canadian citizens only — in particular, the right to vote and certain mobility rights.

The Canadian Charter applies only to Canada’s federal and provincial governments. Therefore, only public authorities, and not private entities (such as private individuals or businesses), are bound to observe the Charter’s rights and freedoms.

How are human rights protected?
That the Canadian Charter forms part of the Canadian Constitution means that governments must ensure that any proposed laws are consistent with it. This is in addition to the remedial provisions of the Canadian Charter.

What remedies are available when human rights are denied or violated?
There are three possible legal remedies available to a person whose rights or freedoms have been infringed or denied:

(a) they can apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances (s24(1))

(b) where evidence has been obtained in violation of any of the guaranteed rights or freedoms, a court can exclude that evidence because, having regard to all the circumstances, the admission of it would bring the administration of justice into disrepute (s24(2))

(c) under the Constitution Act 1982, if a court finds that a law is inconsistent with the Canadian Charter, it can rule that the law is of no force or effect, to the extent of the inconsistency.

(5) United Kingdom – Human Rights Act 1998

The United Kingdom Human Rights Act 1998 (the UKHRA) came into force in 2000. It gives further effect to the European Convention on Human Rights (the ECHR).

What human rights are protected?
The UKHRA affords protection to most of the rights and fundamental freedoms set out in the ECHR and its specified Protocols (s1). Some of the key rights covered by the UKHRA include:

(a) The right to life (Art.2 of the ECHR)

(b) Freedom from torture or inhuman or degrading treatment (Art.3)

(c) The right to a fair trial (Art.6)

(d) No punishment without law (Art.7)

(e) Freedoms of belief (Art.9), free expression (Art.10) and assembly and association (Art.11)

(f) Freedom from discrimination (Art.14)

(g) Rights concerning property, education and free elections (Arts 1-3 of the First Protocol) as well as the abolition of the death penalty (Art.1 of the Sixth Protocol).

It is significant that UK courts must take into account the jurisprudence developed by the European Court of Human Rights as well as the opinions and decisions of the European Commission of Human Rights when determining a question in connection with the rights protected by the UKHRA (s2).

What (if any) limitations or restrictions of those rights are permitted?
While the UKHRA contains no express provision stipulating what restrictions are permitted (unlike, for instance, the Canadian Charter), there is an established distinction under the ECHR between absolute, limited and qualified rights. Absolute rights, such as the right to life, should never be interfered with by the state. Limited rights, such as the right to a fair trial, can be limited in the certain specified circumstances set out in the ECHR. Qualified rights, such as the right to religion and belief, may be restricted only if such interference has a basis in law, is necessary in a democratic society and is in furtherance of a permissible aim set out in the relevant Article, such as the prevention of crime or the protection of public order or health. Importantly, any interference with rights will only be justified if the limitation or restriction is proportionate to the achievement of the permissible aim.

Who is entitled to rights protection? And who is bound to observe human rights?
Where a public authority commits an act against a person which is incompatible with any of the protected rights, the UKHRA allows the person to bring legal proceedings against that authority (s7).

The entitlement to bring the legal proceedings (or rely on the UKHRA in existing proceedings) is given to the same category of persons permitted to bring applications under the ECHR. Specifically, any person, non-governmental organisation or group of individuals is entitled to rights protection under the UKHRA so long as they are the victim of the unlawful act by the public authority.
On the other hand, it is public authorities who are compelled to observe the rights protected by the UKHRA. This includes courts, tribunals and any person whose functions are functions of a public nature, but does not include parliament (s6).

Although there is no direct application of the UKHRA between private parties, commentators have noted that as courts must act consistently with the protected rights, it is inevitable that the UKHRA will have some effect on the rights of persons in proceedings between private parties.

How are human rights protected?
The UKHRA requires that legislation be read and given effect in a way which is compatible with the protected rights, so far as that is possible (s3). Where a court does find an inconsistency between a provision of legislation and a protected right, it may make a declaration of incompatibility (s4). However, such a declaration does not affect the continuing validity and operation of the legislation and is not binding on the parties to the proceedings in which it is made. That being said, a Minister may amend infringing legislation following a declaration of incompatibility if he or she considers there are compelling reasons to do so (s10).

The UKHRA also requires a Minister to make a written statement that a proposed Bill is compatible with the protected rights. If the Minister is unable to make such a statement of compatibility, he must make a statement to that effect and that the government nevertheless wishes to proceed with the Bill (s19).

What remedies are available when human rights are denied or violated?
Where a court finds that the act of a public authority is unlawful, it may grant such relief or remedy as it considers just and appropriate, provided it is within its powers (s8). The relief may include an award of damages provided that it is necessary to afford just satisfaction to the person in whose favour it is made.

Concluding remarks
The purpose of this paper has been to inform members of the various elements of a possible Queensland statutory charter or bill of rights by breaking down and comparing the key features of existing human rights instruments in comparable jurisdictions. The Section emphasises that it is not necessary to advocate a model identical to any of those featured above. It may be that members will consider a model incorporating various components from the examples provided to be the most appropriate for Queensland.

To this end, the Section has also prepared an Executive Summary containing a concise comparison of the differences between the alternative models. It also features a table which contrasts the some of the key characteristics of weak and strong human rights instruments as is apparent from the preceding examination. Members may find this of some benefit when making submissions to the Society.

Notes
6 See http://www.pch.gc.ca/progs/jdp-jdp/canada/guide/overview_e.cfm

Ankush Sharma is a former member of the QLS International Law and Relations Section.
In the decision of Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd (hereafter “Gumland”) delivered by the High Court of Australia in March 2008, it was confirmed that general contractual principles apply to leases. Relevantly for this article, such paraphrased principles include:

1. A court will not disturb an express and clear provision in a lease deeming an inominiate or intermediate term essential.
2. Where the lessee has repudiated the lease or committed a breach of an essential term, the lessor may not only terminate the lease and recover arrears of rent, but also recover damages for future alleged loss.

This article critically explores the logical underpinning and dire consequences associated with the application of such principles in the domain of commercial leasing.

**Essential terms**

As a matter of construction a court would usually read down covenants in a lease contra proferentum and classify terms as intermediate in nature. For example, failure to perform an obligation which is otherwise essential on a stipulated date or, if no date is stipulated within a reasonable time, does not entitle the other party to bring the contractual obligations to an end unless the time of performance is expressly or impliedly made essential by the contract or is made essential by an effective Notice to Complete. Further, a clause permitting re-entry on breach does not necessarily render the clause an essential term of the lease.

The construction process in the context of determining the classification of lease covenants involves applying the “test of essentiality”. This test has been defined as “whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance or the promise that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise, as the case may be, this ought to have been apparent to the promisor”. The term must go to the root of the contract.

The High Court in Shevill v Builder’s Licensing Board indicated that a covenant to pay rent will not, without more, be a fundamental or essential term of a lease. However, in Gumland differently constituted the High Court distinguished Shevill and classified the subject lessee’s failure to pay rent as a breach of an essential term. The classification followed the contractual labelling of the covenant to pay rent within the lease.

This trend was hinted at in DHK Retailers Pty Ltd v Leda Commercial Properties Pty Ltd, in which the court found the subject lease was to be construed literally according to its express provisions and should not be read down to exclude trivial breaches from its operation. The court was reluctant to embark upon applying an essentiality test when the drafter of the lease had presumably already done so.

The decision has great significance for lease parties and lawyers alike. Whilst the High Court has reserved itself a discretion to superimpose its own test of essentiality where words are unclear or the conduct of the parties militates against a literal construction, in the circumstances of its decision it has officially endorsed the effectiveness of “Anti-Shevill” clauses to enable a lessor to more easily effect forfeiture and to sue for loss of bargain damages.

The bastions of freedom of contract, certainty and party autonomy always appear attractive. However, in a practical sense a lessor only needs to copy and effect the execution of a Gumland lease to ensure the enforcement of draconian consequences for the lessee.

**Repudiation**

Whilst there may be overlap and frequent interchangeability, the distinction between termination by repudiation and breach of an essential term (also called “fundamental breach”) is the court’s focus. Fundamental breach looks at the seriousness of contractual term itself, whereas repudiation looks at the seriousness of the breach.

Repudiation of a contract is always a serious matter not likely to be found or inferred.

Repudiation of a contract may be express, by virtue of a declaration by a lessee, or implied by the court. However, generally, a court will not usually imply that a mere breach of covenant on the part of the lessee amounts to a repudiation of a lease. Repudiation of a contract is always a serious matter not likely to be found or inferred.

There is no precise formulation of the conduct necessary for a breach to characterised as repudiatory. Applying an objective test, the court must be satisfied of an actual renunciation of the parties’ liabilities such as a permanent abandonment of the demised premises, or a demonstration of an intention by the lessee to perform its obligations in a manner substantially inconsistent with those obligations such as the commission of a series of serious breaches.

In the context of a covenant to pay rent, default a priori is not sufficient to constitute repudiation of a lease. It would indeed be a harsh doctrine. Paying some, but not all of, the rent, will not determine the lease. If a tenant is suffering financial difficulties but nonetheless doing its best to pay the rent, the court will rarely infer an intention to repudiate its obligations. There needs to be something more, such as:

- Prolonged and significant arrears coupled with admissions of inability to pay rent.
- Failure to pay rent, vacating premises, removing materials and breaching a covenant to continue carrying on business in the demised premises.
- Where a lessee’s conduct is not only dilatory, but “also cavalier and recalcitrant.”

The reasoning supporting this principle is that repudiation or a breach of an essential term of a lease involves considerations which are not present in the case of an ordinary contracts. The lease not only vests an estate or interest in land to the

by John-Paul Mould
lessee but also creates a relational contract between the parties (similar to an employment contract) that centres upon that interest in property7.

Whether the failure to pay rent in Gumland amounted to repudiation was not relevant to the High Court appeal. It involved a sub-lessee failing to pay rent, the default of which the court held the lessee was liable. The sub-lessee did not refuse to pay rent altogether but unilaterally chose to pay only half of the rent payable. The reason for the lessee’s sub-letting was difficult trading conditions experienced when it was in possession. However, there does not seem to be any evidence that the lessee or the sub-lessee, a nationwide entity, were experiencing financial difficulties at the time.

In light of the sub-lessee’s apparent ability to perform its rental obligations, did the sub-lessee’s conduct be deemed to amount to renunciation by the lessee of its obligations under the lease? The lessee could only be held to have renunciated if it had not taken active steps to enforce the sub-lease. There was no evidence that this had not been done. Accordingly, if there was not a finding of breach of essential term, the High Court may have found the landlord to have unlawfully terminated the lease.

There is authority to suggest that in the event of an assignment, the assignee and not the assignor is the entity that has locus standi and an entitlement to relief against forfeiture. Accordingly, it may well have been that the original lessee in Gumdale, without the co-operation and/or joinder of the defaulting sub-lessee, could not have brought the appropriate application against forfeiture in any event.

**Loss of bargain damages**

The significance of the court refusing to intervene where parties have unambiguously agreed that trivial breaches of essential terms of a lease can be otherwise classified is the liability of a lessee to loss of bargain damages. In the event of an essential breach or repudiation, the lease becomes voidable at the option of the lessor.

Until the lessor elects to terminate the lease, the lease will remain on foot and rent will be payable under it5. However, when the lease has been determined by the lessor, the lessee becomes a tenant at will or trespasser, required to pay mesne profits until the lessee’s departure and thereafter loss of bargain damages.

Whilst only obiter dictum, the joint judgment of Gumland went so far as to express a view that parties can validly agree that the breach of a term may justify an award of loss of bargain damages even though the defaulting party’s conduct is not repudiatory and the breached term is not essential. Previously it was held that no lease that purports to preserve to the lessor a right of action in damages after termination can empower a lessor to recover loss of bargain damages where such right would not exist at common law6.

It was significant to the High Court in Shevill that nowhere in the lease does the lessor expressly provide the right to recover loss of bargain damages. However, failure to express an entitlement does not preclude it as it arises at common law7. Provided the conditions referred to above are satisfied, the right will apply unless the parties contract out of it.

In contrast to the position the High Court of Australia has now entrenched, in England a lessor cannot recover such loss of bargain damages8. While the High Court is no longer bound to follow decisions of the House of Lords, a radical departure from the 40-year-old decision of White & Carter (Council) Ltd v McGregor flies in the face of judicial comity dictating that it be followed9. The author’s view is that damages are not an adequate remedy.

One reason for the English position derives from the evaluation process.

The courts usually come to such damages by calculating the balance of rent due less what a lessor is likely to obtain for the balance of the lease term, subject to a discount in an appropriate case for acceleration of damages awarded10. Where the premises have been re-let at the time when the damages are to be assessed, the benefit received by re-letting would be taken into accounts.

The courts have sometimes varied the method of assessing damages to be the difference between the value of the premises as a going concern with a lessee in possession for the term of the lease and their value without a lessee. However, “value” is not the capital value of the premises with and without the income stream derived from the existing lessee.

**Why should repudiation entitle the innocent party to accelerated payment when the contract stipulates that, in circumstances that have occurred, that party should receive payment at a later time?**

The assessment is determined in a lump sum either at the date of the acceptance of the essential breach or at the date of repudiation.

This process raises two issues of concern.

Firstly, why should repudiation entitle the innocent party to accelerated payment when the contract stipulates that, in circumstances that have occurred, that party should receive payment at a later time?11 “There is something to be said for a rule that gives him [the lessor] no more than he bargained for, that is to say damages against the repudiating party for failing to discharge that party’s obligations as and when they fall due”.12 Damages payable by instalments equivalent to rent or otherwise avoid the courts attracting the criticism of a penalty. A lessor is rewarded by the lessee’s repudiatory default by becoming entitled to retake possession and relet the premises, whereas it is still obligated by its duty to mitigate the damages.

Secondly, the nature of the assessment process is a fortunate-telling expedition. Damages are awarded for loss of chance13 and thus involve guesswork rather than estimation4. The damages must be evaluated by reference to the probability of occurrence2. The Court must take account of the commercial prospects of obtaining a tenant for the balance of the term then left under the lease and the rent that could be commanded during that period. In a large lease, this can be an impossible task4. The High Court considers this difficulty does not relieve it from the responsibility of estimating them as best that it can. However, annexed to that responsibility is the liability for injustice that will always result from the perspective of the lessor or lessee because damages will either exceed the ultimate loss suffered by one of the parties. The High Court has previously conceded that the exercise of a contractual power to terminate might be oppressive to the lessee and productive of a windfall profit for the lessors. “Might” is too lenient: the risk is reality. An unjustly enrichment is
inevitable.

Recorded manifestations of the injustice are not hard to find. In 

_Nangus Pty Ltd v Charles Donovan Pty Ltd_, the court held that a lessor’s subsequent loss of ownership of the leased premises was irrelevant. There are many other factors to consider such as market fluctuations, frustration or other vitiating factors.

Another difficulty with the concept of loss of bargain damages is the scope of the assessment. In 

_G & A Lanteri Nominees Pty Ltd v Fishers Stores Consolidated Pty Ltds_, the court was faced with the decision as to whether to focus on long-term loss in the value of the shopping centre or short-term losses which the court found virtually impossible to calculate. In this case, no measurable loss was found. The case begs the question: how far do we project into the future? Or more relevantly, with these uncertainties, why should we project at all?

To avoid the uncertainty and difficulties of assessing damages, it is not uncommon for lessees, such as in _Gumland_, to insert “agreed damages” clauses or “acceleration of rent” clauses. However, the courts will inevitably strike down such clauses if they amount to a penalty. The logical point question surely is: if the parties cannot assess their own damages, why is a court in any more favourable position to do so? One doubts whether any attempt at quantifying damages could be held other than to be penal in nature because of the uncertainty involved. The High Court previously recognised that there is an “incongruity” between the concept that a lessor’s damages for a non-repudatory breach are limited to losses caused by the breach alone, whereas a clause which imposes a liability on the lessee to pay the loss caused by the exercise of a power to terminate a lease upon breach is not a penalty.

The courts have attempted to remedy the issue of vicissitudes by applying a “discount” for the acceleration and/or reduction of damages, similar to the principles applied in personal injury actions or determining loss of opportunity cases. The discount was being held on at least two occasions to be three percent. Discount rates have also been held to be in the order of 11 percent and 10 percent. In _Gumland_, the High Court adopted the rate of 5.19 percent decided by the originating Supreme Courts. However, applying an arbitrary discount without the benefit of foresight suffers from the same flaws as not discounting at all.

The High Court in _Gumland_ suggested that the lessor by its conduct in terminating and suing for loss of bargain damages put itself in a position better than it could have been if it had kept the lease on foot and sued from time to time for arrears of rent as they accrued. This, respectfully, is entirely speculation and provides no logical reason to support their decision.

Apart from the vagaries of the assessment process, the concept of the availability of loss of bargain damages in the context of leases, as counsel for the lessee submitted in _Gumland_, is conceptually flawed because of the repugnancy between the landlord having possession of the demised premises and receiving rent as well.

In _Gumland_, the court strangely gave primacy to the property law doctrine of privity of estate in holding the beneficiaries of the assignment of the lease, and its guarantors, to the covenants of the lease in the absence of privity of contract, but then gave primacy to the contractual principles associated with the breach of the lease over principles of property law dictating against such a conclusion.

The writer agrees with the principle that there is nothing unfair with a lessor “sitting on his hands” and suing for accrued rent on a regular basis as a debt without terminating the leases. The fairness is twofold:

a) Whilst the lease remains on foot, the lessee still has a right to possession of the premises; and

b) The cause of the loss of bargain is solely the lessee’s breach and cannot be attributed to the landlord.

However, to preserve a lessor’s right to the balance of rental under the lease subsequent to after forfeiture removes this fairness.

Irrespective of the conduct of the lessee, it is the forfeiture which ultimately terminates the bargain between leasing parties. Whilst the lessee’s repudiation is not the lessor’s fault, the termination must be attributable to the lessor. The act of accepting a repudiation has been described as “thereby discharging himself from further performance”\(^{50}\), which amounts to positive unilateral conduct.

**Why should a landlord then be entitled to enjoy one provision of the lease and not be bound by another provision?**

A commercial lease ordinarily possesses a duality of character: it is both an executory contract and an executed demise. Upon premature termination of a lease, the lessee has lost its end of the bargain by losing possession of the premises for the balance of the lease. Enforcing forfeiture of a lease and/or election to accept repudiation determines a lessee’s interest in land.\(^{51}\) Thereafter, the landlord is free to make whatever use of the premises it likes.\(^{52}\) In such circumstances, the forfeiting lessor is not ready, willing or able to complete the balance of the contract. Why should a landlord then be entitled to enjoy one provision of the lease and not be bound by another provision? If the lessor revokes the benefit that was conferred on the repudiating party, he cannot insist of the performance by that party of the interdependent obligations that fall due thereafter. If the obligation to pay rent continues, surely the right to occupy the premises continues also.\(^{53}\)

If there had been no breach by the lessee, a lessor excluding the lessee from the premises would be liable to pay the lessee’s losses for the period it was kept out of possession, and in some circumstances, exemplary damages.\(^{54}\) The use of land is the foundation of the bargain, the root of the contract. Hence the previously governing tenet of property law that an estate of land should not be determined independently of the wishes of the parties. This is especially significant having regard to the Torrens system of indefeasibility of title where leases are registered.\(^{55}\)

If the tenant cannot have the land because of a frustrating event, the lease is determined in futuro and there exists no right to loss of bargain damages.\(^{56}\) If the event is the landlord’s forfeiture, the tenant should be excused from its future obligations under the lease.

This conceptual issue alone, it is submitted, answers the well-trodden suggestion that it is untenable to deny resort to the full armoury of remedies ordinarily available to redress repudiation of covenants merely because they may be associated with an estate in land.\(^{57}\)

Whilst the High Court, through its decisions in _Gumland_ and _Progressive Mailing House v Tabali_, decided that contract law principles apply to real property leases, it was
wisely predicted in 1945 that if an interest in land could be terminated by law despite the wishes of the parties, strange and unjust results would follow.2

Upon the issue of armour, Brennan J in *Progressive Mailing House* considered that the principles relating to termination for repudiation or breach of an essential term “put both a shield and a sword in the hands of an innocent party to accept the other party’s repudiation. The shield is the ending of his executory obligations; his sword is an immediate right to damages.” Applying this analogy to the lessee’s situation, his shield is the ending of his executory obligations, but he has been disarmed of his sword, being his right to possession of the demised premises. Hardly a fair fight.

If you take the situation in the context of other contractual principles, a lessee’s forced inability to continue to enjoy the occupation of the premises without interference by the lessor amounts to valuable consideration for the price of the lessor losing future rent. It is suggested there is an implied accord by virtue of the forfeiture.

The High Court attempts to justify its endorsement of loss of bargain damages by relying on the principle that a lessor must act to mitigate loss upon termination of the lease by taking reasonable steps to actively seek another lessee on similar terms. The lessee bears the onus of establishing that the lessor has failed in its duty to mitigate. This onus can be onerous indeed for the following reasons:

a) The lessee’s opportunity to prove breach of the duty to mitigate ends at the date of hearing.

b) Accordingly, the court’s focus on the breach of duty will usually only be retrospective, i.e., the lessor’s actions up to the date that the matter is determined, which, in a stretch, could amount to future breach of duty. With this in mind, how is a defaulting lessee reasonably supposed to ascertain after a hearing the extent to which, and on what terms, a lessor may advertise to re-let the premises or what offers to re-let the lessor has refused?

c) The duty to mitigate has been held by the courts to be very flexible depending upon the economic climate and the convenience of the lessor. A landlord must only take reasonable steps to turn the premises to a profitable use, generally by making reasonable efforts to find a reasonable tenant at a reasonable rent within a reasonable time.

The lessor has no obligation to contract with the first poor rent history, will generally be given relief on the first application upon conditions that rental arrears be met and the landlord’s costs be paid.

Lessor would also point out that courts will generally exercise equitable jurisdiction to refrain sanctioning unconscionable conduct. Professor Duncan, prior to *Gumland*, suggested that seeking to enforce a substantial damages claim for breach of a term made essential expressly where the breach is trivial might be unconscionable in certain circumstances.

But this is not the theme propounded in *Gumland*. The landlords can draft their leases how they like and expect enforcement of their terms beyond any breach by a lessee. If you contextualise the decision within the normal commercial reality of a small struggling retailer negotiating with a commercial shopping centre, even if the process is seen to be fair, the outcome will often not be.

### Conclusion

From a lessor’s point of view, it could be argued that the High Court in *Gumland* has effectively evened the playing field by its decision. They would point to the fact that parties to a lease still cannot contract out of the court’s statutory jurisdiction to relieve against forfeiture that empowers the court to grant or refuse relief “as it thinks fit.” Thankfully, relief is more freely granted against breach of a covenant to repay rent than in any other cases. A tenant, even one with a poor rent history, will generally be given relief on the first application upon conditions that rental arrears be met and the landlord’s costs be paid.

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**Notes**

1. [1982] 85 CLR 327 at 348-349; Carr v J. A. Berriman Pty Ltd [1982] 149 CLR 620 per Gibbs CJ, *Progressive Mailing*

2. Cassidy, D.I. QC in Lexis Nexis Case Notes "Gumland Property Holdings Pty Ltd v Duffy Bros Frut Market (Campbelltown) Pty Ltd".


7. Shevill v Builder’s Licensing Board [1982] 149 CLR 620 per Gibbs CJ, *Progressive Mailing*
House Pty Ltd v Tabali Pty Ltd [1989] 157 CLR 17 per Mason CJ.


9 Gumland Property Holdings Pty Ltd v Duffys Bros Fruit Market (Campbelltown) Pty Ltd (2008) 244 ALR 1 at 20.

10 For example, Koompantho Local Aboriginal Land Council v Sanpine Pty Ltd (2003) 241 ALR 88 at 100.

11 Boge, Christopher “Repudiation of Leases” (April 2006) QLSJ 125 at 129; Lagouvardis v Brett & Janet Cottee Pty Ltd (unreported, Supreme Court of New South Wales, 3 August 1994).


14 Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd [1989] 85 ALR 183, 213.

15 Id. at 447-448.

16 Shevill v Builder’s Licensing Board [1982] 149 CLR 620 at 625-626.

17 For example, Leda Commercial Properties Pty Ltd v DHK Retailers Pty Ltd (1992) 111 FLR at 88; Progressive Mailing House Pty Ltd v Tabali Pty Ltd [1985] 57 ALR 679 at 629.

18 Id. at 619.

19 Shevill v Builder’s Licensing Board [1982] 149 CLR 620; Aquamere Pty Ltd v Exelman Pty Ltd [1988] ANZ Conv R ¶54-304; Arlone Pty Ltd v Teller Properties Pty Ltd [SCA, MG3249/93, 7 February 1995, unreported, BC9302921].


21 Ehrenfeld v Choy (unreported) [2006] NSWSC 1092; EC200608373 at [52].


23 Ripka Pty Ltd v Maggie Bakers Pty Ltd [1984] VR 629 at 635 per Gray J; see also World by Word Pty Ltd v Michael [2004] 1 Qd R 338; Guthrie Hoteliers Pty Ltd v Sulter [NSWSC, 28/07/97, 5 February 1998, unreported, BC802223]; J & C Reid Pty Ltd v Abau Holdings Pty Ltd [1989] ANZ Conv R 44; Jarry Pty Ltd v Vumbaca (No. 2) [1999] NSW Conv R ¶55-902.

24 Wood Factory Pty Ltd v Kintsos Pty Ltd [1985] 2 Qd R 17.

25 Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd [1989] 85 ALR 183 at 191.

26 Progressive Mailing House Pty Ltd v Tabali Pty Ltd [1985] 157 CLR 17 at 33-34.

27 Id. at 33-34.


29 Campbell v Payne and Fitzgerald (1953) 53 SR (NSW) 537 at 539.

30 Redfern & Cassidy, Australian Tenancy Practice & Precedents, Butterworths, ¶17, 135.

31 Progressive Mailing House Pty Ltd v Tabali Pty Ltd [1985] 157 CLR 17 at 619.

32 Reichman v Beveridge [2007] 1 P & CR 20 at [42].

33 [1982] AC 413; Cassidy, D.I. QC in Lexis Nexis Case Notes — “Gumland Property Holdings Pty Ltd v Duffys Bros Fruit Market (Campbelltown) Pty Ltd” at [6].

34 Hughes v NLS Pty Ltd [1966] WAR 100; Lamson Store Services Co Ltd v Russell Wilkins & Sons Ltd (1956) 4 CLR 672 at 684.

35 Cooper & Partners Pty Ltd v Bayliss Developments Pty Ltd [1996] 16 WAR 396 at 413 per Murray J (FC).


38 Progressive Mailing House Pty Ltd v Tabali Pty Ltd [1985] 57 ALR 679 at 630.

39 Id. at 630.

40 Hardware Services Pty Ltd v Primex Association Ltd [1988] 1 Qd R 393 at 403.

41 Jones v Schiffmann (1971) 124 CLR 333 at 308.


44 Boge, Christopher “Repudiation of Leases” (April 2006) QLSJ 125 at 145.


49 Id. at [46] and [51].


53 Hodgins v Dukes Nominees Pty Ltd [2000] 77 SASR 74.

54 Hardware Services Pty Ltd v Primex Association Ltd [1988] 1 Qd R 393.

55 Gumland Property Holdings Pty Ltd v Duffys Bros Fruit Market (Campbelltown) Pty Ltd (unreported) [2006] NSWSC 10 at [15].

56 Gumland Property Holdings Pty Ltd v Duffys Bros Fruit Market (Campbelltown) Pty Ltd (2008) 244 ALR 1 at 17.

57 De Landgraaf v Brown

58 AME-UCD Finance Limited Ltd v Austin (1986) 162 CLR 170, 185.


60 Id. at 626.

61 Id. at 634.

62 Id. at 640.

63 McLeay Nominees Pty Ltd v Tony Sadler Pty Ltd [WA], C2274/91, 7 August 1985, Unreported, BC8504059.

64 Progressive Mailing House Pty Ltd v Tabali Pty Ltd [1985] 57 ALR 679 at 630.

65 Kamakura Pty Ltd v Okes [Commercial Tribunal (SA), 2 February 1990, Unreported].

66 Redfern and Cassidy Australian Tenancy Practice and Precedents at [17, 164].


70 [1985] 57 ALR 609.

71 Cricklewood Property & Investment Trust Ltd v Leighton’s Investment Trust Ltd [1945] AC 221 at 245.

72 Progressive Mailing House Pty Ltd v Tabali Pty Ltd [1985] 57 ALR 679 at 629.


74 Nurko v J-Coop Pty Ltd (unreported) [2008] WAODC 159.

75 Kear Mar Corp Pty Ltd v Labrador Park Shopping Centre Pty Ltd [1988] ATPRR 40 – 853.


78 Cassidy, D.J. In Redfern QC Lexis Nexis Case Notes — Gumland Property Holdings Pty Ltd v Duffys Bros Fruit Market (Campbelltown) Pty Ltd at [7].

79 Section 79(1) Family Law Act.

80 Valburn Pty Ltd v Smith [QSC, 6 June 1989, Unreported]

81 Property Law Act (Qld) Section 124.


84 Legione v Hately [1983] 152 CLR 496 at 444.

Introduction

At the time of writing this paper, one high-profile mining takeover bid under scrutiny by the Foreign Investment Review Board ("FIRB") and Treasury was Chinese state-owned Minmetals $2.6 billion bid for OZ Minerals. Although it is unquestionable that a decision to approve this large-scale and industry-shaping investment requires careful policy consideration, the delay in approving this rescue package placed added pressure on the major banks to deal with the assets of OZ Minerals under voluntary administration. An interim measure was required while FIRB and Treasury decide upon whether such an acquisition posed a threat to the national interest.

Statutory management is one interim measure well-placed to deal with this pressing situation.

How does statutory management operate?

Statutory management is a New Zealand ("NZ") interim official management procedure contained in Part III of the Corporations (Investigation and Management) Act 1989 (NZ) ("the IM Act (NZ)").

In NZ, statutory management is politically initiated by the Governor-General by Order in Council on the advice from the Minister of Commerce following a recommendation from the Securities Commission. Once this declaration is made, an external manager (the statutory manager) is appointed to oversee the affairs of the insolvent company (including its subsidiaries and its associated persons) while a wide general statutory moratorium prevents all creditors from enforcing their security interests. Without a moratorium available funds of $1.2 million and total debts of $38.7 million

In 1989, the NZ government declared Richmond Smart Corporation Limited ("RSCL") – a diverse group of 121 trans-Tasman companies operating under a holding company with a large hotel division – subject to statutory management as an interim policy measure to protect the national tourism industry. At the time of statutory management, RSCL had total available funds of $1.2 million and total debts of $38.7 million to 25 major banks, 5,500 shareholders, 2,200 unsecured creditors, and 1,300 employees. In these circumstances, statutory management avoided an inevitable security grab by the major banks appointing individual receivers competing to realise a certain distribution shortfall.

How does statutory management compare to Australia’s established insolvency procedures?

There are two established statutory procedures contained in the External Administration chapter of the Australian Corporations Act 2001 ("the Corporations Act (Cth)") which are broadly similar to statutory management: the Australian Security and Investment Commission ("ASIC") court appointed receiver and voluntary administration.

ASIC court appointed receiver

Although the political initiation of statutory management can compare to the regulatory roles performed by ASIC to investigate a company for fraud or dishonesty and then apply to the court for a court-appointed receiver/controller, there are certain fundamental differences between the two procedures:

Firstly, a court-appointed receivership does not impose a wide general statutory moratorium to prevent all creditors from enforcing their security interests. Without a moratorium in place, it is unlikely that the external receiver is able to continue the business of a company in financial distress.

Secondly, while both external managers are appointed only in extraordinary circumstances; namely, when there is a pressing need to protect the national interest and no other legal option is available, there are significant differences. Under section 1323 of the Corporations Act (Cth), the court will appoint a receiver only if there is an investigation being carried out by ASIC in relation to an act or omission which is a breach of the Corporations Act; and, it is “necessary or desirable” to protect the interests of some aggrieved person. These preconditions are mostly invoked for fraud and dishonesty. There is rarely an appointment for reasons in the national interest.

And thirdly, the powers of the statutory manager are far wider than the powers of the court-appointed receiver. In addition to preserving the business of the company, the statutory manager can suspend the payment of any money owing notwithstanding the terms of any contract and dispose and sell the assets of the company irrespective of all forms of security interests. It will be interesting to see how the general “in substance” definition of security interest and the national security registrar proposed in the Personal Property Securities Bill 2008 (Cth) will operate in Australia.
Voluntary administration

Voluntary administration has the most resemblance to statutory management for the following reasons: first, the powers of the statutory manager to carry on the business of the company and the need to preserve the business of the corporation is similar to the business rescue objective of voluntary administration; second, both procedures involve the appointment of an external manager to oversee the affairs of the insolvent company; third, both procedures involve the application of a wide-reaching statutory moratorium to prevent all creditors from enforcing their security interests; and fourth, both procedures are designed to operate with minimal involvement from the court. Despite these similarities, there are significant differences in procedure that could be applied to mining companies while FIRB and Treasury formulate policy for the national mining industry.

Objectives

Statutory management in the IM Act (NZ) was modeled on statutory management contained in the Reserve Bank of New Zealand Act 1906. Statutory management under the IM Act (NZ) applies only to corporations and statutory management under the RBNZ Act (NZ) applies only to registered banks. Each procedure has its own unique objectives.

The IM Act statutory manager is appointed as an interim measure to investigate fraud or to oversee a distressed company while a policy response is required. The RBNZ Act (NZ) statutory manager is appointed, amongst other things, but in essence, to oversee the affairs of insolvent registered banks, or to oversee banks whose affairs are detrimental to the stability of the NZ financial system.

The voluntary administrator, on the other hand, is usually appointed privately by the directors of the insolvent company. The appointment provides a degree of breathing space in order to effectively restructure debt so that the major banks and the investors are persuaded to rescue the company. In deciding whether the company is viable for rescue, the major banks and the investors have modest concerns for the overall economy, in this case the national mining industry, other than receiving a better return than would otherwise result in an immediate winding up of the company.

Compare and contrast this to the $253 million Opes Prime creditors’ scheme of arrangement which had the objective of indemnifying third parties ANZ and Merrill Lynch from pending class actions brought by the creditors of Opes Prime. With this success now, the Sons of Gwalia and Lehman Brothers creditors’ schemes of arrangement propose to effect similar provisions.

Role and powers of the external managers

Although both statutory management and voluntary administration involve the appointment of an external manager to oversee the affairs of the insolvent company, the roles and corresponding powers are strikingly different.

The role of the statutory manager is open-ended and does not have time restrictions. The voluntary administrator, however, is restricted to a near 40-business-day process to facilitate the creditors in deciding whether the business of the company is worth rescuing. This facilitative role includes: conducting a creditors meeting to confirm the voluntary administrator’s appointment and any appointment of a committee of creditors; to then investigate the company so that the creditors are informed of the best future course for the company; to then conduct a watershed meeting for the creditors to resolve whether it is in their best interests to rescue the company by approving a deed of company arrangement (“DOCA”); and finally, the voluntary administrator must then ensure that the company executes the DOCA. While this process is running its course the voluntary administrator can exercise certain powers to ensure that the business of the company continues to operate.

The role of the statutory manager, in contrast, is not restricted by a pre-determined process other than for the statutory manager to have regard to certain considerations when exercising powers. The statutory manager is able to exercise wide powers, inter alia, to suspend the repayment of any debt or the performance of any obligations owed by the company despite any term of contract, and is able to sell any property or assets of the company subject to a charge. These powers must be exercised with regard to the following considerations: to preserve the business of the company; to resolve the difficulties of the company; and to preserve the interests of the stakeholders. Mining companies could be declared subject to statutory management until China demonstrates willingness for reciprocal investment.

Moratorium

Although both the statutory management and voluntary administration involve the application of a wide-reaching moratorium to prevent creditors from enforcing their security interests, statutory management is better suited to ensuring that the business of an insolvent company is continued in a global financial crisis when credit markets are paralysed and investor confidence is low.

During statutory management, the rights of anxious creditors, both secured and unsecured, are suspended for the entire duration of the procedure unless waived by the statutory manager. Whereas, under voluntary administration, there is a high risk for large security grabs given that charge holders with security over the whole, or substantially the whole, of the company’s property can appoint receivers within 13 business days from the beginning of the administration. Under statutory management, the major banks could be prevented from attempting to recoup debt arrangements against mining companies while FIRB and Treasury require further time to deliberate.

Powers of the court

The courts are not well-placed to make policy decisions concerning the overall direction of the Australian economy and financial system as a whole. This is because the court makes decisions based on arguments formally presented which rarely investigate the overall impact on financial institutions other than the immediate interests of the parties involved.

The IM Act (NZ) provides the court with minimal express powers other than for the statutory manager to seek directions concerning the management of the company’s business and property; and for certain aggrieved third parties affected by the exercise of the statutory manager’s powers to seek compensation. There is however the court’s inherent constitutional power to judicially review the appointment of the statutory manager.

Voluntary administration, on the other hand, provides the court with wide express powers; to review the appointment of the administrator; to review the actions of the administrator and deed administrator; to make any orders it thinks necessary to protect the interests of the creditors; and notably, the court
has the wide power under section 447A of the *Corporations Act* (Cth) to make any order as to how the administration is to operate to a particular company. These express court powers provide the creditors of the company with hooks to protect their individual interests.

**Notes**

2. See Part II of the *Foreign Acquisitions and Takeovers Act 1975* (Cth).
3. Unless otherwise stated, references to statutory management and the statutory manager throughout this article are to the *IM Act* statutory management procedure only.
5. Although statutory management can be used to also investigate and prevent corporate fraud, the scope of this paper concerns only the business rescue feature of statutory management.
6. The provisional liquidator is not applicable in these circumstances given that it is too soon to assume that OZ Minerals will be liquidated.
7. See Part 3 of the *Australian Security and Investments Commission Act 2001*.
9. This seemingly alarming power to destroy the legal and equitable rights of creditors is alleviated in the *IM Act* by enabling third parties affected by the exercise of the statutory manager’s powers to apply to the court for compensation. Section 420(2) of the *Corporations Act 2001* (Cth) provides the court appointed receiver with certain express powers.
10. This is now the *Reserve Bank of New Zealand Act 1989* (NZ).
13. *Corporations Act 2001* (Cth), s441A.
For as long as there has been employment, employees have been monitored. A recent study by the American Management Association found that almost 80 percent of the largest companies in the United States had engaged in some form of electronic surveillance over the previous year. The rapid growth of workplace video surveillance in Australia as a “hoary chestnut”3 arises from its impact on privacy and civil liberties, and the consequences that flow from its use. Publicly accessible and affordable advances in information technology and a Big Brother culture have provided us with new legal and ethical challenges. Unfortunately the law, especially in relation to Queensland workplaces, still marches behind the technological revolution.

Why should we have, or not have, surveillance?
The presence and extent of private sector surveillance raises a host of issues,4 including whether surveillance:

a) Is justified and necessary in the circumstances;
b) General in nature, for example, to secure obedience, to protect property or to ensure loyalty, or targeted at specific types of activity, such as detection of fraud and other crimes, the deterrence of criminality, and in order to comply with discrimination and defamation laws;
c) Technology neutral or technology specific and dependent;
d) Of indefinite duration or subject to formal review and sunset;
e) Appropriate to its defined purpose or intrusive on other rights of employees.

Surveillance is theoretically objective. It reduces bias, favouritism and error in employee assessment. It provides hard proof for employers and employees to corroborate allegations of impropriety and its probative value expedites disputes arising therefrom. However, its very cover-all nature leads to surveillance being conducted of employees unconnected with the legitimate needs of the employer.

Employers would argue that their contractual freedom and commercial interests support surveillance. Technology replacing human management improves profitability and international competitiveness for Queensland industry. However, endeavouring to protect against future economic loss in this way is likely to be an arbitrary and presumptive exercise.7

Employers have an occupier’s duty of care to entrants, a duty to protect all employees and a general common law and statutory duty to provide a safe workplace. However, the compliance of this duty is usually a secondary aim of surveillance. Also, it tends to be discriminatory (especially in the realm of genetic testing) by eliminating high-risk employees rather than to concentrate efforts on improving the safety of the workplace for all.8

The opportunity for abuse of the power wielded by surveillance lies in its ability to become embedded and therefore hidden, unscrutinised and therefore unaccountable.9

Surveillance has also been linked to greater occupational health and safety problems, lower productivity and negativity in the workplace.10

There is a strong public interest in maintaining the privacy of individuals, particularly when the hours worked by some employees comprise the majority of their life. Employees have rights to autonomy, well-being and dignity.11 In the report of the Australian Law Reform Commission on the protection of privacy in Australia,12 the commission defined privacy as embracing the following notions:

1. Territorial privacy – involving claims in a territorial or spatial sense, related historically, legally and conceptually to property. There is a physical domain within which a claim to be left in solitude and tranquility is advanced and recognised;
2. Personal privacy – involving claims to privacy of one’s person, protected by laws guaranteeing freedom of movement and expression, prohibiting physical assault, and restricting unwarranted search or seizure of the person. This notion is also spatial in a similar sense to the territorial privacy rights, although personal privacy is bounded by social values rather than real walls and fences; and
3. Information privacy – involving claims based on a notion of the dignity and integrity of the individual, and on their relationship to information about themselves.

However, like other human rights, privacy is not absolute. For example, federal and state anti-discrimination legislation does not provide for absolute rights, but rights subject to certain exceptions. Workplace privacy is similar. The workplace is a site of complex, often competing interests.13 The existence and intrusiveness of surveillance must therefore be considered as a balancing exercise of these interests. Below the author will analyse the different approaches taken by the courts and legislatures in relation to this exercise.

The common law genesis and legitimation of surveillance: How did we get this far?

In the absence of any constitutional right, independent charter or Bill of Rights providing the legal basis for a claim to privacy,14 subject to legislation which will be discussed later, Queensland relies generally on the common law regarding surveillance issues.

The trend of the courts has favoured the interests of employers over employees. The reason for this trend lies in the ordinary principles of contract law.

According to the orthodox approach to employment laws, the contract of employment is a personal and voluntary exchange of freely-bargained promises between two parties equally protected by the law. Closely associated with this proposition is the “unitary” conception of industrial relations which holds that employers and employees share a common interest in maximising the commercial well-being of the enterprise.

From a Marxist perspective, the idea that employment law...
is based on voluntarism, equality and consensus is flawed. Instead, the orthodox approach is designed to legitimate capitalist social relations by masking the fact that coercion rather than voluntarism, and conflict rather than consensus, is the reality.26

The contrast between the Marxist and orthodox approaches emerges from the fact that each has a different perspective of employment. Whereas the latter approach looks no further than the formal contractual position, the former approach places the contract of employment in the context of the employment relationship. In particular, it focuses on status and the law of property. The common law states that equipment or facilities owned by an employer and used in the course of employment remain the property of the employer.27 Therefore an employer can dictate the terms of the use of the property through the contract of employment or workplace policies. By virtue of their control over the means of production and resources, employers have superior power over employees and applicants for employment. The uneven distribution of resources enshrined in property law provides the social underpinnings of the “wages-work” bargain, the essence of the employment relationship.28 Thus the relational aspect of the employment contract distinguishes it from other contracts entered into by legally equal parties.29 In assessing that question, it is appropriate to consider the rationality of any attitude taken by the employer and employee.30 It is arguably a corollary of the employer’s duty of good faith or the employee’s obligation to cooperate with the employer in the business ends of the enterprise.31

It has been suggested that the utility of the duty may be limited by the traditional reluctance of the courts to interfere with managerial control as deference to managerial prerogative is part of the fabric of the implied duty of trust and confidence.32 There is thus substantial scope for a court to hold that objectively surveillance practices are not likely to breach trust and confidence (for example, the practices are of necessity), that they do not cause harm that would attract a remedy (that is, the harm is not reasonably foreseeable) or that even if trust and confidence is likely to be harmed, there is a “reasonable and proper cause” for the employer’s conduct.33 Some commentators have suggested that, in the absence of the most arbitrary, offensive, disproportionate and intrusive forms of surveillance, it is likely that the implied duty in fact does not impinge on employers at all.34

On the other hand, it has been suggested that the employers’ obligation to exercise powers in good faith requires “reasonable” conduct and that any exercise of a power for an extraneous purpose is improper and hence unreasonable.35 As surveillance inherently involves both employment-related and extraneous material, it could be argued that it would always breach the duty of trust and confidence. Despite the theoretical basis for employee redress, even if some modes of surveillance may breach the implied duty of trust and confidence in employment contracts, it is unlikely that such breaches will be pursued.

Firstly, litigation would be undesirable for most employees and unions given the unpredictable nature of the common law standards of proof and the costs involved.36 Secondly, the remedies open to aggrieved employees would, in many cases, be of little practical significance. In Burazin v Blacktown City Guardian Pty Ltd,37 the court in obiter stated that, while it was reasonable to assume that damages for mere
distress would be a natural and probable consequence of the breach, an economic loss claim could not be made during the currency of the employment relationship because the implied term is intended to encourage an ongoing relationship and such legal action by the employee would cause further deterioration in the relationship.

It is arguable that this principle does not apply to the situation where the employment relationship has come to an end. In *Malik v Bank of Credit and Commerce International S.A.* for example, damages were recoverable for the breach of the implied duty subsequent to termination. However, in *Bednall v Wesley College*, the Supreme Court of Western Australia held that the implied term of trust and confidence would not survive termination of the contract of employment, the reasoning being that a finding otherwise would be inconsistent with the notion that the term was implied to protect the employment relationship. The court confined *Malik* to the situation where damage had been caused to an employee's future employment prospects by a breach of the implied term by the employer during the currency of the contract of employment.

However, to further muddy the waters, the New South Wales Industrial Relations Commission in *Bowker v Prophecy Technologies* held that the implied term continues to apply after termination of the employment. This case received specific disapproval in *Bednall* and, having regard to the superior status of the judicial in *Bednall*, it is most likely that *Bowker* would not be followed in future. *Bednall* does however disregard the fact that an employment relationship may subsist in the absence of a formal employment contract and fails to appreciate that the purpose of the implied term from an employee perspective is to avoid the devaluation of the employment contract: such issues would favour the *Bowker* approach.

Consequently, it would appear that provided employer surveillance does not affect an employee’s future employment prospects, damages will not flow from a breach of any implied term of trust and confidence found to have arisen from the surveillance. An employee wishing to maintain employment would be confined to the unappealing remedies of either leaving the employ or seeking an injunction to restrain the continuation of the breach.

A third practical difficulty employees face in relation to the implication of trust and confidence into their contract is that an employee may waive or contract out of the duty. In *Australian Services Union v Fuji-Xerox Australias*, the AIRC certified an agreement under Section 170J of the *Workplace Relations Act 1996* (Cth) that included specific clauses regarding privacy rights and the use of tracking devices by the employer. The use of these types of clauses in certified agreements can be expected to become commonplace in the future and potentially flow on into industrial agreements. It should be noted that surveillance is currently neither an “allowable matter” nor a “prohibited content” to be included in federal awards under the *WorkChoices* amendments.

Finally, the House of Lords in *Malik* opined that the recognition of the implied duty of trust and confidence would not open the “floodgates” for employee litigation. In particular, they considered that the limiting principles of causation, remoteness and mitigation would prevent “formidable practical obstacles” for most employees attempting to seek compensation.

In summary, the common law of contract serves to legitimate and reinforce the ability of employers to coerce and control their workforces through surveillance. The present dilution of collective bargaining and deregulation of the labour market under the recent *WorkChoices* reforms, with a focus upon individually negotiated Australian Workplace Agreements, will only tend to cement the common law position in the absence of effective legislation regulating surveillance.

**What about tortious duties?**

Regardless of contract law, employees may now seek redress from employer surveillance in the penumbra of tort. In *Grosse v Purris*, the Queensland District Court held that there can be a civil action for damages in tort based on an actionable right of an individual person to privacy. Applying the principle to a workplace scenario, the elements of the cause of action includes:

1. A wilful act by the employer;
2. Which intrudes upon the privacy or seclusion of the plaintiff;
3. In a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities;
4. Which causes the employee detriment in the form of mental, psychological or emotional harm or distress, or which prevents or hinders the employee from doing an act which the employee is lawfully entitled to do.

The decision could potentially cover a broader range of acts than are covered by the employment contract. For example, the fact that an employee impliedly consented to the surveillance would not prevent him/her from bringing a tort action for highly offensive use of the surveillance material. It should be noted that the District Court considered in *obiter* that a public interest defence may be available.

Turning then to the law of negligence, the Australian courts have been incoherent in their approach to the existence of a duty of care owed by an employer to an employee in respect of the termination of employment.

In the earlier case involving the Supreme Court of Victoria in *Wade v State of Victoria*, it was held that the employer and employee were in a relevant relationship of proximity and the recognition of a duty of care in tort did not impose an unfair, unjust or unreasonable duty on the employer.

In contrast, in *Bednall v Wesley College*, the Supreme Court of Western Australia held that no such duty was owed, even in relation to the manner of investigation and decision-making preceding the termination. Presumably, although not factually relevant to the case, this principle would apply to surveillance which gives rise to termination. Interestingly, *Wade* was not referred to in the decision.

If a duty of care in tort is found to arise from the use of surveillance in a workplace, this would remove the obstacles the courts have introduced when awarding damages for breach of contract, referred to above. We can only wait and see.

**Legislation relevant to Queensland surveillance**

The *Industrial Relations Act*

The surveillance of employees is an “industrial matter” under the *Industrial Relations Act 1999* (Qld). Therefore aggrieved employees could apply to the Industrial Relations Commission under Section 256 for a hearing in relation to their rights and duties. Unfortunately, subject to the following exception, the Act goes no further and as such the common law would be used to interpret the dispute.

If a term was expressed in or imported into an employment contract authorising the surveillance of employees, the question then arises whether it may be struck out for being
“unfair” under Section 276 of the Act. It should be noted that the concurrent WorkChoices “unfair contracts” provisions remain only applicable to independent contractors. An interpretative problem has arisen from Section 276 because literally it appears to be limited to public service officers employed on tenure who have an annual wage above the threshold. However, this interpretation has been limited in Earner v QIC to only exclude private sector employees whose salary exceeds the statutory threshold. Unfortunately, no court to date has decided whether surveillance would be “unfair”.

The Privacy Act
The Privacy Act 1988 (Cth) is an inadequate means of protecting employees from employer surveillance. The Act does not create or preserve a right to privacy and suffers from a lack of enforcement provisions.

Video surveillance
New South Wales is the only state of Australia to have enacted legislation to control the use of video surveillance in the workplace. The legislation will be discussed for the sole reason that the Queensland Parliament’s silence on the issue is deafening.

The Workplace Surveillance Act 2005 (NSW) regulates surveillance through cameras, location tracking devices and computers. The Act creates discrete requirements for “overt” and “covert” surveillance. In exceptional circumstances, employees must be notified of surveillance unless an employer has obtained a warrant for covert surveillance from a magistrate.

The Act asserts specific rules concerning notifying employees of surveillance. Notice must be given in writing, detailed and given at least 14 days before the surveillance commences. Some practical exceptions are including in the overt surveillance requirements for example, employers are not required to notify employees of camera surveillance when they are working somewhere that is not their usual workplace, such as if they are in a different office or meeting room.

Where an employer needs to conduct covert surveillance for suspicion of unlawful activity, a magistrate may issue a warrant for this purpose. The warrant operates for 30 days and there are significant restrictions on the operation of surveillance and the use of surveillance records.

Employers are permitted to conduct surveillance “solely for the purpose of ensuring the security of the workplace or persons in it”.

However, such surveillance must be generally required by a real and significant likelihood that the security of the workplace or persons in it may be jeopardised and employees must be notified.

“Covert surveillance” is exempted under the Act where it involves the following:
1. In order to determine whether an employee is engaged in unlawful activity where the employer has been authorised by a covert surveillance authority.
2. Surveillances conducted by a law enforcement agency.
4. Surveillances of any legal proceedings or proceedings before a law enforcement agency.
5. Where the employer has notified employees or an employee body in writing that surveillance is being undertaken for either the sole purpose of ensuring the security of a workplace or of employees themselves where video surveillance of an employee is extrinsic to that purpose.

If activities that are not related to security purposes are captured on camera, they will only be admitted in legal or disciplinary proceedings if the desirability of admitting the evidence outweighs the method in which it was gained.

Victoria also has specified legislation relating to the use of surveillance devices, although it is not specific to video surveillance and its application to the workplace is more limited. The legislation is the Surveillance Devices Act 1999 (Vic).

In Western Australia, the Surveillance Devices Act 1998 (WA) prohibits the use of optical surveillance in respect of private activities either by a person who is not a party to the private activity or by a person who is a party to the private activity.

In light of the particularly unsavoury aspects of the common law approach to surveillance, there is a call for Queensland to enact similar legislation.

Location tracking devices
The Workplace Surveillance Act 2005 (NSW) also introduced a watershed and welcomed amendments for electronic devices that can track an employee’s locations and movements. Section 13 of the Act states that before undertaking tracking or surveillance, employers must place “a notice clearly visible on their vehicle or other thing indicating that the vehicle or thing is the subject of tracking surveillance”. Again, Queensland should be addressing provisions relating to this technology in its legislative agenda.

Telephone monitoring
The Telecommunications (Interception) Act 1979 (Cth) (the “TIA”) and Invasion of Privacy Act 1971 (Qld) (“the IPA”) provide a statutory regime for the prohibition of listening to or recording communications without the consent of all parties to the communications. The TIA only applies in circumstances where a communication is in passage over a telecommunications system. Otherwise, the communication is not an “interception” under the Act and the IPA applies.

The difficulty arises in the subject context when considering whether an employer recording a telephone call is conducting an “interception”. It is clear that listening per se to a telephone conversation to which one is a party is not an “interception” if the other party knows that this listening is occurring. However, it was held in Duncan v Queen that the recording of a telephone conversation by a person who was a party to the conversation was an “interception”. In comparison, the court in T v Medical Board of South Australia held that recording by a participating party did not “intercept” a communication under the TIA as the statute only applied to third parties.

If an employer has recorded a telephone call, and it is held to be an “interception”, it will only be lawful in two scenarios:
1. Where the employee has knowledge that the communication passing over a telecommunications system is being listened to or recorded.
2. When the person recording the call falls within the following limited exemption: the person was lawfully on the premises to which a telecommunications service is provided by a carriage service provided by means of any equipment which is part of that service.

It is an offence under the TIA for an employer to use...
information lawfully intercepted. However, there are a number of exceptions:

1. “Exempt proceedings”, for example, court proceedings and prosecutions relating to certain serious offences, police disciplinary proceedings, proceedings in relation to bail applications and proceedings relating to debt recovery by carriers.

2. Information intercepted in connection with existing court proceedings.

3. Proceedings relating to offences committed under Sections 70(1), 63 or 107A of the TIA.

However, once admitted in an exempt proceeding, intercepted information does not then become available for general use in non-exempt proceedings, but is “public” in the sense that it may be used by the media.

An employee who is conferred rights by the TIA may be availed of the following remedies:

1. A declaration of unlawfulness.

2. An award of damages, including punitive damages, which is not greater than the total gross income derived by the employer by virtue of the interception (which notably would be extremely difficult to prove); and

3. Injunctive relief, including a mandatory injunction.

Diverting to the state legislation, it is an offence under Section 43(1) of the Invasion of Privacy Act 1971 (Qld) to use a listening device to either overhear, record, monitor or listen to a private conversation. Exceptions include:

1. A person who is a party to the conversation is expressly allowed to use a listening device.

2. The unintentional hearing of a private conversation by telephone.

3. The use of a listening device by a police officer who has approval in writing from both a judge of the Supreme Court and either the commissioner, assistant commissioner or an officer of police higher than inspector who has been authorised by a Supreme Court judge to issue the authorisations.

In determining whether to issue an authority, the judge of the Supreme Court will consider the gravity of the circumstances subject to investigation, the impact of the privacy of any person and the utility of the authorisation in terms of the impact on the investigation.

4. A customs officer if the use is within the course of their duty.

5. A person performing their duty in respect of the security of the Commonwealth.

Specific topics:

1. Email interception

In light of the Telecommunications (Interception) Amendment (Stored Communications) Act 2004 (Cth), emails stored on computer hard drives, central email servers or other storage devices are no longer subject to the general prohibition against interception of communications passing over a telecommunications system for the purposes of Section 7(1) of the TIA. Similarly, unread SMS or MMS messages stored on central storage facilities or on mobile phone handsets are also excluded. The amendments remove stored communications from the scope of the restrictions on use and disclosure of lawfully obtained information set out in Part VII of the TIA, clearing the way for them to be used in legal or disciplinary proceedings.

However, use and disclosure of stored communications is still subject to the Privacy Act 1988 (Cth) and various other legal requirements including those under the Copyright Act 1968 (Cth) and the Freedom of Information Act 1992 (Cth).

The federal Privacy Commissioner has published Guidelines on Workplace Email, Web Browsing and Privacy which suggest the manner in which employers can implement logging and monitoring practices without contravening the relevant privacy principles set out in the Privacy Act. Monitoring and recording emails should only be carried out fairly and lawfully. Internet and email use should therefore only be recorded after employees and any other relevant users have been put on notice that such recording is likely to take place.

Despite these legislative curtailments, there have been a number of international common law decisions relating to surveillance of email that may provide assistance. In Smyth v Pillsbury Company, the United State District Court for the Eastern District of Pennsylvania found that an employee has no reasonable expectation of privacy in their email. The court held that the employer’s interest in preventing inappropriate communications over its email system prevailed over any privacy of those employees who sent the email. The court found that a reasonable person would not consider an employer’s interception of email communications to be a substantial or highly offensive invasion of privacy. This decision is important in light of the similar wording of the second element of the tort of invasion of privacy in Grosse v Purvis, discussed above.

A similar outcome may therefore result in Queensland, although two other courts have come to different decisions involving emails which have passwords or encryption. In McLaren v Microsoft Corp, a Texas court at first instance held that email stored under a private password with the employer’s consent gave rise to a legitimate expectation of privacy. However, the Court of Appeal later found that because the computer belonged to the employee to perform the functions of his job, the email was not his personal property but merely an inherent part of the office environment. The court ultimately decided that the employee, even by creating a personal password, did not create a reasonable expectation of privacy. This case should be compared to the case of Restuccia v Burk Techs where the Massachusetts Supreme Court held that the ability to create passwords and delete emails supported an expectation that employees’ messages would remain private.

2. Drug testing

Industrial tribunals have allowed the random drug testing of employees where it is necessary to enable the employer to fulfil their statutory obligations and their general duty to provide a safe work environment. The policy must have been known to employees and have been consistently enforced.

Otherwise, the law is not so clear. The Federal Court of Australia also held that the power to request “reasonable suspicion” urine testing was found in the common law. The
exercise of the power in relation to a member of the Australian Federal Police was held to be reasonable in the circumstances and the means employed were not disproportionate to the end properly pursued. The testing was not an affront to human dignity, the expectation of privacy by the member was reduced by the disciplinary nature of the police force and no distinction could be made between off-duty and on-duty activities by the testing. On the contrary, public interest considerations justified the testing. However, the court was emphatic that this decision related only to “reasonable suspicion” drug testing and refrained from commenting on other bases of drug testing (for example, random testing) or on directions that are more invasive of privacy or of bodily integrity (for example, body searches or blood tests). 106

The Federal Court has also held that an employee or applicant for employment may have a claim for discrimination on the basis of actual or imputed drug addiction. 107 There is some suggestion that the testing must relate to a drug that causes impairment or unfitness to work for it to be enforceable. 102

3. Private record keeping

Section 7B(3) of the Privacy Act 1988 (Cth) exempts employee records from the scope of its regulatory ambit. “Employee records” are defined in Section 6(1) as a record of personal information relating to the employment of an employee. Examples are detailed in the provision, and most notably include health information, personal contact details, personal leave, maternity or paternity leave, taxation, banking or superannuation matters. The exemption would not protect an employer who purports to collect, use or disclose information about an employee for purposes unrelated to the employment relationship. 108 Further, the exemption is limited to existing or former employees so that it would not apply to information provided in confidence to an employer by a prospective employee. Individuals under those circumstances would be able to assert that the employer is bound to comply with the National Privacy Principles. 104

4. Collection of genetic testing information

Employers’ access to and use of genetic information is not the subject of any specific regulation in Queensland. There are no prohibitions on employers seeking to obtain such information, the introduction of a workplace genetic screening program or the use of disclosure of information obtained (although the common law principles discussed above may generally apply).

The only real constraints on employers accessing and using genetic test information of employees or applicants for employment are that submission to testing must be voluntary and, in using the information obtained, employers must not unlawfully discriminate against the individuals on the basis of real or perceived disability.

If the employee does not give an informed consent to the testing, this will amount to battery. One issue, however, that has arisen is the validity of an employee’s consent in light of the coerciveness of the situation and the result a refusal may have in respect to the employment relationship. 109

The Disability Discrimination Act 1992 (Cth) does not provide absolute protection against discrimination. The legislation provides that discrimination will not be unlawful if a person’s circumstances are so materially different as to justify differential treatment. Are genetically disadvantaged actually materially different from others? While there are no cases directly on point, the notion of material differentiation should be interpreted in accordance with the spirit of the Act in such a manner that an employee’s disability will only be material if it prevents him/her from presently performing the duties of employment. 110 It is also entrenched principle that employees are entitled to be assessed on the basis of their actual abilities, free from preconceived notions as to their suitability by reason of impairment. 117 Moreover, an employer may not exclude a whole class of persons because some of them may not be suitable employees. 104 Therefore knowledge by an employer that a presently healthy employee may develop a disability and cause absence from work does not affect their present capacity to work and would not substantiate a claim for material differentiation.

The Anti-Discrimination Act 1991 (Qld) also does not provide comprehensive cover for employees from genetic discrimination. An exemption from liability may be claimed by an employer on the basis that the employee would have been unable to carry out the inherent requirements of the particular employment or, alternatively, that in order to perform those inherent requirements the employee would require special services or facilities and the provision of these services would impose unjustifiable hardship on the employer. 109

Further, the employers’ duty to prevent foreseeable harm to employees and to provide a safe workplace, both at common law and under the occupational health and safety legislation, may override their duty not to discriminate. In X v The Commonwealth, the High Court held that the Australian Army was not discriminating against a soldier diagnosed with HIV in light of the health risk he represented to others preventing him from fulfilling the inherent requirements of the employment. An employer may consequently seek to exclude an applicant for employment who is identified as having the gene associated with any such condition and could seek to invoke arguments based on the need to protect fellow workers, the public at large or the employee him/herself. 112

The unfortunate limitation involving genetic discrimination is the practical aspect of an employee or employment applicant detecting and proving it. As employers are generally not required to give reasons for declining to hire an employee, applicants will be unaware that they have been discriminated against. Those employees contemplating making a complaint bear the initial onus of establishing that they have been discriminated against on the basis of disability, a heavy onus indeed.

The importance of the collection of genetic information arises from concerns that such information is sensitive, that genetic information is partially shared with biological relatives, and that genetic information is a permanent form of identifier for an individual. A recent report of the Australian Law Reform Commission and the Australian Health Ethics Committee highlighted the need to ensure appropriate safeguards are in place to guide collection and use of genetic information by employers: in particular, to accommodate the necessary and beneficial use of genetic testing in a manner consistent with occupational health and safety objectives, and ensuring the scientific reliability of testing, but to limit other uses with the potential to impact negatively on the individual. Until then, Queensland has a legislative vacuum in relation to genetic testing.

5. Bag checking

It has been suggested that searches of bags, parcels and/ or lockers can only take place if the employee is present.
or has consented to the procedure being conducted in their absence. However, it could also be argued that it is an implied condition of entry into the workplace, especially if it be a supermarket, that bags may be checked.

6. Psychological testing

It is unlikely that psychological testing could be challenged under the Privacy Act 1988 as a collection of information which is not directly related to the employment relationship and therefore in breach of Section 7B(3) of the Act. Such challenge would require the privacy commissioner to make a determination on whether the collection of personal information, which might appear to be unrelated to a person’s work duties and would, therefore, constitute collection of personal information that would not be privileged under the Act.

Bliss v South East Thames Regional Health Authority, a surgeon was required by his employer to undergo a psychiatric examination. The examination was as a result of an intra-workplace personality conflict rather than for any reasonable cause. This was held to be a breach of the implied duty of trust and confidence.

Conclusion

The author trusts that this dissertation has highlighted the unsatisfactory state of the law in relation to workplace surveillance in Queensland. The common law has proven inappropriate and incoherent to date. We need change and clarity, and we need it quickly. If not a Bill of Rights such as those in Victoria and the ACT, we require a comprehensive uniform state or federal regime to produce legal certainty and to maintain public confidence in the law in this highly emotive field. The legislation must strike a well-defined and reasoned balance between the competing public interests involved: the protection of employees’ privacy, the accountability of employers’ opportunism, efficient business operations and public safety. We need to put surveillance under the lens.

Notes

2. Ibid at 161.
5. Above Note 1 at 163.
8. Ibid at 13.
9. Above Note 1 at 163.
10. Ibid at 165.
11. Above Note 7 at 11.
16. Ibid at 115.
19. Ibid at 115.
22. Above Note 18 at 115.
23. Ibid at 116.
26. Ibid at 116.
29. [1998] AC 20
31. Ibid at 35.
37. Ibid at 119.
40. Above Note 36 at 119.
42. Distinguishing Addis v Gramophone Co Ltd [1969] AC 488 where it was held that such an award was impermissible in the law of contract. Note the decision is also contrary to the finding in Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2007] NSWSC 104 at para [189] which followed Addis. Also, in Alltarsa v Public Transport Corporation (2001) 183 ALR 545, although following Burazin, the court considered that there might be a claim where a psychiatric injury resulted rather than mere distress.
43. [1998] AC 20
44. [2005] WASC 101 (24 May 2005) at para [34].
45. Ibid at para [61].
47. Concot Pty Ltd v Worrell (2000) 75 ALJR 312.
50. Bliss v South East Thames Regional Health Authority [1987] ICR 700.
51. Workplace Relations Act 1996 (Cth) ss 513 and 515.
54. Ibid at Para 444.
58. Schedule 1.
59. Workplace Relations Act 1996 (Cth), s352B.
Duncan v Queen (1991) 5 WAR 249 at 252.

T v Medical Board of South Australia (1992) 58 SASR 382.

TIA Section 6(2)

TIA Section 63

TIA Section 63A

TIA Section 63B; 65A

TIA Section 65A; 66; 67

TIA Section 75

TIA Section 71

TIA Section 76


Above Note 81 at 16,171.

IPA Section 43(2)(a)

IPA Section 43(2)(b)

IPA Section 43(c)(i)

IPA Section 43(3)

IPA Section 43(2)(ii)

IPA Section 43(2)(iii)

Information Privacy Principle 1 and National Privacy Principles 1 and 10.

See Information Privacy Principle 1 and National Privacy Principles 1 and 10.


1999 WL 339015 (Tex App – Dallas)

Ibid. at 6.

