

## FROM MILIRRPUM TO MABO: THE HIGH COURT, *TERRA NULLIUS* AND MORAL ENTREPRENEURSHIP

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When a story is well told, I park my analytic faculties at the door.<sup>1</sup>

The success of the critique of legal positivism has been such that there is in current legal thought a widespread adherence to the idea that normativity – with norms understood as ‘morals’, ‘ethics’ or ‘principles’ – is central to law, and that moral integrity in the legal field is closely tied to a critical attitude towards the past.<sup>2</sup> Legal positivism and the framing of judgments in terms of precedent or ‘good law’ risks being equated, then, with a hide-bound inability to adjust to the changed nature of the current moral community. Precedent, wrote Sir Anthony Mason, “brings in its train... a mode of argumentation which... is preoccupied with past decisions and dicta, and an inability to respond to the need for change”.<sup>3</sup>

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1 HL Dalton, “Storytelling on its Own Terms” in P Brooks and P Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (1996) 57 at 57.

2 This meaning of ‘norm’ is to be distinguished from its usage in Michel Foucault’s work. In Foucault’s work, as François Ewald suggests, “the norm is a measurement and a means of producing a common standard”, a point of reference or standard by which social diversity is coordinated: F Ewald, “Norms, Discipline, and the Law” (1990) 30 *Representations* 138. See also the discussion in N Rose and M Valverde, “Governed by Law?” (1998) 7(4) *Social & Legal Studies* 541. There is clearly a relationship between the two, but here we are concerned with different questions.

3 Sir A Mason, “The Use and Abuse of Precedent” (1988) 4 *Australian Bar Review* 93 at 94. This uncoupling of moral community from tradition is a rather striking and novel phenomenon. It has been more common throughout human history and across human cultures to approach ‘looking forward’ with caution, to see tradition precisely as embodying basic human values, demanding considerable allegiance – indeed, this has been one of the central arguments for the virtues of the doctrine of *stare decisis*: GJ Postema, “On the Moral Presence of Our Past” (1991) 36(4) *McGill LJ* 1153.

Both the sympathetic supporters<sup>4</sup> and the hostile critics<sup>5</sup> generally view the *Mabo*<sup>6</sup> judgments in this light. In the sympathetic version, particular judicial decisions and past legal doctrines are seen as embodying principles regarding the nature of civilization and racial equality to which 'we' no longer adhere, confronting the High Court with a choice between an (amoral) adherence to existing legal authority and a (moral) overturning of that authority in conformity with current values. As Brennan J stated:

Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.

Deane and Gaudron JJ voiced a similar view of the law's role in acknowledging and retreating from "past injustices".<sup>8</sup> Kathy Laster affirms that *Mabo* is an example of "a judicial response to changing values", a set of judgments where "the judges of the High Court noted attitudinal changes in the community towards Aboriginal people and, *despite precedent*, six of them were prepared to overrule decisions which they felt belonged to a bygone age".<sup>9</sup> The political storm which then broke out over the decision concerned whether it was appropriate for the High Court to be taking this step in renovating the common law, or whether such a task should properly be left to Parliament.<sup>10</sup>

At the centre of the conflict between legal authority and 'contemporary values' which has been most visibly at issue in the debate over the *Mabo* judgment is the doctrine of *terra nullius* – the consideration of a territory as "practically unoccupied" if occupied by indigenous peoples who do not cultivate the land. It is the rejection or overruling of this 'doctrine' which is generally said to constitute the High Court's judicial activism and its concession to 'contemporary values', to underlie the legal recognition of native title,<sup>11</sup> and to restore the legitimacy of Australian law in relation to its indigenous peoples.

I would like to address two issues raised by the framing of the character of the decision in this way. First, as Richard Bartlett has explained, "[t]erra nullius is

4 N Sharp, *No Ordinary Judgment: Mabo, the Murray Islanders' Land Case*, Aboriginal Studies Press (1996); J Webber, "The Jurisprudence of Regret: the Search for Standards of Justice in *Mabo*" (1995) 17(5) *Syd LR* 5.

5 LJM Cooray, "The High Court in *Mabo*: Legalist or L'égotiste" in M Goot and T Rowse (eds), *Make a Better Offer: the Politics of Mabo*, Pluto (1994) 82, to name only one; overviews can also be found in G Cowlshaw, "Did the Earth Move for You? The anti-Mabo debate" (1995) 6(1/2) *The Australian Journal of Anthropology* 43 and H Wootten, "Mabo and the Lawyers" (1995) 6(1/2) *The Australian Journal of Anthropology* 116.

6 *Mabo and Others v Queensland (No 2)* [1991-1992] 175 CLR 1 ("Mabo")

7 *Ibid* at 42.

8 *Ibid* at 109.

9 K Laster, *Law as Culture*, Federation Press (1997) p 154 (emphasis added).

10 For an overview, see F Brennan, *One Land, One Nation: Mabo - Towards 2001*, University of Queensland Press (1995) pp 20-37.

11 M Kirby, "In Defence of *Mabo*" in M Goot and T Rowse (eds), note 5 *supra* 67; D Ivison, "Decolonizing the Rule of Law: *Mabo's* Case and Postcolonial Constitutionalism" (1997) 17(2) *Oxford Legal Studies* 253 at 256; H Reynolds, "Native Title and Pastoral Leases" (1996) 3(85) *Aboriginal Law Bulletin* 14 at 14.

not a concept of the common law, and it had never been referred to in any case prior to *Mabo* as justifying a denial of native title".<sup>12</sup> With Henry Reynolds<sup>13</sup> providing the leading exception, very little of the scholarly discussion of native title or Aboriginal land rights prior to *Mabo* found it necessary either to raise or to address the concept of *terra nullius*.<sup>14</sup> What, then, was being 'overturned', and what was the point of doing so? Second, both Justice Dawson's dissenting judgment and the earlier judgment of Blackburn J in *Milirrpum*<sup>15</sup> were no less normatively based than the majority in *Mabo*, and no more concerned to base their legitimacy on the authority of the common law. In the *Mabo* judgments, we see not a choice between a particular normativity and a strict legal formalism which is somehow non-normative, but rather a choice between *different* articulations of norms and law, varying combinations of different interpretations of common law authorities and diverging moral orientations. The problem raised by the foregrounding of the moral dimensions of the *Mabo* judgments' entrepreneurship is, as Tim Rowse has remarked:

To reason in moral terms about the nation's very foundations in law, about the 'traditional' and adapted 'moralities' of indigenous peoples and about the sympathies of contemporary Australians, is to engage with matters that are not so much imponderable as endlessly ponderable, because they are not amenable either to final pronouncement or to definite arbitration by reference to 'the facts'.<sup>16</sup>

Rather than settling too comfortably into either the self-congratulatory normative certitude or the outraged political condemnation of the so-called 'rejection of *terra nullius*', I will suggest that perhaps the moral tale of the slaying of *terra nullius* has been a story told a little too well. The overall aim will be to work towards a more careful and modest reading of the legal, political and ethical significance of the *Mabo* judgments, a particularly important example of judicial

12 RH Bartlett, *The Mabo Decision*, Butterworths (1993) p ix.

13 H Reynolds, *The Law of the Land*, Penguin (1987). The earliest reference to the concept in relation to Aboriginal interests in land that I have been able to find is: A Frost in "New South Wales as Terra Nullius: the British Denial of Aboriginal Land Rights" (1981) 19 *Historical Studies* 513. The first discussion of the concept in relation to sovereignty is in E Scott, "Taking Possession of Australia: the Doctrine of 'Terra Nullius' (No Man's Land)" (1940) 26 *Journal of the Royal Australian Historical Society* 1 (I am indebted to K Beattie's "Terra Nullius and the Colonisation of Australia" (unpublished BA Honours Dissertation, Department of Government, University of Sydney, 1998) for drawing my attention to this reference).

14 RH Bartlett, "Aboriginal Land Claims at Common Law" (1983) 15 *University of Western Australia Law Journal* 293; J Hookey, "The Land Rights Case: a Judicial Dispensation for the Taking of Aboriginal Lands in Australia?" (1972) 5 *FLR* 85; K McNeil, "A Question of Title: has the Common Law been Misapplied to Disposses the Aboriginals?" (1990) 16(1) *Monash ULR* 91; NM Williams, *The Yolngu and their Land*, Australian Institute of Aboriginal Studies (1986); see also Sir H Gibbs, "Foreword" in MA Stephenson and S Ratnapala (eds) *Mabo: A Judicial Revolution*, University of Queensland Press (1993) xiii.

15 *Milirrpum v Nabalco Pty Ltd* (1971) 17 *FLR* 141 ("*Milirrpum*").

16 T Rowse, *After Mabo: Interpreting Indigenous Traditions*, Melbourne University Press (1993) p 1; see also P Patton's discussion of the 'values' question in "After Mabo" (1994) 27(4) *Southern Review* 511. For a further exploration of this problem in relation to academics and law, see RA Posner, *The Problematics of Moral and Legal Theory*, Harvard University Press (1999).

venturing into the normative realm, and a form of essentially ethico-political activity which I shall refer to as the High Court's "moral entrepreneurship".<sup>17</sup>

## I. NATIVE TITLE AND *MILIRRPUM* v *NABALCO PTY LTD* – THE BLACKBURN JUDGMENT

What was the legal precedent facing the High Court when it considered *Mabo*? Strictly speaking, there was only one case: *Milirrpum*, which had been presided over by Blackburn J of the Supreme Court of the Northern Territory. A proper understanding of the *Mabo* judgments, especially what they are meant to have 'overturned', depends on a familiarity with *Mabo*'s 'prehistory', the *Milirrpum* case. This prehistory has been obscured by the triumphalism of the leading *Mabo* judgments as well as the debate following *Mabo*, both of which tend to gloss over some of the central features of Justice Blackburn's reasoning in order to preserve the consistency of the idea of a 'doctrine of *terra nullius*'. The questions at issue in that case were: did Australian common law include recognition of a doctrine of 'communal native title'? And did the plaintiffs have a proprietary interest in the land in question?

Blackburn J identified a number of hurdles which needed to be cleared before both these questions could be answered in the affirmative. His Honour's first reason for rejecting the plaintiff's claim was one of fact, namely that the plaintiffs had not established that their links to the relevant land were the same as their predecessors' in 1788. Second, he found that as a matter of law, regardless of what new interpretations of the facts might conclude, New South Wales had to be regarded as a settled or occupied territory, rather than a conquered or ceded one.<sup>18</sup> Third, he found that Australian courts binding on his own had identified the Crown as "the owner in demesne of all the land of New South Wales immediately the settlement was established".<sup>19</sup> Fourth, he found that there was no doctrine of communal title in English law as it applied to settled colonies. Fifth, he found that the plaintiffs could not demonstrate an interest in land that could be recognised in Australian law as "proprietary".

Blackburn J did not use the concept *terra nullius* explicitly; if it could be said to play an implicit role in the judgment, it was in his finding that New South Wales was to be regarded as a settled or occupied territory, rather than as a conquered or ceded one. What then followed from this was that "in principle from the moment of the foundation of a settled colony English law, so far as it was applicable, applied in the whole of the colony".<sup>20</sup> For Blackburn J there was, then, no question of the recognition or incorporation of indigenous sources of law. However, what was decisive for the direction of Justice Blackburn's argument specifically in relation to native title was *not* this conclusion. Rather, it

17 The term originates in the sociology of deviance, particularly from H Becker, *Outsiders: Studies in the Sociology of Deviance*, Free Press (1963).

18 Note 15 *supra* at 243-4.

19 *Ibid* at 247.

20 *Ibid* at 244.

was his response to the question of "whether English law, *as applied to a settled colony*, included or now includes a rule that communal native title where proved to exist must be recognized".<sup>21</sup>

A crucial element of His Honour's reasoning in answering this question was his third finding, viz from the time of settlement, the Crown held title to all unalienated land. This land was considered 'waste land' and the Crown as possessor held the beneficial *as well as* the radical title to such lands. The basis for this doctrine is found in a number of High Court cases,<sup>22</sup> which Blackburn J held he was bound to follow.<sup>23</sup> This led inexorably to his fourth conclusion, that there was no doctrine of communal native title in either English or Australian common law, and that "wherever the principles for which Mr Woodward contended have to any extent been put into practice, that has been done by statute or by executive policy".<sup>24</sup>

It is also of interest to note Justice Blackburn's final finding concerning the nature of the plaintiffs' interest in land, since it qualifies his conclusion that the colony was in law to be considered as 'settled'. His Honour responded to defence counsel's assertion that the plaintiffs' had no recognisable system of law at all, let alone a proprietary interest in land, by stating that he did not find himself "much impressed by this line of argument". His Honour declared:

I am very clearly of the opinion, upon the evidence, that the social rules and customs of the plaintiffs cannot possibly be dismissed as lying on the other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is that shown in the evidence before me.<sup>25</sup>

The differences between the Australian Aboriginal system of law and the English system of law were, then, "differences of degree".<sup>26</sup> His Honour proceeded to declare that those differences were significant and that the plaintiffs' interests in land were "not in the nature of proprietary interests".<sup>27</sup> He remarked, however, that this was not because he regarded them as so low in the scale of social organisation that they could not possibly display such an interest. It was Justice Blackburn's characterisation of proprietary interests, which emphasised the exclusionary and individualistic aspects of the concept of

21 *Ibid* (original emphasis).

22 The 'waste lands' cases: *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404; *Council of the Municipality of Randwick v Rutledge and Others* (1959) 102 CLR 54.

23 Note 15 *supra* at 246-7. Woodward's submission that these constructions were based on questions of fact – was the territory occupied or not? – and thus not binding, fell on deaf ears. Blackburn J simply reasserted that "the categorization of New South Wales as a colony acquired by settlement or peaceful occupation, as being inhabited only by uncivilised people, is a matter of law": at 249. This, of course, overlooked the fact that a territory regarded as "settled" or "practically unoccupied" for the purposes of sovereignty can nonetheless be simultaneously regarded as either occupied or not for the purposes of title to land, and that this is a question of fact, not law. See K McNeil, note 14 *supra* at 102-3, and B Hocking, "Aboriginal Law Does Now Run in Australia" (1993) 15 *Syd LR* 187 at 195.

24 Note 15 *supra* at 262; see also at 244.

25 *Ibid* at 266-7.

26 *Ibid* at 268.

27 *Ibid* at 273.

property, which precluded the plaintiffs' interest in the land from being legally recognised. Among the critics of Justice Blackburn's characterisation of proprietary interests is Nancy Williams, who argues that his decision "affirmed the principles underlying the rights of the citizen isolate as individual economic man, principles basic to assumptions of Australian law in 1970".<sup>28</sup>

Most importantly, of all the five elements of Justice Blackburn's reasoning, the second concerning the colony as a "settled or occupied" territory, rather than a "conquered or ceded" one, should be seen as the *least* significant in settling His Honour's construction of native title. As we shall see, it was an interpretation with which the *Mabo* judgments would agree. Whether indigenous law survived was not at issue, and 'native title' is not a concept in Aboriginal law;<sup>29</sup> 'settled' or 'conquered', *terra nullius* or not, the question to which Blackburn J was turning his mind was whether English and Australian common law recognised native title in *either* settled or conquered territories. The answer would be the same in both cases. This means that it *makes no difference* whether or not the colony was regarded as *terra nullius* in the 'restricted' sense of a settled rather than conquered or ceded colony.<sup>30</sup> In other words, Blackburn J could also have "overturned the doctrine of *terra nullius*", but his position on other points of law would have led him to the same conclusion. Far more decisive – and this is the real departure of the *Mabo* judgments, as we shall see – is the separate question of whether the common law of England and Australia equates the radical title acquired by the Crown on assuming sovereignty with absolute beneficial title.

28 NM Williams, note 14 *supra*, p 202.

29 This means that there are some problems with saying that "the *Mabo* case overturned the old view that British law applied without any account being taken of the existing indigenous law, including the indigenous land law": K Booker, A Glass, and R Watt, *Federal Constitutional Law*, Butterworths (2nd ed, 1998) p 10. A similar formulation appears in A Blackshield and G Williams, *Australian Constitutional Law and Theory* Federation Press (2nd ed, 1998) p 178 where it is said that the judgment "recognised that the indigenous population had a pre-existing system of law, which.... would remain in force under the new sovereign except where specifically modified or extinguished by legislative or executive action". An important qualification is that the High Court, in *Mabo* and elsewhere, especially in relation to criminal law, resolutely refuses to recognise the force of indigenous law over English or Australian law. Whether native title is recognised in English and Australian law, then, is a matter internal to that body of law, and indigenous law only remains 'in force' to the extent that Australian law allows it to do so. One would also have to distinguish here between the High Court's approach to the concept of property and to other legal concerns, especially questions of criminal law: see, for example, Chief Justice Mason's position in *Walker v State of New South Wales* (1994) 182 CLR 45.

30 G Nettheim noted in "Justice or Handouts? Aborigines, Law and Policy" (1986) 58(1) *Australian Quarterly* 60 at 61 that "even if he [Blackburn J] had accepted the conquered colony theory, the result in the Gove case would have been the same". J Crawford notes in "The Appropriation of Terra Nullius" (1989) 59(3) *Oceania* 226 at 227, ie his review of Reynolds' *Law of the Land*, note 13 *supra*, the major source of much of the *terra nullius* debate, that "... there is a tendency here to conflate the classification of Australia as settled or conquered with the existence or recognition of communal native title, which are essentially distinct issues"; again, K Beattie, note 13 *supra*, directed me to this reference. K McNeil also comments in note 14 *supra* at 92 that if Aboriginal land rights existed, "they should have continued regardless of whether Australia was conquered or settled".

## II. MABO AND TERRA NULLIUS

In handing down a judgment which accorded with Lord Denning's, but for different reasons, Lord Diplock once exclaimed "[a]fter all, that is the beauty of the common law; it is a maze and not a motorway".<sup>31</sup> The *Mabo* judgments display two quite different conceptual and rhetorical routes through the maze of the common law towards settling the question of native title; one operating with a 'restricted' conception of *terra nullius* (Australia as a settled colony), and the other with an 'expanded' notion of *terra nullius* (Australia as settled and practically unoccupied).

Brennan J identifies a central basis of the notion that the Crown acquired absolute beneficial title on assuming sovereignty as being the idea that "there is no other proprietor". He notes that this idea in turn depended on the 'expanded' conception of *terra nullius*:

It was only by fastening on the notion that a settled colony was *terra nullius* that it was possible to predicate of the Crown the acquisition of ownership of land already occupied by indigenous inhabitants. It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other.... the rejection of the notion of *terra nullius* clears away the fictional impediment to the recognition of indigenous rights and interests in colonial land.<sup>32</sup>

Similarly, Deane and Gaudron JJ propose that "inevitably",

... one is compelled to acknowledge the role played, in the dispossession and oppression of the Aborigines, by the two propositions that the territory of New South Wales was, in 1788, *terra nullius* in the sense of unoccupied or uninhabited for legal purposes and that full legal and beneficial ownership of all the lands of the Colony vested in the Crown, unaffected by any claims of the Aboriginal inhabitants. *Those propositions provided a legal basis for and justification of the dispossession.* They constituted the legal context of the acts done to enforce it and, while accepted, rendered unlawful acts done by the Aboriginal inhabitants to protect traditional occupation or use. The official endorsement, by administrative practice and in judgments of the courts, of those two propositions provided the environment in which the Aboriginal people of the continent came to be treated as a different and lower form of life whose very existence could be ignored for the purpose of determining the legal right to occupy and use their traditional homelands.<sup>33</sup>

These formulations are thus organised around the 'expanded' conception of *terra nullius*, as well as around the question of whether the Crown's radical title is to be equated with beneficial ownership.

Brennan J, for example, states that the existing authorities lead him to the conclusion that it is "preferable" in relation to title to land, to *equate* the inhabitants of settled colonies with those of conquered territories,<sup>34</sup> rendering the 'restricted' concept of *terra nullius* immaterial. His Honour also noted that:

31 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 730.

32 Note 6 *supra* at 45 (emphasis added).

33 *Ibid* at 108-9 (emphasis added).

34 *Ibid* at 57.

[T]he dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists.<sup>35</sup>

This means that the common law was actually immaterial to the dispossession of Australian Aborigines, and if there was any legal foundation to that dispossession, it was not the 'doctrine of *terra nullius*'. As David Ritter explains, "the colonists required no legal doctrine to explain why Aboriginal people's land rights were not to be recognized under law because no doctrine was required for what was axiomatic".<sup>36</sup>

Ian Hunter suggests that this renders the *Mabo* judgment a particularly weak form of recognising indigenous rights, being only given real force by legislation.<sup>37</sup> In reality, however, this is simply an observation of the way the common law and the courts *always* relate to government and 'acts of state', certainly in relation to the entire history of colonisation and the inexorable dispossession of indigenous inhabitants. Indeed, prior to *Mabo*, Les Hiatt remarked on the tendency to overlook the fact that *Milirrpum* was followed by the Woodward Royal Commission and the *Aboriginal Land Rights (NT) Act* 1976 (Cth), which provided a statutory establishment of Aboriginal land ownership arguably firmer than the kind of common law recognition in *Mabo*. "With hindsight", wrote Hiatt, "we could reasonably say that the case was a legal battle that the Aborigines of the Northern Territory had to lose in order to win the war".<sup>38</sup> In any case, the concern here is a different one, with the problems associated with the peculiarly normative way in which majority judgments in *Mabo* framed that relationship between law and government.

Deane and Gaudron JJ also paint a scenario in which the rights associated with common law native title *had always been* binding on the Crown, but that for all practical purposes,

there is an element of the absurd about the suggestion that it would have even occurred to the native inhabitants of a new British Colony that they should bring proceedings in a British court against the British Crown to vindicate their rights under a common law of which they would be likely to know nothing.<sup>39</sup>

Their Honours also point out the major – indeed, fatal – flaws in the four Australian cases<sup>40</sup> which support the "two propositions": they consisted of "little

35 *Ibid* at 58.

36 D Ritter, "The 'Rejection of Terra Nullius' in *Mabo*: A Critical Analysis" (1996) 18(1) *Syd LR* 5 at 6. For a related discussion of the role of *terra nullius* in imperial and colonial policy and administration, as opposed to law, see K Beattie, note 13 *supra*. This is a critique of the whole argument found especially in Reynolds' work, but echoed in the *Mabo* majority, concerning the central significance of *terra nullius* in Aboriginal dispossession.

37 I Hunter, "Native Title: Acts of State and the Rule of Law" in M Goot and T Rowse (eds), note 5 *supra* 97 at 107.

38 LR Hiatt, "The Appropriation of Terra Nullius" (1989) 59(3) *Oceania* 222 at 226.

39 Note 6 *supra* at 93.

40 *Attorney-General v Brown* (1847) 1 Legge 312; *Cooper v Stuart* (1889) 14 App Cas 286; *Council of the Municipality of Randwick v Rutledge and Others* (1959) 102 CLR 54; *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404.



more than bare assertion", they were not concerned with Aboriginal title to land, and the relevant comments are all *dicta*.<sup>41</sup> We are also asked to accept the notion that it is the very *poverty* of their reasoning which establishes the "formidable" authority of these four cases, since it "tends to emphasise the fact that the propositions were regarded as either obvious or well settled".<sup>42</sup>

Richard Bartlett has correctly identified these comments as overstating the significance of the *dicta* of the Australian cases, as well as pointing out that the "authority" which the three Justices presented themselves as sparring with was largely illusory.<sup>43</sup> Toohey J observed that the plaintiffs accepted that the territory in question had been settled rather than conquered or ceded, but this did not mean that their land should be treated simply as vacant land, and this problem simply fails to be adequately addressed by the relevant Australian cases.<sup>44</sup> Indeed, as Toohey J states, the common law position is that "previous interests in the land may be said to survive *unless* it can be shown that the effect of annexation is to destroy them", which means that "the onus rests with those claiming that traditional title does not exist".<sup>45</sup> Toohey J also points out that the line of authority which led Blackburn J to his conclusions is countered by another which ought to be regarded as more persuasive, namely the "doctrine of continuity" expressed in the Privy Council African cases, which presumes the continuance of existing property rights upon colonisation.<sup>46</sup> For Toohey J, making indigenous inhabitants trespassers on their own land was not simply contrary to current moral principles, it was "at odds with the basic values of the common law", as it has always operated.<sup>47</sup>

The majority in *Mabo* agreed with Blackburn J that, at law, Australia is to be regarded as a "settled" colony, so that English common law "subject to appropriate adjustment, automatically became the domestic law of the colony", with limited possibility of recognition of indigenous law. Thus, the 'restricted' conception of *terra nullius* was left entirely intact.<sup>48</sup> The two interconnected questions at the heart of the *Mabo* judgments were: first, whether the English feudal doctrine of tenure should be interpreted in such a way that the Crown's radical title is to be equated with absolute beneficial title to all land in the Colony (no matter how a colony is classified – settled, conquered or ceded), as apparently indicated by the *dicta* concerning the 'waste lands' cases;<sup>49</sup> and second, whether native title had only been recognised in common law jurisdictions in legislation or executive policy, as Blackburn J had held? The

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41 Note 6 *supra* at 104.

42 *Ibid.*

43 Note 12 *supra*, p xi.

44 Note 40 *supra*.

45 Note 6 *supra* at 183.

46 *Amodu Tijani v Secretary of Southern Nigeria* [1921] 2 AC 399; *Oyekan and Others v Adele* [1957] 2 All ER 785.

47 Note 6 *supra* at 184.

48 *Ibid* at 78-81, per Deane and Gaudron JJ.

49 *Attorney-General v Brown* (1847) 1 Legge 312; *Council of the Municipality of Randwick v Rutledge and Others* (1959) 102 CLR 54, and *NSW v Commonwealth* (1975) 135 CLR 337 ("Sea and Submerged Lands Act Case").

majority of the High Court answered both questions in the negative, for reasons of law, not in response to community values nor to formulate a different approach to a supposed doctrine of *terra nullius*.

On the first question, the majority in *Mabo* decided that the feudal doctrine of tenure is, and always has been, entirely compatible with survival of native title. "What the Crown acquired", wrote Brennan J, "was a radical title to land, a sovereign political power over land, the sum of which is not tantamount to absolute ownership of land". Where the Crown's political power to disregard native title had not actually been exercised, "there is no reason to deny the law's protection to the descendants of indigenous citizens who can establish their entitlement to rights and interests which survived the Crown's acquisition of sovereignty".<sup>50</sup> The only real barrier to recognition of such residual indigenous rights in land was the assumption in *Attorney-General v Brown* that "all lands of the Colony were relevantly unoccupied at the time of its establishment".<sup>51</sup> But this is a question of fact, not law, which any concrete evidence of indigenous occupation settles. To presume non-occupancy – *populus nullus* as Barbara Hocking terms it<sup>52</sup> – is simply factually incorrect and an embarrassment to Australian law in terms of reason and logic, quite apart from its moral dimensions.<sup>53</sup>

In relation to the second question, only Justice Dawson's dissenting judgment followed Justice Blackburn's interpretation in arguing that native interests in land have to be explicitly recognised by a new sovereign if they are not to be regarded as having been extinguished on the acquisition of sovereignty. The majority felt themselves well persuaded by the:

many precedents in the Privy Council, African, Canadian, USA, New Zealand, New Guinea, the Solomon Islands and other cases in the long line of authority bearing on this point..... all holding that the Crown's radical title is subject to (burdened, reduced, or qualified by) the prior interests.

Justice Hall's position in *Calder v Attorney-General of British Columbia*<sup>55</sup> was treated as representing the correct interpretation of the common law, namely that "the aboriginal Indian title does not depend on treaty, executive order or legislative enactment", and that Justice Blackburn's construction of the North American authorities was "wholly wrong".<sup>56</sup>

The difference between *Milirrpum* and *Mabo* was not, then, that Blackburn J accepted a supposed 'doctrine of *terra nullius*' and the majority in *Mabo* did not.

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50 Note 6 *supra* at 53.

51 *Ibid* at 102, per Deane and Gaudron JJ.

52 B Hocking, note 23 *supra* at 191.

53 It is actually an interesting counter-factual to pose: if a case concerning indigenous title had been brought before the NSW Supreme Court in 1947, if Stephens CJ, Dickinson and Therry JJ had been asked whether they thought that all the 'waste' lands of the colony were genuinely unoccupied, and what they thought of the evidence of indigenous habitation, would they have declared that those lands were truly 'unoccupied'?

54 B Hocking, note 23 *supra* at 195.

55 (1973) 34 DLR (3d) 145 (SC).

56 *Ibid* at 218.

There is no dispute between the two judgments about the treatment of Australia as a 'settled' colony and whether English common law became domestic law on the acquisition of sovereignty, nor did Blackburn J regard the Australian Aborigines as being so "low on the scale of social organisation" that their physical presence should be legally ignored. Where they *did* differ was in their construction of the relevant legal authorities. Blackburn J held that they indicated that beneficial title was acquired by the Crown along with radical title, and that native title had only been recognised in statutory executive action. In contrast, the majority in *Mabo* found that the authorities, including the Privy Council and the Australian High Court itself, overwhelmingly compelled one to the opposite conclusions on both these questions.

### III. THE HIGH COURT, NORMATIVITY AND LAW

Jeremy Webber has suggested that the recognition of native title in *Mabo* is the result of a particular type of moral inquiry, and that its jurisprudence is a "jurisprudence of regret"<sup>57</sup>. The retention of *terra nullius* in Australia had become increasingly anomalous, "an archaic leftover profoundly out of step with the contemporary direction of Australian law".<sup>58</sup> Faced with the ongoing presence of a particular legacy in the law, the High Court "had either to perpetuate or renounce it".<sup>59</sup> Referring to Kent McNeil's work,<sup>60</sup> Webber argues that "treating *Mabo* as though it were simply a rectification of a mistaken interpretation of the common law of indigenous title begs the essential question: why should Australia follow that law? It has not done so for 200 years".<sup>61</sup>

The difficulty with this interpretation is that there was no real legacy of law concerning either *terra nullius* or native title to be followed at all. As Ritter notes:

[W]hile the Australian colonies were indeed judicially classified as "desert and uncultivated", and Aboriginal people were apparently treated as having no common law right to their traditional lands, there was no judicial decision that created a nexus between the former legal proposition and the latter historical fact. That is, no early Australian or English case ever stated that because Australia was "*terra nullius*" or "desert and uncultivated", Aboriginal people possessed no common law right to their tribal lands.<sup>62</sup>

There were *dicta* in four cases regarding the nature of Crown title to land,<sup>63</sup> a certain line of authority from the Indian Privy Council cases suggesting, weakly and arguably, that native title only exists under statutory provision, and only one Australian decision, *Milirrpum*, by a relatively junior court, directly concerned with the question. It is problematic to speak of Australia following a particular interpretation of the common law of indigenous title before 1971, since

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57 J Webber, note 4 *supra* at 10.

58 *Ibid* at 25.

59 *Ibid* at 28.

60 Note 14 *supra*.

61 J Webber, note 4 *supra* at 5.

62 D Ritter, note 36 *supra* at 9.

63 Note 40 *supra*.

*Milirrpum* was the first and only time the question had come before an Australian court.

As James Crawford remarked in 1989, the doctrine of communal native title had been "treated 'on the ground' as inapplicable, and there were for 150 years no judicial decisions to confirm or set against that calculated ignorance".<sup>64</sup> *Milirrpum* was never appealed, although there was the Woodward Royal Commission and the legislative efforts to correct *Milirrpum*'s outcome,<sup>65</sup> (the effectiveness of which there is a tendency to underestimate). *Mabo* was the first opportunity the Australian High Court has had to turn its mind to the question. The essential weakness of the supposed 'legacy' being overturned in *Mabo* is apparent in the judgment of Toohey J, who finds it unnecessary to 'overturn' *terra nullius* at all, because he correctly sees no reason to dignify the mere presumption of the absence of indigenous occupation with the designation of a legal 'doctrine' requiring 'overturning'.<sup>66</sup>

Although there is clearly 'regret' running through the judgments of Brennan, Deane and Gaudron JJ, I would suggest that it actually plays only a relatively minor role in their jurisprudence. The reception of Justice Blackburn's construction of native title prior to *Mabo*, both in scholarly discussions<sup>67</sup> and in related decisions in other jurisdictions,<sup>68</sup> has been almost universally critical of the judgment without any reference to *terra nullius*, for the simple reason that it was jurisprudentially irrelevant, to native title at least. If the practitioners of Australian colonialism have been able to grin smugly at us across the two centuries prior to 1971, it is not because they have made such astute use of law in dispossessing the Aborigines; it is precisely because they have managed to evade law, to keep questions of indigenous interests in land out of law's reach, and wholly within the realms of politics and administrative governance.

Henry Reynolds has been influential in introducing the concept of *terra nullius* as a touchstone for understanding the history of Aboriginal dispossession, but until *Mabo*, the role of substance played by *terra nullius* in Australian law has been in relation to questions of sovereignty, and this is an

64 J Crawford, note 30 *supra* at 228.

65 *Aboriginal Land Rights (NT) Act 1976* (Cth). Woodward later wrote: "I took the view that the finding of close identification between particular groups of people and particular land was sufficient to mount a claim for recognition of Aboriginal title at a political level. I had no confidence that the High Court, as it was then constituted, would produce any better result for the Aboriginal people than had already been achieved. Indeed, I was afraid that doubts might be cast on Justice Blackburn's findings about Aboriginal law. I therefore advised against an appeal": AE Woodward, *Three Wigs and Five Hats*, Northern Territory Library Service (1990) p 6.

66 J Webber, note 4 *supra* at 17 finds fault with Justice Toohey's judgment for precisely this reason, because "although it provides a solid discussion of the common law of indigenous title, it declines to suggest why, at this late date, Australia should adopt that law. Given the long history of denial, a judge should offer some justification, at least implicitly, for rejecting the old position and embracing the new. It is insufficient to state the common law as though it has always been thus, for in Australia that was manifestly not the case". Clearly my own position is exactly the reverse of this; it is unclear why the fact that *Milirrpum* was simply bad law should not be reason enough for rejecting its construction of native title and turning to another.

67 K McNeil, RH Bartlett and J Hookey, note 14 *supra*.

68 For example, *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 (SC).

issue the High Court has much less accommodating views on.<sup>69</sup> That is why Garth Nettheim describes the judgment as “no ‘judicial revolution’, but a careful and scholarly application of established common law principles and methods”,<sup>70</sup> and why Bartlett sees the decision as determined by “the overwhelming dictates of the jurisprudence in every other part of the common law world”, and considers that in presenting themselves as “making law” in *Mabo*, Brennan, Deane and Gaudron JJ “overstated the extent to which the court was engaged in such a role”.<sup>71</sup>

A central problem with the idea of the law being responsive to ‘the contemporary values of the Australian people’ is that such values have no objective, absolute existence, and it is unclear how High Court Justices might present their understanding of community values as having any persuasive authority. Values, norms and moral principles are inherently contested in advanced industrial societies, especially those which we can characterise as liberal democracies. Law, as we understand it today, only emerges in those social contexts where it is *not* possible to rely on shared values to reproduce social order, integration and cohesion. There are, it is true, constant *appeals* made to ‘community values’, but such appeals are rhetorical strategies to generate support for a particular position within a moral debate, attempts to *construct* a particular moral community, rather than descriptions of a value consensus which actually exists.<sup>72</sup> When the High Court asserts that it is responding to ‘the contemporary values of the Australian people’, it is in fact choosing to play an active role in the construction of those values in a particular image, acting as a moral entrepreneur, rather than simply reflecting something that exists independently of itself.

This is not the place to discuss the virtues and difficulties of such moral entrepreneurship in any detail, but it is clear that both the decision to undertake it and the way in which it is undertaken have little to do with a choice between legal formalism or a responsiveness to surrounding community values, for the simple reason that precedent and legal authority can be utilised in a multiplicity of ways. The difference between *Mabo* and *Milirrpum* lay not in the differing attitudes to legal precedent, but in the ways in which it was used, and Brennan, Deane and Gaudron JJ were no less concerned to buttress their arguments with legal authority than was Blackburn J. Precedent is often, and certainly was in this

69 See *Coe v Commonwealth of Australia* (1979) 24 ALR 118; (1993) 118 ALR 193; *Walker v State of New South Wales* (1994) 182 CLR 45; H Reynolds, *Aboriginal Sovereignty*, Allen & Unwin (1996) p 1; J Hookey, “Settlement and Sovereignty” in P Hanks & B Keon-Cohen (eds) *Aborigines and the Law* (1984) 1 at 1; P Patton, “Sovereignty, Law, and Difference in Australia: After the *Mabo* case” (1996) 21(2) *Alternatives* 149; D Ivison, note 11 *supra*.

70 G Nettheim, “Judicial Revolution or Cautious Correction? *Mabo v Queensland*” (1993) 16(1) *UNSWLJ* 1 at 16.

71 RH Bartlett, note 12 *supra*, p xi.

72 Versions of this argument which have surfaced in legal theory more broadly include R Delgado, “Norms and Normal Science: Toward a Critique of Normativity in Legal Thought” (1991) 139 *University of Pennsylvania Law Review* 933; RA Posner, note 16 *supra*; P Schlag, “Normative and Nowhere to Go” (1990) 43 *Stanford Law Review* 167; P Schlag, “Values” (1994) 6 *Yale Journal of Law & Humanities* 219. A leading example in another arena is B Anderson’s *Imagined Communities*, Verso (1991).

particular case, not unified, and there were several 'lines of authority' to be drawn on, allowing for a significant degree of discretion as to how those differing lines of authority would be related to each other. The law's appeals either to authority and precedent, or to "the contemporary values of the Australian people" are best understood, then, as no more, and also no less, than different rhetorical strategies for its legitimation in relation to other forms of discursive power.<sup>73</sup>

As such, the 'rejection of *terra nullius*' is arguably more about Australian history and moral community than Australian jurisprudence. It also had the rather perverse effect, in the subsequent public debate around the decision, of diverting our attention from the fact that there were strong reasons of law to recognise native title, and made the High Court far more vulnerable to the criticism of 'excessive judicial activism' than the substance of the case itself demanded. The effect of the foray by Brennan, Deane and Gaudron JJ into moral entrepreneurship was the almost entire disappearance from public view of the fact that both *Milirrpum* and Justice Dawson's dissenting judgment were indefensible in a very straightforward legal and logical sense, quite apart from one's moral position regarding the 'unutterable shame' of Australia's past treatment of its indigenous population. It also provided an almost endless supply of rhetorical hostages and an easy ideological target for those commentators eager for an opportunity to flay the Hasluckian vision of monocultural assimilation back to life. If we agree that the achievement of something recognisable as 'justice' by both indigenous and non-indigenous Australians is clearly a desirable objective, and if that can be achieved modestly with sound judicial analysis, it remains an open question whether the Justices of the High Court improve their service of this aspiration by choosing, additionally, to foreground their ventures into the realms of historiography and moral entrepreneurship. This does not mean that jurisprudential normativity disappears, that there is such a thing as 'pure' law stripped of normative concerns, but merely that there are times when it achieves its aims more effectively by working less ostentatiously.

We can end with a contrast: Chief Justice Warren's opinion in *Brown v Board of Education*,<sup>74</sup> one of the best known judgments of the century. Sanford Levinson observes how bland the opinion is, how unilluminating it is about the history of race relations in America, and he asks why Warren CJ passed over the chance "to educate the public about the ravages of racial segregation or to arouse a truly righteous anger against the oppression that had characterized, at that time, well over three centuries of American history?"<sup>75</sup> The answer, says Levinson, was provided by Warren CJ himself, who wrote that opinions should be "short, readable by the lay public, non-rhetorical, unemotional and, above all, non-

73 D Ritter, note 36 *supra* at 6-7, 30 and 32. Ritter argues further that this particular rhetorical move was somehow "necessary" to restore the High Court's broader moral legitimacy, but without making it clear where the compulsion behind this supposed "necessity" actually comes from.

74 (1954) 347 US 483.

75 S Levinson, "The Rhetoric of the Judicial Opinion" in P Brooks and P Gewirtz (eds), note 1 *supra* 187 at 197-8.

accusatory",<sup>76</sup> an orientation which could be attributed to Chief Justice Warren's sensitivity to "not getting everyone's back up when embarking on important political campaigns".<sup>77</sup> Levinson also refers to Barrett Prettyman outlining how the opinion "took the sting off the decision, it wasn't accusatory, and it didn't pretend that the Fourteenth Amendment was more helpful than the history suggested".<sup>78</sup> These characteristics might usefully serve as a model for a counter-factual, less morally entrepreneurial position on *Mabo*, which Justice Toohey's judgment comes closest to, one which 'took the sting off the decision, wasn't accusatory, and didn't pretend that *terra nullius* was more significant than the history suggested'.

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76 *Ibid* at 198.

77 *Ibid.*

78 *Ibid.*

## DEMATERIALIZATION OF INSURANCE DOCUMENTS IN INTERNATIONAL TRADE TRANSACTIONS: A NEED FOR LEGISLATIVE REFORM

EMMANUEL T LARYEA\*

### I. INTRODUCTION

This article draws attention to a need for legislative reform in Australian marine insurance law to facilitate the dematerialisation of marine insurance documents in international trade transactions.<sup>1</sup> In 1985, the United Nations Commission on International Trade Law ("UNCITRAL")<sup>2</sup> urged governments and international organisations to put in place new laws and to revise existing legal and other texts, to facilitate and promote electronic documentation of trade transactions.<sup>3</sup> A section of the international business community had, prior to UNCITRAL's recommendations, recognised the need to facilitate dematerialised

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1 In this article, *dematerialisation* means the documentation, recording or messaging of transactions in electronic format, instead of on paper. Dematerialised documentation and electronic documentation or electronic messaging will thus be used interchangeably. *International trade*, *international sale* or, simply, *trade* will be used to refer to international sale transactions involving international carriage of goods by sea. That is, transactions involving shipping documents and often referred to as *documentary sale transactions* or, restrictively, *cif contracts*. The writer is aware that international trade is much wider and involves more than documentary sale transactions, and documentary sale transactions could be on terms other than *cif*. International trade generally involves the movement of one or more persons, capital, goods, or information. See P Gibbs and H Hayashi, "Sectorial Issues and the Multilateral Framework for Trade in Services: An Overview" in *Trade in Services: Sectorial Issues*, UNCTAD/ITP/26 (1989) 25.

2 UNCITRAL was created in December 1966 by the General Assembly of the United Nations with a mandate to further the progressive harmonisation and unification of international trade law. See United Nations General Assembly Resolution 2205 (XXI).

3 See *Official Records of the General Assembly, Fortieth Session, Supplement No 17 (A/40/17)* (1985) at 360.



trade documentation and was working towards that end.<sup>4</sup> UNCITRAL's directive reiterated that need, aroused global interest, and provided an impetus for efforts aimed at legally facilitating dematerialised documentation.<sup>5</sup>

The technology for electronic communication of business data is already commonplace in technologically advanced countries. Use of electronic data interchange ("EDI")<sup>6</sup> in business communications is on the increase,<sup>7</sup> and international business information is now communicated across the globe electronically.<sup>8</sup> The electronic form is being used increasingly for international transport documents.<sup>9</sup> A recently established electronic documentation system, Bill of Lading Electronic Registry Organisation ("BOLERO") promises full dematerialisation of trade documents.<sup>10</sup> BOLERO supports not only electronic transport documents but also all other trade documents.<sup>11</sup> The availability of electronic documentation systems requires governments to create legal environments that facilitate electronic documentation.

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- 4 This is evidenced by early trials of electronic transport documents, such as bills of lading, sea and air waybills. For example, the Atlantic Container Lines ("ACL"), one of the world's largest container carriers, introduced an electronic sea waybill system labelled Data Freight Receipt ("DFR") in 1971. See B Kozolchyk, "The Paperless Letter of Credit and Related Documents of Title" (1992) 55 *Law and Contemporary Problems* 39 at 85-6. See also work done by international bodies before 1985, for example, *Legal Aspects of Trade Data Interchange: Bills of Lading and Automatic Data Processing*, TRADE/WP4/R159 (1981); *Legal Problems and ADP Systems in International Trade*, TRADE/WP4/GE2/R123 (1978); *Trade Data Interchange Restraints*, TRADE/WP4/R99 (1980); *Draft Recommendations on Signatures/Authentication in Trade Documents*, TRADE/WP4/GE2/R111/REV1 (1979).
  - 5 See D Faber, "Electronic Bills of Lading" [1996] *LMCLQ* 232. See also *Legal Aspects of Trade Data Interchange: Review of Definitions of "Writing", "Signature", and "Document" Employed in Multilateral Conventions and Agreements Relating to International Trade*, TRADE/WP4/R819 (1992); *Studies Concerning the Replacement of the CIM Consignment Note by an Instrument Suitable for Automatic Data Transmission - Docimel Project*, TRADE/WP4/R479 (1987); *Dispensing with a Handwritten Signature in Invoices by Means of Computer Printouts*, TRADE/WP4/R405 (1986).
  - 6 Electronic Data Interchange ("EDI") is the computer-to-computer transmission of information in structured form or according to agreed message format. See V Leyland, *Electronic Data Interchange: A Management View*, Prentice Hall (1993).
  - 7 AH Boss, "Electronic Data Interchange Agreements: Private Contracting Toward a Global Environment" (1992) 13 *Northwestern Journal of International Law & Business* 31 at 32-3; AA Pisciotta and JH Barker, "Telecommunications Regulatory Implications for International EDI Transactions" (1992) 13 *Northwestern Journal of International Law & Business* 71.
  - 8 DJP McKenzie, "Commercial Transactions on the Global Information Infrastructure: Commerce on the Net: Surfing Through Cyberspace without Getting Wet" (1996) 14 *Marshall J. Computer & Info. Law* 247. See generally, RD Whitaker, "Letters of Credit and Electronic Commerce" (1995) 31 *Idaho Law Review* 699.
  - 9 GI Zekos, "The Use of Electronic Technology in Maritime Transport: the Economic Necessity and the Legal Framework in European Union Law" (1998) 3 *Web Journal of Current Legal Issues* <<http://webjcli.ncl.ac.uk/1998/issues3/zekos3.htm>>; RB Kelly, "The CMI Charts a Course on the Sea of Electronic Data Interchange: Rules for Electronic Bills of Lading" (1992) 16(2) *Tulane Maritime Law Journal* 349; AH Boss, "International Commercial Use of Electronic Data Interchange and Electronic Communications Technologies" (1991) 46 *The Business Lawyer* 1787; GF Chandlers, "Electronic Transmission of Bills of Lading" (1989) 20 *Journal of Maritime Law & Commerce* 571; RP Merges and GH Reynolds, "Towards a Computerised System for Negotiating Ocean Bills of Lading" (1986) 6 *Journal of Law & Commerce* 23.
  - 10 Information about BOLERO is available at BOLERO's web site <<http://www.bolerold.com>>.
  - 11 *Ibid.*

Australia seeks to create a legal environment conducive to electronic documentation of trade transactions. A *Sea-Carriage Documents Act*, a law that facilitates electronic transport documentation, has been enacted in each State to replace bills of lading legislation, considered to inhibit electronic documentation.<sup>12</sup> To complement the *Sea-Carriage Documents Act*, the related *Carriage of Goods by Sea Act 1991* (Cth) has been modified to accommodate electronic documents.<sup>13</sup> Additionally, an electronic transactions law, the *Electronic Transactions Act 1999* (Cth), has been enacted to facilitate electronic commerce generally.<sup>14</sup>

Australia's sea transport documents law is probably the first proactive legislation that facilitates electronic transport documents.<sup>15</sup> However, legislating for electronic transport documentation is not sufficient to realise the goals of dematerialisation. Transport documents, though very important in documentary sale transactions, form only a part of the documents usually required. Entwined with the contract of carriage in international sale transactions is a contract of marine insurance, by which the goods are insured against maritime perils.<sup>16</sup> Insurance documents often accompany transport documents in documentary sale transactions, particularly cif contracts, which form the bases of the analysis in this article.<sup>17</sup> However, the insurance contract and documents generated

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12 See the *Sea-Carriage Documents Act 1996* (Qld), which repealed and replaced ss 5-7 of the *Mercantile Act 1867* (Qld) that regulated bills of lading. The Act was proposed for separate enactment in the various jurisdictions so it did not come into effect in all states at the same time. For the various jurisdictions, see *Sea-Carriage Documents Act 1998* (Vic), which repealed ss 73-4 of the *Goods Act 1958* (Vic) that regulated bills of lading; *Sea-Carriage Documents Act 1997* (NSW), which repealed part 5A of the *Sale of Goods Act 1923* (NSW) that regulated bills of lading; *Sea-Carriage Documents Act 1997* (Tas), which repealed the *Bills of Lading Act 1857* (Tas); and the *Sea-Carriage Documents Act 1998* (SA), which repealed ss 14-15 of the *Mercantile Law Act 1936* (SA). In this article the Act will be generally referred to as *Sea-Carriage Documents Act*.

13 See *Carriage of Goods by Sea Act 1991* (Cth), s 7 and Schedule 1A – Schedule of Modifications.

14 The *Electronic Transactions Act 1999* (Cth) received Royal Assent on 10 December 1999, and was proclaimed on 15 March 2000.

15 This writer is not aware of similar legislation having been enacted in any jurisdiction, at least not before 1996 when the *Sea-Carriage Documents Act* came into effect in Queensland. A report compiled in 1995 from various countries – including Argentina, Belgium, Canada, France, Germany, Greece, Japan, New Zealand, the UK and the USA – indicated that none of the countries had laws that expressly facilitate electronic sea transport documents. See AN Yiannopoulos (ed), *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems*, Kluwer Law International (1995).

16 The term *marine insurance*, and indeed *maritime perils*, are somewhat misleading because a contract of marine insurance can, by agreement of the parties or custom of the trade, be extended so as to protect the assured against losses on inland waters or land which are incidental to the sea voyage. See the Australian *Marine Insurance Act 1909* (Cth), ss 8-9; and the UK *Marine Insurance Act 1906* (UK), ss 2-3.

17 See note 1 *supra*.

thereunder are regulated by the *Marine Insurance Act 1909* (Cth), which does not support electronic documentation.<sup>18</sup>

There is no point in partial dematerialisation.<sup>19</sup> As will be seen, partial dematerialisation defeats the purpose of dematerialisation, so complete dematerialisation is necessary if the full benefits of electronic documentation are to be realised.<sup>20</sup> Thus, the marine insurance law needs to be reformed to bring it in line with the transport documents law.

This article shows how the *Marine Insurance Act 1909* (Cth) impedes electronic documentation and should be reformed. Discussions in the article will be based primarily on the Australian *Marine Insurance Act 1909* (Cth) (hereinafter "*Marine Insurance Act 1909*" or "Australian Act"), with general consideration of the UK *Marine Insurance Act 1906* (UK) (hereinafter "*Marine Insurance Act 1906*" or "UK Act").<sup>21</sup> There are four reasons why the UK Act will be considered. First, the Australian Act is derived from the UK Act, and the provisions are similar in many respects.<sup>22</sup> Second, application of the UK Act has generated a body of cases that expound marine insurance law generally, and are relevant to the discussion in this article.<sup>23</sup> Third, a great number of marine insurance contracts in international trade are subject to UK marine insurance law.<sup>24</sup> Fourth, the marine insurance law of most common law countries, particularly the former members of the British Commonwealth, derive from the UK Act.<sup>25</sup> Consequently, any analyses and recommendations made in respect of the UK Act may have an international application.

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18 The commercial invoice is another principal document that comes with the transport and insurance documents. Parties may also require additional peripheral documents such as certificates of origin, consular invoices, health and safety certificates, and export clearance certificates. There seems to be no legal impediments to electronic commercial invoices or peripheral documents in Australia, as these documents operate as informational or transactional documents between private commercial parties. There may be problems where a government department requires an importer or exporter to present any of the documents and the department concerned is not in a position to support electronic documents, but that is not considered a legal problem in this article because it would not affect the legal validity of the documents.

19 P Todd, "Dematerialisation of International Trade Instruments" in JJ Norton, C Reed and I Walden (eds), *Cross-Border Electronic Banking: Challenges and Opportunities*, LLP (1995) 105 at 107.

20 See text around notes 137-41 *infra*.

21 Where the two statutes (the *Marine Insurance Act 1909* and the *Marine Insurance Act 1906*) are referred to generally, they will be cited collectively as "*Marine Insurance Act*".

22 The corresponding UK Act section (equivalent to the Australian section) can be found by deducting six from the Australian section number. See W Holligan, "Marine Insurance" in AA Tarr (ed), *Australian Insurance Law*, Federation Press (1987) 319; D Cremean, "Marine Insurance" in MWD White (ed), *Australian Maritime Law*, Federation Press (1991) 92 at 93.

23 Indeed the *Marine Insurance Act 1906* was itself a codification of English case law of marine insurance developed over the centuries. See AL Parks, *The Law and Practice of Marine Insurance and Average*, vol 1, Stevens & Sons (1988) p 15.

24 See, for example, *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50 at 63, where it was said that the *Marine Insurance Act 1906* is the *lingua franca* of international insurance.

25 In *Amin Rasheed Shipping Corporation* *ibid* at 62, Lord Diplock advocated that courts should take "judicial notice of the fact that the Standard Form of English Marine Policy, together with the appropriate Institute clauses attached, was widely used on insurance markets in many countries of the world, other than those countries of the Commonwealth that have enacted or inherited Statutes of their own in the same terms as the *Marine Insurance Act 1906*" (emphasis added).

This article identifies the various insurance documents used in international trade transactions, and outlines the legal and commercial functions of each of those documents. It then assesses whether those functions can be replicated electronically within the existing law, and whether such replication is desirable.

In considering the electronic replication of the functions of the insurance documents, the legal hindrances presented by the existing law, and the undesirable consequences of these hindrances, will be evident. By considering the desirability of replicating the various functions of paper insurance documents, those that are irrelevant in electronic systems will be identified. Only functions of continuing relevance will be recommended for replication electronically. To help identify the usual documents as well as enhance understanding of their functions, the formation of a typical marine insurance contract will be described in brief.

## II. FORMATION OF THE MARINE INSURANCE CONTRACT

Formation of the contract starts with a broker, acting as an agent for the assured, or very occasionally the assured him or herself, preparing a memorandum of agreement called a slip. The broker approaches underwriters and seeks their subscriptions to the cover.<sup>26</sup> An underwriter who wishes to participate in the insurance will initial the slip, stating in the form of a percentage the proportion of the risk the underwriter is prepared to cover. The underwriter's subscription is termed the 'underwriter's line'.<sup>27</sup> The broker usually selects a leading underwriter with whom to deal.<sup>28</sup> The broker takes the slip in the first instance to the leading underwriter. The broker and underwriter go through the slip, agree on any amendments to the broker's draft and fix the premium.<sup>29</sup> The leading underwriter then initials the slip for the proportion he or she wishes to cover, and the broker takes the initialled slip round the market to other insurers who initial it for such proportion of the cover as each is willing to accept.<sup>30</sup> Once the broker has obtained the desired level of subscription, the slip is closed. The slip may close at below, equal to or above 100 per cent of the risk being insured. If the slip closes below 100 per cent,<sup>31</sup> the assured will be exposed

26 For a detailed judicial description of the contract formation process, see Lord Diplock's statement in *American Airlines v Hope* [1974] 2 Lloyd's Rep 301 at 304. See also HN Bennett, *The Law of Marine Insurance*, Clarendon Press (1996) p 29; CM Schmitthoff, *Schmitthoff's Export Trade*, Stevens & Sons (9th ed, 1990) pp 499-500.

27 HN Bennett *ibid*.

28 The leading underwriter would be a reputable underwriter in the market who has expertise in the kind of cover the broker seeks and whose lead is likely to be followed by other insurers in the market.

29 The shaping of the risk and subscription thereto by one or more leading underwriters renders the risk marketable to other 'following' underwriters whose confidence in the expertise of the leader will induce them to underwrite a proportion of the risk. See *General Accident Fire & Life Assurance Corp v Tanter (Zephr)* [1984] 1 Lloyd's Rep 58 at 66.

30 Sometimes the broker presents a 'quotation slip', the purpose of which is merely to test the market rather than to conclude a legally binding contract. See RJ Lambeth, *Templeman on Marine Insurance: Its Principles and Practice*, Pitman (6th ed, 1986) p 18.

31 That is, where the broker is unable to obtain subscription up to the full value of the risk insured.

to the unsubscribed portion of the risk.<sup>32</sup> If the broker collects more than 100 per cent subscription, there ensues, upon closure of the slip, an automatic proportionate reduction of each line so that the subscriptions total 100 per cent exactly.<sup>33</sup> The proportionate reduction of the lines is known as 'signing down'.<sup>34</sup>

Usually, the slip contemplates its eventual replacement by a policy of insurance, subject to such deletions and additions as are indicated in the slip.<sup>35</sup> The policy, which is often executed long after the contract is concluded,<sup>36</sup> is the insurance document usually required to accompany transport and other documents for tender under documentary sale transactions. Because the preparation of the policy takes time, particularly when a number of underwriters or several insurance companies are involved, and documents may be required promptly, other insurance documents have become useful.<sup>37</sup> Prominent among these documents are the certificate of insurance, the broker's cover note and the letter of insurance.<sup>38</sup> These documents are intended for provisional use, but they often end up being the final insurance document because the policy is not issued at all.

The functions of the five insurance documents identified above – the slip, insurance policy, certificate of insurance, broker's cover note, and letter of insurance – will be analysed against two criteria. First, whether the functions can be replicated electronically within the existing law; and second, whether it is essential to replicate each function of the paper documents in electronic systems. It will be pointed out that some provisions of the *Marine Insurance Act* hinder electronic replication of vital functions of important insurance documents, while other provisions are unnecessary. This article will recommend that the provisions of the *Marine Insurance Act* that hinder electronic documentation be redrafted, and those that are unnecessary be repealed. It will also be seen that not all the functions of paper documents need to be replicated electronically, as some functions will be made redundant by the nature of electronic messaging.

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32 *Marine Insurance Act* 1909, s 87; *Marine Insurance Act* 1906, s 81.

33 See *Hope*, note 26 *supra* at 304-5; *Tanter*, note 29 *supra* at 531-2.

34 HN Bennett, "The Role of the Slip in Marine Insurance" [1994] *LMCLQ* 94. Where the broker intends to continue to collect subscriptions after the lines written on the slip total 100 percent, it is customary for the broker to indicate this to the leader. This permits the leader to judge accurately the size of line to which the leader needs to subscribe in order to obtain the desired slice of risk and premium after signing down.

35 Where no replacement policy is envisaged, it is customary to refer to a 'slip policy'. See *Hope*, note 26 *supra* at 304-5.

36 *Ibid* at 304, where the slip was initialled on 8 October 1968 and the policy was not issued by 28 December 1968 when the insured property was damaged and the assured sought to claim the loss under the contract. See also HN Bennett, note 26 *supra*, p 30.

37 See *Wilson, Holgate & Co v Belgian Grain and Product Co* [1920] 2 KB 1 at 8.

38 According to Bailhache J, in *ibid*, "the preparation of a policy of insurance takes some little time, particularly if there are a number of underwriters or several insurance companies, and when documents require to be tended with promptness on arrival of a steamer... it is not always practicable to obtain actual insurance policies. In order to facilitate business... buyers are accordingly in the habit of accepting broker's cover notes and certificates of insurance instead of insisting on policies".

### III. THE SLIP

The slip, as the name implies, is a slip of paper on which the insurance broker (or very occasionally the assured) sets forth the essential details of the risk, as well as the terms and conditions of the insurance. The slip is the document signed by an underwriter to conclude the contract. Where the underwriter initials the slip without amendment, the slip conveys the terms of the assured's offer and evidences the underwriter's acceptance. If the underwriter requires a change of terms, the underwriter's response will constitute a counter-offer, which may lead to further negotiation, but the underwriter's eventual initialling of the slip concludes the contract of insurance for the percentage indicated.

#### A. Functions of the Slip

The legal properties of the slip are uncertain.<sup>39</sup> The uncertainty is the result of a dichotomy between commercial practice and understanding of insurance markets on the one hand, and the treatment of the slip in marine insurance statutes on the other.<sup>40</sup> Insurance markets have for centuries concluded marine insurance contracts on the slip.<sup>41</sup> Those engaged in marine insurance consider the slip to be the complete and final contract between parties,<sup>42</sup> and this is recognised judicially.<sup>43</sup> Marine insurance statutes, on the other hand, render the slip inadmissible in evidence unless a policy is issued.<sup>44</sup> Section 28 of the *Marine Insurance Act 1909* provides that the slip is "inadmissible in evidence in an action for the recovery of a loss under the contract" unless the contract is embodied in a marine insurance policy.<sup>45</sup>

If, as insurance markets understand, and judicial pronouncements support, the slip contains the assured's offer and the writing of each line constitutes an

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39 Note 34 *supra* at 94.

40 *Ibid.*

41 *Ibid.*

42 "The slip is, in practice, and according to the understanding of those engaged in marine insurance, the complete and final contract between the parties, fixing the terms of the insurance and premium, and neither party can, without the assent of the other, deviate from the terms thus agreed": *Ionides v Pacific Fire & Marine Insurance Co* (1871) LR 6 QB 674 at 684-5, per Blackburn J.

43 See *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1982] QB 1022 at 1038, where Staughton J held that the act of initialling the slip constitutes an immediate acceptance of the assured's offer contained in the slip. This was affirmed on appeal, Kerr LJ stating (Slade and Oliver LJJ concurring) that "the presentation of the slip by the broker constitutes an offer, and the writing of each line constitutes an acceptance of this offer by the underwriter pro tanto". See the appeal decision at [1983] QB 856 at 866.

44 *Marine Insurance Act 1909*, s 28; *Marine Insurance Act 1906*, s 22. Earlier English statutes rendered the entire contract null and void unless a policy was issued and stamped. See *Stamp Act 1795* (35 Geo 3, c 63), s 11; *Stamp Act 1814* (54 Geo 3, c 144); *Customs and Inland Revenue Act 1867* (30 Vict, c 23), s 7.

45 There is a slight difference between the Australian and the United Kingdom provisions. The Australian Act states that "subject to the provisions of any Act, a contract of marine insurance is inadmissible in evidence for the recovery of a loss under the contract unless it is embodied in a marine insurance policy in accordance with this Act. The policy may be executed and issued either at the time which the contract is concluded or afterwards" [emphasis added]. The United Kingdom equivalent, which is found in s 22 of the *Marine Insurance Act 1906*, does not include the phrase "for the recovery of a loss under the contract".

acceptance of this offer, then several consequences will follow, one of which is that the slip contains and evidences the terms of the insurance contract.<sup>46</sup> Thus, the terms of s 28 of the *Marine Insurance Act* 1909, rendering the slip inadmissible in evidence unless a policy is issued, present difficulties.

Two questions may arise in respect of s 28. First, is there a difference, at law, between the slip and the policy and what does the difference imply? Second, is the slip admissible for purposes other than in an action for the recovery of a loss?<sup>47</sup> For example, is the slip admissible to prove that a contract was concluded and when, who the parties were, whether there was an agency relationship between the leader and following underwriters, and what the terms of the contract were generally?

The answer to both questions seems to be 'yes'. The *Marine Insurance Act* distinguishes between the conclusion of the contract (on the slip) and the execution of the policy.<sup>48</sup> Section 27 states that "[a] contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not".<sup>49</sup> Section 28 reads: "[t]he policy may be executed and issued either at the time when the contract is concluded or afterwards."<sup>50</sup> The policy is a formal document that is executed at the time of or after the contract and embodies the insurance contract.

The effect of the provisions in the *Marine Insurance Act*<sup>51</sup> is to recognise the existence of a valid insurance contract concluded on the slip but to deny its enforceability until a formal policy is issued. It is submitted that the requirement for a policy without which the contract is unenforceable is an unnecessary formalism. The statutory requirement for a formal policy is the result of eighteenth and nineteenth centuries' fiscal driven laws, which no longer apply.<sup>52</sup> The historic levying of stamp duty, at special increased rates, upon marine insurance contracts in England required a formally executed and stamped policy. Stamp duty is a tax on documents, not transactions.<sup>53</sup> To prevent avoidance of the duty, marine insurance contracts were subjected to various regimes of

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46 Other consequences are that (1) each subscription gives rise to a separate and distinct contract between the assured and the initialling underwriter, and each underwriter will be bound by the terms of the slip as it stands when the underwriter initialled it; (2) options in the resulting contracts open either to the underwriter or the assured may be exercised differently by or against either party; and (3) the assured may receive diversity of response from underwriters to its claims. To ensure that the terms of the contract are the same between the assured and all the underwriters, and also that the underwriters act in harmony under the contract, parties often insert what is known as a 'leading underwriter's clause' or 'tba L/U'. The leading underwriters clause makes all the underwriters bound by any variation made to the terms of the contract between the leading underwriter and the assured. See CM Schmitthoff, note 26 *supra*, p 499; HN Bennett, note 26 *supra*, pp 32-3. See also *Jaglom v Excess Insurance Co Ltd* [1972] 2 QB 250 at 257; *Hope*, note 26 *supra* at 245.

47 The second question may not arise in respect of the UK Act, *Marine Insurance Act* 1906, s 22, as the section renders the slip inadmissible generally and not necessarily for the recovery of a loss under the contract. See the difference between the Australian and the UK provisions explained at note 45 *supra*.

48 *Marine Insurance Act* 1909, s 27; *Marine Insurance Act* 1906, s 21.

49 *Ibid.*

50 *Marine Insurance Act* 1909, s 28; *Marine Insurance Act* 1906, s 22.

51 *Marine Insurance Act* 1909, ss 27-8; *Marine Insurance Act* 1906, ss 21-2.

52 Note 34 *supra* at 94-107.

53 *Ibid* at 95.

formalities, of progressively diminishing severity, until the *Marine Insurance Act* 1906.<sup>54</sup> The earliest statutes rendered void marine insurance contracts that did not comply with the statutory requirements. The *Marine Insurance Act* does not render the contract void but denies its enforceability unless the contract is embodied in a policy.<sup>55</sup>

As marine insurance contracts are no longer subject to any special stamp duty, it is submitted that there is no longer legal or commercial justification for s 28 in its present terms, and it should be amended. It may be desirable to require written evidence of marine insurance contracts, but the slip should satisfy the writing requirement.

Incidentally, the slip has several important uses when a valid policy is issued. The obligations of the parties originate in the slip, and the slip is admissible for showing when the proposal was accepted<sup>56</sup> as well as to rectify the policy.<sup>57</sup> In *Symington & Co v Union Insurance Society of Canton Ltd (No 2)*,<sup>58</sup> Scrutton LJ held that:

[T]he obligation of the underwriter originated in the slip, and their duty, in honour if not in law, was to reproduce the terms of the slip in the policy. If an insurance company wishes to make their obligation as expressed in the policy differ from the obligation which they have undertaken in the slip they must reserve in the slip power to make such alteration. Without such power, where there is a total contradiction between the terms of the slip and those of the policy, the terms of the slip must prevail.<sup>59</sup>

Why should these qualities of the slip not be upheld without unnecessarily requiring the execution of a policy?

Although the functions of the slip are not certain, it may be safe to list them as follows: The slip is an offer by a prospective assured to contract on the terms contained therein. If an insurer accepts the offer, a contract of insurance is established between the underwriter and the assured and the parties become bound by the terms contained in the slip. The slip may contain 'leading underwriter clauses' which establish and evidence the terms of an agency contract between a leading underwriter and following underwriters. The slip usually provides for the subsequent embodiment of the contract terms in a policy. When a policy has been issued, the policy evidences the final terms of the contract but, if there is any discrepancy between the policy and the slip, reference may be made to the slip and the terms of the slip will prevail. If the parties wish to make their obligations as expressed in the policy differ from

54 *Ibid.* The Australian *Marine Insurance Act* 1909 is derived from the UK Act, so the history of the two Acts is the same.

55 *Ibid.* See also *Marine Insurance Act* 1909, s 27; and *Marine Insurance Act* 1906, s 21.

56 *Marine Insurance Act* 1909, s 27; *Marine Insurance Act* 1906, s 21.

57 *The Aikshaw* (1893) 9 TLR 605. In this case, the slip stated that the vessel was covered "at and from any port or ports and (or) place or places on the west coast of South America in any rotation" for a voyage to Europe. The policy on its wording attached only "at and from any ports and (or) places of loading". The vessel was lost after arriving at a port on the west coast of South America but before arriving at a port of loading. Rectification was ordered to make the policy conform to the slip.

58 (1928) 34 Com Cas 233 at 235.

59 See also *Motteux v London Assurance* (1739) 1 Atk 545; *Western Assurance Co v Poole* (1903) 8 Com Cas 108.



those undertaken in the slip, they must reserve the power in the slip to make such alterations.<sup>60</sup> Until the terms of the contract contained in the slip are incorporated in a policy, the slip evidences, at least at common law, the terms of the contract.

Under the Australian Act, the slip is inadmissible in evidence in an action for the recovery of a loss under the contract unless the contract is embodied in a marine insurance policy.<sup>61</sup> However, the slip is admissible in an action for purposes other than for the recovery of a loss even when a policy is not issued.<sup>62</sup>

(i) *Can the Functions of the Slip be Performed Electronically?*

There should be no legal impediments to electronic insurance 'slips'.<sup>63</sup> There is no stipulation as to the method of concluding marine insurance contracts. The contract may be concluded by whatever means is agreeable to the parties, except that the slip cannot be proved in a court of law for the recovery of a loss unless a policy is issued. An electronic 'preliminary insurance contract proposal'<sup>64</sup> may be prepared by the assured or the assured's broker and circulated electronically to prospective underwriters. Underwriters who wish to participate in the insurance cover may subscribe to the necessary portions that they wish to cover by electronically signing the proposal, and indicating the proportion that they wish to underwrite.

Electronic means of assenting to contract terms should be legally binding, as there is no requirement that a marine insurance contract be manually signed. Although the *Marine Insurance Act* requires the insurer's signature or that of the insurer's agent on a policy to bind the insurer, the statute acknowledges that the contract may be concluded before it is embodied in a policy.<sup>65</sup> The insurer's signature becomes important when it comes to enforcement of the contract. A duly signed policy issued after the contract has been concluded is sufficient under the provisions of the statutes.<sup>66</sup>

The slip (in this case the 'preliminary insurance contract') would be inadmissible in evidence if no policy is issued, but the inadmissibility has nothing to do with the medium of contracting. Admissibility of the slip in evidence turns on whether a policy has been issued or not. If the contract is not embodied in a policy, a preliminary insurance contract will be inadmissible just as a paper slip will be.

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60 CM Schmitthoff, note 26 *supra*, p 500; *Symington & Co v Union Insurance Society of Canton Ltd (No 2)* (1928) 34 Com Cas 233 at 235.

61 Under the UK Act, the slip is inadmissible in evidence unless the contract is embodied in a marine insurance policy. See *Marine Insurance Act* 1906, s 22.

62 In the United Kingdom, the slip is not admissible for any purpose unless a policy is issued or another statute provides otherwise. See *ibid*.

63 It may sound illogical to talk of an electronic slip. The term slip appears to connote paper. Probably an electronic 'preliminary insurance contract' sounds better.

64 See note 63 *supra*, where it was suggested that the term 'preliminary insurance contract' appeals to the ear better than 'electronic slip'. The phrase 'preliminary insurance contract proposal', instead of 'electronic slip', will be used to refer to the electronic proposed terms of the insurance contract offered by the assured. When the proposal has been underwritten, it may be called the 'electronic insurance contract'.

65 *Marine Insurance Act* 1909, ss 27-8; *Marine Insurance Act* 1906, ss 21-2.

66 *Ibid*.

(ii) *Is it Desirable to Perform the Functions of the Slip (Preliminary Insurance Contract) Electronically?*

As has already been noted, parties to a marine insurance contract may conclude their contract by any medium agreeable to them. No law prevents the parties from concluding the contract orally or electronically, except that an orally concluded marine insurance contract will not be admissible in evidence if the contract is not subsequently embodied in a signed written policy. A written policy is a prerequisite to the enforcement of a marine insurance contract, but the policy need not be written before or at the time of the contract; it may be executed after the contract.

It is important, however, to conclude marine insurance contracts in writing. Marine insurance contracts are complex. The contract contains descriptions – of the property, the risk, and the person whose interest is insured – as well as terms and conditions of the contract and obligations of the parties. It is prudent for the contracting parties to set out clearly in writing all the necessary information relating to the contract. An electronic preliminary insurance contract is desirable for this purpose.

Moreover, a contract of marine insurance, like every contract of insurance, is a contract *uberrimae fidei*,<sup>67</sup> which means parties have to maintain a detailed record of all the information disclosed at the time of contracting. The parties owe each other a duty of utmost good faith to disclose, before the contract is concluded, every material circumstance<sup>68</sup> which is, or in the ordinary course of business ought to be, known to the parties.<sup>69</sup> The duty of utmost good faith is mutual,<sup>70</sup> though its burden weighs more on the assured.<sup>71</sup> The assured is required to disclose every material fact that would influence the judgement of a prudent insurer in fixing the premium or determining whether to take the risk. A breach of utmost good faith by either party gives the other party the right to avoid the contract.<sup>72</sup> It is therefore important for future purposes that the parties put in writing all material information disclosed at the time of the contract, and the preliminary insurance contract will be useful in this regard.

The process of marine insurance contracting may also demand the use of the preliminary insurance contract. In forming the contract, the broker or assured may need to circulate a written preliminary insurance contract proposal on the market.<sup>73</sup> Subscription of a leading underwriter will be evident on a preliminary

67 *Marine Insurance Act* 1909, s 23; *Marine Insurance Act* 1906, s 17. See also *Container Transport International Inc and Reliance Group Inc v Oceanus Mutual Underwriting Association (Burmuda) Ltd* [1982] 2 Lloyd's Rep 178.

68 Circumstances, in this context, are facts. The facts must be known, or ought to be known to the parties, particularly the assured.

69 See *Marine Insurance Act* 1909, s 24; *Marine Insurance Act* 1906, s 18. See also *Ionides v Pender* (1874) LR 9 QB at 537; *Proudfoot v Montefiore* (1867) LR 2 QB 511.

70 *Carter v Boehm* (1766) 3 Burr 1905.

71 HE Ivamy, *Chalmers's Insurance Act* 1906, Butterworths (9th ed, 1983) p 24.

72 See *Marine Insurance Act* 1909, s 24; *Marine Insurance Act* 1906, s 18.

73 See a description of the contract formation process by Lord Diplock in *Hope*, note 26 *supra* at 304; and text accompanying notes 26-38 *supra*.

insurance contract and will make it easier for the broker to obtain subscriptions from other underwriters. Any leading underwriter clauses in the contract will also be evident in writing.

Furthermore, the preliminary insurance contract will be of great use in situations where the formal policy does not adequately reflect the agreed terms of the contract. The policy is usually issued long after a marine insurance contract has been concluded. In executing the policy, terms may be omitted or wrongly written and the parties may need to refer to the preliminary insurance contract to rectify the policy.<sup>74</sup> The slip is considered in such cases and the preliminary insurance contract will perform similar functions.<sup>75</sup> From the above discussion, one may conclude that it is desirable to replicate the functions of the paper slip electronically, by the use of a preliminary insurance contract.

#### IV. THE POLICY

A lot has already been said about the policy in previous paragraphs. The policy is a formal document that embodies an earlier contract. It may be executed and issued either at the time of the contract or afterwards.<sup>76</sup> Execution and issuance of a marine insurance policy is a statutory requirement, non-compliance with which renders the contract inadmissible in evidence in an action for the recovery of loss.<sup>77</sup> A policy is required to specify: the name of the assured or his or her agent, the subject-matter insured and the risk insured against, the voyage or period of time or both, the sum or sums insured, and the name or names of the insurer(s); and it must be signed by or on behalf of the insurer.<sup>78</sup>

##### Functions of the Policy

The policy fulfils a statutory requirement: it is a requirement for admission of evidence under the contract for the recovery of a loss.<sup>79</sup> The policy is not necessarily the contract: the contract is usually constituted in the slip. However, where the parties intend the terms of the contract to be finally incorporated in a policy and the policy is issued, the policy may constitute the contract between the parties and it therefore needs to state the full terms of the insurance contract.<sup>80</sup>

74 See *The Aikshaw* (1893) 9 TLR 605; *Symington & Co v Union Insurance Society of Canton Ltd* (No 2) (1928) 34 Com Cas 233.

75 *The Aikshaw* and *Symington* *ibid*.

76 *Marine Insurance Act* 1909, s 28; *Marine Insurance Act* 1906, s 22.

77 *Marine Insurance Act* 1909, s 28.

78 *Marine Insurance Act* 1909, ss 29-30. Under the *Marine Insurance Act* 1906, ss 23-4, only the name of the assured, or some person who effects the insurance on his or her behalf, and the insurer's signature are required. Section 23 of the *Marine Insurance Act* 1906, which specifies the particulars to be contained in a policy, had similar provisions to the *Marine Insurance Act* 1909, but was amended by the *Finance Act* 1959 (Eng), ss 30(5), (7), 37(5), Sch 8, Pt II; and the *Finance Act* 1959 (Northern Ireland), ss 5(5), (7), 17(2), Sch 3, Pt II.

79 *Marine Insurance Act* 1909, s 28.

80 *Youell v Bland Welch & Co Ltd* [1990] 2 Lloyd's Rep 423; [1992] 2 Lloyd's Rep 127 (CA).

The policy constituting the contract between the assured and the insurer is the type required in documentary sale transactions.<sup>81</sup> Goods are sold cif<sup>82</sup> and the seller is obliged to furnish the buyer with documents that attest to due performance of the contract by the seller.<sup>83</sup> Under a cif contract, risk in the goods "generally passes [to the buyer] on shipment or as from shipment".<sup>84</sup> The buyer, who will pay against documents, must be able to see from the insurance document that he or she is covered as required by the agreed terms of the contract of sale. The marine insurance policy evidences the protection against the agreed maritime perils.

The seller may take the insurance in his or her name, yet the protection extends to the buyer because the marine insurance policy is assignable. The assured may assign the policy to the buyer or other third party assignees, thereby transferring the beneficial interest in the policy to them.<sup>85</sup> Upon assignment of the policy, the original assured departs from the scene and is replaced by the assignee.<sup>86</sup> Assignment of a marine policy under the *Marine Insurance Act* requires transfer of the whole beneficial interest in the policy.<sup>87</sup> Assignment may be effected "by indorsement thereon or in other customary manner".<sup>88</sup> It is unclear whether mere delivery is adequate to transfer interest in the policy.<sup>89</sup>

Assignment of a marine policy entitles assignees to sue in their own name,<sup>90</sup> which is a convenient feature. The buyer-assignee need not rely on the foreign seller to sue in the event of a loss, and third parties, such as banks, who take security over the shipping documents can sue in their own name in the event of a loss.

In order that an assignment does not prejudice the insurer's interest, the *Marine Insurance Act* entitles insurers to raise against assignees any defences to which the insurers may be entitled as against the original assured.<sup>91</sup> The assignment operates to transfer the beneficial interest of the assured-assignor, subject to any equities, claims, counter-claims and defences that the insurer may have against the assignor. Thus, it was held in *Pickersgill & Sons Ltd v London*

81 *Wilson, Holgate & Co*, note 37 *supra*; *Diamond Alkali Export Corp v Fl Bourgeois* [1921] 3 KB 443; *Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 KB 1; *Malmberg v H & J Evans & Co* (1924) 30 Com Cas 107 at 113.

82 See text around note 1 *supra*.

83 AG Guest (ed), *Benjamin's Sale of Goods*, Sweet & Maxwell (1997) p 1247; *Tregelles v Sewell* (1862) 7 H & N 574; *Holland Colombo Trading Soc Ltd v Alawdeen* [1954] 2 Lloyd's Rep 45.

84 *Comptoir d' Achat et de Vente Du Boerenbond Belges SA v Luis de Ridder Limitada, The Julia* [1949] AC 293 at 309, per Lord Porter. See also *E Clemens Horst Co Ltd v Biddel Bros* [1911] 1 KB 934 at 956-9; *Bowden Bros & Co Ltd v Little* (1907) 4 CLR 1364; *M Golodez & Co Inc v Czarnikow Rionda Co Inc (The Galatia)* [1980] 1 WLR 495 at 510.

85 *Marine Insurance Act* 1909, s 56(1); *Marine Insurance Act* 1906, s 50(1).

86 But assignment does not release the assignor from his obligation to perform the contract (and the assignee does not assume the burden of the contract) with the result that the insurer cannot actively sue the assignor.

87 *Marine Insurance Act* 1909, s 56(2); *Marine Insurance Act* 1906, s 50(2).

88 *Marine Insurance Act* 1909, s 56(3); *Marine Insurance Act* 1906, s 50(3).

89 *Baker v Adam* (1910) 15 Com Cas 227 (the issue here related to transfer by way of security). Cf *Safadi v Western Assurance Co* (1933) 46 Ll L Rep 140 at 144.

90 *Marine Insurance Act* 1909, s 56(2); *Marine Insurance Act* 1906, s 50(2).

91 See s 56(2) of the *Marine Insurance Act* 1909; s 50(2) of the *Marine Insurance Act* 1906.

& *Provincial Marine & General Insurance Co Ltd*<sup>92</sup> that a breach of the duty of utmost good faith by the assured provided a defence good against an assignee of the policy.

The marine insurance policy is therefore not a negotiable document. Assignment of a marine insurance policy does not operate to confer 'holder in due course' status. An assignee who takes a policy in good faith and without notice of any defect in the assignor's interest would nonetheless be saddled with any defects in the assignor's title.

The concept of assignment of insurance policies was designed to respond to the demands of cif transactions.<sup>93</sup> Under such contracts, the price paid by the buyer covers three items: the cost of the goods (or cargo), insurance and freight. The seller contracts to supply goods, see to their shipment and insure them against marine perils while in transit. The seller undertakes to produce documents evidencing his or her fulfilment of each of these three elements, and the policy evidences the insurance cover. Transfer of the documents triggers the passing of property in the goods and risk retrospectively as from the time of shipment.<sup>94</sup> As between the buyer and the seller, risk of loss of or damage to the goods during the entire transit after loading on board the carrying vessel lies with the buyer. If the carrying vessel sinks, the buyer must pay the seller, take the documents, and claim on the insurance.<sup>95</sup> The seller may present the documents and assign the insurance policy after the cargo is lost in transit.<sup>96</sup>

The functions of the policy may be summarised as follows: First, the policy satisfies statutory requirements for the enforcement of marine insurance contracts. Second, the policy evidences protection against marine perils and offers an important assurance required by cif buyers who pay against shipping documents, and financiers of documentary credit transactions who often take security over the documents. Third, the policy is assignable to the buyer or other parties, to transfer the beneficial interest in the insurance contract to them. Assignment of the insurance policy does not operate to confer 'holder in due course' status, as the assignee takes the document subject to any equities, claims, counter-claims and defences that the insurer may have against the assignor.

#### (i) *Can the Functions of the Marine Insurance Policy be Performed Electronically?*

To perform the statutory functions of the policy electronically, a valid electronic policy should be capable of being issued within the law, and the policy should be assignable. An electronic document equivalent to the paper

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92 [1912] 3 KB 614.

93 HN Bennett, note 26 *supra*, p 335.

94 RN Purvis and R Darvas, *Commercial Letters of Credit, Shipping Documents and Termination of Disputes in International Trade*, Butterworths (1975) p 90.

95 *Manbre Saccharine Co Ltd v Corn Products Co Ltd* [1919] 1 KB 198.

96 *Marine Insurance Act* 1909, ss 56(1) and 57 (proviso); *Marine Insurance Act* 1906, ss 50(1) and 51 (proviso).

policy should pose no general problems under Australian law.<sup>97</sup> Electronic messaging will provide the specified information and satisfy the statutory requirement without any difficulty. Electronic signatures should be valid at both common law and under the *Electronic Transactions Act* 1999 (Cth).

At common law generally, a signature is any symbol or mark adopted by persons to show their approval or assent to a writing or transaction. It was said in *R v Moore, ex-parte Myer*<sup>98</sup> that "[a] 'signature' is only a mark, and where a statute merely requires that a document shall be signed, the statute is satisfied by proof of the making of a mark upon the document by or by the authority of the signatory".<sup>99</sup>

The above language seems to restrict the definition to manual signatures, but that may have been because the issue in that case was whether the applicant's name on a pledge-ticket, a paper document, satisfied the requirement of signature under a pawnbrokers statute. It was explained that:

the object of all statutes which require a particular document to be signed by a particular person is to authenticate the genuineness of the document... When the statute does not require that the document shall be signed with the name of the party signing, a cross or initials or part only of the name will be sufficient.<sup>100</sup>

The *Marine Insurance Act* requires a signature generally, so any mark, sign or other means of authentication, including electronic, should suffice.

In *Molodyski v Vema Australia Pty Ltd*,<sup>101</sup> Cohen J stated that the effectiveness of a signature turns on the intention of the signatory. Wright and Winn suggest that "what is important is not what the symbol is or the technical reliability of the symbol, but rather the *intent* behind the symbol".<sup>102</sup> It is submitted that if parties to an electronic marine insurance policy intend their adopted means of authentication to be binding (which would most probably be the case) and the policy contains all the requisite information, legal effect should be given to the intentions of the parties. In view of the common use of electronic signatures in Australia today,<sup>103</sup> electronic signatures should not be denied legal effect for the purposes of the *Marine Insurance Act*.

If doubts remain about the legal effect of electronic signatures at common law, the *Electronic Transactions Act* 1999 (Cth) (hereinafter "*Electronic*

97 The elements of a valid policy are that it must specify certain information and must be signed by or on behalf of the insurer. See the text preceding note 78 *supra*, which outlines the information required. See also *Marine Insurance Act* 1909, ss 29-30.

98 (1884) 10 VR 322.

99 *Ibid* per Higginbotham J at 324.

100 *Ibid*.

101 [1989] NSW Conv R 55-446.

102 B Wright and JK Winn, *The Law of Electronic Commerce*, Aspen Law and Business (3rd ed, 1998) at [14.01].

103 For example, PINs used for automatic teller machines. See A Tyree, "Banking Law" (1995) 6 *Journal of Banking Law and Practice* 119.

*Transactions Act*") may clear those doubts.<sup>104</sup> Section 4(c) provides that a requirement of signature imposed under a law of the Commonwealth can be met in electronic form. Section 10 further provides that:

if, under a law of the Commonwealth, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if: (a) a method is used to identify the person and to indicate the person's approval of the information communicated; and (b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purpose for which the information was communicated.<sup>105</sup>

Unfortunately, the *Electronic Transactions Act* does not apply immediately to all Commonwealth laws, and it does not seem to apply to the *Marine Insurance Act* 1909. Section 5(2) of the *Electronic Transactions Act* limits the application of the Act before 1 July 2001 to certain Commonwealth laws to be prescribed by regulations. The *Electronic Transactions Act* will apply to all laws of the Commonwealth after 1 July 2001, unless a law of the Commonwealth is specifically excluded from its application.<sup>106</sup> The regulations promulgated under the *Electronic Transactions Act* do not include the *Marine Insurance Act* 1909 in the list of laws to which the Act applies.<sup>107</sup>

This author suggests that the *Marine Insurance Act* 1909 should be included in the regulations. Considering the reasons for limiting the scope of application of the *Electronic Transactions Act*, it should apply to the *Marine Insurance Act* 1909. The initial scope of application of the *Electronic Transactions Act* is limited "to allow those Commonwealth Departments and agencies who are not currently capable of dealing with the community electronically time to put the necessary systems in place".<sup>108</sup> The *Marine Insurance Act* 1909 affects mainly private business and not dealings by the community with Commonwealth departments and agencies. The object of the *Electronic Transactions Act* is to facilitate the use of electronic transactions, and promote business and community confidence in electronic transactions.<sup>109</sup> Inclusion of the *Marine Insurance Act* 1909 in the regulations will advance this object, and not affect the community's dealing with Commonwealth departments and agencies. Therefore, the *Marine Insurance Act* 1909 should be specified in the regulations.

Application of the *Electronic Transactions Act* to the *Marine Insurance Act* 1909 is one way of eliminating any problems that may be associated with electronic signatures in respect of the *Marine Insurance Act*. Another way is to

104 For commencement of the *Electronic Transactions Act*, see note 14 *supra*. The *Electronic Transactions Act* was modelled on the UNCITRAL Model Law on Electronic Commerce, following recommendations made by an expert group, the Electronic Commerce Expert Group, in a report, "Electronic Commerce: Building The Legal Framework", submitted to the Attorney General on 31 March 1998, available at <<http://www.law.gov.au/agh/home/advisory/eccg/single.htm>>.

105 *Electronic Transactions Act* 1999 (Cth), s 10(1).

106 *Ibid*, s 5(2).

107 See Electronic Transactions Regulations 2000 (Cth).

108 See *Explanatory Memorandum*, Electronic Transactions Bill 1999 (Cth) at 5. It has been suggested that the timeframe, in excess of two years, is unnecessarily long and should be shortened to between six and twelve months. See S Barber, "Electronic Transactions Bill Takes Shape" (1999) 18 *Communications Law Bulletin* 1.

109 *Electronic Transactions Act* 1999 (Cth), s 3(b)-(c).

redraft the *Marine Insurance Act* to provide for electronic signatures. For reasons to be stated below,<sup>110</sup> redrafting of the *Marine Insurance Act* should be preferred.

If, as has been argued, a valid electronic policy can be issued, such a policy will evidence protection against the risks stated therein. The protection under the contract would be enforceable by the assured in case of loss or damage to the goods. The next question is: can the protection evidenced by an electronic insurance policy be assigned?

Assignment of an electronic policy appears to be legally possible. The *Marine Insurance Act* provides for assignment "by indorsement thereon or in other customary manner".<sup>111</sup> The author's initial impression of the first mode of assignment, ie "by indorsement thereon" is that the language connotes the existence of paper on which the assignor may write his or her signature. This author suggests, however, that an electronic policy that is electronically signed with the intention to transfer its beneficial interest should produce the necessary legal effect. It would appear that a marine insurance policy is good for the information it contains and not its form.<sup>112</sup> Accordingly, an electronic 'indorsement' (ie authentication) of an electronic policy should be recognised.

Moreover, s 56(3) of the *Marine Insurance Act* 1909 permits assignment not only by indorsement, but also "in other customary manner". It is probably too early to say that electronic signatures or electronic modes of transfer of documents have attained legal recognition as custom. Custom takes time to establish,<sup>113</sup> but "more depends on the number of the transactions which help to create it than on the time over which the transactions are spread".<sup>114</sup> The test for whether a particular practice has become mercantile custom is the intensity of the practice, coupled with general notions and acceptance, rather than the period over which the practice has spanned. In *Edelstein v Schuler & Co*,<sup>115</sup> Bingham J found no difficulty in holding that a class of securities which was of comparatively recent origin had, by the volume and rate of its use and general mercantile acceptance, become negotiable. Although electronic signatures are of recent development, a case can be argued for their recognition as a customary mode of signing (indorsing) or authenticating electronic documents. Electronic commerce merchant law, it has been argued, is already evolving.<sup>116</sup>

Furthermore, it is recognised that the common law "has in the hands of judges the same facility [as the law merchant] for adapting itself to the changing needs of the general public".<sup>117</sup> There is an obvious need for legal recognition of electronic signatures in today's commercial world. Electronic modes of

<sup>110</sup> See text around notes 132-5 *infra*.

<sup>111</sup> *Marine Insurance Act* 1909, s 56(3); *Marine Insurance Act* 1906, s 50(3).

<sup>112</sup> See *Marine Insurance Act* 1909, s 28; *Marine Insurance Act* 1906, s 22.

<sup>113</sup> P Todd, note 19 *supra* at 119.

<sup>114</sup> *Edelstein v Schuler & Co* [1902] 2 KB 144 at 154, per Bingham J.

<sup>115</sup> [1902] 2 KB 144. See also *Bechuanaland Exploration Co v London Trading Bank* [1898] 2 QB 658.

<sup>116</sup> See P Quirk, "The Law Merchant: Model for Cyberlaw" (1997) 1 *Law and Technology* 1.

<sup>117</sup> Note 114 *supra* at 155.



communication are replacing paper in business and commercial dealings. The law should adapt itself to this change and recognise electronic signatures.

Additionally, the provision in the *Marine Insurance Act* permitting transfer in a customary manner signifies flexibility. It may not be wrong to suppose that the *Marine Insurance Act* intends to accommodate recognisable modes of transfer other than by indorsement. Accordingly, electronic modes of transfer should be recognised.

Even if s 56(3) of the *Marine Insurance Act* 1909 does not recognise electronic signatures, this author submits that an electronic insurance policy, purportedly signed and pursuant to which either party or both parties have acted, may be enforced. Section 4 of the *Marine Insurance Act* 1909 provides that the rules of the common law, including the law merchant, apply to contracts of marine insurance unless they are inconsistent with the express provisions of the Act. If the saved rules include the doctrines of equity, then a party may be precluded from reneging on his or her obligations, in circumstances that are contrary to equity and good conscience.<sup>118</sup> Equitable doctrines of estoppel and unconscionability may operate, for example, to prevent an insurer or assignor from denying an assignee of an electronic policy the beneficial interest of the policy on the ground that the mode of assignment is not legally recognisable.<sup>119</sup> These doctrines, which have seen a recent rejuvenation and expansion in Australia and the United Kingdom,<sup>120</sup> have been applied in numerous circumstances to grant relief to disadvantaged parties and may assist a purported assignee of an electronic insurance policy.

Parties to an electronic marine insurance policy could also ensure the effectiveness of their electronic 'indorsement' methods by private agreement.<sup>121</sup> The parties may agree that their adopted electronic mode of signing and transfer constitutes 'indorsement' within the meaning of the *Marine Insurance Act*.<sup>122</sup> They may further undertake not to contest the validity or enforceability of their electronic mode of signing.<sup>123</sup>

Several benefits may flow from an electronic contracting agreement. Apart from removing legal uncertainty that may be present in the *Marine Insurance Act* and other laws, the parties can provide for technical requirements in the exchange of information.<sup>124</sup> They can provide for the appropriate allocation of risk, such as risk of errors or omissions in the electronic transmission, or the

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118 That is, circumstances amounting to 'equitable fraud', the collective term used to describe the broad grounds on which equitable jurisdiction is exercised to intervene in transactions under which a party may be taking undue advantage of the strict application of the common law, and to grant equitable remedies. See I Beale, "Unconscionability in Equity and Under the Trade Practices Act 1974" [1999] *National Law Review* 2, available at <<http://www.nlr.com.au/main.htm>>.

119 See, for example, *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 384.

120 See Sir A Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World", (1994) 110 *LQR* 238.

121 B Wright and JK Winn, note 102 *supra*.

122 See AH Boss, note 7 *supra* at 35.

123 *Ibid* at 59.

124 *Ibid* at 35.

apportionment of liability for the acts of third parties, and specify procedural and security requirements.<sup>125</sup>

However, private contracting to overcome electronic assignability problems is not without its limitations. An electronic insurance policy may involve several parties, including the insurer, assured (seller), financiers, and buyers. These parties have to be included in the private electronic contract if the electronic insurance policy is to work across the chain. Some of the parties, particularly those who may buy goods afloat, may not be identifiable at the time of contracting. The initial contracting parties would have to either negotiate a separate electronic agreement with each party that enters the picture, or write a general agreement to which all new parties to the transaction are made to agree. In situations where goods are sold several times to numerous dealers at short periods,<sup>126</sup> the latter mode would be the preferable option, as negotiating a separate agreement with each party may be time consuming,<sup>127</sup> and costly.<sup>128</sup>

It is submitted, from the above discussion, that the important functions of the policy can be replicated electronically. However, problems arise when searching legal arguments need to be relied upon to come to this conclusion. Doubts may linger in the minds of business parties, lowering confidence in the electronic systems and making commercial parties hesitant to use electronic insurance documents.<sup>129</sup> To facilitate and promote electronic documentation of the insurance contract, a legal environment that expressly supports electronic documents should be put in place.

Legislative reform is the best way to create a legal electronic environment devoid of complexities, and this fact has been recognised in Australia.<sup>130</sup> Legislating to facilitate electronic documentation of insurance documents may be achieved in two ways.<sup>131</sup> One way is to enact a law such as the *Electronic Transactions Act* that generally makes electronic signatures as legally effective as manual signatures. The other method is to redraft the *Marine Insurance Act* 1909 to accommodate electronic documents and signatures. The latter method would require the provisions of the *Marine Insurance Act* 1909 to be couched in medium-neutral language, so that the Act accommodates paper, electronic and other communication media.

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125 *Ibid.*

126 For example, in the oil trade, a particular shipment may change hands more than 100 times while in transit. See P Todd, *Bills of Lading and Bankers' Documentary Credits*, Lloyds of London Press (1990) p 2.

127 B Wright and JK Winn, note 102 *supra* at [12.01].

128 AH Boss, note 7 *supra* at 36.

129 JB Ritter, "Defining Electronic Commerce" (1992) 13 *Northwestern Journal of International Law & Business* 3 at 4.

130 See the report of the Electronic Commerce Expert Group, "Electronic Commerce: Building The Legal Framework", note 105 *supra*; and *Electronic Transactions Act* 1999 (Cth), s 3.

131 There are many models of legislation to facilitate electronic transactions. Sneddon distinguishes three main types: facultative laws, laws which regulate particular authentication technologies and infrastructures, and laws which extend or adapt existing regulation of transactions to cover electronic transactions. See M Sneddon, "Legislating To Facilitate Electronic Signatures and Records: Exceptions, Standards and the Impact on the Statute Book" (1998) 21(2) *UNSWLJ* 334 at 340.

Either method will give legal effect to electronic insurance documents, but this author submits that the latter method is preferable. There are two reasons it would be preferable to redraft the *Marine Insurance Act*. The first reason is that the language of some provisions, for example "assignment by indorsement thereon",<sup>132</sup> are paper-biased, discriminatory and antiquated. Although the *Electronic Transactions Act* may make electronic authentication effective within those provisions, it would be more appropriate to replace the unsuitable language with terminologies that reflect electronic media for conveying and recording information. The second reason is that by redrafting the *Marine Insurance Act*, the law would be ascertainable in one piece of legislation. One would not need to consult fragmented laws to ascertain the current law. The law would be neat and tidy and a model for other jurisdictions, like the sea transport documents law has been. Australian sea transport documents laws have been redrafted to accommodate electronic documents,<sup>133</sup> and consistency would demand that a similar method be adopted in reforming the marine insurance law.

When redrafting the *Marine Insurance Act*, caution must be exercised so as not to muddle its global character. Marine insurance is global,<sup>134</sup> and it is important that its regulatory framework remains global. A similar approach to redrafting the sea transport document laws, which left their global character intact, should be adopted in redrafting the *Marine Insurance Act*.<sup>135</sup> The paper-biased texts in the *Marine Insurance Act* should be replaced with texts reflecting modern communication systems, but without changing the global nature of the statute.

(ii) *Is it Desirable to Perform the Functions of the Marine Insurance Policy Electronically?*

Electronic marine insurance policies should be used in electronic trade documentation systems. The marine insurance policy is an important document in documentary sale transactions. The policy is a statutory requirement, non-compliance with which renders the contract inadmissible. It is essential, therefore, to issue a policy, at least until the law is changed.

If an electronic insurance policy is not issued, a paper policy must be issued, else evidence will not be admitted in an action for the recovery of a loss under the insurance contract.<sup>136</sup> It will be counterproductive to combine paper insurance documents with electronic transport documents. Electronic

132 *Marine Insurance Act* 1909, s 56(3); *Marine Insurance Act* 1906, s 50(3).

133 See notes 12 and 13 *supra*.

134 See *Amin Rasheed Shipping Corporation*, note 24 *supra* at 62; and text around notes 24-5 *supra*.

135 In amending the sea transport documents laws in Australia to accommodate electronic documents, the texts of two statutes of global character were changed. The paper-biased texts of the *Carriage of Goods by Sea Act* 1991 (Cth), which enacts the International Convention for the Unification of Certain Rules Relating to Bills of Lading ("Hague Convention") (1924) as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules Law Relating to Bills of Lading Signed at Brussels on 25 August 1925 ("Hague-Visby Protocol") (1968), were redrafted. Similarly, the paper-biased texts of bills of lading provisions in the various states were repealed and replaced with a new statute: the *Sea-Carriage Documents Act*, in the various states. See notes 12 and 13 *supra*.

136 *Marine Insurance Act* 1909, s 28.

documentation affords commercial parties remarkable and unparalleled improvements in the accuracy, speed and efficiency with which transactions are negotiated, confirmed and performed.<sup>137</sup> The benefits of speed and efficiency flow from the nature and mode of generating and transmitting electronic documents.<sup>138</sup> Paper is slow and costly to move and process.<sup>139</sup> If the full benefits of electronic documentation are to be realised, the principal documents used in documentary transactions should be dematerialised. Presenting paper and electronic documents means some documents will be transmitted and processed with electronic speed, accuracy and efficiency, whilst others are transported and processed in the slow and inefficient way that international business is moving away from. It is therefore important that the principal documents are presented electronically.<sup>140</sup>

Under cif contracts, the invoice, bill of lading and insurance policy are tendered together. The bill of lading should not be presented before the insurance policy. Transfer of the negotiable bill of lading<sup>141</sup> conveys constructive possession of, and, unless otherwise stated, property in, the goods represented by it to the transferee.<sup>142</sup> It is a salient characteristic of cif contracts "that the property not only may but must pass by delivery of the documents against which payment is made".<sup>143</sup> Sellers lose their beneficial interest in the insurance policy when they part with their interest in the goods.<sup>144</sup> Transfer of property in the insured goods does not transfer to the assignee the rights under the contract of insurance, unless there is an express or implied agreement with the assignee to that effect.<sup>145</sup>

If the insurance is not assigned before or at the time of transfer of the bill of lading, and the transfer divests the seller-assured of his or her property in the goods, the assured cannot subsequently assign his or her beneficial interest in the policy. Any purported assignment of the policy after sellers have divested

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137 JB Ritter, note 130 *supra* at 3.

138 J Y Gliniecki and CG Ogada, "Legal Acceptance of Electronic Documents, Writings, Signatures, and Notices in International Transportation Conventions: A Challenge in the Age of Global Electronic Commerce" (1992) 13 *Northwestern Journal of International Law & Business* 117 at 120.

139 I Walden and N Savage, "The Legal Problems of Paperless Transactions" [1989] *JBL* 102 at 103; KJ Kotch, "Addressing The Legal Problems of International Electronic Data Interchange: The Use of Computer Records As Evidence in Different Legal Systems" (1992) 6 *Temple International & Comparative Law Journal* at 451.

140 Questions about whether the ocean bill of lading can be dematerialised are beyond the scope of this article. Suffice it to say that, for the purpose of this article, the international business community and governments have worked, and continue to work, on the dematerialisation of bills of lading. BOLERO is the latest electronic bills of lading system. See text around notes 4-10 *supra*.

141 A bill of lading may be issued to a named consignee, in which case only the consignee may validly present it to obtain the goods from the vessel. Alternatively, it may be made negotiable: issued to bearer or to order. If the bill is made to bearer, it passes from one person to another by delivery. If it is issued to order, which is usually the case, it is transferred by delivery and indorsement.

142 *Lickbarrow v Mason* (1787) 2 TR 63 at 69. See also MD Bools, *The Bill of Lading: A Document of Title to Goods*, Anglo-American Corporation (1997) p 174; AG Guest, note 83 *supra*, p 983; RN Purvis and R Darvas, note 94 *supra*, p 87.

143 *The Julia*, note 84 *supra* at 317, per Lord Simonds.

144 *Marine Insurance Act* 1909, s 57; *Marine Insurance Act* 1906, s 51.

145 *Marine Insurance Act* 1909, s 21; *Marine Insurance Act* 1906, s 15.

themselves of property in the insured goods is inoperative.<sup>146</sup> It is important, therefore, that the insurance policy is dematerialised together with the bill of lading. Therefore, an electronic insurance policy needs to be issued in electronic systems of documenting trade transactions, and the law should facilitate that.

## V. THE CERTIFICATE OF INSURANCE

It is now common to tender a certificate of insurance instead of the policy with transport documents. As mentioned earlier, one reason that certificates of insurance have become useful is that preparation of the policy takes time, particularly when a number of underwriters or several insurance companies are involved, and documents may be required promptly.<sup>147</sup> While waiting for the policy to issue, brokers or leading insurers issue certificates of insurance to certify that an insurance cover of the required description has been effected.

Another reason certificates of insurance have become common is the popularity of floating policies. Floating policies are a method of insuring recurring shipments of goods, and cover future transactions, the details of which are unknown at the time.<sup>148</sup> A floating policy usually covers a specified value and period.<sup>149</sup> When goods are ordered, the exporter effects the insurance of the shipment by sending to the insurers a declaration of details of the consignment.<sup>150</sup> Each shipment covered by the policy must be shipped within the specified period and the value of each declaration is deducted from the value of the policy. The broker or assured usually receives one policy document for the floating cover. The broker or assured or sometimes the insurer issues in respect of each consignment a certificate of insurance within the terms of the cover, certifying that he or she is holding the policy of insurance.<sup>151</sup>

### Functions of the Certificate of Insurance

Generally, the cif seller must tender the insurance policy himself or herself,<sup>152</sup> but the parties may stipulate that a certificate of insurance be tendered instead of the policy.<sup>153</sup> Authorities, at least in England and Australia, suggest that a certificate of insurance is not in law equivalent to an insurance policy.<sup>154</sup> It was held in *Donald H Scott & Co v Barclays Bank*<sup>155</sup> that a certificate of insurance is

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146 Note 145 *supra*.

147 See Justice Bailhache's judgment in *Wilson, Holgate & Co*, note 37 *supra* at 8.

148 Purvis and Darvas, note 94 *supra*, p 101.

149 *Ibid*.

150 CM Schmitthoff, note 26 *supra*, pp 494-6

151 *Ibid*.

152 *Manbre Saccharine Co*, note 95 *supra*; *Wilson, Hogate & Co*, note 37 *supra*; *Diamond Alkali Export Corp*, note 81 *supra*.

153 *Burstall v Grimsdale* (1906) 11 Com Cas 280; *The Julia*, note 84 *supra*.

154 It appears some American certificates of insurance may be regarded as equivalent to policies, if they contain all the terms necessary to constitute a valid policy. See P Todd, note 126 *supra*, p 95.

155 [1923] 2 KB 1. *Donald H Scott & Co v Barclays Bank* approved earlier cases such as *Manbre Saccharine Co*, note 95 *supra* and *Wilson, Hogate & Co*, note 37 *supra*.

not an "approved insurance policy". In *Harper & Co v Mackechnie & Co*,<sup>156</sup> it was decided that even where the buyer accepts a certificate of insurance, the seller impliedly warrants that the assertions in the certificate are correct and that the insurance policy referred to in the certificate will be produced.

Owing to the wide use of certificates of insurance in modern trade, however, it appears that a practice has evolved whereby a certificate of insurance that entitles the assured (or transferee) to demand the issue of a policy is regarded as equivalent to a formal policy.<sup>157</sup> Certificates of insurance issued by an insurance broker, the insurer or assured, entitle the holder to demand the issue of a policy in the terms of the certificate and to claim for losses.<sup>158</sup> Such certificates should incorporate all the terms of the contract of insurance. One of the reasons that the insurance certificate was rejected as not equating to the policy in *Diamond Alkali Export Corp v Fl Bourgeois*<sup>159</sup> was that it was not possible for the buyer to ascertain from the certificate whether the terms of the insurance contract are usual and customary in the trade as required under a cif contract.<sup>160</sup> Another reason is that the certificate cannot be assigned under the *Marine Insurance Act*.<sup>161</sup>

The decisive criterion in determining whether the certificate of insurance operates similarly to the policy and should be accepted under a cif contract is whether it entitles the holder at any time to demand the issue of a formal policy.<sup>162</sup> A certificate of insurance that entitles its holder to demand the policy operates to transfer the protection under the insurance policy to the holder. The holder cannot sue on the certificate but is entitled to obtain the policy and sue thereon.<sup>163</sup>

#### (i) *Can the Functions of the Certificate of Insurance be Performed Electronically?*

As a document furnishing information and certifying that a consignment has been insured, the function of the certificate of insurance should easily be performed electronically.

Whether the certificate entitles the assured to demand the policy depends on the terms of the insurance cover, or other such agreement, pursuant to which the certificate was issued. The medium through which the certifying information is carried is irrelevant. An electronic message conveying the information normally contained in a certificate of insurance, and which is intended to be such a certificate, should give the same rights and liabilities as a paper certificate of insurance. The term *holder* of an electronic insurance certificate may raise some

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156 [1925] 2 KB 423.

157 CM Schmitthoff, note 26 *supra*, p 39.

158 *Ibid*, p 501.

159 [1921] 3 KB 443.

160 *Ibid* at 455-6.

161 *Ibid* at 456-7.

162 CM Schmitthoff, note 26 *supra*, p 39.

163 The *Marine Insurance Act* provides for only the policy and not the certificate of insurance. See *Marine Insurance Act* 1909, s 56(2); and *Marine Insurance Act* 1906, s 51(2).

conceptual difficulties, but it should be understood to mean the person who at any time has the certificate message and who alone can demand the policy.

As evidence of a right to demand the issue of a policy, there should be no problems in Australia and the United Kingdom. Electronic records are legally recognised for evidential purposes in Australia and the United Kingdom, and indeed many other jurisdictions.<sup>164</sup>

Essentially, the functions of the insurance certificate can be performed electronically. If the certificate of insurance is issued on behalf of the insurer, caution must be exercised so as to ensure that the certificate message is duly authenticated by or on behalf of the insurer. Such authentication is required for the certificate of insurance to confer or impose rights or responsibilities similar to the policy on the insurer.<sup>165</sup> As the certificate of insurance may be issued by the broker or assured, these parties must ensure that the insurance cover entitles them to sign or authenticate the certificate message on behalf of the insurer.

### *(ii) Is It Desirable to Perform the Functions of the Certificate of Insurance Electronically?*

The certificate of insurance is issued to indicate that the consignment has been duly insured and a formal policy will issue in due course. Use of certificates of insurance has become common because of delays that often occur in preparing the actual policy,<sup>166</sup> and the convenience of certificates under floating insurance policies.

Delays occur in the preparation of the policy because they are prepared manually. One of the major attractions of electronic messaging is the speed at which electronic documents can be prepared and transmitted.<sup>167</sup> If electronic policies can be prepared promptly, the use of insurance certificates may diminish. However, electronic certificates of insurance may continue in use for the convenience they offer under floating covers.

## **VI. THE BROKER'S COVER NOTE**

The broker's cover note is merely an advice note sent by a broker to the client (assured) informing the client that an insurance cover has been obtained. The note takes the form of a memorandum of insurance and is usually executed on a duplicate form of instructions.<sup>168</sup>

Insurance brokers are not under a general duty to issue cover notes but, as a matter of prudent business practice, they notify their clients promptly of the

164 For the evidential value of electronic data, see ET Laryea, "The Evidential Status of Electronic Data" [1999] *National Law Review* 3, available at <<http://www.nlr.com.au/main.htm>>; C Nicoll, "Should Computers be Trusted? Hearsay and Authentication with Special Reference to Electronic Commerce" [1999] *JBL* 332; KJ Kotch, note 139 *supra* at 451.

165 See s 30 of the *Marine Insurance Act* 1909; s 24 of the *Marine Insurance Act* 1906.

166 See text around notes 37-8 *supra*.

167 AA Pisciotto and JH Barker, note 7 *supra* at 73; KJ Kotch, note 139 *supra* at 451.

168 CM Schmitthoff, note 26 *supra*, p 490.

terms of the insurance they have arranged for them. In *United Mills Agencies Ltd v R E Harvey, Bray & Co*,<sup>169</sup> for example, the plaintiffs' (assured) contention that the brokers were under a duty to notify them at once of the terms of the insurance that the brokers had obtained for them, and that the brokers had breached that duty, was dismissed:

It was, no doubt, prudent to do so, both to allay the client's anxiety and possibly to enable the client to check the terms of the insurance, but that was very different from saying it was part of the broker's duty.<sup>170</sup>

Assureds who wish to receive prompt notification from their broker must include that in their instructions to, or arrangements with, the broker.

### **Functions of the Broker's Cover Note**

The broker's cover note appears to have no particular function apart from evidencing the fact that the broker has effected an insurance contract on behalf of the assured, and the terms of the contract effected.

In practice, some exporters tender the broker's cover note to their customers as confirmation that an insurance policy has been effected. Unlike the insurance certificate, which may entitle the buyer to demand the issue of a policy, the broker's cover note confers no such rights on the buyer. Its practical value is thus less than that of the insurance certificate. Buyers hesitate to accept cover notes as effective insurance documents. Third parties taking security in a consignment in respect of which a cover note is issued likewise hesitate to accept them as giving adequate protection. In the absence of stipulations to the contrary, a cif buyer is not required to accept the broker's cover note as an effective insurance document.<sup>171</sup>

#### *(i) Can the Functions of the Broker's Cover Note be Performed Electronically?*

A message from a broker advising an assured that an insurance policy has been obtained on the assured's behalf and setting out the terms of the insurance contract will not be difficult to replicate electronically.

#### *(ii) Is It Desirable to Perform the Functions of the Broker's Cover Note Electronically?*

Since brokers send cover notes to their clients for their information, and as a matter of prudent business practice, this author suggests that the practice should

169 [1951] 2 Lloyd's Rep 631. Here the plaintiffs instructed the defendants, insurance brokers, to effect an open marine insurance on their goods, obtaining immediate cover. The brokers reported that the cover was placed and two days later they sent the assured the cover note which did not contain a clause covering the goods while at the packers. That night, part of the goods were destroyed by fire at the packers' warehouse. In an action against the brokers, the plaintiffs contended, inter alia, that the brokers owed a duty to notify them promptly of the terms of cover obtained by the brokers for them and that that duty had been breached. It was held that the brokers were under no such duty, and the plaintiffs' claim was rejected.

170 *Ibid* at 643, per McNair J.

171 CM Schmitthoff, note 26 *supra*, p 501.



continue in electronic systems. It is prudent for brokers to notify their clients promptly of the terms of insurance contracts that they arrange on their clients' behalf. Electronic notification messaging would be quick, labour efficient and cost effective, so there should be no problems with issuing electronic notification messages that are equivalent to paper cover notes.

## VII. THE LETTER OF INSURANCE

Letters of insurance are simply letters addressed by the seller (the assured) to the buyer confirming that the required insurance has been effected over a consignment. The letter of insurance is usually written when there is a delay in the seller's receipt of an actual policy.

### Functions of the Letter of Insurance

Letters of insurance have no established status in law, but they are admissible in evidence against the seller (the assured) in litigation between the buyer and the seller.<sup>172</sup> The commercial value of a letter of insurance depends on the trust reposed in the seller by the buyer or other third parties that may be involved in the transaction.<sup>173</sup> Generally, letters of insurance are not accorded much commercial value and are rarely tendered as the insurance document.

#### *(i) Can the Functions of the Letter of Insurance be Performed Electronically?*

Like the other documents already discussed, the evidential function of the letter of insurance will not be difficult to replicate electronically. An electronic letter of insurance would be admitted in evidence in Australia, the United Kingdom and other jurisdictions that have laws enabling the admission of computer data.<sup>174</sup>

#### *(ii) Is it Desirable to Perform the Functions of the Letter of Insurance Electronically?*

Since, as has been noted, the letter of insurance is used because of the delay in preparing the paper policy, and it is expected that electronic policies would be issued fairly promptly, one could expect the letter of insurance to be redundant in electronic systems.

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<sup>172</sup> *Ibid*, p 502.

<sup>173</sup> *Ibid*.

<sup>174</sup> See, generally, ET Laryea, note 165 *supra*; C Nicoll, note 165 *supra*.

## VIII. CONCLUSION

Legal obstacles exist in Australian maritime law that hinder dematerialisation of marine insurance documents and militate against Australia's bid to create a legal environment conducive to electronic documentation of trade transactions. These obstacles may be addressed by legislation. The legislation may take two forms, through an ancillary law, such as the *Electronic Transactions Act*, that controls electronic transactions generally; or by amending the *Marine Insurance Act* to accommodate electronic documentation. Either method would facilitate electronic insurance documents, but the latter should be preferred. Australia's *Electronic Transactions Act* is a positive move for dematerialised documentation. The *Electronic Transactions Act* is not yet in force and it is not known whether the *Electronic Transactions Act* will apply to the *Marine Insurance Act* 1909 upon coming into force. This author suggests that the *Marine Insurance Act* 1909 should be amended to accommodate modern means of communications, whether or not the *Electronic Transactions Act* will apply to it.

Amending the *Marine Insurance Act* 1909 gives an opportunity to amend two unnecessary, but inhibitive, provisions in the statute: One is s 28 of the *Marine Insurance Act* 1909,<sup>175</sup> which provides that unless marine insurance contracts are embodied in a policy, they are inadmissible in evidence. There is currently no legal or commercial basis for this requirement. Writing may be required for the insurance contract, but there is no need for the provision in its present state. The provision should be amended to accommodate any written or electronic record of an insurance contract that contains the essential information. It would be desirable if the word 'policy' is not used. In this way, an electronic insurance contract message containing all the essential information would be enforceable.

The other provision that needs amendment is s 56(3), which prescribes the mode or manner of assigning marine insurance contracts.<sup>176</sup> The phrase "indorsement thereon" presumes a policy on paper. This is restrictive and can unnecessarily hinder electronic insurance documents. Assignment of marine insurance policies is not only a convenient but also an invaluable feature of the document. The language of s 56(3) should be replaced with a medium-neutral text that accommodates paper as well as electronic media.

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175 The United Kingdom equivalent can be found in s 22 of the *Marine Insurance Act* 1906.

176 The United Kingdom equivalent can be found in s 50(3) of the *Marine Insurance Act* 1906.