

University of New South Wales
University of New South Wales Faculty of Law Research Series
2009

Year 2009

Paper 48

The Great Depression, This Depression, and
Administrative Law

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Mark Aronson

Abstract

The Great Depression contributed to the rapid growth in the size and functions of the administrative state. While its importance for administrative law scholarship was greater in America than in Australia or the United Kingdom, it focused scholars everywhere on questions of the democratic legitimacy of government institutions functioning beyond any practical oversight of Parliament. The current global economic crisis poses similar questions. New banking laws permit forced sales and nationalisation in the UK, and the laws relating to compensation for government interventions in both Australia and the UK carry the potential for serious unfairness. Vast government stimulus programs contain few legal constraints or genuine oversight mechanisms. These are issues warranting the attention of administrative law scholars.

THE GREAT DEPRESSION, THIS DEPRESSION, AND ADMINISTRATIVE LAW

*Mark Aronson**

A INTRODUCTION

Instruction on the Great Depression used to come from our parents, our grandparents, and the History Channel. Now everyone has something to say about it.¹ Economists tell us that the global financial crisis is the biggest economic reversal since the Great Depression, and governments in Washington, London and Canberra are likening their resolve to that displayed by President Roosevelt in the early days of the New Deal. If they were even half-way right, then these would be busy times indeed for administrative lawyers. Although they are wrong, the legislative and administrative responses to the current crisis include measures that should rekindle some of administrative law's deepest concerns about the democratic legitimacy of the administrative state. New banking laws, in particular, have transferred enormous discretionary powers to central government's regulatory authorities, and these pose real issues about protection from arbitrary power, and about the very process of making laws and holding the administration to account. In other areas, we are likely to see a more hands-on style of market and corporate regulation, but probably nothing so radical as to require us to dig out the history books.

Banking legislation is transferring to government authorities huge powers to decide the future of any bank that looks like wobbling; this includes power to make subordinate legislation that overrides private property and contractual rights, that overrides other statutes, and that can even be retrospective. In effect, this legislative activity decides nothing, but delegates all decisional powers to government. Emergency legislation has always been like that. The two World Wars saw Parliament's legislative importance almost entirely sidelined. And in peace time, security emergencies or threats since the 11th of September 2001 saw worrying shifts of power to governments. Stricter migration controls were frequently justified by

* Law Faculty, University of New South Wales. The author would like to thank Emilius Avgouleas, Keven Booker, Ross Buckley, Peter Cane, Phil Cooper, David Dixon, David Dyzenhaus, Arthur Glass, Matthew Groves, Carol Harlow, Martin Krygier, Janet McLean, Keith Mason, David Raper, Mike Taggart, and Greg Weeks.

¹ The so-called 'dustbin of history' is almost empty. Barzun attributed the phrase to Augustine Birrell, an English MP, not (as commonly supposed) Karl Marx: Jacques Barzun, *From Dawn to Decadence: 500 Years of Western Cultural Life – 1500 the Present* (2000), xviii.

reference to concerns for national security.² The new banking legislation should bring back into prominence long-standing debates about subordinate legislation – its implications for the balance between Executive and Parliamentary power; the processes by which it is proposed, debated and scrutinised; the propriety of skeleton Acts which leave all policy to subordinate legislation; and where policy-making is so delegated, the democratic legitimacy of making laws in an environment that is constructed in such a way as to avoid the hazards of direct engagement in partisan politics.³

Running in parallel with these concerns about the new banking legislation are similar concerns about the processes by which governments have raised and are spending quite astonishingly large sums of money in an effort to stimulate their ailing economies. Appropriation Acts have long been skeleton affairs. They authorise governments to spend lots of money but impose very few enforceable rules on the spending process; the Acts are largely permissive. The speed with which some of the stimulus packages were rushed through their legislatures, combined with the sheer size of the sums involved, prompts further reflection on whether democratic legitimacy might require more *ex post* accountability safeguards, even if it is not feasible to legislate for prior constraints as to how the money will be spent.

Before the global financial crisis, governments had *said* that they were intent on downsizing themselves and their regulatory activities, trusting increasingly to the market as a preferable form of ordering. What they *did*, however, was often something quite different. The privatisation of government utilities, in particular, was accompanied in most places by an exponential growth in regulatory requirements. Regulatory activity flourished in other areas also, although its forms (contractual, economic incentives, industry self-regulation and the like) sometimes sought to camouflage government's leading (if not formally directive) role.⁴ Carol Harlow mapped out a remarkable disjunction between the 'small government' rhetoric of recent governments, and the steady expansion of government regulation and supervision into areas formerly regarded by liberals as off-limits.⁵

Predictions can be dangerous, but the financial crisis has been with us long enough to warrant the effort. The pretence of deregulation has already been dropped in one

² For example, Australia's future Prime Minister, Mr Rudd, spoke from the Opposition benches in strong support of a number of government Bills tightening immigration controls. He repeatedly emphasised the Bills' importance to national security since 9/11. See Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2001, 30942-3. The indefinite detention laws which the House of Lords struck down in *A v Secretary of State for the Home Department* [2005] 2 AC 68 had applied only to foreigners; indeed, that was the reason for their invalidation. Australia's mandatory detention laws had been on the books for a decade before 9/11, but the Federal Court had found an interpretive way around them until the High Court disagreed in *Al-Kateb v Godwin* (2004) 219 CLR 562.

³ See Edward C Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (2001) 1-18.

⁴ Carol Harlow, 'The "Hidden Paw" of the State and the Publicisation of Private Law', in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (2009), 75-98, 83, noting that talk of 'decentred regulation' can be quite misleading.

⁵ *Ibid* 75-98.

area. It seems fairly clear that we can expect the financial services industry to be brought more directly under government regulation, and that there will be a lot more regulatory requirements. We can expect to see more emphasis on market transparency and stricter rules about conflicts of interest. We might even see regulation come to the parallel universe of the derivatives market. This will all be done in the name of correcting market failures; the aspiration to a better-functioning market economy will not be shed. Government 'controls' of banks will necessarily be different, if only because big banks have become too important to fail. The language will be still be of 'regulation', but that is a word of many meanings. So far as it implies rules published in advance designed to influence peoples' conduct, it might be more appropriate to talk of the new banking laws in terms of 'managerial oversight', 'risk avoidance', and 'harm minimisation', or (as to this last term and more prosaically) 'cleaning up the mess'.⁶

B THE GREAT DEPRESSION AND ADMINISTRATIVE LAW

This is not the place and I am not the person to write a history of administrative law scholarship, but in the histories that have been written so far, it would appear that the United States is exceptional in giving prominence to the Great Depression, which is taken as the major causative factor behind the passage of their *Administrative Procedure Act 1946* (US) ('APA').

English histories acknowledge the rapid growth of the administrative state in the 1930s, but the Great Depression rarely figures as an important period in the development of English administrative law. One reason might be that the country's administrative bureaucracies had a considerably longer history, with political arguments about its 'collectivist'⁷ implications preceding the Depression. Maitland⁸ and Dicey painted very different pictures of the machinery of the modern state, and Dicey's antagonism to a separate institutional structure for adjudicating disputes between state and subject is well-known.⁹ However, with the exception of accounts of the steps taken to assert a measure of parliamentary control over the making and

⁶ Parallels might be drawn with police law and practice. Prime Minister Thatcher preached the virtues of small government and reduced red tape, but her most important reform of police law (the *Police and Criminal Evidence Act 1984* (UK)) did two things; it radically widened police investigative powers, and introduced a raft of regulations which for the first time offered genuine protection to criminal suspects. Prime Minister Blair's government broadened the focus to pre-emptive interventions, not against those suspected of crime but those likely to commit it. The protective regulatory environment has retreated in consequence. There is always a time lag, but Australia has followed suit. See David Dixon, 'Authorise and Regulate: a Comparative Perspective on the Rise and Fall of a Regulatory Strategy', in Ed Cape and Richard Young (eds), *Regulating Policing: the Police and Criminal Evidence Act 1984 Past, Present and Future* (2008) 21.

⁷ Dicey's term: see Albert Venn Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (1905), 259-302.

⁸ See especially Frederic William Maitland, *The Constitutional History of England: A Course of Lectures* (1908) 505-6.

⁹ His version of the rule of law required such disputes to be adjudicated in the 'ordinary courts': Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 193.



review of subordinate legislation,¹⁰ the focus of many of the current English textbooks is on the development of overarching *systems* of administrative law from the late 1950s and beyond. Subordinate legislation has certainly generated specialist scholarship,¹¹ but the more widely available general textbooks seem to differ on its importance to administrative law. One leading text devotes a lengthy chapter to the topic, giving some detail on the subject of judicial scrutiny, much less on parliamentary controls, and almost none on the processes anterior to those latter controls. It explains: 'To treat the subject of parliamentary control in any detail would take us beyond administrative law.'¹² Another leading text, however, takes the constitutional and political side of the subject far more seriously, and looks to America's *APA* for ideas on how best to reform British practices.¹³ More coverage and depth can be found in the third leading text, which has never conformed to the court-centric traditional model.¹⁴

Having said that, the popular account of the emergence of English administrative law focuses principally on judicial review's radical expansionism starting in the 1960s.¹⁵ With judicial review as its central focus, this approach casts the expansionist judiciary in an heroic light, as contrasted with their wimpish predecessors dating back to the outbreak of the first World War. On this account, the wimps had forgotten judicial review's proud history of controlling state power, a history going back to the middle of the 17th century.¹⁶ Others suggested that the long period of judicial 'quietism' might in part be put down to their fear of being seen to engage more directly in the political, social and economic debates of the day.¹⁷ The two World Wars and the Great Depression in between saw massive increases in the size and coverage of the administrative state, but for the most part, judicial review confined its oversight to functions that were either 'judicial' or reasonably analogous to judicial functions. That left great swathes of 'administrative' and 'legislative' functions beyond the effective scope of judicial review, and it is worth noting that judicial review of subordinate legislation remains exceptional.¹⁸ One prominent textbook removes the capitals and

¹⁰ See, eg, William R Wade and Christopher F Forsyth, *Administrative Law* (10th ed, 2009), 857-904.

¹¹ See Keith Puttick, *Challenging Delegated Legislation* (1988); Page, above n 3; Daniel Greenberg, *Craies on Legislation* (9th ed, 2008) chs 3 and 6. For a comparative survey, see Theodore Th Ziamou, *Rulemaking, Participation and the Limits of Public Law in the USA and Europe* (2001).

¹² Wade and Forsyth, above n 10, 765.

¹³ Paul Craig, *Administrative Law* (6th ed, 2008) ch 22.

¹⁴ Carol Harlow and Richard Rawlings, *Law and Administration* (3rd ed, 2009), chs 4 and 5.

¹⁵ The standard account has the judges going up and over the trenches with the decisions in the great quartet of *Ridge v Baldwin* [1964] AC 40; *Conway v Rimmer* [1968] AC 910; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997; and *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. See, eg, Wade and Forsyth, above n 10, 12-18.

¹⁶ Wade and Forsyth, above n 10, 13-14.

¹⁷ Peter Leyland and Gordon Anthony, *Textbook on Administrative Law* (6th ed, 2009) 14. It is difficult but not impossible to square that explanation with the thesis advanced by others that the judges were upper class warriors bent on the protection of property rights. See Patrick McAuslan, 'Administrative Law, Collective Consumption and Judicial Policy' (1983) 46 *Modern Law Review* 1.

¹⁸ Judicial review eventually overcame its reluctance to supervise 'administrative' decision-making, but it has never wholly overcome its sense that judicial review of subordinate legislation is exceptional. Lord Hodson said in *McEldowney v Forde* [1971] AC 632, 645 that

describes the period of judicial retreat before the 1960s as 'the great depression'.¹⁹ The judges said that they were powerless to do anything in the face of both an exponential increase in the volume of subordinate legislation and huge administrative discretions conferred by legislation that they were disposed to construe literally. The Chief Justice, Lord Hewart, famously inveighed against the administrative state as 'the new despotism',²⁰ but he also condemned 'administrative law' as 'Continental jargon'.²¹ Beyond judicial review, administrative law's counterpoise of generalised and credibly independent mechanisms of external review and accountability largely remained lacking until the legislative reforms that followed the publication of the *Franks Report* in 1957.²² Indeed, the same account that casts the judiciary in heroic terms admits that it took legislative reform of tribunals and inquiries to start the ball rolling.²³

Australian histories of administrative law down to the 1960s are thinner and less varied. As in Britain, their principal focus is on the courts, although not to the exclusion of the history of tribunal reforms. Australia's judicial review kept a higher profile than its English counterpart, because the High Court's constitutionally entrenched judicial review jurisdiction clearly extended beyond the 'judicial' or 'quasi-judicial' functions of administrative government.²⁴ However, in judicial review domains unsupported by the *Constitution*, Australia's judicial review cases understandably paid considerable deference to England's until the abolition of appeals to the Privy Council.²⁵ The Australian literature debated developments in the United States and Britain, and Lord Hewart's extravagant attack on 'the new despotism' used to be much-cited.²⁶ More importantly, however, that attack was acknowledged to have gone too far, to have advocated a return to a model of government that had long since passed beyond recall. As in England, its persuasive impact seems to have been confined to the *political* recognition of the importance of subordinate legislation, and

unless there is evidence of bad faith, courts are reluctant to 'interfere with the exercise of wide powers to make regulations'. In a comment that might reflect poorly on the quality of argument, Lord Guest said (at 649) that anyone challenging the validity of a statutory instrument bore a heavy onus, and (at 648) that he had been unable to find any precedent of such a challenge since *R v Halliday* [1917] AC 260.

19

Wade and Forsyth, above n 10, 14.

20

Lord G Hewart, *The New Despotism* (1929).

21

Lord G Hewart *Not Without Prejudice* (1937) 96. He was undoubtedly influenced by the fact that until 1915 (with the publication of Albert Venn Dicey, 'The Development of Administrative Law in England' (1915) 31 *Law Quarterly Review* 148), and grudgingly even then, Dicey had denied the existence of *droit administratif* (he could not for most of his life bring himself to say it in English). See H W Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 *Osgoode Hall Law Journal* 1.

22

Committee on Administrative Tribunals and Enquiries, *Franks Report* (1957) Cmnd 218.

23

Wade and Forsyth, above n 10, 13.

24

Labour law disputes were standard fare in the High Court's judicial review jurisdiction under s 75(v) of the *Constitution*.

25

The abolition was done in piecemeal fashion, the last tie being cut by the *Australia Act 1986* (Cth) s 11.

26

See, eg, K H Bailey, 'Administrative Legislation in the Commonwealth' (Pt 1) [1930] 4 *Australian Law Journal* 7; K H Bailey, 'Administrative Legislation in the Commonwealth' (Pt 2) [1930] 4 *Australian Law Journal* 38; Herbert Vere Evatt, 'The Judiciary and Administrative Law in Australia' (1937) 15 *Canadian Bar Review* 247, 262-3; R Else Mitchell, 'Delegated and Sub-delegated Legislation' (1943) 17 *Australian Law Journal* 75.



the consequent reform of the parliamentary processes for supervising how it is made and what it contains.²⁷ There had been earlier signs that the High Court would probably confine its interest in developing a constitutionally entrenched separation of powers doctrine to ensuring a separation of the judicial power,²⁸ and the High Court confirmed this in a 1931 decision (explained below) that virtually freed the Commonwealth Parliament from any constraints on delegating its legislative powers.²⁹

The decision to deny a strict separation of powers between Australia's legislative and executive branches did not immediately devalue the topic's importance. Mike Taggart noted that subordinate legislation was the principal concern of the early Anglo-Commonwealth administrative law literature between roughly 1930 and 1950.³⁰ The debates in those days tended to revolve around arguments as to whether an administrative state was the Trojan Horse for socialism, and whether there were any feasible alternatives to executive rule-making and discretions. Some of those debates appear rather quaint these days, but to be fair to those who were fearful of the spread of subordinate legislation, one should also note the astonishing breadth of rule-making powers thus granted to officials, powers, one might add, that usually came with no appeal rights.

Acts concerning government powers in times of war, emergencies or civil disturbances have long contained huge delegations of power, but the examples did not stop at that point. In the UK, the Minister administering the *Poor Law Act 1930* (UK) could 'make such rules, orders and regulations as he may think fit for ... the management of the poor'.³¹ However, that power was not a product of the Great Depression – it went back to 1834, when it empowered the independent Poor Law Commissioners.³² The UK's Agricultural Marketing Acts 1931 to 1933 (UK)³³ transferred plenary power over a vast section of the economy to marketing boards and the central government. Similarly, the *Coal Mines Act 1930* (UK)³⁴ empowered state control of an entire industry. There were contemporary parallels in the legislation of the Australian States relating to primary industries³⁵ and work creation schemes,³⁶ but

²⁷ The creation and remit of the Senate Standing Committee on Regulations and Ordinances were directly attributable to the stir caused by Lord Hewart's books. That Committee dates back to 1932, and is the Senate's oldest Standing Committee with a remit beyond matters of internal parliamentary management.

²⁸ *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492; *Roche v Kronheimer* (1921) 29 CLR 329.

²⁹ *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73. As noted below, the United States still has, in theory, an 'intelligible principles' requirement of legislative authority to make subordinate legislation, but the requirement is a dead letter.

³⁰ Michael Taggart, 'From 'Parliamentary Powers' to Privatization: the Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 *University of Toronto Law Journal* 575, 590–600.

³¹ 20 & 21 Geo C, c 17, s 136(1)(a).

³² *Poor Law Amendment Act 1834* (UK), s 15.

³³ 21 & 22 Geo 5, c 42; 23 & 24 Geo 5, c 31; 24 Geo 5, c 1.

³⁴ 20 & 21 Geo 5, c 34.

³⁵ See, eg, *Milk Act 1931* (NSW); *Dairy Products Act 1933* (NSW); *Dried Fruits Act 1933* (NSW); and *Wheat and Wheat Products Act 1936* (NSW).

³⁶ Section 9 of the *Prevention and Relief of Unemployment Act 1930* (NSW) empowered the government to issue declarations that stipulated the terms and conditions of employment in any occupation. Declarations had the force of law, and overrode any pre-existing

it seems likely that Australia had fewer statutes than the UK authorising the government to use subordinate legislation to amend primary legislation.³⁷ The most notorious example of such a clause at the Commonwealth level was an Act with only one substantive provision; it invested the government with total control over the employment of transport workers. The subordinate legislation that it thus empowered overrode any other Act.³⁸

Taggart argued that starting in the 1950s, subordinate legislation gradually disappeared from the radar screens of most Anglo-Commonwealth administrative lawyers.³⁹ His pessimism was essentially accurate with regard to Australian administrative law textbooks,⁴⁰ but it appears to have painted an overly gloomy picture of British scholarship. Taggart hoped for a surge of interest in the topic as a result of the massive 'juridification' that accompanied privatisation. If the surge in regulation that accompanied privatisation indeed had anything to do with continued scholarly interest in rule-making in the UK, then perhaps the global financial crisis will have a similar effect. The 'reregulation' of the financial services industry has already begun, and the new banking legislation (below) leaves almost everything to subordinate legislation.

As a term, 'administrative law' made frequent appearances in Australia's secondary literature, but in most instances, this was by way of references to overseas literature. Its first High Court outing was in 1943,⁴¹ and the first Australian book of that title did not appear until 1950.⁴² Justice Evatt of the High Court wrote an extended and surprisingly modern essay on the topic in 1937.⁴³ Its overall theme was for reform to accommodate the conflicting demands of efficient and low-cost administration whilst at the same time requiring fair procedures and granting adjudicative tribunals a measure of independence from the government of the day. Evatt said that it was not Parliament that ran the country, but 'thousands of Boards, officials and administrators,

contract or any pre-existing State industrial award or agreement. Declarations did not have to be tabled in Parliament and were therefore not subject to disallowance by negative vote in either chamber.

³⁷ *Wheat Products (Prices Fixation) Act 1938* (NSW) appears to have been exceptional. Clauses authorising such subordinate legislation are known as Henry VIII clauses: see below.

³⁸ *Transport Workers Act 1928-1929* (Cth), s 3, upheld in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

³⁹ Taggart, above n 30, 613-20.

⁴⁰ So far as it deals with subordinate legislation, Australia's public law literature seems to be pitched to a practitioner market, confining itself to an outline of the legal and regulatory frameworks for framing, debating and promulgating subordinate legislation; see, eg, Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (3rd ed 2005).

⁴¹ *Johnston Fear & Kingham & the Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314, (Rich J), citing William Alexander Robson, *Justice and Administrative Law: A Study of the British Constitution* (1928); and Frederick John Port *Administrative Law* (1929) — the first two English books with 'administrative law' in the title. His Honour's outlook might best be captured by his statement at 327: 'It is no part of the Court's duty to approach regulations with a desire to destroy them, especially if a provision, the subject of attack, be one of ordinary prudence and fairness.'

⁴² Wolfgang Friedmann, *Principles of Australian Administrative Law* (1950).

⁴³ Evatt, above n 26. This was originally an address given in Sydney the previous year to a State branch of the Institute of Public Administration.



whose decisions are seldom appealable or even reviewable by the courts. In the modern State this is necessary, subject to safeguards in the interests of the people.⁴⁴

Evatt saw those safeguards in both democratic terms and as securing 'social justice and social security'.⁴⁵ His view might best be summed up as liberal-democratic, balancing pragmatism with a genuine concern for rule of law principles that were so lacking in many of the tribunals, particularly at the State level.⁴⁶ Evatt came from the Labor side of politics, but his essay acknowledged the Great Depression only indirectly, via a discussion of the American Supreme Court's treatment of certain New Deal legislation.

As in the UK, Australia's administrative law histories do not treat the Great Depression either as one of the subject's defining moments, or as directly leading to such a moment. The most recent textbook account of the history of Australian administrative law makes no claim to provide more than a sketch,⁴⁷ but that sketch is nevertheless noteworthy for making no mention of the Great Depression. It states that '[t]he birth of modern Australian administrative law can probably be fixed at the publication of the Kerr Committee Report in 1971.⁴⁸ That was the Report which laid the foundation for statutes establishing the Ombudsman, a generalist administrative appeals tribunal, the Administrative Review Council, and a statutory code for judicial review. Freedom of Information and other measures soon followed.

In stark contrast to the Anglo-Australian histories of administrative law, the Great Depression's importance to American administrative law is clear. The independent regulatory agency was for many years the principal focus of American administrative lawyers, and their histories typically reflected that by starting in earnest with the Interstate Commerce Commission (created in 1887), whilst briefly acknowledging the existence of administrative government before that.⁴⁹ Their historical scholarship is far more varied and nuanced nowadays. Although the Americans acknowledged the existence of 'administrative law' much earlier than in the UK,⁵⁰ it (or, at least, the administrative state) was as bitterly resented by the largely conservative bar and bench. The debates crystallised in the 1930s around the New Deal's regulatory agencies. The emphasis was then, as it is today, on rule-making by agencies beyond

⁴⁴ Ibid 269.

⁴⁵ Ibid 269.

⁴⁶ Peter Bayne, 'Mr Justice Evatt's Theory of Administrative Law: Adjusting State Regulation to the Liberal Theory of the Individual and the State' (1991) 9 *Law in Context* 1.

⁴⁷ Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (2008) 1-43.

⁴⁸ Ibid 4, referring to *Commonwealth Administrative Review Committee Report* (Parl Paper No 144 (1971)). See also John McMillan, 'Parliament and Administrative Law' (Research Paper No 13, 2000-01), which is an extensive history specially commissioned for the centenary of federation; it, too, saw the *Kerr Report* as the pivotal moment of Australian administrative law, and made no mention of the Great Depression.

⁴⁹ E Gellhorn and G O Robinson, 'Perspectives on Administrative Law' (1975) 75 *Columbia Law Review* 771, 772.

⁵⁰ See Frank Johnson Goodnow, *Comparative Administrative Law: an Analysis of the Administrative Systems, National and Local, of the United States, England, France and Germany* (1893) 6-7; Ernst Freund, *Cases on Administrative Law: Selected from Decisions of English and American Courts* (1911); Felix Frankfurter, 'The Task of Administrative Law' (1927) 75 *University of Pennsylvania Law Review* 614.

electoral accountability, although agency policy-making was in fact largely achieved in those days through adjudication. Rule-making was a more pressing problem for the Americans than for the British or Australians, whose parliamentary systems located an elected executive within their legislatures. The Supreme Court's initial response was to strike down extraordinarily broad delegations of law-making powers in two decisions in 1935.⁵¹ The political backlash was enormous, with the President proposing legislation to enlarge the Court's composition so that he could stack it with more compliant appointees. Speaking constitutionally, the issue was whether the constitutional separation of powers doctrine could yield a workable test for constraining the congressional authorisation of executive rule-making. But in public, the issues played out in economic and political terms, 'between those who sought positive government and those who opposed it.'⁵² The administration started putting a few more principles of general guidance into the relevant New Deal legislation, and the Court has gone along with this compromise ever since.⁵³ But it took more than that to calm the more general debates thus started about the structure and processes of the administrative state. The principal battlegrounds were two committees of inquiry.⁵⁴ The report from the second of those committees led eventually to the *APA*.

In short, if the *APA* was for American administrative law its greatest 'moment', its genesis was a fervent and sustained debate at the highest levels sparked by the Great Depression. Importantly for this paper, one of those debates remains as one of the drivers of American administrative law scholarship; it is the debate about the democratic legitimacy (or its absence) of the modern administrative state. Rule-making is the principal site of that debate, simply because it involves law-making beyond any meaningful Congressional input. In the 1970s, one of the hopes for the *APA*'s rule-making procedures requiring 'notice and comment' was to create a surrogate political process that might provide interest groups with a voice so obviously neither heard nor represented when Congress enacted skeleton legislation.⁵⁵

⁵¹ *ALA Schechter Poultry Corp v United States* 295 US 495 (1935); and *Panama Refining Co v Ryan* 293 US 388 (1935).

⁵² Kenneth Culp Davis and R J Pierce, Jr, *Administrative Law Treatise* (3rd ed, 1994) vol 1, p 12.

⁵³ Daniel Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993).

⁵⁴ See President's Committee on Administrative Management in the Government of the United States, *Report of the Administrative Management in the Federal Government* (1937) (known after its chair as the *Brownlow Report*); Attorney General's Committee on Administrative Procedure, *Final Report of Attorney General's Committee on Administrative Procedure* (1941). The American Bar Association's Administrative Procedure Database Archive has the 1941 Report; that database is housed at Florida State University College of Law <www.law.fsu.edu>.

⁵⁵ Richard B Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1667, 1670:

Increasingly, the function of administrative law is not the protection of private autonomy but the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision. Whether this is a coherent or workable aim is an open issue. But there is no denying the importance of the transformation.



C SUBORDINATE LEGISLATION: RULE OF LAW OR DEMOCRATIC LEGITIMACY?

Subordinate legislation was the principal vice in Lord Hewart's new despotism. He granted it formal legality because it was authorised by Parliament, and Hewart never questioned parliamentary supremacy. But he saw the proliferation of subordinate legislation as an abuse of parliamentary supremacy that undermined the rule of law. He thought that the departmental mandarins had captured their Ministers, and were legislating without any practical controls by Parliament.⁵⁶

Hewart may well have been Britain's worst Chief Justice ever, or at least since the seventeenth century,⁵⁷ and he may well have been a complete nonentity in intellectual terms;⁵⁸ but he was a gifted polemicist and some of his concerns still resonate. His first complaint was that there was too much subordinate legislation. Speeches and articles ever since have routinely demonstrated that any year's subordinate legislation occupies more shelf space than the same period's output of primary legislation. Secondly, those primary Acts which authorised government to make subordinate legislation did so in terms so broad as to be beyond any practical risk of judicial invalidation for being ultra vires. Thirdly, many Acts sought to protect against even this slight risk of invalidation by means of a peculiar form of ouster clause which required subordinate legislation to be treated as if it had been enacted by Parliament itself.⁵⁹ Worse still (and fourthly), some Acts empowered the government to make subordinate legislation amending or suspending the terms of the primary legislation and even of other legislation. These were Henry VIII clauses, so named because Parliament had once yielded a similar power to that king.⁶⁰ Fifthly, there were no regular mechanisms within the Parliament for scrutinising subordinate legislation and disallowing it if sufficient Members so desired. Other charges included that the drafting of subordinate legislation was often very poor, because it fell to departments rather than to Parliamentary Counsel; and that it was often difficult to find. Writing more than a decade later, Megarry added complaints about the proliferation of 'administrative quasi-legislation',⁶¹ or what might now be called soft law.

In strictly legal terms, some things have changed since Hewart's time.⁶² Indeed, prompted by his polemic, all Parliaments have well-established mechanisms that regularise the scrutiny of subordinate legislation with a view to its possible

⁵⁶ Hewart, *The New Despotism*, above n 20, 17.

⁵⁷ Taggart, above n 30, 578, citing (respectively) Lord Devlin, *Easing the Passing: the Trial of John Bodkin Adams* (1985) 92, and R F V Heuston, *Lives of the Lord Chancellors, 1885-1940* (1964) 603.

⁵⁸ The report of *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259, has Hewart CJ making the famous statement that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done.' One State Chief Justice, however, believes that Hewart should have acknowledged Lord Sankey as the original author of that proposition; J J Spigelman, 'Seen to be Done: the Principle of Open Justice – Part 1' (2000) 74 *Australian Law Journal* 290, 290–2.

⁵⁹ See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) 977–79.

⁶⁰ *Statute of Proclamations 1539* (Eng), 31 Hen VIII c 8.

⁶¹ R E Megarry, 'Administrative Quasi-legislation' (1944) 60 *Law Quarterly Review* 125.

⁶² The Australian arrangements are described in Pearce and Argument, above n 40.

disallowance. At least in the case of Australia's Parliaments, their standing committees entrusted with that task all have common-form criteria by which to judge subordinate legislation. They particularly dislike subordinate legislation that trespasses unduly on personal rights and liberties, or that represents too much red tape. Increasingly, the remit of parliamentary committees is being extended to incorporate the scrutiny of Bills. Three of the criteria there are whether rights, liberties or obligations are unduly dependent upon unreviewable decisions or subject to unduly broad discretionary powers; whether the subject matter is inappropriate for delegated legislation; and whether there is sufficient opportunity for parliamentary scrutiny of subordinate legislation. Australia's committees all profess a strong dislike of Henry VIII clauses.

Australia's subordinate legislation is now easily accessed via the web, and its drafting has noticeably improved. Most Australian jurisdictions now have legislative requirements for seeking public input into proposed subordinate legislation. In contrast to America, the Australian Acts keep the judiciary out of that aspect of rule-making, and assign its supervision to parliamentary committees.⁶³ Soft law still lies beyond the reach of these reforms, and whilst wide-ranging Henry VIII clauses are extremely rare,⁶⁴ laws relating to corporate law and banking have long empowered the regulators to disapply or modify various parts of the primary legislation that would otherwise apply in individual circumstances.⁶⁵ One could view these as Henry VIII clauses, but only in miniature, because the government's power to rewrite primary legislation applies only to a specific firm, event or transaction. That is in stark contrast to the UK's Henry VIII clauses, which are not in miniature and which (despite protests) have now become standardised in most 'regulatory' areas; some of them even empower government to amend primary legislation enacted *after* enactment of the Henry VIII clause in question.⁶⁶ Whilst Australia's 'miniature' version delegates legislative power, it is also a fairly clear acknowledgement of the English Parliament's seventeenth century declaration 'That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority *without Consent of Parlyament* is illegall.'⁶⁷

These parliamentary reforms of the processes for making and scrutinising subordinate legislation scarcely begin to address Hewart's concerns except in a purely formal sense, and Hewart's concerns were largely substantive. Cabinet still controls Parliament, the executive branch still legislates with very little correction from Parliament, regulatory legislation typically contains very few guiding principles or policies beyond a collection of impossibly broad objectives, and the real meat is left for later, whether by way of subordinate legislation or soft law. In a sense, what Hewart got wrong here was his labels; it is absurd to characterise the UK and Australia, whether then or now, as having abandoned the rule of law. The Americans got it right

⁶³ See: *Legislation Act 2001* (ACT); *Subordinate Legislation Act 1992* (Tas); *Subordinate Legislation Act 1994* (Vic); *Subordinate Legislation Act 1989* (NSW); *Statutory Instruments Act 1992* (Qld); *Legislative Instruments Act 2003* (Cth).

⁶⁴ Ian C Harris, Bernard C Wright and Peter E Fowler (eds), *House of Representatives Practice* (5th ed, 2005), 398–9.

⁶⁵ See, eg, *Corporations Act 2001* (Cth), s 655A. Henry VIII clauses are unconstitutional in America: *Clinton v City of New York*, 524 US 417 (1998), striking down a clause empowering the President to disapply ('veto') particular items in an Appropriation Act.

⁶⁶ See, eg: *European Communities Act 1972* (UK) c 68 ss 2(2), 2(4), sch 2; *Human Rights Act 1998* (UK), c 42 s 10, sch 2 para 1; *Legislative and Regulatory Reform Act 2006* (UK) c 51.

⁶⁷ *Bill of Rights 1688* (Eng) c 2, s 1 (emphasis added).



when they saw democratic legitimacy as the underlying issue about subordinate legislation.

Hewart had described his rule of law at rather more length than he defined it, but it seemed to contain the standard Diceyan ingredients of freedom from arbitrary power, and was focused almost entirely on the role of the common law courts; the legislative process was barely mentioned.⁶⁸ Like Dicey, Hewart's rule of law read like a hymn of praise to the English common law and was fiercely, indeed apparently uniquely, British.

The standard list of ingredients for rule of law prescriptions is somewhat longer these days. Martin Krygier gives a useful summary of Fuller's constituents⁶⁹ of the 'internal morality of law':⁷⁰

Briefly, these conditions are that there must be: (1) general rules; (2) made public; that are (3) non-retroactive; (4) comprehensible; (5) non-contradictory; (6) possible to perform; (7) relatively stable; and (8) administered in ways congruent with the rules as announced.

Krygier finds some of these ingredients less helpful than others, and is suspicious of most recipe lists – they tend to ignore contexts, structures and cultures, all of which affect the extent to which law rules. Lists such as Fuller's therefore read like lawyers' check-lists, tied to specific periods of time and to specific institutional architectures. Two consequences are disappointing results from their transplantation to societies newly emerged from tyranny, and an inability to theorise how it can be that the style of laws, legal institutions and administration might be able to change significantly over time in stable, western democracies without in fact any lessening in the respect accorded to law or in the protection against arbitrariness.

If Hewart's concerns as to the executive's dominance of Parliament were valid back in 1929, then he would be spinning in his grave nowadays. Back then, there were commentators who fiercely defended the need for executive legislation, which could be formulated by experts, passed quickly, and amended as need arose without the tedium and delays associated with the formulation and passage of primary legislation. More fundamentally, they noted that Hewart's vision of the split between parliamentary and executive legislation had not just passed long ago, but it had passed with no visible manifestation of the heavens falling.⁷¹ In other words, the rule of law remained. Government was still limited, bureaucrats still behaved according to rules and principles, people appeared no less able to order their affairs in conformity with the law and the way it would be administered, and the potential for arbitrary power still existed but probably manifested no more than previously. Subordinate legislation indeed needed to be studied, not for its rule of law implications, but for its manifest tendency to remove the making of major pieces of law from the public (and therefore political) arena. Edward Page calls it 'politics in seclusion'.⁷²

The constitutional law of Australia and the United States offers no help. America still has a theoretical limit upon the delegation of law-making power, but it has become entirely ineffective; extremely broad standards ('intelligible principles') within the

⁶⁸ Lord G Hewart, *The New Despotism*, above n 20, 22-36.

⁶⁹ Lon L Fuller, *The Morality of Law* (1964) 33-94.

⁷⁰ Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in G Palombella and N Walker (eds), *Relocating the Rule of Law* (2009) 45, 49.

⁷¹ Taggart, above n 30, 594-600.

⁷² Edward C Page, above n 3, 1-18.

primary legislation are enough to keep their non-delegation principle at bay.⁷³ Congressional oversight of subordinate rule-making is limited by a number of factors, including a Supreme Court decision that made it impossible for a statute to empower either chamber to overturn a subordinate law by resolution; that was said to be a legislative act that could be performed only by the passage of fresh primary legislation.⁷⁴ The APA's notice and comment procedures for rule-making were at one stage thought to have the potential for performing a surrogate congressional role for interest groups which could not make their voices heard in Congress itself.⁷⁵ Those hopes were not realised, and the President now exercises more controls over agency rule-making processes *before* the APA's formal requirements commence.⁷⁶

As it applies in Australia, the constitutional separation of powers is decidedly asymmetric. In essence, the judicial power of the Commonwealth is protected and quarantined, but at roughly the same time as Hewart's *New Despotism* was receiving wide publicity, the High Court decided that there were virtually no constraints upon the Commonwealth Parliament delegating its law-making powers. The only exception was that the delegation had to relate to one or more of the topics over which the Parliament has legislative competence.⁷⁷ A subsequent (and limited) exception declared that where Parliament's legislative competence turned on the formation of an opinion that particular legislation with respect to Aborigines was 'necessary', then the task of forming that opinion was not delegable.⁷⁸ The High Court has more recently hinted at another exception, founded on a restrictive definition of 'law' (or, perhaps, 'legislation'). The Commonwealth Parliament has legislative competence over 'aliens' but the Court has doubted whether an Act would be valid if it did nothing more than invest the Minister with discretionary power over all people falling within the constitutional conception of aliens. This would not be because such an Act would fail to relate to a head of legislative competence (in this case, 'aliens'), but because it might be so lacking in content as not even to be an enacted law.⁷⁹ The suggestion was that to qualify as 'legislation', the relevant document might have to contain 'a rule of conduct or a declaration as to power, right or duty'.⁸⁰ In other words, a document might not be 'legislative' (whether primary or subordinate) if its only 'rule' is to authorise others to make rules.⁸¹

⁷³ *Mistretta v US*, 488 US 361 (1989); *Touby v US*, 500 US 160 (1991). See also Schoenbrod, above n 53.

⁷⁴ *Immigration and Nationalization Service v Chadha*, 462 US 919 (1983).

⁷⁵ Stewart, above n 55.

⁷⁶ Peter L Strauss, 'From Expertise to Politics: the Transformation of American Rulemaking' (1996) 31 *Wake Forest Law Review* 745.

⁷⁷ *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

⁷⁸ *Western Australia v Commonwealth* (1995) 183 CLR 373, 486.

⁷⁹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513.

⁸⁰ *Ibid* (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), quoting from *Commonwealth v Grunseit* (1943) 67 CLR 58, 82 (Latham CJ). See also *Kable v DPP (NSW)* (1996) 189 CLR 51, 76, where Dawson J (in dissent) noted an argument that in the general sense of the term (as opposed to its constitutional sense), a 'law' has to conform to an Austinian 'command'.

⁸¹ Cf *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73, 102, where Dixon J seemed to say that were it not for Australia's inheritance of a long-established English tradition of treating subordinate legislation as truly 'legislative', one might have been able to argue that subordinate rules should not be characterised as a



Edward Rubin had similar reservations about saying that skeleton Acts were 'laws', but he was commenting on the changing nature of law-making rather than offering constitutional arguments against the changes. He argued that we must adjust our conception of 'legislation'.⁸² Legislation used typically to be 'transitive' in his terms, because it contained enough detail to be immediately operative. Even Acts prescribing minimum safety requirements for workplaces used typically to be transitive – Congress itself stipulated the exact measures which employers had to take.⁸³ Rubin argued persuasively that modern statutes are typically intransitive. Beyond a few broad statements of objectives sufficient to satisfy the non-delegation's 'intelligible principles' requirement, American legislation these days typically leaves everything (even policy at the broadest level) to the executive branch and its agencies. All legislation needs implementation, and we are accustomed to focusing on the courts in that respect, but that is a habit of thought that needs questioning in the administrative state. There are degrees of intransitivity, and Rubin thought that highly intransitive legislation might become 'law' only after government agencies had commenced its implementation by promulgating subordinate legislation. Rubin's purpose was to set the stage for evaluating and improving modern legislation, primarily in terms of its effectiveness but also in terms of its conformity to the sorts of rule of law criteria that might still make sense when applied to intransitive legislation that speaks only to administrative agencies.⁸⁴ His argument that primary legislation establishing regulatory regimes typically fails to meet most of Fuller's eight requirements for law's 'internal morality'⁸⁵ was not intended to suggest that it might for that reason be unconstitutional. Indeed, he was particularly critical of two constitutional doctrines inherited from the transitive era (non-delegation and vagueness) for missing the point about modern government.

These terminological issues are probably too vague for constitutional courts, but we can still admit to some uneasiness about the format of the principal legislation in Australia and the United Kingdom concerning their governments' powers over banks. When things start to go wrong with any particular bank in either country, it will find itself subject to sweeping governmental powers that are discretionary for the most part. If things go so wrong as to prompt forced restructures, the Acts talk of compensation, but the devil will be in the detail, which is left almost entirely to

manifestation of 'true legislative power' wherever they were subject to repeal by a higher legislative source.

⁸² Edward Rubin, 'Law and Legislation in the Administrative State' (1989) 89 *Columbia Law Review* 369.

⁸³ The example comes from a response to Rubin by Peter Strauss, 'Legislative Theory and the Rule of Law: Some Comments on Rubin' (1989) 89 *Columbia Law Review* 427, 428–30. Strauss compared railroad safety legislation passed in 1893 with automobile safety legislation passed in 1966. The differences were huge and went far beyond the former being transitive and the latter intransitive. Members of Congress used to be directly involved in formulating an Act's content, which they debated amongst themselves. That sort of work these days is left to huge congressional bureaucracies supervised by staffers.

⁸⁴ Although Rubin largely avoided the terminology of 'rule of law', he assumed the normativity of 'law', and his intransitive statutes are amenable to rule of law analysis: Strauss, above n 83; M Krygier, above n 70, 56–7; and David Dyzenhaus, 'Accountability and the Concept of (Global) Administrative Law' (Working Paper No 2008/7, Institute for International Law and Justice, 2008).

⁸⁵ Rubin, above n 82, 397–408.

subordinate legislation. In particular, the valuation principles fall to be determined by government on a case by case basis, and the UK's principles to safeguard against the untoward consequences of splitting a business will be determined by soft law (Codes) that ranks lower than statutory instruments in any strictly hierarchical sense. Britain's *Banking Act 2009* (UK) ('2009 Act') also has Henry VIII clauses,⁸⁶ although these were modified in the Bill stages in response to sustained protests. They even empower subordinate legislation to make retrospective amendments of primary legislation. Except in an emergency, any exercise of the Henry VIII powers has to be tabled in Parliament and will come into effect only upon an affirmative resolution in each House.

It would appear that when large sums of public money are to be spent propping up any bank in particular, and perhaps all banks, law will be made on the run and even after the event. A country's reputational interests might then provide creditors and others with more protection than the strict letter of the law.

D THIS DEPRESSION, ADMINISTRATIVE LAW AND BELIEF SYSTEMS

Government rhetoric is important. It discloses shifts in underlying beliefs and gives clues as to likely future action. Even so, one must be careful to read between the lines; 'vision statements' for political audiences rarely tell the whole story. The global financial crisis has reversed the government rhetoric of the previous 30 years; governments characterising themselves as 'hands off' the markets are now happy to talk of 'hands on' engagement. In practice, however, there will indeed be discontinuities, but perhaps not as many as the rhetoric would have us believe.

Most leaders these days prefer to talk of their countries' recessions, but President G W Bush characterised the present economic crisis as a 'depression', and said in his final press conference that it was his successor's job to ensure that things did not get worse than the Great Depression.⁸⁷ This prompts thoughts as to whether the present crisis will be as important to administrative lawyers as the Great Depression. Such conjecture might seem melodramatic; after all, the most noticeable impact of the Great Depression on Anglo-Australian administrative law was confined to the processes of making subordinate legislation, and its most noticeable impact on American administrative law was to spark a debate that ran for almost a decade before their *APA* became law. One might therefore ask whether the present economic crisis will have any noticeable effect on the study of administrative law. It will be suggested that the answer might to some extent depend on what administrative lawyers see themselves as doing; whether their concerns should (as in America) extend to the democratic legitimacy of the administrative state.

The global financial crisis has certainly produced masses of government rhetoric. Institutions, political parties and economic pundits are quite naturally looking for causes and cures. In the search for causes, *almost* everyone blames everyone else. I

⁸⁶ *Banking Act 2009* (UK) c 1, ss 75 (empowering the amendment of any Act other than the 2009 Act itself), 135, 156, 168.

⁸⁷ Office of the Press Secretary, *Transcript of Press Conference by President G W Bush on January 12, 2009* (2009) The White House: President George W Bush <<http://georgewbush-whitehouse.archives.gov/news/releases/2009/01/20090112.html>> at 29 July 2009.



emphasise 'almost' because some commentators appear to believe that blame is either entirely or largely inappropriate; that this sort of boom-and-bust cycle is an inherent quality of a free market which has no credible competitor. The unlamented President Bush certainly thought that government bore no blame.⁸⁸ At a Congressional hearing into the role of regulatory failure, Dr Greenspan (the former Governor of the US Federal Reserve Bank) regretted only that he had not regulated credit default swaps.⁸⁹ Greenspan defended both his ideological commitments and his need to have some. He was charged not with having a false ideology, but with ideology itself:

Over and over again, ideology trumped governance. Our regulators became enablers rather than enforcers. Their trust in the wisdom of the markets was infinite. The mantra became: government regulation is wrong and the market is infallible.⁹⁰

His response made a lot of sense:

[A]n ideology ... is a conceptual framework with the way people deal with reality. Everyone has one. You have to — to exist, you need an ideology. The question is whether it is accurate or not.⁹¹

Australia's Prime Minister Rudd has two different and differing positions. First, he will be driven by values rather than ideology, a distinction he has not sought to explain;⁹² and secondly, the crisis is all the fault of neoliberal ideologues who for the last 30 years allowed 'extreme capitalism' to behave ever more recklessly. It falls to government, he said, to return to a more social path, and to pick up the regulatory tasks and social commitments abandoned to the market by his wayward predecessors.⁹³ It might be difficult to get a fix on his definitions of ideology and extreme capitalism,⁹⁴ but it is not at all difficult to see where he is going. His massive government spending program will be accompanied by increased regulatory activity focused on the causes or possible causes of market failures. He characterised the

⁸⁸ 'I believe this — the phrase "burdens of the office" is overstated. You know, it's kind of like, why me? Oh, the burdens, you know. Why did the financial collapse have to happen on my watch? It's just — it's pathetic, isn't it, self-pity.' Ibid.

⁸⁹ See Evidence to Committee on Oversight and Government Reform, Congress of the United States (House of Representatives), Washington DC, 23 October 2008 (Alan Greenspan) <<http://oversight.house.gov/documents/20081023100438.pdf>> at 29 July 2009.

⁹⁰ Evidence to Committee on Oversight and Government Reform, Congress of the United States (House of Representatives), Washington DC, 23 October 2008, 2 (Henry Waxman, Chairman) <<http://oversight.house.gov/documents/20081023100359.pdf>> at 29 July 2009.

⁹¹ Evidence to Committee on Oversight and Government Reform, Congress of the United States (House of Representatives), Washington DC, 23 October 2008 (Alan Greenspan) <<http://oversight.house.gov/documents/20081024163819.pdf>> at 29 July 2009.

⁹² Kevin Rudd, 'The Australian Response to the Global Financial Crisis' (Speech delivered at the Federal Labor Business Forum, Sydney, 3 October 2008) <<http://www.pm.gov.au/node/5548>> at 29 July 2009. He said on an earlier occasion: 'We simply don't have to choose between Hayek and Brezhnev': Kevin Rudd, 'Address to the Centre for Independent Studies' (Speech delivered at the Centre for Independent Studies Consilium, Queensland, 3 August 2008) <<http://www.pm.gov.au/node/5666>> at 29 July 2009.

⁹³ See Kevin Rudd, 'The Global Financial Crisis', *The Monthly* (Melbourne), February 2009, 20.

⁹⁴ Opposition members naturally deny the charge of 'neoliberalism', or profess puzzlement as to its meaning. As to the charge of regulatory failure, they deny it, saying that Australia had the best regulatory system in the Western World. See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 4 February 2009.

previous 30 years as an era in which the state retreated because its economic managers believed that state intervention in the markets was either unnecessary or even counter-productive. There can be no understatement of the extent to which Mr Rudd believes that era now to be over. He has cast himself as the new leader for a new 'epoch', whose central theme will be 'a reliance on the agency of the state'.⁹⁵ He continued:

The intellectual challenge for social democrats is not just to repudiate the neo-liberal extremism that has landed us in this mess, but to advance the case that the social-democratic state offers the best guarantee of preserving the productive capacity of properly regulated competitive markets, while ensuring that *government* is the regulator, that *government* is the funder or provider of public goods and that *government* offsets the inevitable inequalities of the market with a commitment to fairness for all. Social democracy's continuing philosophical claim to political legitimacy is its capacity to balance the private and the public, profit and wages, the market and the state. That philosophy once again speaks with clarity and cogency to the challenges of our time.⁹⁶

It is perhaps understandable that much of what Mr Rudd does and says is of the 'me too' variety – his announcements often bear uncanny resemblances to government announcements coming out of Washington and London. That might make for even more depressing politics, but it does help the administrative lawyer who is trying to get a fix on likely developments.

New developments for the administrative lawyer will come first in the banking and financial services industries. We have already seen massive government subventions of the banking and insurance sectors worldwide, and some of these raise significant public law issues. The markets will be more regulated because many people believe that regulatory failure was largely responsible for the current mess. 'Transparency' will be the *leitmotif* in that area, but one should not expect governments to practise that virtue as much as they will preach it to others.⁹⁷ Nor will greater transparency be the magic bullet, because behavioural economics cautions that in times of market euphoria, rational actors still need protection against their better judgment.⁹⁸ The very

⁹⁵ Rudd, 'The Global Financial Crisis' above n 93, 21.

⁹⁶ *Ibid* (emphasis in original).

⁹⁷ Legislation has long underpinned the secrecy surrounding regulatory interactions with banks; see, eg, *Australian Prudential Regulation Authority Act 1998* (Cth) ss 56-7; and *Banking Act 1959* (Cth) ss 11CF and 69D. Financial journalists in Britain were able to detect that something was seriously wrong with the Northern Rock Bank after reading the Bank of England's weekly accounts. Those accounts need no longer be published. Similarly, charges provided to the Bank of England need no longer be registered at Companies House. See *Banking Act 2009* (UK) c 1, ss 245, 252 respectively. There had been some concern before the latter Act that the EU Market Abuse Directive (MAD) required immediate disclosure of emergency liquidity assistance even where that would have been entirely counterproductive; see Emiliou Avgouleas, 'Banking Supervision and the Special Resolution Regime of the *Banking Act 2009*: The Unfinished Reform' (2009) 4 *Capital Markets Law Journal* 201, 212-3.

⁹⁸ Emiliou Avgouleas, 'The Global Financial Crisis, Behavioural Finance and Financial Regulation: In Search of a New Orthodoxy' (2009) 9 *Journal of Corporate Law Studies* 23. See also John Simon, 'Three Australian Asset-price Bubbles' in Anthony Richards and Tim Robinson (eds), *Asset Prices and Monetary Policy* (2003) 8, 12, accessed online at <<http://www.rba.gov.au/PublicationsAndResearch/Conferences/2003/Simon.pdf>>, quoting from a letter to *The Times* 12 July 1845: 'There is not a single dabbler in scrip who

style of regulation will revert to a command and control model; the experiments with principles-based and decentred regulation will be put on the backburner.⁹⁹ In Australia, other areas (such as environmental protection and educational services) will also find themselves more regulated, partly because the States will yield control to the federal government in return for more money, but partly because industry self-regulation is simply less credible these days.¹⁰⁰ With the exception of sporadic government moves against takeovers financed by sovereign wealth funds,¹⁰¹ large-scale reversions to trade protectionism are unlikely. However, the consequence will likely be a tightening of immigration controls over non-citizen workers. Immigration, therefore, will continue to keep administrative lawyers busy, but the centre of gravity might shift somewhat from asylum-seekers to people seeking work or family reunification.

In short, the economic crisis will see a burgeoning of state activity. This will include increased regulatory activity in the financial services industry, and in the banking industry, the replacement of light-touch prudential supervision with more active government intervention over more areas (including liquidity levels), and even (on occasion) managerial involvement. Paradoxical as this may seem, however, the underlying preference for market ordering over state intervention will remain rock-solid. Every bank rescue so far has been characterised as exceptional, every nationalisation as temporary. It would also seem that every operational takeover by government of troubled financial institutions has in fact been outsourced to private sector experts who are for the most part kept at arm's length from government.¹⁰² Private sector experts have also played a huge part in devising government policy initiatives for handling the crisis. The belief remains that the state can steer but not row,¹⁰³ supplemented, perhaps, by the belief that for the short term, it must also spend.

does not steadfastly believe — first, that a crash sooner or later, is inevitable; and secondly, that he himself will escape it.'

⁹⁹ That is the sub-text of Lorraine Conway and Timothy Edmonds, 'Banking Bill: Bill 147 of 2007-08' (Research Paper No 08/77, House of Commons Library, 2008) 31-5; and Lorraine Conway and Timothy Edmonds, 'Banking Bill Committee Stage Report' (Research Paper No 08/85, House of Commons Library, 2008) 21-2, which appears to discuss principles-based regulation as on the brink of major reevaluation.

¹⁰⁰ For example, the *Migration Act 1958* (Cth) provides a regulatory scheme for migration agents, but s 315 allowed the government to entrust its operations to an industry body. The government will now assume direct control of the scheme: Chris Evans, 'New Body to Regulate Migration Agents' (Press Release, 9 February 2009) <<http://www.minister.immi.gov.au/media/media-releases/2009/ce09014.htm>> at 29 July 2009.

¹⁰¹ Chinese sovereign wealth funds seeking greater ownership of Australia's mining companies are likely to encounter some resistance via the government's discretionary powers under the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

¹⁰² See Treasury Committee, UK House of Commons, *Banking Crisis: Dealing with the Failure of the UK Banks* (2009), 83-90. The exceptions are inevitable. For example, the Committee's report noted (at [108]) that Chancellor took personal responsibility for ordering a significant modification of the nationalised Northern Rock Bank's policy objective of paying down its debts to government as soon as possible, a policy that conflicted with the government's exhortations to all banks to resume volume in the mortgage market.

¹⁰³ Peter Drucker, *The Age of Discontinuity: Guidelines to our Changing Society* (1969) 212-42.



In an era in which governments are taking equity stakes in troubled financial institutions, one might ask whether we have seen the end of the love affair with privatisation and outsourcing. It is suggested that once again, there will be a disjunction between rhetoric and practice. The competing rhetorical positions are familiar, having been finely honed and repeated over the last few decades. They are unlikely to be much changed, although the reversal of fortunes will be much cited. The proponents of privatisation and outsourcing cite reasons for the almost inevitable success of the measures – the state can set policy but not deliver services efficiently, Ministers are less likely to stop public sector workers feathering their own nests because it's not their money and they don't want to admit to failure, and public sector industrial practices are more hide-bound than their private sector counterparts. The opponents' most commonly cited factors leading to almost inevitable failure are equally familiar – the profit motive simply cannot coexist with public values and social concerns, most governments lack the expertise to devise and manage large scale contracts for the successful delivery of public services, the private sector is too secretive, and it is unconcerned with individual injustices if its outputs meet generalised performance benchmarks.¹⁰⁴

These competing rhetorics conceal what are often more practical concerns about the actual processes of privatisation and outsourcing, and the design of regulatory oversight of assets and services previously owned and operated by government itself. It was thought initially that asset sales would result in a downsizing of government, and depending on the way one measures these things, that may have occurred in some instances. Generally speaking, however, the privatisation and outsourcing of essential public utilities undoubtedly led to a massive increase in regulation, to achieve indirectly what could once be achieved directly through the rights of ownership.¹⁰⁵ Despite that, Australian administrative lawyers have tended to leave issues of regulatory design to the social sciences. Nor have they paid as much attention as they might to the processes of designing major public contracts and the processes of public contract management.¹⁰⁶ There was considerable debate about the Ombudsman's role with regard to privatised or outsourced utilities and services, and some success in that regard. The Commonwealth Ombudsman's jurisdiction was extended in 2005 to all private sector contractors and their subcontractors delivering publicly funded goods or services to the general public.¹⁰⁷ The Freedom of Information Acts (FOI Acts) in most parts of Australia still allow governments to collude with contractors in ensuring secrecy. Their trick is to insert standard-form confidentiality clauses into the contracts, which most FOI regimes will then honour.¹⁰⁸ Appeal rights have survived the

¹⁰⁴ See Steve Letza, Clive Smallman and Xiuping Sun, 'Reframing Privatisation: Deconstructing the Myth of Efficiency' (2004) 37 *Policy Sciences* 159–83.

¹⁰⁵ See Harlow, above n 4, 7.

¹⁰⁶ See Alfred Aman, Jr, 'Politics, Policy and Outsourcing in the United States: The Role of Administrative Law', and Richard Rawlings, 'Poetic Justice: Public Contracting and the Case of the London Tube', in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (2008) 205 and 223 respectively.

¹⁰⁷ See *Ombudsman Act 1976* (Cth), ss 3(4B), 3BA, 8(11), 9(1AA), 14, 35(3).

¹⁰⁸ There is an occasional exception by statute; see *Public Access to Government Contracts 2000* (ACT). Governments can also make administrative arrangements to publicise major



outsourcing of the provision of services to people on welfare, but not without difficulties.¹⁰⁹ Judicial review of decisions made pursuant to government contracts remains unavailable.¹¹⁰

The grander ideological battles persist to the present time in Australia, but there has been a considerable shift in the size of their political constituencies. In the public domain, the balance of rhetorical power has shifted decisively from the state-sceptics, who scarcely trusted the state to do anything well, to the private sector sceptics who point to the free market's manifest failures as reasons for never trusting it again. In the corridors of power, however, there is usually some effort to avoid the extremes. This is producing some curious results.

Governments desperately short of cash continue to think seriously about privatisation and outsourcing at the same time that this is becoming politically more difficult to achieve. The proposed sale of the iconic Snowy Mountains hydro-electric scheme was enthusiastically promoted by the three governments which owned it (namely, the Commonwealth, New South Wales and Victoria), but in 2006 the Commonwealth cancelled the sale at the last minute in order to appease conservative rural interests. The Commonwealth government is now politically opposed to outright asset sales. However, some State governments believe that they have little choice because their borrowing capacity is inevitably less than that of the Commonwealth government.

Many commentators have lain some of the blame for the global financial crisis on the private sector's credit rating agencies, which may have to submit to some form of regulation. They remain powerful nonetheless, and they have firm views as to the relationship between a state's overall borrowing and its credit rating. In Australia, at least, any government's interest payments rise steeply if its ratings go down. That puts the State governments under enormous pressure to devise projects whose most immediate sources of finance come from the private sector. They have at various stages experimented with different manifestations of Public Private Projects. The New South Wales Labor government said in 2000 that it was prepared to work in partnership with the private sector, but added that this did 'not mean privatisation or outsourcing'.¹¹¹ Six years later, it watered that down by seeking to distinguish between core and non-core government services; only the latter, it said, might be put out to the private

contracts; for example, Victoria's major contracts are available at <www.tenders.vic.gov.au>.

109 See Kate Owens, 'The Job Network: How Legal and Accountable are its (Un)employment Services?' (2001) 8 *Australian Journal of Administrative Law* 49; Rachel Bacon, 'Rewriting the Social Contract? The SSAT, the AAT and the Contracting Out of Government Services' (2002) 30 *Federal Law Review* 39; Rachel Livingstone, 'Contracting Out of Employment Services in Australia and Administrative Law' (2003) 10 *Australian Journal of Administrative Law* 77; Richard Mulgan, 'Government Accountability for Outsourced Services' (2006) *Australian Journal of Public Administration* 48; and Rachel Harris, 'Avoiding the Worst of All Worlds: Government Accountability for Outsourced Employment Services' (2007) 54 *Australian Institute of Administrative Law Forum* 3.

110 See *Griffith University v Tang* (2005) 221 CLR 99, 128-9; Aronson, Dyer and Groves, above n 59, 82-84, 138, 143-46.

111 New South Wales Treasury: Office of Financial Management, *Working with Government: Private Financing of Infrastructure and Certain Government Services in NSW* (2000) i.

sector.¹¹² The distinction lacked political traction in 2008, which saw the government's humiliating defeat of its attempt to privatise most of the businesses and assets of the State's electricity utilities. The political consequences were catastrophic for the government, whose budget went into a tail-spin.¹¹³ At the time of writing, the same government was pursuing the idea of other asset sales. It wants to sell off its profitable lotteries business,¹¹⁴ and it wants to privatise two more prisons because it is politically unable to contain prison staffing costs.¹¹⁵ Prison privatisation is hugely unpopular with unions who have a powerful voice within the State Labor government, and a compromise might be expected. Similarly, the UK government's plan¹¹⁶ to sell a large but minority stake in the Royal Mail stretched party discipline beyond breaking point.

Each of these events could serve as a case study into the political and economic dynamics of privatisation, and there are many more such stories from the last five or so years in Australia. Overall, however, there is no doubt that the urge to privatise is as great as ever, and that this can be done in any number of ways, from outright asset sales to secured loans in the form of government leases, franchises and more complex financial arrangements. Even though the weight of Australian public opinion is now against privatisation and outsourcing, both the general public and governments themselves share a deep-seated mistrust of the government's capacity to run any business properly. In Australia's case, that mistrust goes back a long way.¹¹⁷ But even in Britain, which has the strongest history of nationalised enterprises, the government puts the management of banks that it has had to take over into the hands of private sector firms.¹¹⁸ It will be noted below that the United Kingdom's bank nationalisation legislation carefully avoids the 'n' word, preferring the quite possibly misleading euphemism of 'temporary public ownership'. America is similarly phobic about the 'n' word; its government placed Fannie Mae and Freddie Mac into what its legislation calls 'conservatorship'.¹¹⁹

¹¹² New South Wales Treasury: Office of Financial Management, *Working With Government: Guidelines for Privately Financed Projects* (2006) 1.

¹¹³ See Auditor General (NSW), *Report to Parliament 2008* (2008) vol 4, 121–2; and Evidence to General Purpose Standing Committee No 1, Legislative Council of New South Wales, Sydney, 9 October 2008 (John Pierce, NSW Treasury Secretary).

¹¹⁴ See New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 November 2008, 11078 (Eric Roozendaal, Treasurer).

¹¹⁵ See General Purpose Standing Committee No 3, Legislative Council of New South Wales, *The Privatisation of Prisons and Prison-related Services* (2009).

¹¹⁶ *Postal Services Bill 2009* (UK), withdrawn in July 2009.

¹¹⁷ A referendum defeated the government's proposal in 1944 to extend the Commonwealth Parliament's powers over a number of areas for 5 years after the cessation of hostilities. The 'no' case said that one of the extensions ('employment and unemployment') amounted to 'civil conscription', which would be run by 'the Government's "Brains Trust"', mostly made up of 'men who, for the most part, have never had to organize or control a successful pie-stall!': *Wong v Commonwealth* (2009) 236 CLR 573, 587 (French CJ and Gummow J).

¹¹⁸ Treasury Committee, UK House of Commons, *The Run on the Rock: Fifth Report of Session 2007–08* (2008) vol 1, [375].

¹¹⁹ The Federal Housing Finance Agency put Fannie Mae and Freddie Mac into conservatorship pursuant to the *Federal Housing Finance Regulatory Reform Act of 2008*, Pub L No 110–289, 122 Stat 2654 (2008) and the *Federal Housing Enterprises Financial Safety and Soundness Act of 1992*, 12 USC §§ 4501 et seq (1992).



In a sense, that epitomises the debates about privatisation. Political opinion may be against it unless it is disguised as something other than a straight-out asset sale, but those yearning for its polar opposite (nationalisation) will be sorely disappointed. No government wants to nationalise the institutions or industries it is saving, and where they do take equity stakes, they routinely declare (even in statutes) that this will only be temporary. State involvement in the mixed economy has important social and economic purposes, of course, but the socialist aspiration of state ownership of the key sectors of the economy is no more. State ownership is seen as a temporary step towards the restoration of market forces and with them, private ownership; it is most emphatically not promoted as a mechanism for removing material and social inequality.¹²⁰

E GOVERNMENT INTERVENTIONS IN THE BANKING SECTOR

Australia

The threat of corporate insolvency is usually regarded as a necessary ingredient of free markets, which means that government interventions are exceptional. Whilst most countries have schemes that look after depositors in the event of a bank insolvency, and most central banks use their powers as lender of last resort to give short-term assistance to fundamentally sound banks, the present economic crisis has occasioned more drastic government interventions. These include the installation of government managers into a troubled bank and government-subsidised takeovers by otherwise unwilling private sector purchasers. Such interventions raise serious issues of public law, which have not received much discussion of late in Australia. It is roughly 20 years since the last trading bank crises in Australia,¹²¹ and it has been a very long time indeed since any depositors lost their money.¹²²

Disputes between governments and banks have been legendary in Australia. They go back to 1816, when Governor Macquarie allowed limited liability status to the incorporators of Australia's first bank (the Bank of New South Wales), even though his instructions from London forbade that.¹²³

For the first 50 years of its existence, the Australian Labor Party harboured a dislike of private sector banking that was at times so profound as to embrace paranoid conspiracy theories whose principal actors were the forces of imperial domination and capitalists bent on the perpetual subordination of the working class.¹²⁴ Its now-

¹²⁰ See Ben Jackson, 'Revisionism Reconsidered: 'Property-owning Democracy' and Egalitarian Strategy in Post-War Britain' (2005) 16 *Twentieth Century British History* 416.

¹²¹ The State Banks of Victoria and South Australia were on-sold to other banks in the early 1990s after massive capital injections from their State governments.

¹²² Bryan Fitz-Gibbon and Marianne Gizycki, 'A History of Last-resort Lending and Other Support for Troubled Financial Institutions in Australia' (Research Discussion Paper No 2001-07, Reserve Bank of Australia, 2001) 1.

¹²³ *Ibid* 9-10.

¹²⁴ Stephen Martin, *Labor and Financial Deregulation: the Hawke/Keating Governments, Banking and New Labor* (Ph D thesis, University of Wollongong, 1999) 75-114. The writer accessed this thesis via the Australian National Library's thesis database at <www.anl.gov.au>. Its author was in the federal Labor governments from 1983 to 1996, eventually becoming Speaker of the House of Representatives.

repealed 'socialist' platform might logically have entailed the goal of nationalising the private banking sector. That would have left the Commonwealth government owning the Commonwealth Bank (a Labor government creation dating back to 1911), and the State governments owning their own savings banks, which have always been constitutionally immune from federal takeover.¹²⁵ In fact, however, Labor did not attempt nationalisation until 1947, by an Act that both the High Court and the Privy Council said was invalid. It was politically poisonous, too, and was a large factor in the government's trouncing at the 1949 general election. Federal Labor remained in Opposition for the next 23 years. It is a measure of the extent of the party's reinvention that it was federal Labor that floated the Australian dollar in 1983, allowed foreign banks into the Australian financial sector in 1985, and privatised the Commonwealth Bank in three tranches between 1990 and 1995.¹²⁶ There might well be some in the current federal Labor government who rue the fact that the government no longer owns a trading bank. Governments everywhere have started up corporate vehicles which lend money on commercial terms to those unable to borrow elsewhere, but these are very different from institutions accepting deposits from the general public.¹²⁷

Australia's bank nationalisation story started in earnest in the 1930s. A State Labor government tried to default on some of its debt obligations in 1931, particularly its debts to banks in London.¹²⁸ The conservative national government met the debt payments, but the Commonwealth Bank ultimately refused to help both the State government and its Savings Bank which had then to close. The State Governor dismissed the fire-brand Premier, who was defeated in the general election that followed.¹²⁹ A Royal Commission set up in 1935¹³⁰ produced only minor legislative changes.¹³¹ However, wartime regulations made in 1941 effectively empowered the Commonwealth Bank to set interest rates, and required all other banks to keep

¹²⁵ Section 51(xiii) of the *Constitution* gives the Commonwealth Parliament the power to legislate with respect to 'Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money'.

¹²⁶ See Martin, above n 124, chs 5, 6, 7 respectively.

¹²⁷ The UK Treasury's scheme did not seek legislative authorisation: see Her Majesty's Treasury, UK House of Commons, *Budget 2009: Building Britain's Future* (2009) 54–5. To its credit, the Australian government sought legislative authorisation in its *Australian Business Investment Partnership Bill 2009* (Cth). The Senate rejected that measure, and it was not known at the time of writing whether the government would try again.

¹²⁸ London's special political status had long been clear. For example, the *Commonwealth Bank Act 1911* (Cth) was amended in 1924 to establish a London Board of Advice, whose members were not to be drawn from the banking industry.

¹²⁹ For the Premier's dismissal, see Republic Advisory Committee, *An Australian Republic: The Options* (1992) vol 2, [260]. For the banking history, see Fitz-Gibbon and Gizycki, above n 122, 39–49.

¹³⁰ Commonwealth, Royal Commission Appointed to Inquire into the Monetary and Banking Systems at Present in Operation in Australia, *Final Report* (1937). This is known as the *Napier Report*.

¹³¹ Ben Chifley (later to become Prime Minister) was Labor's representative on the Royal Commission. He wrote a minority report advocating the nationalisation of the banks, but his argument was brief and undeveloped: David Day, *Chifley* (2001) 321–5.



reserves on deposit with the Commonwealth Bank.¹³² Legislation passed in 1945 sought to continue the Commonwealth Bank's enhanced position beyond the Second World War, but it went too far in at least one respect. Its overall effect was to prevent private sector banks from conducting business for State and local governments.¹³³ The High Court held that this was invalid because it violated the federal principle; it was a direct attack on the integrity of the States, whose continuation was constitutionally entrenched.¹³⁴

The government's reaction was immediate; it decided to rush through legislation which it boasted would lead to the nationalisation of all the private banks. The Act itself was more complicated. It certainly empowered the Treasurer, by notice to any or all of the private banks, to effect a compulsory transfer of all of the locally held shares in the subject bank to the Commonwealth Bank, but that was a discretionary power left entirely in the hands of the Treasurer.¹³⁵ The Act also empowered the Treasurer to issue any one or more of the private banks with a notice requiring it or them to cease operating altogether.¹³⁶ Politically, the government handled the matter with breathtaking ineptitude,¹³⁷ and legally, it fared no better in both the High Court and the Privy Council. It is convenient to refer collectively to the decisions of those two bodies as the *Bank Nationalisation Cases*, and those cases held the Act to have been constitutionally flawed in a number of respects.¹³⁸

The *Bank Nationalisation Cases* held that the Act failed to honour the constitutional guarantee of just terms in the event of compulsory acquisition. That was a serious defect, of course, but one that was capable of repair by subsequent legislation. What no amendment could have repaired, however, was the section empowering the Treasurer to tell a private bank to close its doors. That was held to violate s 92 of the *Constitution*, which guaranteed that 'trade, commerce and intercourse among the States ... shall be absolutely free'. On any strictly legal analysis, the more general statements in the High Court and the Privy Council as to the meaning of 'absolutely free' were incoherent,¹³⁹ although to be fair, their inarticulacy was no greater than many of the judgments that

132 See *National Security (War-Time Banking Control) Regulations 1941* (Cth) cl 9, passed pursuant to the *National Security Act 1939* (Cth).

133 *Banking Act 1945* (Cth) s 48.

134 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

135 *Banking Act 1947* (Cth) s 13.

136 *Banking Act 1947* (Cth) s 46.

137 Opposition to nationalisation was ferocious, extremely well-organised, and wide-spread across the country — there could be no doubting the measure's unpopularity. For the full account, see A L May, *The Battle for the Banks* (1968). The government's defence of the measure was half-hearted. See: Day, above n 131, 456–65. See also Selwyn Cornish, 'Sir Leslie Melville: An Interview' (1993) 69 *The Economic Record* 437; Bob White and Cecelia Clarke, 'Cheques and Balances: Memoirs of a Banker' (1995) 109 *Australian Banker* 283; and H W Arndt, 'Bank Nationalisation: Only 50 Years Ago?' (1997) 85 *Canberra Bulletin of Public Administration* 59.

138 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 (High Court); and *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 (Privy Council). The reports are 400 and 147 pages long respectively.

139 See Julius Stone, 'A Government of Laws and Yet of Men: Being a Survey of Half a Century of the Australian Commerce Power' (1950) 25 *New York University Law Review* 451, 475–96.

had gone before and many that would follow.¹⁴⁰ The leading judgments in the *Bank Nationalisation Cases* attempted to draw distinctions between orderly regulation on the one hand, and direct and immediate impediments to trade on the other. Four out of the six judges¹⁴¹ in the High Court could be read as having left open the theoretical possibility that the Commonwealth Parliament could legislate for nationalisation *per se*, as opposed to legislation directed not to the compulsory acquisition of a business, but simply to closing it down. On the other hand, the Privy Council addressed only the Treasurer's power to tell a bank to cease business. The Board left open the possibility that an Act might yet be valid if it created a monopoly for a government business enterprise owned by the Commonwealth by banning all private competition. Their Lordships said that this would be valid if the measure 'was the only practical and reasonable manner of regulation'.¹⁴² But these were only theoretical possibilities.¹⁴³ The practical effect of the *Bank Nationalisation Cases* was to take *any* nationalisation moves off the legislative agenda for fear that they would violate the *Constitution's* protection of 'free trade' in s 92.

Freed from Privy Council appeals, and faced with roughly 140 High Court and Privy Council precedents whose combined effect was to leave the application of s 92 to guesswork, the High Court abandoned the older cases in 1988 and started again. It held that s 92 protects interstate trade and commerce against laws or executive action that are protectionist in the sense of imposing burdens on interstate activity or conferring benefits on intrastate activity in a manner or with the effect of discriminating between the two.¹⁴⁴ One of the Court's concerns was to enunciate a doctrine which freed it of the necessity to define 'what is legitimate regulation in an ordered society'.¹⁴⁵ This removed the threat of the constitutional invalidation of nationalisation pursuant to s 92, although, of course, any compulsory acquisition would still need to ensure the payment of compensation 'on just terms'.¹⁴⁶

The Australian government would face particular difficulties in complying with the guarantee of just terms. The Act at issue in the *Bank Nationalisation Cases* had violated the guarantee in two respects. In form, the compulsory acquisition was to be undertaken by the Commonwealth Bank, not the Commonwealth, and the Bank was the entity obliged to pay compensation. Failing agreement between the parties, a newly established Federal Court of Claims was to try the dispute and award whatever

¹⁴⁰ For example, it was obvious that s 92 bound the States. However, whether it also bound the Commonwealth was an open question until resolved in the affirmative by *James v Commonwealth* (1936) 55 CLR 1. See more generally Geoff Lindell, *The Australian Constitution: Growth, Adaptation and Conflict – Reflections About Some Major Cases and Events* (1999) 25 *Monash University Law Review* 257, 266–73.

¹⁴¹ Latham CJ, and McTiernan, Starke and Dixon JJ.

¹⁴² *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497, 641 (Lords Porter, Simonds, Normand, Morton and MacDermott).

¹⁴³ As to government monopolies, see *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29.

¹⁴⁴ *Cole v Whitfield* (1988) 165 CLR 360.

¹⁴⁵ *Ibid* (1988) 165 CLR 360, 403 (per curiam).

¹⁴⁶ Section 51(xxxi) of the *Constitution* empowers the Commonwealth Parliament to pass laws with respect to the 'acquisition of property on just terms from any State or person for any purpose in respect of which the [Commonwealth] Parliament has power to make laws'.



'it thinks fair and reasonable'.¹⁴⁷ That would have passed constitutional muster had it not been qualified in two respects. First, the Act said that no other court had jurisdiction to try the dispute, and this was invalid for attempting to contradict the High Court's constitutionally entrenched original jurisdiction in all matters 'in which the Commonwealth, or a person ... being sued on behalf of the Commonwealth, is a party'.¹⁴⁸ The High Court said that no legislative artifice could get around the fact that for constitutional purposes, the Commonwealth Bank was in truth the Commonwealth. The attempt to exclude the High Court's jurisdiction was therefore invalid, and the Act's structure was such that this invalidity pulled the rug out from under the new Court of Claims, leaving the Act with no provision that validly empowered the determination of disputed claims. That particular constitutional trap would be easily avoided were the current or any future government to attempt nationalisation.

The 1947 Act failed the requirement of just terms in another and more fundamental respect. It empowered the Commonwealth Bank to replace a target bank's directors with its own nominees, who would then have had complete control of the target. Once installed, the nominees would have been able to reach an agreement with the Commonwealth Bank as to the amount of compensation, an agreement that would bind all of the shareholders. In essence, the shareholders were to be stripped of any power to contradict the Commonwealth Bank's view of a fair takeover price. That in itself breached the requirement of just terms, but it constituted an additional breach as regards foreign shareholders. Locally owned shares would have vested in the Commonwealth Bank immediately when the new directors were announced, but that would not have applied to foreign shareholders. The result was that shares held overseas would have been stripped of much of their value, because their owners would have lost any say in the running of 'their' bank. That, too, was held to be a compulsory acquisition, and it was one for which the Act provided no compensation.

Dixon J's judgment in the *Bank Nationalisation Case* addressed another issue which could be a government's worst nightmare in a dispute over the assessment of just terms. The private banks had complained that the price tag for any compulsory acquisition would necessarily be so huge that its payment would require the government either to print or borrow more money, with the result that compensation would end up being paid in devalued currency. His Honour held that this would have been a good argument if the private banks had adduced solid evidence in its support.¹⁴⁹ These days, therefore, the nationalisation of a sizeable bank or insurer might end up having to be paid for with foreign currency.

In case these concerns should be regarded as of merely historical interest, it might be worth looking at some of the bank rescue powers currently under contemplation. The world's central bankers are struggling to evaluate and redefine their role in sustaining or even promoting liquidity in their financial markets. A research paper written by two staffers at Australia's central bank has the usual disclaimer to the effect that it should not be taken as representing the official line, but it is informative

¹⁴⁷ *Banking Act 1947* (Cth) s 44(5) ('1947 Act').

¹⁴⁸ *Constitution* s 75(iii).

¹⁴⁹ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 339-41 (Dixon J).

nonetheless.¹⁵⁰ The authors devote considerable space to an analysis of the advantages of direct intervention in the financial markets to sustain or revive liquidity. However, their strong preference is for those interventions to be prudential, flexible, continuous and market-based. Whilst not being entirely dismissive of 'emergency' loans to banks with poor underlying positions, they would prefer to characterise the central bank's role in that respect as Lender of Last Rites.¹⁵¹ It is a role, they say, that should be adopted (if at all) only as a temporary bridging mechanism for a transition to new owners, preferably private sector owners. It is fairly clear that even by way of administering the last rites, nationalisation is seen as the worst of all options. Furthermore, the idea of nationalisation by *compulsory* acquisition is simply not mentioned. One might speculate that whilst the legal obstacles encountered in the *Bank Nationalisation Cases* to compulsory acquisition can now be surmounted, it is a move whose removal from the policy-makers' agenda has become permanent. The difficulties of compliance with the constitutional guarantee of just terms must surely be one of the reasons.

Australia's regulatory authorities have fairly standard supervisory powers over banks. The prudential regulator has extensive powers, which include licence variation or even revocation, and appeal rights lie to the Administrative Appeals Tribunal (AAT).¹⁵² Of more immediate interest are the prudential regulator's powers over any bank whose depositors appear to be at risk, or whose business might miscarry in such a way as to threaten 'instability in the Australian financial system'.¹⁵³ Depositors have first call on the regulator's attention; if insolvency proceedings are commenced, for example, the government first pays the depositors and then looks to the normal winding up process for reimbursement.¹⁵⁴ Even if insolvency proceedings have not been initiated, the regulator can remove and appoint directors, with appeal rights to the AAT unless the ground for intervention is the bank's likely failure or a system-wide threat to financial stability.¹⁵⁵ If the bank still appears to be solvent, but either its depositors or the financial system's stability are under threat, the regulator can investigate, give directions, and even appoint a statutory manager with temporary power to control and run the bank's business. Statutory managers supersede a bank's board for the duration of their appointment.¹⁵⁶ They can sell all or part of the business¹⁵⁷ and change the bank's capital structure.¹⁵⁸ The manager will be acting on the report of an independent valuer, whose inquiries are framed by any Ministerial instructions as to the assumptions that must be made.¹⁵⁹ If the manager's powers are

150 Jonathan Kearns and Philip Lowe, 'Promoting Liquidity: Why and How?' (Research Discussion Paper Series No 2008-06, Reserve Bank of Australia, 2008) <www.rba.gov.au/rdp/RDP2008-06.pdf> at 25 August 2009.

151 *Ibid* 31. One should add that an Australian bank in a position that is not quite so dire might expect to receive assistance from the other Australian banks, pursuant to 'certified industry support contracts' under the *Banking Act 1959* (Cth) ss 11CA-11CG.

152 *Banking Act 1959* (Cth) ss 9(9), 9A(8).

153 *Banking Act 1959* (Cth) s 11CA(1)(k).

154 *Banking Act 1959* (Cth) pt II, div 2AA, inserted into the Act in 2008.

155 *Banking Act 1959* (Cth) s 11CA(5A).

156 *Banking Act 1959* (Cth) s 15.

157 *Banking Act 1959* (Cth) s 14A(5).

158 *Banking Act 1959* (Cth) s 14AA.

159 *Banking Act 1959* (Cth) s 14AB.



exercised in a way that amounts to a compulsory acquisition of property, then the person affected has the right to look to the Commonwealth for compensation on just terms, with appeal rights to the Federal Court.¹⁶⁰

United Kingdom

It is instructive at this point to turn to developments in the UK, because the global financial crisis has forced the authorities in that country to give greater attention to the legal difficulties associated with government decisions to intervene where banks are failing. The UK has ratified the First Protocol (including Article 1) of the European Convention on Human Rights. Article 1 protects every natural or legal person's 'peaceful enjoyment of [their] possessions'. It provides further that there shall be no deprivation of a person's possessions 'except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.¹⁶¹ The UK's domestic law protects rights under Article 1 via the *Human Rights Act 1998* (UK) ('HRA'). The Article does not confer a right to full compensation upon compulsory acquisition, but anything less than that will be relevant to a determination of whether the government has struck a fair balance between the competing public and private interests.¹⁶² The most that a court can do if a statute empowers compulsory acquisition in circumstances that are plainly unfair is to declare the Act's incompatibility with the HRA.

The *Banking (Special Provisions) Act 2008* (UK) ('2008 Act') was the first UK Act dealing specifically with government support of failing banks. It named no bank, although it was rushed through to facilitate the nationalisation of the failed Northern Rock Bank (NRB). The NRB was the first UK bank to experience a run since the nineteenth century.¹⁶³ The 2008 Act expired after a year. It was replaced by the 2009 Act, which contains far more detail, and a variety of alternatives to full nationalisation, but these only increase one's concerns as to the extraordinary powers now vested in the government.

Both Acts empower the government or its institutions to make orders compulsorily transferring the property and the shares of local banks. Both Acts distinguish between share transfers and property transfers, giving the government a choice as to whether to deal with a troubled bank's assets and business, its shares or both. Both Acts require Treasury to make orders establishing schemes for assessing compensation, and both Acts empower Treasury to include mandatory valuation principles within those orders. The only valuation principles which the Acts themselves stipulate require any assessment to treat all financial assistance that the government has provided so far as having been repaid, and to assume that no further financial assistance will be forthcoming. Litigation challenging those principles for breach of the HRA's protection

¹⁶⁰ *Banking Act 1959* (Cth) s 69E.

¹⁶¹ *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 20 March 1952, ETS 5, art 1 (entered into force 18 May 1954).

¹⁶² *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35, 54; *Lithgow v United Kingdom* (1986) 8 EHRR 329; *James v United Kingdom* (1986) 8 EHRR 123; and *Holy Monasteries v Greece* (1994) 20 EHRR 1, 30.

¹⁶³ Emiliios Avgouleas, 'Banking Supervision and the Special Resolution Regime of the *Banking Act 2009: The Unfinished Reform*' (2009) 4 *Capital Markets Law Journal* 201, 206.

of property rights has understandably failed.¹⁶⁴ To be in breach, the principles would have to be 'manifestly unfair', and it was held that in the case of the NRB, there was no hint of unfairness. Government financial assistance had been provided as loans repayable on demand, and the bank's shares at the time it was nationalised held value only because of that assistance. The argument to the contrary assumed the shareholders' entitlement to retain government support despite the fact that it had been accepted with the condition that it was repayable on demand. The court warmly endorsed the principle that the shareholders' interests come last.¹⁶⁵

Each Act defines financial assistance in a manner which one might have supposed would identify only such assistance as was provided uniquely to the specific bank in question, rather than system-wide assistance to the banking sector generally. However, the *2008 Act* appeared to draw the distinction more narrowly. Its relevant definition extended to any case where the Chancellor had announced 'guarantee arrangements in relation to *the* deposit-taker'.¹⁶⁶ The definite article is here italicised, because it is the only indication that the government's capped guarantee of *all* bank deposits might not fall within the *2008 Act's* definition of government assistance. That Act's only specific exclusion from the definition related to 'ordinary market assistance', which meant 'assistance provided as part of the Bank [of England]'s standing facilities in the sterling money markets or as part of the Bank's open market operations in those markets.¹⁶⁷

The *2009 Act's* definition is unclear in a different way. It includes guarantees, and empowers Treasury to promulgate subordinate legislation deeming additional circumstances that constitute financial assistance.¹⁶⁸ In the specific context of assessing compensation, the Act instructs the valuer to 'disregard actual or potential financial assistance ...[except] ordinary market assistance offered by the Bank [of England] on its usual terms'.¹⁶⁹

Government announcements of system-wide guarantees for depositors might well amount to 'ordinary market assistance', but it is not at all clear that they are 'offered'.

The Acts provide largely indicative guidance as to what might go into a compensation scheme, but s 57(5) of the *2009 Act* contains the chilling warning:

There is nothing to prevent the application of the valuation principles in an order from resulting in no compensation being payable to a transferor.

The *2008 Act* allowed the Treasury to formulate compensation principles stipulating a specific date for valuing the shares and property, and the *2009 Act* expanded on that by allowing for the calculation of average values over a stipulated date range. Both Acts allow Treasury to require that the valuation be conducted on the footing that as at a particular date of Treasury's choosing, the relevant bank was no longer a going concern. They also empower Treasury to tell the valuer 'matters' either to be considered or left out of account, raising the ominous prospect of Treasury instructions to apply stipulated discounts globally to whole classes of financial instruments and other assets.

¹⁶⁴ *SRM Global Master Fund LP & Ors v Commissioners of Her Majesty's Treasury* [2009] EWCA Civ 788 (Unreported, 28 July 2009).

¹⁶⁵ *Ibid* [8]-[11], [61]-[66] (Laws LJ).

¹⁶⁶ *Banking (Special Provisions) Act 2008* (UK) c 2, s 2(3)(b) (emphasis added).

¹⁶⁷ *Banking (Special Provisions) Act 2008* (UK) c 2, ss 5(5)(b), 7(4)(b)(emphasis added).

¹⁶⁸ *Banking Act 2009* (UK) c 1, s 257.

¹⁶⁹ *Banking Act 2009* (UK) c 1, s 57(3).



Perhaps the most contentious issues during the Bill stages of the 2009 Act related to the consequences of the government splitting a bank between its sound and unsound parts.¹⁷⁰ If the government forces only a partial sale direct from the failing bank to the private sector, or transfers only part of the failing bank to the government's bridge bank with the idea of that part's on-sale in the near future, the value of the part left behind must inevitably be diminished. It is also inevitable that a partial sale would affect the value of third-party arrangements with the bank. Subordinate legislation aims to protect third party creditors against unfair splitting,¹⁷¹ with the intent that multiple arrangements involving set-offs and netting are kept together. Given the interconnections between many of the financial instruments, however, one must doubt whether untoward consequences of splitting can be wholly avoided. The 2009 Act provides that if the leftover bank goes into insolvency, its creditors are entitled to expect Treasury to strive to ensure that they receive no less than they would have received if the whole bank had entered into insolvency at the outset of government intervention.¹⁷² It also provides for a 'resolution fund' which could distribute to the shareholders left behind a pro rata share of any profits made from onselling the profitable part of the business.¹⁷³ The resolution fund will be relevant only in the event that a net profit is realised after the government's intervention. Third party creditors adversely affected by the intervention might hope for better treatment, although the government retains the power to decide on a case by case basis whether it will contribute to their compensation, or leave them to feed solely on the carcase or carcases of the residual or onsold portions of the bank as appropriate.¹⁷⁴

The 2008 Act contemplated appeals to a tribunal which was to have no power to substitute its own decision for that of the valuer. Rather, the tribunal could only remit back to the valuer if it thought that the original valuation was 'unreasonable'. The 2009 Act requires Treasury schemes to provide for appeals either to a tribunal or a court, but it is not clear whether the appellate body must be able to replace the valuer's decision with its own.¹⁷⁵

The 2009 Act's alternatives to full nationalisation are not ranked in order of priority, although the government made it plain how it would approach the matter. In descending order, the 2009 Act gives the government three 'stabilisation options' with respect to seriously troubled banks. The first option is to find a private sector purchaser for the bank's shares or property. It includes the power to effect share or property transfers by order. The second option is to transfer the bank's business (but not its shares) to a government owned bridge bank, which will hopefully off-load that business to the private sector within a year. The third stabilisation option is to place the bank's shares into 'temporary public ownership' (the Act's euphemism for nationalisation), although the Act sets no deadline for ending that arrangement. In practical terms, all three options were available under the 2008 Act, although the 2009 Act contains new language ('temporary') and new mechanisms ('bridge bank'). Action

¹⁷⁰ Conway and Edmonds, 'Banking Bill: Bill 147 of 2007-08', above n 99, 31-5; and Conway and Edmonds, 'Banking Bill Committee Stage Report', above n 99, 20-2.

¹⁷¹ *The Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009* (UK), SI 2009 No 322.

¹⁷² *Banking Act 2009* (UK) c 1, s 60.

¹⁷³ *Banking Act 2009* (UK) c 1, s 58.

¹⁷⁴ *Banking Act 2009* (UK) c 1, s 61.

¹⁷⁵ *Banking Act 2009* (UK) c 1, s 55(6).

under the first two options can be limited to specific parts of the bank. That would enable the government to follow President Bush's example of taking over only the more toxic aspects of troubled financial institutions. In the UK, however, the government's power to be selective in how it conducts a bank rescue has resulted in government assistance for transferring the more attractive parts of a bank to the private sector, leaving the more serious problems with the residual bank. The difference is huge, being a choice between nationalising the profits or the losses.¹⁷⁶ The 2009 Act introduced fast-track administration and winding up procedures specifically for the banking sector, and one might confidently expect these to be used for residual banks.

The 2008 Act said that these far-reaching government powers were to be exercised in the public interest, whose principal criterion was the avoidance of a serious threat to the stability of the UK financial system. The second criterion was the need to safeguard the value of government financial assistance that had already been given in an attempt to stave off a serious threat to the financial system's stability.¹⁷⁷ None of the 2009 Act's three stabilisation options can be exercised unless the relevant bank has either breached or is likely to breach minimum regulatory requirements as to capital adequacy or prudential management.¹⁷⁸ The further requirements in the case of either of the first two options are that government intervention is needed to protect the public interest in 'the stability of the financial systems of the United Kingdom, ... the maintenance of public confidence in the stability of the banking systems of the United Kingdom, or ... the protection of depositors.'¹⁷⁹

As for the third option (so-called temporary public ownership), the preconditions are no different to those in the 2008 Act.¹⁸⁰

The 2009 Act's objectives also talk of stability and public confidence, as well as the protection of depositors' and public funds and, curiously, the avoidance of a contravention of the HRA's protection of property rights. None of those objectives is ranked. They are matters for the government authorities to bear in mind,¹⁸¹ and Treasury can issue Codes of Practice to give further guidance.¹⁸²

The United States

It has been remarked that bank regulation in general and rescues in particular have long conformed to more 'legalistic' structures in the United States than in the United Kingdom where, it was said, the norm was 'club government' by the City.¹⁸³ It is not surprising, therefore, that some of the regulatory and insolvency mechanisms recently enacted in the United Kingdom were in fact on America's statute books since the New

¹⁷⁶ Having said that, the UK Treasury has an 'Asset Protection Scheme' which is not tied to the banking sector. The scheme bears some worrying similarities to the American government's assumptions of toxic risks, and some commentators fear it might develop into a 'bad bank'. See Treasury Committee, *Banking Crisis*, above n 102, 173.

¹⁷⁷ *Banking (Special Provisions) Act 2008* (UK) c 2, s 2(2).

¹⁷⁸ *Banking Act 2009* (UK) c 1, s 7, referencing the 'threshold conditions' as defined by the *Financial Services and Markets Act 2000* (UK) c 8, s 41(1).

¹⁷⁹ *Banking Act 2009* (UK) c 1, s 8(2).

¹⁸⁰ *Banking Act 2009* (UK) c 1, s 9.

¹⁸¹ *Banking Act 2009* (UK) c 1, s 4.

¹⁸² *Banking Act 2009* (UK) c 1, s 5.

¹⁸³ Ross Cranston, *Principles of Banking Law* (2nd ed, 2002) 94-7.



Deal. In particular, President Roosevelt's *Banking Act of 1933* (US) was probably the first banking law at a national level to empower government takeovers and transfers of failing or failed banks. It did this via a government insurance corporation for depositors,¹⁸⁴ which helped restore public confidence at the same time as it gave significant powers to the corporation itself. Most national and State banks joined the insurance scheme, at the price of submitting to an insolvency regime especially tailored to the banking industry. The corporation's powers are large, and the UK's *2009 Act* obviously had some of its mechanisms in mind (for example, the 'bridge bank'). The American corporation, however, cannot make self-serving subordinate legislation stipulating how a bank's property is to be valued, and its decisions are subject to judicial appeal.¹⁸⁵

Perhaps more interesting than Roosevelt's laws were his assumptions of power to declare new (and temporary) law as the Commander in Chief.¹⁸⁶ He summoned an emergency session of Congress within the first fortnight of his presidency, to pass the *Emergency Banking Act 1933* (US).¹⁸⁷ The speed with which the Bill became law was astonishing. No printed copies were available, and members had to listen to the Clerk's reading of it and then pass it immediately. They also had to approve a resolution 'ratifying' Roosevelt's emergency declarations. All of these measures were announced in the language of 'war', and some of them were presented as if they were a simple extension of a *1917 Act* concerned with enemy property (although the full name of the old Act was airbrushed out). Roosevelt's declarations and his new emergency Act were obviously arbitrary, and in some respects, appalling. His appropriation of the language of war set a precedent for claims by subsequent Presidents for unquestioning obedience to emergency measures.¹⁸⁸ But by the time that serious challenges were to reach the Supreme Court, government by the President had softened into government by regulatory agencies, which latter style the court eventually upheld.

Difficulties in applying the UK model in Australia

The fact that the United Kingdom's financial credibility is at stake is surely the greatest protection against its government abusing its extraordinary powers over the financial sector. Having said that, however, it must also be said that the compensation principles

¹⁸⁴ The Federal Deposit Insurance Corporation (FDIC); see now 12 USC ch 16.

¹⁸⁵ Most of the historical literature concerning the New Deal banking reforms concentrates on the so-called Glass-Steagall Act, which was in fact only part of the *Banking Act 1933*. Various praised and condemned, that part quarantined investment banking from commercial banking, on the theory that traditional banking should not chase the high-risk profits of investment banking. The same Act introduced the FDIC, whose success is not as contested. It must suffice here to refer to: Noelle T Heintz and Robert M Travisino, 'What is Past is Prologue: Why Congress Should Reject Current Financial Reform Bills and Breathe New Life into Glass-Steagall' (1998) 13 *St John's Journal of Legal Commentary* 373; Dalvinder Singh, *Banking Regulation of the UK and US Financial Markets* (2007); and Ellen D Russell, *New Deal Banking Reforms and Keynesian Welfare State Capitalism* (2008).

¹⁸⁶ This paragraph is based upon Roger L Roots, 'Government by Permanent Emergency: The Forgotten History of the New Deal Constitution' (2000) 33 *Suffolk University Law Review* 259.

¹⁸⁷ *Emergency Banking Relief Act*, 15 USC §§ 51a-51c (1933).

¹⁸⁸ America's wars on poverty, drugs and terrorism are obvious examples. 'War' may not be so easily misused elsewhere, but Prime Minister Rudd's demand for an unquestioning acceptance of his stimulus package was premised on the existence of crisis precluding the normal niceties of Parliamentary scrutiny; see below Part F.

applying in that country would be difficult to operate in any country, and some of them would run into considerable constitutional difficulty were they to be transposed to Australia. Further, there might be serious (albeit technical) doubts as to whether the first option in the 2009 Act could ever be transposed to Australia. The mechanics of that option involve the sale of part or all of a bank's business directly to another private sector bank. From the perspective of the acquiring bank, the sale is not forced. Indeed, it may well have agreed to the sale on the basis that it would be purchasing further market share at a fire sale price. The original bank's perspective will undoubtedly be different. It will have been forced into a sale for a price set by agreement between the purchaser and the government authorities. Whilst it is true that the independent valuer can subsequently reset the price, one must wonder about the odds of that happening. Of course, if the valuer were to determine that the price had been too high, the purchasing bank would have to wear the consequences. If, however, the determination was that the bank had been acquired at an undervalue, the valuer would then have the power of determining who would have to contribute the remainder.¹⁸⁹ The government or the purchaser would be the obvious candidates in that scenario, but the valuer's power in this regard is surely moot. It is highly likely that the sale agreement between government and purchaser would have contracted for the government to wear the risk of a valuer's order to pay more. In that circumstance, therefore, the purchaser would have got a bargain at taxpayers' expense.

The compulsory acquisition powers vested in the government of the United States are not constitutionally limited to the case where the government proposes to keep the property. The Supreme Court held that those powers can also be used with the intention of handing over the property to the private sector, provided that there was a public interest purpose.¹⁹⁰ That was an extremely controversial decision, particularly because of the breadth it gave to 'public purpose', which was held to encompass local economic development. Subsequent State court decisions and State referendums have ensured that at the State level, a narrower meaning of 'public purpose' will apply, so as to avoid what was characterised politically (and sometimes unfairly) as compulsory acquisitions for 'private to private' purposes.¹⁹¹ Whether the Australian Parliament can engage in 'private to private' compulsory acquisition remains an open question.¹⁹² If the Parliament were to lack that power, it would also be an open question as to whether it would be unfair to characterise a mechanism akin to the United Kingdom's first option as being nothing less than 'private to private'. One would expect that both the legislative and executive purposes would be construed as 'public' in the context of a government intervention to avert a serious threat to the country's financial system.

¹⁸⁹ *Banking Act 2009* (UK) c 1, s 61.

¹⁹⁰ *Kelo v New London* 545 US 469 (2005).

¹⁹¹ Timothy J Dowling, 'Kelo as Trojan Horse: How the Property Rights Movement is Misusing the Kelo Decision to Advance a Radical Agenda' (2007) 54 *The Federal Lawyer* 46; and Andrew S Han, 'From New London to Norwood: A Year in the Life of Eminent Domain' (2008) 57 *Duke Law Journal* 1449, 1451-52.

¹⁹² The court was able to avoid the issue in *Griffiths v Minister for Lands, Planning and the Environment* (2008) 235 CLR 232. That case involved an Act of the Northern Territory which, like the States, has no constitutionally entrenched restrictions upon compulsory acquisition. Kirby J (dissenting) gave the *Kelo* debate extended consideration, at 266-9.



The Australian Parliament's legislative competence with respect to banking is subject to the constitutional restrictions upon compulsory acquisitions.¹⁹³ Short of outright nationalisation, however, it is notoriously difficult to determine the reach of the constitutional protection. The banking legislation plays safe by guaranteeing Commonwealth payment of compensation on just terms for any 'acquisition of property',¹⁹⁴ but this could turn out to be less generous than the United Kingdom's legislation. For example, it is not at all clear that a diminution in the value of shares resulting from a decision on the part of the statutory manager to restructure the bank's capital base would be characterised as an 'acquisition'.¹⁹⁵ Australia has no equivalent of the United Kingdom's resolution fund. Nor does it have any protective mechanisms for third party creditors adversely affected by partial sales. The curious result is that Australian law offers a troubled bank's shareholders more protection than UK law by its lack of authorisation for forced sales or nationalisation, but it offers less protection for the bank's creditors who might be adversely affected by at least some of the government interventions falling short of those measures.

F SPENDING POWER

Government's powers to spend money raise many of the same concerns raised by subordinate legislation. All governments following the Westminster model need appropriations Acts to authorise their spending, but in Australia, there is no constitutional need for those Acts to contain detailed criteria for how the money is to be spent. This has enabled a shift of power from Parliament to the executive, a shift into whose merits the High Court will not enter.¹⁹⁶ This is because appropriations legislation provides the government with legal authority but typically imposes no legally enforceable constraints. This leaves open some obvious problems, ranging from rorting, and pork-barrelling to sheer incompetence in the distribution of government largesse. But the problems also include government by contract or pseudo-contract. Government procurement programs can (and often do) impose rules on its contractors that would be too politically contentious to legislate into law, and yet the size of the program might mean that its rules have the same practical effect. As in the case of

¹⁹³ See *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1; and *Newcrest Mining (WA) Ltd v Commonwealth* (1996) 190 CLR 513.

¹⁹⁴ *Banking Act 1959* (Cth) s 69E.

¹⁹⁵ The constitutional protection might not apply if the government's intervention powers were characterised as 'a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity'; see *Australian Tape Manufacturers Association Ltd v Commonwealth* (1991) 176 CLR 480, 510 (Mason CJ, Brennan, Deane and Gaudron JJ); and *Capricorn Diamonds Investments Pty Ltd v Catto* (2002) 5 VR 61, 88-92. Another exception to the scope of the constitutional protection applies where the rights acquired 'are inherently susceptible to modification'. This appears to be most relevant to rights deriving solely from statute, and especially so if they are dependent upon government funding; *Health Insurance Commission v Peverill* (1994) 179 CLR 226, 237 (Mason CJ, Deane and Gaudron JJ). See also: Scott Evans, 'When is an Acquisition of Property Not an Acquisition of Property?' (2000) 11 *Public Law Review* 183; and Rosalind Dixon, 'Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution' (2005) 27 *Sydney Law Review* 639.

¹⁹⁶ *Combet v Commonwealth* (2005) 224 CLR 494; and *Pape v Commissioner of Taxation* (2009) 257 ALR 1.

subordinate legislation, the political processes provide the real constraints in Australia and the UK. By way of contrast, a large and complex body of law governs federal procurement in the United States.¹⁹⁷

Appropriations legislation in Australia typically appropriates amounts for 'outputs' and 'outcomes', but neither of those two terms imposes any realistic constraint. Money for a Departmental output is simply the money that the Department pays for doing things, and an outcome is what the Department might rationally hope to achieve by any designated expenditure.¹⁹⁸ Gleeson CJ acknowledged that legislation with purposes specified as vaguely as this resulted in a drastic reduction of judicial review. The real controls, he said, were political: 'Specificity of appropriation is not the only form of practical control over government expenditure. The political dynamics of estimation and review form part of the setting in which appropriations are sought, and made.'¹⁹⁹

In a submission to the Senate Finance and Public Administration Committee, Geoffrey Lindell wrote: 'Unfortunately the modern reality is that Parliament is gradually losing control over the expenditure of public funds.'²⁰⁰ The current Chief Justice quoted most of that sentence in a judgment that upheld a government hand-out to taxpayers as being incidental to the executive's claimed need to respond in this way to the global financial crisis, essentially because it was a crisis needing a national solution. The word he omitted was 'unfortunately'.²⁰¹

In common with many other countries, one of the Australian government's reactions to the global financial crisis was to rush a 'stimulus' package through Parliament, authorising massive government spending on new projects. Prime Minister Rudd's Bills in February 2009 to appropriate A\$42 billion (Australian dollars) started out as long as they ended — 40 pages in all.²⁰² And the Prime Minister had initially demanded their passage through the House of Representatives (which his party controlled) and the Senate (which it did not) in just two days. The rhetoric of

¹⁹⁷ 41 USC ch 4; and CFR, title 48.

¹⁹⁸ *Combet v Commonwealth* (2005) 224 CLR 494. The majority treated appropriations that are described in both ways as if they were simply output items for the relevant Department, and the expenses at issue were undoubtedly for Departmental purposes. For the three judges who treated the relevant expenditures as having to conform to an 'outcome', the question was whether a massive advertising campaign to promote the government's intention to introduce legislation reducing union power could be said to be for the purpose(s) of achieving 'higher productivity, higher pay workplaces'. Two of those three judges rather quaintly found (McHugh J, at 554-5, and Kirby J, at 607-8) the advertisements wanting for their failure to say anything specific, thereby overlooking the whole point of such advertising, which is to promote a feel-good mood to overcome the product's biggest weakness. American constitutional law has no *a priori* position against government-funded speech: *Pleasant Grove City, Utah v Summum* 129 S Ct 1125 (2009).

¹⁹⁹ *Combet v Commonwealth* (2005) 224 CLR 494, 523 (Gleeson CJ).

²⁰⁰ Evidence to Senate Committee on Finance and Public Administration, Parliament of Australia, Canberra, 19 January 2007, [7] (Geoffrey Lindell).

²⁰¹ *Pape v Commissioner of Taxation* (2009) 257 ALR 1, [65] French CJ.

²⁰² *Appropriation (Nation Building and Jobs) Act (No 1) 2008-2009* (Cth); and *Appropriation (Nation Building and Jobs) Act (No 2) 2008-2009* (Cth). Constitutional considerations require that ordinary expenses (salaries, buildings and so on) be in a separate Bill from 'administered' expenses, being the costs of providing programs which agencies administer. The Senate cannot amend the former.



crisis was intense, and was used to justify a contemptible treatment of Members. The only real debates were in back-room deals with the crossbenchers in the Senate; for everyone else, it was presented on the basis of 'take it or leave it'. The Acts contain very few constraints on executive discretion. Each Act refers to a mass of budget papers tabled during the debates, so that courts can consider them if their interpretation should come before them, but that is extraordinarily unlikely. The Acts make it clear that the budget papers are intended only for indicative guidance; they are not binding. In essence, the same position applies to the statements in each Act as to the purposes for any of the specific appropriations.

President Bush had earlier tried to treat Capitol Hill with the same disregard, but the separation of powers and a weaker system of party discipline got the better of him. Administrative law discussion lists in America hummed with indignation when Bush first presented Congress with his plan for legislation to relieve Wall Street of its 'toxic assets' – the so-called Troubled Assets Relief Program (TARP). The Bill was only 44 pages long, which was widely regarded as a disgrace, not just politically but legally. By the time it reached the statute book, TARP authorised an emergency appropriation of US\$700 billion (American dollars), and had grown to 169 pages,²⁰³ which the American administrative law academy thought was an improvement.

In terms of length and detail, President Obama's Bill for the appropriation of a further \$US789bn was a further improvement. It started out hundreds of pages long, and grew to 407 pages by the time it passed into law as the *American Recovery and Investment Act of 2009* ('*Recovery Act*').²⁰⁴ The academy was more pleased with the *Recovery Act* than with TARP, but that was not just because the second Act was longer. The Act's length might say more about the influence of particular lobbies in getting more funding for their projects than about providing genuine constraints on Executive action.²⁰⁵ It is interesting that the administrative law discussion lists followed the Bill stages to check on its requirements for genuine Congressional oversight of how the money is being or was spent.²⁰⁶ If it was not feasible to involve Congress in the detail beforehand, then it was necessary to ensure oversight ex post, and the Act's provisions in that regard are extensive.

Australia's parliaments have less capacity for conducting meaningful and independent audits of how government and its emanations have spent their money, and whether they have achieved the goals they had articulated back when they had sought parliamentary appropriations. The executive branch sets the accounting and

²⁰³ *Emergency Economic Stabilization Act of 2008*, Pub L No 110-343, 122 Stat 3765. See Archit Shah, 'Emergency Economic Stabilization Act of 2008' (2009) 46 *Harvard Journal on Legislation* 569.

²⁰⁴ *American Recovery and Investment Act of 2009*, Pub L No 111-5, 123 Stat 115.

²⁰⁵ *American Recovery and Investment Act of 2009*, Pub L No 111-5, 123 Stat 115 gave the National Aeronautics and Space Administration an extra US\$400m for 'Science', an extra US\$150m for 'Aeronautics', and an extra US\$400m for 'Exploration', with no more detail than that.

²⁰⁶ *American Recovery and Investment Act of 2009*, Pub L No 111-5, 123 Stat 115 established a range of accountability structures, including the Recovery Accountability and Transparency Board and the Recovery Independent Advisory Panel. Email from Susan Rose-Ackerman to Yale's Comparative Administrative Law List, 26 February 2009. The email is archived at Susan Rose-Ackerman, *Comparative Administrative Law List* (2009) <<http://mailman.yale.edu/mailman/listinfo/comp-admin-law>>.

financial standards, and although the Commonwealth Auditor General is an independent officer of the parliament, there is nothing approaching America's Congressional Budget Office to service the relevant parliamentary committees.²⁰⁷

H WHAT IS THE PROBLEM?

The laws recently enacted in response to the global economic crisis vest huge powers in central government and its regulators, but laws dealing with crises always have, and there is no doubting that we are in the middle of a big crisis. From the public lawyer's perspective, the rule of law's overarching motif is the avoidance of arbitrary government, but as Krygier noted,²⁰⁸ cultural values and practices serve that end as much as do legal rules, and perhaps more. Read in isolation, the UK's banking legislation allows government to be almost wholly arbitrary, even setting the scene for the full nationalisation of the country's banks without any guarantees of fair process or compensation. Read in isolation, the stimulus packages also give too much power to their governments. A legal realist might at this point be tempted to shrug off these possibilities as too remote, particularly in liberal democracies, and they will be largely right. Subject to one proviso, the UK would be unlikely to exercise its new-found banking powers arbitrarily, because that would damage its reputation which would in turn threaten its leadership position in the world's capital markets. Subject to the same proviso, President Obama is unlikely to use his spending powers arbitrarily, because he has an array of Congressional committees looking over his shoulder.²⁰⁹ The proviso is democratic legitimacy; if the governments of either country can mobilise their political constituencies to support any action that is arbitrary or at least of dubious legality, then they may get away with it. Two examples will suffice.

It has already been noted that America's *Recovery Act* leaves the Executive with huge discretions. True, it has an objects clause, but that is no more than hot air.²¹⁰ It is also true that the Act sets lots of parameters designed to rein in costs and prevent robbing by contractors or exploitation of their workers. Like Roosevelt before him, President Obama's *Recovery Act* also links much of the spending to an increase in

²⁰⁷ See Charles Lawson, 'Re-Invigorating the Accountability and Transparency of the Australian Government's Expenditure' (2008) 32 *Melbourne University Law Review* 879, 913-21.

²⁰⁸ Krygier, above n 70.

²⁰⁹ Supplemented by input from a very active civil society; see www.stimuluswatch.org.

²¹⁰ *American Recovery and Investment Act of 2009*, Pub L No 111-5, § 3(a), 123 Stat 115, 115-16 provides that the Act's purposes include: '(1) To preserve and create jobs and promote economic recovery. (2) To assist those most impacted by the recession. (3) To provide investments needed to increase economic efficiency by spurring technological advances in science and health. (4) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits. (5) To stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.' § 3(b), 123 Stat 115, 116 then provides: 'The President and the heads of Federal departments and agencies shall manage and expend the funds made available in this Act so as to achieve the purposes specified in subsection (a), including commencing expenditures and activities as quickly as possible consistent with prudent management.'



working class and union power.²¹¹ But that still leaves the objects of expenditure relatively unconstrained. America has long had a complex set of laws governing federal procurement,²¹² but it is not at all clear how those rules are meant to integrate with any specific requirements of the *Recovery Act*.²¹³ That Act has an extremely controversial 'Buy American' clause,²¹⁴ although it does not apply to the States,²¹⁵ who will do the bulk of the contracting. So far as it does apply, the 'Buy American' clause stipulates that the Act's funding for public building projects and other public works is not to be spent on non-American iron, steel or other manufactured goods unless the relevant federal Department gives a reasoned certificate that at least one of three possible exceptions applies. These are that it is in the public interest to waive the requirement to buy American, or that the local market cannot supply the relevant product to a sufficient standard or in sufficient quantities, or that buying American would increase the project cost by more than 25 percent. Standing outside those three exceptions is a subsection requiring the section to be administered in a manner consistent with America's international agreements. The Senate had inserted this last requirement to placate considerable domestic and international fears of a descent into worldwide trade protectionism,²¹⁶ but the Senate seems not to have understood the scale of the problem. China and India have no treaty guarantees against American protectionism. Nor would the Senate's amendment pick up the long-established discretionary power to accord favourable treatment to the world's least developed nations. Rather than procuring repeal or amendment of the 'Buy American' clause, its opponents apparently see no legal obstacle to the Administration issuing subordinate legislation that would simply require that it be administered according only to the pre-existing procurement laws.²¹⁷ That is not quite Henry VIII, but it comes fairly close.

The second example is perhaps more dramatic. It comes from the UK, whose default conflictual principles in cross-border insolvency administrations disregard the insolvency law of another country to the extent that it seeks to distinguish between unsecured creditors according to whether they are nationals or residents of the foreign country in question.²¹⁸ The *2009 Act* stipulates that so far as they relate to property outside the United Kingdom, property transfer orders are conditional upon their effectiveness pursuant to the law of the other country. However, the Bank of England can issue directions dis-applying that requirement.²¹⁹ As in the case of 'Buy American', there is clearly a political tension between domestic and international considerations. It

²¹¹ Mitchell H Rubinstein, 'Obama's Big Deal; The 2009 Federal Stimulus; Labor and Employment Law at the Crossroads' (2009) 33 *Rutgers Law Record* 1.

²¹² 41 USC ch 4; and CFR, title 48.

²¹³ See *American Recovery and Investment Act of 2009*, Pub L No 111-5, § 1610, 123 Stat 115, 304-5.

²¹⁴ *American Recovery and Investment Act of 2009*, Pub L No 111-5, § 1605, 123 Stat 115, 303.

²¹⁵ That is the practical effect of *American Recovery and Investment Act of 2009*, Pub L No 111-5, § 1610, 123 Stat 115, 304-5; see Steven L Schooner and Christopher R Yukins, 'Tempering "Buy American" in the Recovery Act – Steering Clear of a Trade War' (2009) 51(10) *The Government Contractor* ¶78 (Public Law and Legal Theory Working Paper No. 462, The George Washington University Law School).

²¹⁶ Schooner and Yukins, above n 215.

²¹⁷ *Ibid.*

²¹⁸ See *Re HIH Casualty & General Insurance Ltd* [2008] 1 WLR 852 (HL). The extent of the discretion to depart from this default position remains unclear.

²¹⁹ *Banking Act 2009* (UK), c 1, s 39. See Avgouleas, above n 163, 232.

is submitted that this tension was nowhere more evident than in the UK Government's treatment of the failed Landsbanki bank of Iceland. Fearful that Iceland's insolvency laws might treat such of the bank's creditors as were Iceland's citizens more favourably than UK creditors, the government issued subordinate legislation freezing the bank's UK assets. Nothing in the banking legislation permitted that, but the government justified its conduct by using its powers over the property of terrorists and their supporters.²²⁰ Powers granted to deal with Al Qaeda and like organisations were being used because terrorist property orders could be made wherever Treasury reasonably believed that a foreign person or government was about to take 'action to the detriment of the United Kingdom's economy (or part of it)'.²²¹ Landsbanki had a substantial body of UK creditors, but nowhere near enough to warrant the conclusion that the country's economy was under threat from Icelandic insolvency laws, and even if it were, the threat could scarcely be characterised as terrorist. It is also inconceivable that the government would treat the United States as a terrorist if President Obama were to require a strict application of the 'Buy American' clause.

I CONCLUSION

Some lessons from the Great Depression remain. No matter how great the crisis, governments need to behave in conformity with rule of law principles, and they need to stand truly accountable before their legislatures.

A political scientist once challenged the competence of public lawyers to engage in meaningful theoretical reflection on the political implications of their country's administrative laws.²²² Maybe so, but they cannot afford to ignore the nature of the laws currently being passed to handle the global economic crisis. Most of these laws are little more than a shift back to a relatively recent style of hands-on regulation in the financial services market. Despite tightening the regulatory controls in those areas, there will be no change to the underlying belief in the superiority of market ordering over state control, let alone state ownership. So-called re-regulation will be limited to the correction of market failures.

Government interventions in the banking sector, however, are of a different order. They raise real questions about protection from arbitrary power. Most of this sector's significant laws will come in the form of subordinate legislation with very little practical oversight from Parliament. Government's vast stimulus measures have similarly lacked parliamentary input. One might legitimately question whether arbitrary powers are truly needed to handle the global economic crisis,²²³ but even if they are, they lack democratic legitimacy absent more accountability mechanisms to check on how they have been exercised.

²²⁰ See HM Treasury's *Financial Sanctions Notice* of 17 October 2008, explaining *The Landsbanki Freezing Order 2008* (UK) SI 2008 No 2668.

²²¹ *Anti-Terrorism, Crime and Security Act 2001* (UK) c 24, s 4(2)(a).

²²² Brendan O'Leary, 'What Should Public Lawyers Do?' (1992) 12 *Oxford Journal of Legal Studies* 404.

²²³ 'Inevitably arbitrary' according to Avgouleas, above n 163, 231.