



LAW Matters

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In less than 100 days the next United Nations Climate Change Conference will get underway in Copenhagen.



Dean's message

The global financial crisis claimed another victim when it was announced in July that Monash's commercial partner in the Caulfield precinct project was unable to proceed with the development of three student accommodation towers and retail and commercial buildings.

One consequence of this change is that the new law school building, which is a part of the development, but funded by the University, is unable to proceed until new partners are found for the development as a whole. After two years of intensive planning, involving staff, students and other parts of the university, this is a disappointing outcome, but we are assured that the building will proceed once all of the financial and any consequential issues have been settled.

The new building will be a significant improvement on our present facilities and this delay will provide the Faculty with an opportunity to further improve on the design and the amenities offered by the building. We will pass on more news about the project as we receive it.

This issue highlights the extra-ordinary achievements of some of our current and recently graduated students and some of the experiences they have during their courses. An interest in debating is often a precursor to an interest in studying law, and the ability to debate is a useful skill for legal practitioners. Monash Law students figured prominently in Intersociety debating, in the annual Great Law Week Debate, were vanquished by law staff in the inaugural staff student debate, and, just before this issue went to press, distinguished themselves in the University's Alumni debate before an audience of over 200 alumni, staff and Monash supporters.

Advocacy skills are important for law graduates, but equally so are skills in negotiating, in settling disputes without litigation and assisting clients in dealing with a range of problems, legal and non-legal. Dr Michael King's article on non-adversarial justice draws attention to some of the research being undertaken at Monash into this area of law and to some of the teaching programs that adopt a non-adversarial perspective. This focus is consonant with the Victorian government's long-term vision for the justice system expressed in its most recent Justice Statement. Monash scholars have contributed to the development of new theories of justice as well as to the education of a new generation of legal practitioners who will be comfortable with less adversarial approaches to civil and family law and who will understand the changes in court structures and processes that are consequential of this less adversarial approach.

In May 2010, the Faculty, together with the Australian Institute of Judicial Administration, will be hosting a conference on this theme in Melbourne to be opened by Victorian Attorney-General Rob Hulls MP. One of the keynote speakers will be President Jose Ramos Horta of East Timor who will be speaking on the topic of truth and reconciliation processes. Alumni are welcome to attend and to present papers.

On page 14 we also invite alumni to offer their assistance as mentors to our students. This is a valuable program that involves just a little time, but a large reward. Please let us know if you can assist.

Professor Arie Freiberg, AM
Dean, Monash Law School

DIARY DATES: 2009

20 October

Conference – Planning and Climate Change Conference. How can the planning process be
www.law.monash.edu.au/regstudies/planning.

2 November

Public Lecture – Justice Eliezer Rivlin
Judging in Israel: Balancing Contradictions
marketing@law.monash.edu.au

4 November

Public Lecture – Professor Hugh Corder,
'A Human rights roadmap: Has the constitutional protection of economic, social and cultural rights worked in South Africa?'
castan.centre@law.monash.edu.au

19 November

Public Lecture – Lucinda Lecture
presented by The Honourable Justice Susan Kiefel
marketing@law.monash.edu.au

Postgraduate and Monash JD combined information evening

Wednesday 2 December 2009, 6 – 7 pm,
Monash Law Chambers,
472 Bourke Street, Melbourne

Register at

www.law.monash.edu.au/postgraduate
or marketing@law.monash.edu.au
or contact (03) 9903 8500.

Queen's Birthday Honours 2009

Member of the Order of Australia (AM)

Professor Arie Freiberg AM (LLD, LLM, LLB (Hons), Dip Crim.)

For service to the law, particularly in the fields of criminology and reform relating to sentencing, to legal education and academic leadership.

Medal of the Order of Australia (OAM)

Mr Robert Altamore OAM (BA 1977, LLM 1979)

For service to people with a vision impairment through advocacy roles with a range of organisations.

Mr James Cyngler OAM (BEd 1974, LLB 1975)

For service to the community in the area of Jewish education.

Mr Ian McCutchison OAM (BJuris 1974, LLB 1975)

For service to the community through executive roles.

Monash law student gets voice on world stage

Monash Arts/Law student Christopher Varney has been appointed the 2009 Australian Youth Representative to the United Nations by the Department of Foreign Affairs and Trade and the United Nations Youth Associations (UNYA).

Christopher became a fully-accredited member of the Australian delegation to the UN and travelled to New York in September to deliver an address to the General Assembly focussed on youth participation in Australia.

Before taking the position in New York, Christopher travelled throughout Australia, speaking to young people in an effort to ensure their views are represented at the UN.

Representing his generation was an amazing honour and privilege.

"Young people play a vital role in their communities today. I am thrilled to have this opportunity to elevate the voices of Australia's youth on the world stage.

"Young people are unfortunately thrown many criticisms. However, I see today's young people as a 'generation of hope' that Australia can be proud of and as youth representative I am committed to sharing my generation's story and potential."

Christopher said the youth representative position was testament to Australia's commitment to respecting and developing young people's perspective and place in social discussion.

"I would like to thank the Department of Foreign Affairs and Trade and the United Nations Youth Association for consistently providing young people with the opportunity to speak through this role," Christopher said.

The Youth Representative Program is an initiative of the United Nations Youth Association of Australia.



Current Arts/Law student, Christopher Varney

Law graduate receives 2009 Distinguished Young Alumni Award

The 2009 Distinguished Alumni Awards ceremony was held at BMW Edge in Melbourne's Federation Square in front of an audience of more than 350 alumni, staff, donors, students and friends.

The Chancellor Dr Alan Finkel AM, presented the Distinguished Alumni Awards and commented that the six recipients had been selected from the vast global Monash alumni community.

"These alumni have made an impact on the world stage – in education and research, business, health care, the environment, development and innovation. This evening's awardees are without peer," said Dr Finkel.

Monash Law graduate Mr Hugh Evans was presented with the 2009 Distinguished Young Alumni Award. Hugh is a social movement's campaigner and was the 2004 Young Australian of the Year.

Professor Arie Freiberg AM, who nominated Mr Evans, noted that "in addition to his significant community contribution, Hugh was amongst the top 25 graduating students from the Law faculty".



Hugh Evans (BSc 2008, LLB(Hons) 2008)

"Hugh's passion and commitment to human rights began when he was 14 and travelled to the Philippines as an ambassador for World Vision. After completing high school in 2001, Hugh deferred University becoming World Vision's inaugural Youth Ambassador travelling to South Africa."

Mr Evans is currently Director of The Global Poverty Project working to help achieve the United Nations' Millennium Development Goals to end extreme poverty by 2015.

In 2001, Mr Evans founded the Oaktree Foundation, Australia's first youth-run aid organisation with a mission to empower young people in the developing world through education. He was Co-chair of the inaugural Youth 2020 Summit in Canberra, and one of the key leaders behind the successful Australian 'Make Poverty History' campaign.

In supporting Mr Evans's nomination, Associate Professor Cristina Varsavsky says she is "struck by his obvious determination, passion and positive nature." She wrote: "At such a young age Hugh has made a remarkable impact as a humanitarian, and the effects of his work have had far reaching effects across the world."

Mr Evans is currently pursuing a Masters in International Relations at the University of Cambridge. This has been supported by the Sir John Monash Award and a scholarship from the British Council.

Dean of the Law School receives a Queen's Birthday AM

The Dean of Monash Law School, Professor Arie Freiberg has been appointed a Member of the Order of Australia (AM) for service to the law, particularly in the fields of criminology and reform relating to sentencing, legal education and academic leadership.

"It's a great honour to be recognised by one's community for one's work, especially in an area as sensitive, emotive and controversial as sentencing, where I hope I have been able to inject some reason into the debate," Professor Freiberg said.

"It is also pleasing to be recognised for my contribution to legal education in law and criminology. It has been a pleasure engaging with, and possibly influencing, young minds for over three decades at both Monash and the University of Melbourne."



Professor Arie Freiberg AM, with the Governor of Victoria, David de Kretser AC.
Photo by Vicki Jones Photography

Law School Staff Vs Student Debate

The Monash Law School Ambassador Program hosted the inaugural Staff vs Student debate at Monash Law Chambers on Wednesday 2nd September.

Aiming to break down staff and student barriers, the light hearted debate was entitled 'Law students these days have it too easy' and was adjudicated by Professor Arie Freiberg AM.

In front of a crowd of more than 90 people staff members Nicki Mollard, Colin Campbell and Jonathan Clough put themselves in the firing line arguing in the negative against three fiery legal undergraduates Natalie Devitsakis, Damien Bruckard and Amit Golder.

The evening was entertaining and a success with the law staff announcing the winners by the clapometer.



Current Arts/Law student, Damien Bruckard.

Where are they now?

Emily Peterson

(LLB(Hons) 2006, BSc 2006)

In 2006 I graduated from Monash University with a LLB (with Honours) and BSc (majoring in astrophysics). In my penultimate year I completed seasonal clerkships at Mallesons Stephen Jacques, Allens Arthur Robinson and Arnold Bloch Leibler. Having a strong personality, the ABL style sat best with me and I accepted a position there as an articled clerk in the litigation team in 2006. After admission, I remained at ABL until mid 2008, after which I made the bold decision (in the midst of the GFC) to venture out solo and launch my business, Legal Tender.

Legal Tender is an online lawyer-client matching service with a big difference: clients post their case on the website and lawyers "tender" to win the matter. Clients can compare cost estimates, along with skills, history, reputation and experience and choose the lawyer best suited to their needs and budget. Legal Tender recently expanded from Victoria into NSW and will grow nationally in the near future. More information can be found at www.legaltender.com.au.

Jennifer Nielsen

(BSc 1986, LLB(Hons) 1988)

I completed my law degree in 1987, but stayed on at Monash for a few more years – as Editor of Lot's Wife, and a tutor both in the Law School and with the Monash Orientation Scheme for Aborigines (MOSA). All up, I worked with MOSA for three years, and also completed my Articles with the Victorian Aboriginal Legal Service Inc. After the ALS, my partner and I moved to the semi-tropical climes of the far north coast of New South Wales, and I worked in a small general practice based near Byron Bay. Shortly afterwards, I was joined on the far north coast by Greta Bird – one of my former Monash lecturers – who had been appointed as an Associate Professor at the School of Law & Justice at Southern Cross University.

Greta encouraged me to pursue an academic career, and in 1994 I started working as an Associate Lecturer at Southern Cross University. In 2007, I gained my doctorate, under the co-supervision of Professor Jenny Morgan (also ex-Monash) and Associate Professor Irene Watson (Uni SA).

This year, I was appointed as the Head of School at the School of Law and Justice, Southern Cross University and was delighted to be welcomed at my first Council of Australian Law Deans meeting by yet another of my Monash lecturers – Professor Arie Freiberg. Our School also has links with another former Monash lecturer, Professor Ron McCallum, who is a member of our School's Law Advisory Committee.

One of my most rewarding career achievements was in 1996 when I was part of a committed group who established the Northern Rivers Community Centre – in 2000, the New South Law & Justice Foundation named me its inaugural Volunteer of the Year for my part. I credit this achievement in particular to the teaching of the late Tim McCoy and of Simon Smith, who were inspirational guides during my time in Professional Practice at Springvale Community Legal Centre.

Great Law Week Debate

As part of the annual Law Week celebrations on Wednesday 13th May, 2009 two teams of Monash graduates debated the controversial topic *"They're not morons: governments should butt out of young peoples' lives"*.

Held at the Melbourne Exhibition and Convention Centre. The debate was moderated by Cameron Grant, a current Monash Law student who did a brilliant job keeping the audience and debaters on track throughout the event.

The affirmative team was lead by Meg O'Sullivan who is a Barrister and former world debating champion, with team members, Damien Carrick presenter of the Law Report on the ABC Radio National and Beth Wilson Victoria's Health Services Commissioner.

Damien opened for the affirmative team setting the tone with "Young people take up technology and emerging machinery quicker than any other group in the population. Young people are not morons, who do you ask for help with technology? It's a pity governments don't do the same when developing a policy, they ask nobody."

The negative team comprised of team captain Barrister Shivani Pillai, David Galbally one of Melbourne most respected QC's and Sally Cockburn, (aka Dr Feelgood) who presents on 3AW and Channel 7's Morning Show.

Shivani lead the negative team argument with "Young people think for themselves but don't think that much. You only have to turn on the television and watch a reality show or listen to the local news to know that young people are morons. They binge, whinge and make me cringe."

Beth Wilson argued the facts that "The government passes legislations and laws to control so many aspects of our young people's lives, there's laws for piercing and tattoos, its not young people who shouldn't have them its old people. Instead of laws that discriminate against young people we need to find laws that help our young people grow up well."

David Galbally debated that "We want law abiding, responsible, social people and we want that without a government. How are we going to get it without government interference or government control? Young people don't regard themselves as human they are something different, they wouldn't understand what free thinking, challenging and debating was all about and they wouldn't want to do that, they'd go to Facebook or Myspace. The more intelligent of them have worked out how to communicate in 140 characters. Soon novels will be on postage stamps."

The affirmative team captain Meg O'Sullivan closed by stating "We have to question whether binge drinking is a problem amongst young people? It is engaged in equally if not more so by adults. There's nothing wrong with drinking and having a good time. Young people are there to enjoy their life."

Sally Cockburn provided a strong closing argument for the negative team "A thinking person realises the government provides safeguards, perks and work provisions. It is essential governments make rules, regulations and laws to make sure that when the parents fall down that there is something for these young people to be protected by."

Following the deliberation by the panel of judges and chaired by the President of the Monash Association of Debaters, Damien Bruckard, the affirmative were announced the winners of the 2009 Great Law Week Debate.

Disclaimer: The Great Law Week Debate identifies a topical issue and then allocates the debaters to either the affirmative or negative team. The debaters arguments were based on the topic and team they were in rather than their own beliefs.



L to R: Shivani Pillai, David Galbally QC, Sally Cockburn, Cameron Grant, Meg O'Sullivan, Beth Wilson & Damien Carrick

Monash Law Student wins scholarship

The Deputy Premier and Attorney-General Rob Hulls recently awarded current Monash University Arts/Law student Chris Hooper the 2009 Justice Disability Scholarship.

The Justice Disability Scholarship which is valued at \$20,000 for two years recognises exceptional students with disabilities and aims to give them the opportunity to prepare for employment and leadership roles after the successful completion of their study.

Mr Hulls said the awards program is one initiative in the Justice Disability Action Plan 2009-2011, which will improve access and inclusion of people with a disability to justice services, programs and facilities.

Chris, who grew up in Tynong North (West Gippsland) and attended Drouin Secondary College hopes to use the scholarship pursue a career in the community law sector in local capacity building and community development and to focus on social justice and empowerment.

He says the scholarship will "relieve the pressure of having to balance work and full-time study and allow me to focus my attention on achieving my full potential. It will also allow me to attend personal development seminars and advocacy classes which will hopefully allow me to become a better advocate for the rights of others."

Chris chose to study law because "I believe that the source of individual and group rights is best fought for through the avenues of the law and the law articulates our rights and responsibilities, I hope to be able to contribute to framing it in a way that makes the best possible allowance for social justice."

For Chris, studying at Monash has been "a great way to meet like-minded people and form strong friendships, it has given me an opportunity to pursue my passions and a standard to attempt to achieve and live up to."



L to R: Arts/Law student Chris Hooper, Deputy Premier and Attorney General Rob Hulls.

MAD debaters win the argument

Monash has taken out this year's Australasian Intersarsity Debating Championships (Austral), which were held in Melbourne in August.

Hosted by the Monash Association of Debaters the 2009 Austral, attracted more than 400 student competitors from 55 universities across 12 countries.

Monash team 1, made up of Amit Golder, Tim Jeffrie, and Fiona Prowse won the grand final against team 1 from the Victorian University of Wellington (New Zealand) on the topic: That Palestine should accept demilitarisation in return for a guaranteed sovereign state.

Amit was also awarded the Martin Sorensen Trophy for being the best speaker of the tournament.

In a first, three other Monash speakers made the Top 10 speakers of the tournament, and Monash teams were also represented in the semi and quarter finals.

Austral's convener Victor Finkel said with wins in five of the last 10 years and with runners-up honours in two more, Monash had a clear claim to being the best debating university in the region.



L to R: Tim Jeffrie (BA/LLB), Fiona Prowse (BA/LLB), and Amit Golder (BA/LLB). Photo courtesy Peter Firus.

"With great support from the University, most notably from the vice-chancellor, and faculties including Law, Business and Economics, Engineering, Arts, Science, Medicine, and Information Technology a large team of Monash student volunteers has been able to pull off a great success.

"Our thanks also go to our corporate sponsors Air Asia, BHP Billiton, and COSMOS magazine."

Preliminary rounds of the event were held at Caulfield campus with the semi-finals held at the Victorian Parliament and the grand final held at the Melbourne Convention and Exhibition Centre.

The American Drug Court movement and launch of *Non-adversarial Justice*

Judge Peggy Fulton Hora (retired) was the guest lecturer at the launch of a recent publication from the Monash Law Faculty *Non-Adversarial Justice*.



The Honourable Peggy Fulton Hora

Judge Hora spoke on an aspect of non-adversarial justice – the solutions-focused Drug Courts which have been a feature of American criminal justice system for the last 20 years.

Judge Hora, who retired in 2006, was presiding judge for the Californian Drug Treatment Court and a celebrated proponent of this and other problem-solving courts. She provided a personal account of the movement and her entry into the legal profession as a mature-aged student with children.

The Judge spoke of the crisis in the criminal justice system which led to the establishment of the Drug Court. The system was characterised by an expanding prisoner population and jail overcrowding. Courts were faced with high rates of recidivism and were becoming plea-bargain mills. Judge Hora saw the recycling of people with complex social issues of substance abuse, homelessness, mental health and violence and acknowledged that the system could not incarcerate its way out of these problems.

The Drug Court and other problem-solving courts seek innovative solutions to the chronic behaviours of court users who have recurring contacts with the justice system. Focussing on outcomes, the courts are designed to provide positive case outcomes for victims, society and the offender. Outcomes include reduced recidivism and the creation of safer communities.

Following the lecture Mr Ian Gray, Chief Magistrate, Magistrate's Court of Victoria launched the book *Non-Adversarial Justice* by Dr Michael King, Professor Arie Freiberg, Dr Becky Batagol and Mr Ross Hyams. The book outlines key aspects of the growing international trend towards the use of non-adversarial justice within legal systems. It examines non-adversarial theories and practices in detail, explores their interrelationships, and looks at the implications and future directions for the courts, for the legal profession, and for legal education.

Non-Adversarial Justice

Dr Michael King PhD, MA, LLB (Hons), BJuris

The legal profession and the court system are in the process of significant change. Technological developments, a move towards a national profession and the influence of managerial practices are key influences in the change process. Arguably the most significant influence has been the move towards more comprehensive, humane, psychologically optimal and participatory methods of dispute resolution, legal practice and judging. This is the development of non-adversarial justice.

Non-adversarial justice is an important element of the Attorney General's Justice Statement 2 which seeks to promote greater use of appropriate dispute resolution in legal dispute resolution and problem-solving approaches in courts.

Non-adversarial justice is an umbrella term that includes diverse practices such as appropriate dispute resolution (a refinement of the term 'alternative dispute resolution'), problem-solving courts, Indigenous sentencing courts, court diversion programs, coroner's courts, therapeutic jurisprudence, restorative justice, preventive law, creative problem solving and holistic approaches to law.

A key theme of non-adversarial justice is the use of appropriate processes to meet the needs of the parties and the wider community. It recognises that for some cases, court proceedings is the only appropriate method for resolving the legal problem – such as where there is a need for an authoritative decision or the creation of a precedent or where the parties cannot settle a matter. However, it also sees an inherent risk in litigation that the differences between the parties may be amplified by an adversarial process and that underlying issues – such as communication problems, family breakdown or the substance abuse – may not be properly addressed and future legal problems not prevented.

Even where court proceedings are necessary, approaches within non-adversarial justice such as therapeutic jurisprudence and creative problem solving may assist courts and lawyers involved to use processes that minimise negative side-effects from litigation and that promote a more comprehensive resolution of legal matters.

Non-adversarial justice sees that in many disputes between parties litigation is unnecessary. Some parties are able to resolve disputes themselves without any professional intervention. Where parties seek the assistance of a lawyer, there are a range of non-adversarial approaches that are available – such as negotiation, mediation, collaborative law, conciliation, restorative justice meetings and arbitration. The use of these processes will depend on the nature of the dispute and the needs of the parties. While arbitration is closest in nature to litigation, the others emphasise party participation in the process and in decision-making, promote dialogue and explore a greater range of possible options to resolve the matter than can be considered by a court.

Although processes to resolve disputes other than by going to court are most commonly associated with civil and family law matters, in some less serious criminal cases in Australia – most often in the area of juvenile offending – restorative justice and diversion processes are used rather than charges laid in court.

While these processes concern what happens outside courts, there is also much happening inside courts that is radically different from how they operated thirty years ago. Judicial officers are involved in managing cases to promote a more expeditious and cost-effective resolution of disputes with referral to appropriate dispute resolution processes where appropriate. Moreover, in problem-solving courts such as drug courts, mental health courts or lists, the Collingwood Neighbourhood Justice Centre – Australia's only community court – family violence courts and specialist lists targeting offenders with particular needs, judicial officers and lawyers are applying therapeutic jurisprudence principles. They are drawing from behavioural science practices and principles to inform how they should operate.



Dr Michael King PhD, MA
LLB (Hons), BJuris

These judicial officers and lawyers are working more in a collaborative manner – often with the aid of multi-disciplinary teams – to assist offenders to address their underlying issues and prevent or break a cycle of offending. Increasingly judicial officers in mainstream courts are applying therapeutic jurisprudence principles. There is a growing body of research that supports the approach of these courts – particularly drug courts.

Judicial officers presiding in Indigenous sentencing courts are also adapting to new ways of judging, drawing on restorative justice and therapeutic jurisprudence principles in facilitating dialogue in court between the parties involved.

The development of non-adversarial justice has also meant that judges, magistrates and lawyers need skills that have not been valued in traditional judicial and legal practice or in legal education. Intrapersonal and interpersonal skills and an understanding of and ability to apply therapeutic jurisprudence principles are important aspects of the skill base for judicial officers and lawyers who take this broader approach to their work.

The faculty has been active in researching and teaching non-adversarial justice. The undergraduate elective "Non-Adversarial Justice" – the first course of its kind in Australia – is in its third year and the postgraduate unit "Non-Adversarial Family Law" was taught for the first time this year by Becky Batagol, Ross Hyams and Justice Mushin. A class on comprehensive legal problem solving – including material on the key approaches in non-adversarial justice – was taught for the first time this year in the compulsory first year unit Research and Writing. In its final report on its inquiry into appropriate dispute resolution and restorative justice the Victorian Parliament's Law Reform Committee commended the faculty "for its pioneering work in the area of non-adversarial legal education".

Federation Press recently published the book *Non-Adversarial Justice*, by faculty members Michael King, Arie Freiberg, Becky Batagol and Ross Hyams. The book explores the main approaches of non-adversarial justice and their implications for the courts, legal profession and legal education.

Recent developments in consumer policy and law

Dr David Cousins AM PhD, M Eco, B Eco (Hons), Dip Ed, Professional Fellow

Over the past year there has been a flurry of activity on the consumer law front. After years of relative inactivity, the Australian Government has passed legislation relating to trade measurement, component pricing and unit pricing and has introduced Bills to amend significantly the consumer protection provisions of the Trade Practices Act, and to regulate credit.

This activity has been prompted by a range of factors including the dissatisfaction of the States and Territories with the previous hands off approach of the Australian Government, an increased recognition of the important links between consumer policy and competition policy; and an increased emphasis on reducing unnecessary regulatory burdens on business caused by having a multiplicity of consumer laws and regulators.

In Australia, the Commonwealth, State and Territory governments have had concurrent powers in relation to most areas of consumer policy. Some consumer policy legislation, such as that relating to weights and measures (trade measurement), pre-dated Federation. However, even though the Commonwealth Government was given constitutional powers over weights and measures, the State governments maintained their weights and measures functions. The States established general consumer agencies before the Commonwealth entered the field (the first agency was the Consumer Protection Council in Victoria, which was established in 1965). Many consumer laws were passed in these jurisdictions in following years, often relating to specific industries, such as motor vehicles, real estate agency and credit.

The Commonwealth introduced a general consumer law in 1974 as Part V of the *Trade Practices Act 1974*. Victoria, in 1985, was again the first State to pass legislation to mirror this law. Inevitably differences between the general consumer laws of the Commonwealth and the States and Territories emerged over time. There was also significant overlap between the general laws and the industry specific laws. Differences of view and difficulties of coordinating nine jurisdictions meant that consumer laws often only slowly responded to emerging marketplace issues, such as the increased importation of dangerous toys to Australia and the explosive growth in mortgage broking in the late 1990s to early 2000s.

The Hilmer Review of National Competition Policy in 1995 did not explicitly include consideration of consumer policy. It did incorporate the review of past and new legislation which restricted competition, but its focus was primarily on creating the supply side conditions necessary for effective competition. It did not examine the demand side conditions conducive to competition, in particular the need to have informed and empowered consumers willing and able to switch their custom between suppliers. It was, belatedly, left to the Productivity Commission review of Australia's Consumer Policy Framework in 2007–08 to do this.

A significant development in consumer policy in Australia was Victoria's move in October 2003 to introduce legislation relating to unfair contract terms. This legislation was modelled, in part, on UK and European law. It enabled the regulator to respond in a more pro-active way to systemic weaknesses in contracting causing consumer detriment. Through the exercise of its extra-territorial powers, the Victorian regulator was able to effect significant changes to national contracts affecting areas such as mobile phones, internet service providers and hire care operators. Whilst all States and Territories favoured national legislation to deal with unfair contract terms, this was opposed by the Commonwealth until the Productivity Commission agreed it was the way to move forward. The Productivity Commission also recommended that other enforcement powers introduced by State Governments be included in the national general consumer law.

Whilst much of the early initiative for reform of consumer laws came from the States and Territories, a more recent emphasis on reducing regulatory burdens has added significant impetus to the reform process. The Council of Australian Governments (COAG), which agreed to a National Reform Agenda, including



Dr David Cousins AM
PhD, M Eco, B Eco (Hons),
Dip Ed, Professional Fellow

regulatory reform, at its February 2006 meeting, has promoted many consumer policy reforms, especially since the election of the Rudd Government. It agreed to the transfer of trade measurement to the Australian Government and to the adoption of a uniform national consumer law. It has also agreed to the Australian Government assuming responsibility for credit laws and agreed in principle to the establishment of a national licensing scheme, which would replace the separate State and Territory regimes covering a significant number of important occupations.

The legal framework for the Australian Government to regulate trade measurement was introduced with the *National Measurement Amendment Act 2008*. The National Measurement Institute will be responsible for its administration from 1 July 2010. A number of changes have also been made to the existing model State and Territory legislation, including allowing for the operation of the average quantity system for pre-packaged goods.

On 2 October 2008 COAG agreed to proposals for a new uniform national consumer law based on the Trade Practices Act with agreed amendments to product safety provisions, the inclusion of unfair contract terms provisions, new enforcement provisions and best practice provisions from State and Territory laws. The States and Territories are to apply this Australian Consumer Law by 1 January 2011. An Inter-governmental agreement has been signed which deals with processes and voting arrangements associated with amendments to the law, and coordination of enforcement between agencies. However, pending implementation of the uniform law, the Australian Government has moved unilaterally to implement some key aspects of this law. These include the unfair contract terms provisions and new enforcement powers. *The Trade Practices Amendment (Australian Consumer Law) Bill 2009* was introduced to the Parliament on 24 June 2009 and has since been referred to the Senate Economics Committee. The Committee is due to report on the Bill by 7 September 2009 and the Government has indicated its intention for the legislation to come into effect on 1 January 2010.

The powers of the Australian Competition and Consumer Commission (ACCC) to enforce the new Australian Consumer Law are being extended by the inclusion in the legislation of civil pecuniary penalties; disqualification orders; infringement notices; substantiation notices; public warning notices; and court orders to seek redress for consumers not party to a particular action.

The new unfair contract terms provisions will have a narrower coverage than the Victorian law. They will only relate to standard-form consumer contracts and not the main subject matter of the standard-form contract or the upfront price payable under the contract. The possible extension of these provisions to protect small business is subject to on-going consideration. A contract term is unfair and void when it causes a significant imbalance in the parties' rights and obligations arising under the contract and it is not reasonably necessary to protect the legitimate rights of the supplier. A court must have regard to any detriment or substantial likelihood of detriment caused by the term, the transparency of the term and the contract as a whole in determining whether a term is unfair. The legislation includes a non-exhaustive, indicative grey list of types of terms that may be considered unfair. There is also provision to prescribe unfair terms in regulations. Penalties under the Act apply to breaches of prescribed terms. *The Australian Securities and Investments Commission Act 2001* is also being amended so that the unfair contract terms provisions will apply to consumer financial services.

The powers of the Australian Competition and Consumer Commission (ACCC) to enforce the new Australian Consumer Law are being extended by the inclusion in the legislation of civil pecuniary penalties; disqualification orders; infringement notices; substantiation notices; public warning notices; and court orders to seek redress for consumers not party to a particular action.

A National Consumer Credit Protection Reform Package, comprising the *National Consumer Credit Protection Bill 2009*, which replicates the existing Uniform Consumer Credit Code as the National Credit Code; the *National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009*; and the *National Consumer Credit Protection (Fees) Bill 2009* was introduced to the Parliament on 25 June 2009. These Bills implement the transfer of credit laws to the Australian Government, establish a national licensing regime for credit providers and providers of related credit services, extend protections to investment property loans, specify responsible lending requirements for all lending, and enhance the existing provisions of the Uniform Consumer Credit Code. The Government wants the Reform Package to commence on 1 November 2009 with licence applications from existing providers required by June 2010, but the responsible lending provisions will be delayed until 1 January 2011.

The *Trade Practices Amendment (Clarity in Pricing) Act 2008* came into effect on 25 May 2009 to require businesses that make representations to consumers about the partial (component) price of a good or service to also display as prominently the total price, to the extent that it is possible to do so. Legislation to give effect to unit pricing has also been passed by the Parliament. Unit pricing is where grocery items are priced by reference to common units of measure such as per 100 grams and per 100 millilitres. The Retail Grocery Industry (Unit Pricing) Code will come into effect as a mandatory Code under the Trade Practices Act on 1 December 2009. It requires large supermarkets and on-line retailers to display unit prices for all items for which a price is displayed, unless the item is specifically exempt. Unit pricing facilitates pricing comparisons across products and outlets



These recent and proposed changes in consumer laws will expand the role of the Australian Government in consumer policy relative to the States and Territories. The Australian Government will assume greater responsibilities in product safety, credit and trade measurement. It will have a stronger influence over policy and stronger enforcement powers under the general consumer law. The States and Territories will retain an involvement in policy setting, in relation to the Australian Consumer Law, and enforcement. Historically the bulk of public enforcement of consumer law in Australia has been done by the bigger States with an emphasis on criminal prosecutions. The Australian Competition and Consumer Commission (ACCC) has had a stronger public profile, but takes fewer cases and mostly these are civil matters. It is an over-generalisation to say that the ACCC has focussed on national matters and the States and Territories on local matters.

Key objectives of the consumer policy reforms are to achieve greater consistency of consumer law and its administration across the Australian jurisdictions and reduced regulatory burdens for businesses through greater reliance on general, as opposed to industry-specific consumer laws. Whilst greater consistency is likely to be achieved in some areas, in other areas a high degree of consistency already existed. Reduced regulatory burdens may be achieved in some areas by centralising administration, but in areas like credit, where an extensive licensing system is to be introduced, this seems unlikely.

Will the changes enhance protections for consumers? Consumers will be more empowered by having clearer pricing through total and unit pricing requirements. There will be a broader potential application of unfair contract provisions across Australia and some protections, such as proposed responsible lending requirements, may be introduced earlier than would otherwise have been the case. For leading jurisdictions like Victoria, it seems likely that there will be a winding back of protections in a number of areas in order to satisfy the requirements of national uniformity.

More changes to consumer legislation are possible in the near future. One significant area relates to implied conditions and warranties. The Commonwealth Consumer Affairs Advisory Council has recently examined the adequacy of existing statutory implied conditions and warranties for goods and services under the Trade Practices Act and other State and Territory fair trading legislation. This includes a consideration of whether lemon laws in Australia are needed to protect consumers in situations where goods repeatedly fail to meet expected standards of performance and quality, specifically in relation to motor vehicles. The Council has also examined the existence of extended express warranties and their interaction with the statutory requirements. As the Government has indicated that it expects the uniform Australian Consumer Law will be introduced to the Parliament in early 2010, there will be limited time for consultation to occur on the Council's recommendations if they are to be incorporated into the Bill.

Excellence in teaching at Monash Law School

The Law Faculty is very proud of the quality and achievements of its teaching staff and continues to invest in developing teaching excellence within the Faculty. It provides opportunities for staff to continue to develop their teaching potential by participating in a range of professional development and other activities such as:

- The annual Faculty Teaching Workshop
- Faculty Teaching Seminars
- Training sessions on essential areas of teaching, such as Inclusive Teaching
- The Graduate Certificate in Higher Education
- The Sessional Teachers Orientation and STEP programs
- Faculty Teaching Awards
- The Vice Chancellor's Showcase of Teaching Excellence.

Faculty staff design and teach Units which regularly rate in the top tier of the University's Unit Evaluations. They have won awards for teaching at the Faculty and University level as well as prestigious national awards such as the Australian Learning and Teaching Council (ALTC) Award for Teaching Excellence in Law and the Prime Minister's Award for Australian University Teacher of the Year.

The Faculty engages the services of many expert sessional teachers who are world leaders in their field, including those who teach into the Prato Program. Teaching staff are ably supported by an outstanding team of staff in the Law Library, including experts in Learning Skills. In a recent survey, this team was rated second in the Group of Eight for their provision of library services.

The Faculty's performance in a number of key areas associated with teaching has been outstanding. An example of this is the Faculty's performance in the University's Vice-Chancellor's Award for Teaching Excellence.

The Law Faculty is only able to nominate one person each year for this award. The Law Faculty has the highest number of winners of the award in the University. Eleven law staff members have won this award and one staff member has received a special commendation. The successful staff include – Professor Stephen Barkoczy, Professor Jeff Waincymer, Professor Mark Davidson, Professor Bernadette McSherry, Mr Leighton Morris, Professor Adrian Evans, Associate Professor Jonathan Clough and Professor Richard Fox.

In 2008, the Law Faculty introduced the Faculty Teaching Awards, which were the idea of the then Director of Teaching Dr Melissa de Zwart and the Manager – Education Services Ms Joanna Becker. Jo explains why they were so keen to have Faculty-based Teaching Awards.

"We felt that recognition and validation of the excellence of our teaching staff was crucial and that a formal award structure was needed to encourage staff to go on to apply for the much larger University and national awards. Once they had been through the process of applying for and winning a Faculty Teaching Award we thought they would feel a lot more comfortable with the rather daunting prospect of developing an application for the Vice Chancellor's or the ALTC teaching awards."

Applicants for the Faculty Teaching Awards are expected to demonstrate substantial evidence of their excellent teaching over a period of time, so they have to start collecting supporting documentation up to 12 months before applications close. This material may include copies of their outstanding Teaching Evaluations (MonQueSTs), Unit Evaluations, testimonials from students and colleagues and Commendation Certificates from the Dean.

The Faculty now offers Awards for Teaching Excellence in 3 categories. The winners receive \$1000 and a Certificate. Applications for the 2009 Faculty Teaching Awards will close on Nov 30th.

The winners of the 2008 Faculty Teaching Awards were:

- The Sessional Teacher Award – Dr Vicki Vann and Ms Nicole Mollard
- The Early Career Teacher Award – Dr Colin Campbell
- The Faculty Teacher Award – Mr Ross Hyams

Ross Hyams



The winner of the 2008 Faculty Teacher Award, Mr Ross Hyams, who promotes work-integrated learning activities through the clinical program and external placement opportunities.

Professor Stephen Barkoczy



Professor Stephen Barkoczy, winner of Monash University's Vice Chancellor's Award for Teaching Excellence in 2007, the ALTC Award for Teaching Excellence in Law in 2008 and the Prime Minister's Award for Australian University Teacher of the Year in 2008.

Law of obligations academic joins Monash



Sirko Harder
(Dr iur 2001,
LLM 2003,
PhD 2006)

Sirko Harder, a qualified German lawyer, has joined the team at Monash Law School in the position of senior lecturer. Prior to joining Monash University in 2009, he worked at the University of Leicester (2006–2009) and the University of Aberdeen (2005–2006).

Sirko's research focus is on the law of obligations, in particular the law of damages, and on private international law. He has just finished the manuscript of a monograph entitled *'Measuring Damages in the Law of Obligations: the search for harmonised principles'*, which will be published by Hart Publishing next year. The monograph has grown out of the PhD thesis which he wrote at the University of Aberdeen.

Sirko has had many achievements in his career including an Outstanding Doctoral Thesis Award by the Reinhold und Maria Teufel Foundation, Germany. He also has published articles in distinguished journals such as *The Conveyancer and Property Lawyer*, *Edinburgh Law Review* and *Journal of Business Law* (forthcoming).

Sirko says: "What attracted me to Monash was the possibility of moving to Australia and to Melbourne in particular. I did my LLM at the University of Queensland. After leaving Brisbane, I always dreamed about moving back to Australia, and the job offer from Monash made the dream come true. One of my goals while at Monash Law School is to provide high quality research and high quality teaching."

International experience

Monash University and the Faculty of Law have made a strategic commitment to the internationalisation of educational opportunities for our students. As such the Law School has developed a number of internships to enhance both the personal and professional development of our students. Below are three students who recently returned from internships.



Skrine, Malaysia

Bronwyn Fraser, Arts/Law, 5th year

Skrine is one of the largest commercial law firms in Kuala Lumpur, Malaysia with over 50 partners and a large support base. Their clients include Malaysian and international companies, governmental agencies and regulatory authorities.

During the internship I rotated through the three main practice groups – one week in Intellectual

Property, one week in Dispute Resolution, and two weeks in Corporate. Islamic law plays a large part in Malaysian business due to Malaysia's large Muslim population, and being able to spend a day doing some work in the newly created Islamic Banking group gave me a challenging perspective on different approaches to law.

What impressed me most about my time at Skrine was the effort and lengths the lawyers went to teach me about the Malaysian legal system and how a legal practice functions. From creating a problem book about due diligence to showing me how to draft and present skeletal submissions, my supervising lawyers made such an effort to ensure that I was involved and learning. Trips to the impressively-named 'Palace of Justice' in Putra Jaya were also a great way to see the Malaysian law in action.

My best advice for anyone thinking of applying for this program is to be open to different influences on the practice of law. The influence of Islamic law on Malaysia's legal system, which is almost identical to Australia's, will make you consider how the law works in a different light. Skrine subscribe to the belief that 'the world of opportunity does not recognise national boundaries', and I can whole-heartedly recommend this program to any student who wishes to broaden their horizons and experience both a different legal system and culture.



United Nations Internship, New York, USA

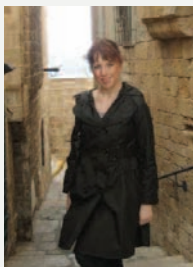
Tom Guan, Commerce/Law (Hons), 6th year

Standing beneath the monolithic building of the United Nations Secretariat for the first time, there was a moment of awe. For me, it was a lifelong dream that finally came true, to work for the United Nations. So with great hopes and expectations, I started my two months of Internship with the United Nations Headquarters in New York.

The internship provided a complete experience of the United Nations Headquarters. I had clearance to attend Security Council and General Assembly meetings, and a host of other international conferences. My office was high up in the 37th floor of the iconic 'matchbox' skyscraper. My colleagues were extremely friendly and helpful in settling me in, and providing assistance.

I believe work only accounts for about half of the treasured experience at the UN. It is true that I learnt many new techniques and skills at DPA, but most of the things I gained from the internship are intangible. I made many friends from all over the world. It was a privilege to work with so many talented young people; all who wanted to change the world for the better. As I made new friends, we shared stories, and established bonds that stretched beyond borders or geopolitics. I saw Iraqi and Israeli Interns becoming close friends, and Georgian and Russian Interns having lunch together.

It is an internship opportunity not to be missed, and I would strongly recommend it for any Monash student, no matter what discipline.



Herzog, Fox and Neeman, Israel

Rachelle Shtoltzenberg, Arts/Law, 5th year

Herzog, Fox, and Neeman is one of Israel's foremost corporate and commercial law offices representing leading companies worldwide. The firm was founded in 1972 by three prominent lawyers. With an international and multi-disciplinary legal staff of over ninety, Herzog, Fox and Neeman has recently been rated by Dun and Bradstreet as Israel's largest law firm.

During the summer break I undertook a legal internship, with the firm. I wanted to pursue my interest in commercial law and having never been to Israel this was the best opportunity I could have hoped for. This experience provided me with a practical perspective on the application of the ideas, theories, and strategies I have been learning in my own legal education.

In addition, I experienced first hand how the finest lawyers balance their demanding schedules, while striking work-life balance. My internship was very educational and an inspiring experience. I learned immensely during my time there.

For any law student looking to begin a career in law, this is the place to learn. What I learned over the summer holidays cannot be replicated in law school. This was an amazing experience and I would absolutely recommend the internship for any student looking for a preview of life as a lawyer in a commercial environment.

I was also impressed with the level of responsibility I was given and the wide variety of tasks and practice areas I experienced. I was thrilled to be able to be involved in the preparation of a journal article for publication and to receive acknowledgement in the article.

I recommend everyone to acquire an internship as it is truly an exceptional experience to work in another country, be exposed to a different culture, and gain practical experience in your area of interest. Today's employers are not just looking for experience, but they are demanding it. Gaining an internship now may help secure employment after graduation.

Diverse Doctoral Research

The faculty has a number of higher degree by research students undertaking their doctoral studies within the faculty. In 2009 the following six students joined the Monash Law School.

Pascale Chifflet

Pascale is a French national she completed her LLB with honours from Université Pierre Mendès France (Grenoble, France) and LLM with honours from Université Panthéon Sorbonne (Paris, France).

Pascale worked for the United Nations Tribunal for the former Yugoslavia for nearly 10 years prior to arriving in Australia in 2006.

Pascale's PhD thesis is 'The implications of the use of offender profiling in the criminal justice process'.

Stuart Kells

Stuart has a background in commerce and economics. He has held senior positions with the Victoria government including Assistant Auditor-General (Performance Audit), Executive Director of the Office of Manufacturing, and various economic policy roles in the department of Premier and Cabinet.

Stuart's PhD thesis is 'Public Sector Oversight Bodies' such as public audit offices, anti-corruption commissions and competition commissions.

Son Tan Nguyen

Son is from Vietnam. He completed his LLB from the National University of Ho Chi Minh City Law University and an LLM from the University of Melbourne. He is currently on leave of absence from the Faculty of Law, National Political and Administration Academy, Vietnam where he is employed as a lecturer.

Son's PhD thesis is 'The interaction between dispute settlement under the WTO and Free Trade Agreements'. Son is funded by the Monash Graduate Scholarship and the Law School Foundation.

Ainee Adam

Ainee's PhD thesis is 'Enforcement of Intellectual Property Rights (IPRS) to prevent the global trade in counterfeit products: assessing the adequacy of existing laws'.

Choo, Kah Sing

Choo's PhD thesis is 'Sustainability of Islamic Legal Tradition within a Secularized Constitution: A case Study of the dual legal systems in Malaysia with special reference to Freedom of Religion'. Choo is funded by the Law School Foundation.

Lauran Breedon

Laura's PhD thesis is 'The law and health ageing: legal strategies for primary prevention, early intervention and remedy of elder abuse and neglect'.

The effect of the financial crisis

Professor Dana Muir, Arthur F. Thurnau Professor of Business Law, Stephen M. Ross School of Business, University of Michigan, visited the Faculty on 12 May 2009 to present a seminar on 'The Effect of the Financial Crisis on U.S. Pensions – A Comparative Perspective on Financial Services Regulatory Reform'.

The seminar covered retirement/superannuation savings accounts in the U.S. and Australia, the effect of financial crisis on account assets, Australian implications for reform of U.S. financial services regulation and the potential effect of financial services regulatory reform on U.S. pension regulation.



L to R: Professor Marilyn Pittard and Professor Dana Muir.

Costello Lecture: It's my body isn't it? Children, medical treatment and human rights

As part of the 2009 series of Monash Lectures the annual Costello Lecture was held at BMW Edge Theatre at Federation Square with an excellent attendance.

Professor HP Lee introduced Tim Costello who had recently returned from a trip to Ethiopia with Hugh Jackman and his wife Deborah-Lee Furness. They were there as Ambassadors for World Vision.

The Costello Lecture has been running since 2001 and aims to address issues of human rights, ethics and social justice.

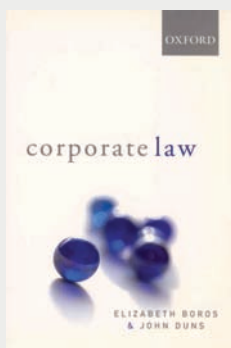
Tim Costello introduced Chief Justice Diana Bryant of the Family Court of Australia who discussed the highly topical issue 'It's my body isn't it? Children, medical treatment and human rights'. The lecture highlighted parts of the law not understood by many members of the general public and gave insight into recent judicial decision making.



The Honourable Chief Justice Diana Bryant

New Publications by Monash Law School Staff

www.law.monash.edu.au/research/book-releases.html



Corporate Law (Second Edition)

Elizabeth Boros and John Duns

Corporate Law examines the legal principles and policies that govern companies. Written in a plain-speaking style this text brings the accessibility of an introductory text together with the depth and analysis of a higher-level text, providing students with a solid understanding of all the key topics. It does this through an exploration of the theoretical and policy basis for each topic while also placing each topic in its practical context. This book is equally valuable to readers approaching the subject for the first time, and for those seeking a deeper understanding of corporate law.



Elizabeth Boros



John Duns



Australian Insolvency Law

Christopher Symes and John Duns

In 2008 and 2009 the world's financial systems have unravelled in what is now known as the Global Financial Crisis. As a result, the economies of every developed nation in the world have suffered with corporate collapses and tales of personal financial distress.

Never has there been a time when a book such as this is more timely or topical.

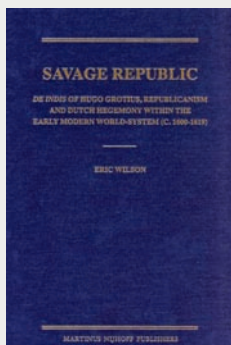
Australian Insolvency Law covers the important aspects of both personal and corporate insolvency. Each chapter steps the reader through the technical and procedural aspects of the various regimes, providing a clear understanding of fundamental concepts, technical detail and practical issues. It covers international aspects of insolvency law and in particular, the new cross border insolvency regime.



Christopher Symes



John Duns



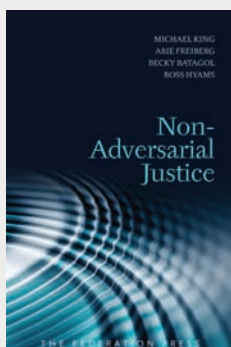
Savage Republic: De Indis of Hugo Grotius, Republicanism and Dutch Hegemony within the Early Modern World-System (c.1600-1619)

Eric Wilson

Intended for the professional academic and graduate student, this book is the first to utilize the methodology of "New Stream" legal scholarship in an extended critical "exegesis" of Hugo Grotius' *De Indis* (c.1604-6). *De Indis* is predicated upon a two-fold discursive strategy: (i) investing "private" Trading Companies with "public" international legal personality, and (ii) collapsing the distinction between "private" and "public" warfare. Governing the operation of textual interpretation is *De Indis*' status as a republican treatise juridically legitimating an early modern Trans-National corporation (the VOC) that served as an agent of a "primitive" system of global governance, the early Capitalist World-Economy. The application of New Stream scholarship reveals that the republican signature of *De Indis* consists of a discursive "micro-oscillation" between the "thick" ontology of Late Scholasticism ("Utopia") and the "thin" ontology of Civic Humanism ("Apology") wholly appropriate to the governance requirements of the embryonic Modern World-System.



Eric Wilson



Non-Adversarial Justice

Michael King, Arie Freiberg, Becky Batagol and Ross Hyams

This book outlines key aspects of a growing trend within the Australian, United States, Canadian, New Zealand, United Kingdom and other legal systems towards the use of non-adversarial justice.

It examines in detail non-adversarial theories and practices such as therapeutic jurisprudence, restorative justice, preventive law, creative problem solving, holistic law, appropriate or alternative dispute resolution, collaborative law, problem-oriented courts, diversion programs, indigenous courts, coroners courts and managerial and administrative procedures.

It identifies the common themes, values and principles that bring these disparate theories and practices together and explicates them for practitioners, courts and students. It examines the implications of these changes on legal practice, the courts and legal education.



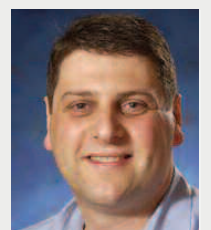
Michael King



Arie Freiberg



Becky Batagol



Ross Hyams

Counting down to Copenhagen

Rowena Cantley-Smith (BEC 1989, LLB 1993, LLM Public International Law 2001, PhD candidate)

In less than 100 days the next United Nations Climate Change Conference (COP 15) will get underway in Copenhagen.¹ A new international agreement, to replace the Kyoto Protocol after it expires at the end of 2012, is supposed to be agreed at this meeting. While some suggest that a 'climate deal in Copenhagen this year is an unequivocal requirement to stop climate change from slipping out of control',² there is still no international consensus on this important international instrument. At the conclusion of the most recent United Nations climate change talks in Bonn, it became clear that unless the pace of current negotiations increases rapidly in the coming weeks, it is unlikely that a new agreement will be adopted this year.³

If this does indeed turn out to be the case, questions arise as to how this situation has come about and what might be the consequences of such inaction? In considering such questions, it is informative to revisit the background to this current international predicament, not only to understand more fully the development and nature of the existing international climate change obligations, but also to be mindful of the complexities and difficulties characterising the current rounds of international climate change negotiations.

International Climate Change Agreements

There are currently two major international agreements on climate change: *United Nations Framework Convention on Climate Change* (UNFCCC) and the Kyoto Protocol (KP). At the 1992 Earth Summit in Rio de Janeiro, most of the world's nations expressly recognised the adverse impact of human activity on the environment by committing themselves to the first of these international instruments. The key objective of the UNFCCC is to stabilise greenhouse gas emissions at levels that would 'prevent dangerous anthropogenic interference with the climate system'.⁴ States' primary international obligations in this regard include establishing national inventories of greenhouse gas emissions and sinks' and 'integrating climate change considerations into national social, economic and environmental policies'.⁵ In seeking to meet these international obligations, States are required to take account of principles of international environmental law, especially inter-generational equity, the precautionary approach, sustainable development and common but differentiated responsibilities.⁶ With respect to last of these, the UNFCCC recognises the difference between States in two ways: (i) the different responsibility for creating greenhouse gas emissions, which historically have been generated by industrialised countries; and (ii) the different capacity of States to respond to the consequences of such transboundary environmental hazards. Most notably, industrialised States are encouraged to pursue national climate change policies and measures that seek to meet two concurrent outcomes, namely the mitigation of greenhouse gas emissions and the protection of greenhouse gas sinks.⁷

It soon became apparent that the obligations set down in the UNFCCC needed to be strengthened considerably in order for effective mitigation of global greenhouse gas emissions to occur. Consequently, an additional instrument (the KP) was agreed to at the 1997 UN Climate Change Conference (COP 3).⁸ The KP is different to the UNFCCC in two main ways. First, the emission reductions obligations set out in the KP are no longer discretionary. Industrialised countries are now required, rather than encouraged, to reduce their greenhouse gas emissions in accordance with their respective targets.⁹ Known as Annex B countries, most industrialised States are obliged under the KP to meet quantified emission targets (an average of 5% below 1990 levels) during the commitment phase from 2008 to 2012.¹⁰ Interestingly, Australia was one of only three nations who were granted a reprieve on this emission target and in fact was rewarded with an emissions target of 8% above its 1990 levels. Secondly, the KP has introduced three flexible market based mechanisms to assist States meet their emissions targets. These are an international emissions trading system (often referred to as the carbon market), the clean development mechanism and joint implementation.¹² In short, the international emissions trading system allows those States who exceed their emission targets to buy additional emission units from States with excess capacity.



Rowena Cantley-Smith

The other two KP mechanisms operate on a different basis. The Clean Development Mechanism (the CDM) is often referred to as an environmental investment and credit scheme. Under the CDM, an Annex B State can meet its emission targets, in part, by investing in emission reduction or removal projects in a developing country.¹³ The resulting emission reductions or removal must be in excess of what would have normally occurred. In such instances, emission reductions from a CDM project create certified emission reduction credits (referred to as CERs), which in turn can be traded or used by the Annex B State as an offset against its KP emissions target. While the third mechanism, joint implementation (JI), is also a variant on the CDM investment and credit scheme. The JI system also facilitates emission reduction or removal projects and creates emission reduction units (known as ERUs). As with the CDM, emissions achieved through JI projects can also be traded or used as an offset against a State's Kyoto emission targets. Unlike the CDM this mechanism can only be applied to projects involving Annex B States and/or those states who have undertaken an emissions reduction obligation in accordance with the KP.

Getting to Copenhagen: A Road Paved with Good Intent

From the perspective of climate change, 2007 was a pivotal year. Close to home, under new Federal Government leadership Australia finally ratified the KP. The International Panel on Climate Change (the IPCC) released its fourth and final assessment report on climate change, its effects and causes,¹⁴ and the United Nations Climate Change Conference (COP 13) adopted the Bali Roadmap at its December 2007 meeting.¹⁵ The IPCC's Report stated, with more than 90 per cent certainty, that human activities, particularly the increased use of fossil fuels, are the major cause of global warming.¹⁶ It also noted that overall global greenhouse gas emissions due to human activities had increased by 70 per cent between 1970 and 2004, while carbon dioxide emissions had risen by around 80 per cent over the same period.¹⁷ At the COP 13, States agreed to enter negotiations for a new international agreement on climate change and finalise this by 2009. Four main areas were identified as essential for establishing a long term shared vision on climate change: increased mitigation of greenhouse gas emissions; adaptation to climate change; technology transfers and development; and financing.¹⁸ Reducing emissions from deforestation was also agreed to be actively pursued. A year later, States committed to shifting into full negotiating mode and drafting 'an ambitious and effective international response to climate change' that could be agreed to in Copenhagen at the end of 2009.¹⁹

What is in dispute?

Despite the many international efforts to reach consensus on a draft agreement for consideration in Copenhagen later this year, the prospect of this happening is low. While it is not possible to canvass all aspects of the ongoing disagreements, at the heart of the current predicament is the debate between industrialised and developing States as to who should bear the responsibility for future climate change action. While historically emissions have been generated by industrialised states, expectations are that emerging economies and developing nations will be the major source of future greenhouse gas emissions. Key issues for developing states include the means, methods and sources of finance for climate change adaptation and mitigation actions, the transfer of relevant technology (especially clean-energy technology) and reductions in emissions from deforestation and forest degradation. For industrialised States and emerging economies the most significant area for disagreement concerns the size, the binding nature and timing of emission reduction targets. During recent climate change negotiations, for instance, it was suggested that the current mid-term (2020) emissions reduction undertakings of many industrialised states ought to be turned into legally binding targets as part of the 2009 Copenhagen agreement.²⁰ While general agreement has been reached for ambitious long term emission reduction targets to be included in any future climate change agreement, short and medium term binding targets have been suggested, in part, to overcome what is seen as the potential risk of inaction on climate change responses in the intervening years.²¹ It has also been proposed that emerging economies such as China and India, and former communist states of the Soviet Union (including the energy superpower Russia) should also now be subjected to sizeable binding emissions targets. Given the possible adverse impact on economic growth, emerging economies are not overly impressed with this idea and so far, have strenuously rejected it.²² It remains to be seen how this difficult issue will be resolved. Deciding what is to be the appropriate baseline year for target calculations is also still being contested.

Where to from here?

Despite predictions that all will be lost if no international agreement is reached in Copenhagen, arguably there is still time to resolve this issue before the first phase of the KP expires in 2012. Realising that strong leadership and political guidance is clearly warranted, the UN Secretary-General, Ban Ki-moon, has requested all of the 192 Heads of State and Governments who are parties to the UNFCCC to attend a Climate Change Summit.²³ Another positive outcome has been the noticeable turn around on climate change by the Obama Federal Government in the USA. Having been advised at the COP 13 in Bali to get out of the way if it was not willing to lead the way,²⁴ it is somewhat reassuring to see a different approach now being adopted by the USA. At the climate change talks in Bonn earlier this year, the US Special Envoy on Climate change, Todd Stern, stated that the USA was 'determined to make up for lost time. America is now once again strongly committed to developing a global response to climate change. We do not doubt the science, we do not doubt the urgency, and we do not doubt the enormity of the challenge before us'.²⁵ Now that the USA clearly understands its important role in dealing with climate change, it can also be anticipated that Australia will likewise take a stronger stance in the negotiations leading up to, and including Copenhagen. Working towards ensuring that an inclusive and effective international deal on climate change is important for all nations of the world. Hopefully this can be achieved before time runs out on the KP.

Rowena is a lecturer at Monash Law School and Barrister. She is also associated with the Centre for Environment and Energy Law at the University of Leuven, Belgium.

References

- ¹ 7–18 December 2009.
- ² Y de Boer, UNFCCC Executive Secretary, *Media Briefing*, 14 August 2009, Bonn, Germany. Note: In 2009 the first round of formal negotiations and informal consultations on a new climate change instrument took place in Bonn, 29 March–8 April, 1–12 June and more recently 10–14 August. Two further sessions will be held prior to Copenhagen: 28 September 9 October in Bangkok and 2–6 November in Barcelona.
- ³ Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, *Revised Negotiating Text*, FCCC/AWG/LCA/2009/INF.1, 22 June 2009, UNFCCC, Bonn. See also comments of Y de Boer (UNFCCC Executive Secretary), *Media Briefing*, 14 August 2009, Bonn, Germany, unfccc.int/2860.php.
- ⁴ United Nations Framework Convention on Climate Change 1992 (UNFCCC 1992), Art 2.
- ⁵ UNFCCC 1992, Art 4 (1).
- ⁶ UNFCCC 1992, Art 3.
- ⁷ UNFCCC 1992, Art 4(2).
- ⁸ Negotiations on the substantive nature of the Kyoto Protocol continued until 2001, at which time a set of detailed rules for the operation and implementation of the Kyoto Protocol were agreed to by the Parties to the Convention: see UN Climate Change Conference, *The Marrakesh Accords*, COP 7, 2001, Morocco.
- ⁹ The Kyoto Protocol to the United Nations Framework Conference on Climate Change 1992 (UNFCCC), was adopted in Kyoto, Japan, on 11 December 1997 and opened for signature in early 1998. It entered into force on 16 February 2005. To date, 184 Parties of the UNFCCC have ratified its Protocol.
- ¹⁰ Kyoto Protocol, Art 3. Not all industrialised states have ratified the Kyoto Protocol, eg, the USA.
- ¹¹ This emissions trading system is not restricted to trade in carbon, but as this is the largest of the six major greenhouse gases, the market is often referred to as the carbon market. Also, more than actual emissions can be traded and sold in this market, including the removal of emissions resulting from land use, land-use change and forestry (LULUCF) activities (eg, reforestation) and emission reductions resulting from joint implementation and clean development mechanism projects. For further discussion see UNFCCC website, unfccc.int/kyoto_protocol/mechanisms/emissions_trading/items/2731.php/.
- ¹² Kyoto Protocol, Articles 17, 12 and 6 respectively.
- ¹³ The CDM applies to projects for emissions reductions and/or removals: Kyoto Protocol, Art 12.
- ¹⁴ Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report*, 2007, www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.
- ¹⁵ Ad Hoc Working Group on Long-term Cooperative Action under the Convention, The Bali Roadmap, FCCC/CP/2007/L.7/Rev.1 14, COP 13, December 2007, UN Conference on Climate Change.
- ¹⁶ Intergovernmental Panel on Climate Change, above n 16. See also N Stern, *The Economics of Climate Change: The Stern Review*, 2007, UK Cabinet Office – HM Treasury, CUP, Cambridge.
- ¹⁷ Intergovernmental Panel on Climate Change, above n 15.
- ¹⁸ *Ibid.*
- ¹⁹ UN Climate Change Conference, COP 14, Poznań, December 2008.
- ²⁰ *Ibid.* See also above n 1 and n 4.
- ²¹ UNCCC climate change negotiations, above n 1 and n 4.
- ²² See eg, M Bom, *India on binding emission targets: "No way"*, 4 August 2009, UNCCC Danish Government website, en.cop15.dk.
- ²³ Y de Boer, above n 2.
- ²⁴ Delegate from Papua New Guinea, UNCCC, Plenary Sessions, COP 13, 3–15 December 2007, Bali.
- ²⁵ T Stern, Press Briefing of the U.S. Delegation UNFCCC Climate Change.

Postgraduate Law Units: October 2009 – April 2010

Units are listed alphabetically. For full timetable details visit: www.law.monash.edu.au/postgraduate/timetables/

LAW7303	Advocacy: theory and practice Professor The Honourable George Hampel AM QC	2 March (2010) Semester
LAW7349	Comparative international tax law Professor Pasquale Pistone	1 February (2010) Intensive
LAW7056	Competition law Associate Professor John Duns / Mr Andrew Monotti	1 March (2010) Semester
LAW7011	Copyright Dr David Lindsay	5 Feb (2010) Semi-intensive
LAW7306	Corporate governance and directors' duties TBA	2 March (2010) Semester
LAW7254	Design law and practice Mr Warwick Rothnie / Mr Raymond Hind	10 Dec (2009) Intensive
LAW7444	Economics of regulation Professor David Cousins	19 Oct (2009) Intensive
LAW7317	Evaluating what works in regulation Professor Graeme Hodge	12 April (2010) Intensive
LAW7308	Expert evidence Professor Ian Freckelton	22 March (2010) Semi-intensive
LAW7260	Indigenous rights and international law Ms Melissa Castan	22 Feb (2010) Intensive
LAW7323	International banking and finance: law and practice Dr Emmanuel Laryea	1 March (2010) Semi-intensive
LAW7341	International criminal law: procedural and practical aspects Dr Gideon Boas / Mr Peter Morrissey QC	3 March (2010) Semester
LAW7068	International environmental law Ms Rowena Cantley-Smith	23 March (2010) Intensive

LAW7218	International humanitarian law Dr Eugene O'Sullivan	19 April (2010) Intensive
LAW7311	International human rights law and women Ms Kate Eastman	22 Oct (2009) Intensive
LAW7083	Law of employee relations Mr Richard Naughton / Mr Bruce Moore	3 March (2010) Semester
LAW7087	Local government law Mr Mark Hayes	22 April (2010) Intensive
LAW7251	Negotiation and mediation skills Mr Shawn Whelan	22 April (2010) Intensive
LAW7263	Overview of corporate law Mr Scott Wotherspoon	4 March (2010) Semester
LAW7223	Overview of intellectual property Mr Ian Horak	2 March (2010) Intensive
LAW7026	Overview of international human rights law Ms Kate Eastman	15 March (2010) Intensive
LAW7332	Principles of construction law Mr Greg Campbell / Mr Paul Woods	12 Nov (2009) Intensive
LAW7276	Principles of taxation Professor Stephen Barkoczy	18 Feb (2010) Semi-intensive
LAW7330	Protecting the rights of minorities, marginalised and vulnerable people Dr Paula Gerber	30 Nov (2009) Semester
LAW7313	Regulatory fundamentals: concepts, constructs and context Professor Graeme Hodge	15 March (2010) Intensive
LAW7224	Trade mark practice Mr Ian Horak	5 Nov (2009) Intensive

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