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# **Journal of Law and Governance**

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**Professor Anona Armstrong AM  
Editor**

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Victoria University  
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Victoria University's College of Law & Justice, which has sponsored the Journal for the past five years, has completed a memorandum of agreement with the Chinese Northwest University of Law and Political Science. The Law Schools of both Universities will jointly host the Journal under its new name of *Journal of Law and Governance*. The Journal will continue to be listed with EBSCO.

I wish to thank the founding Editors, Professor Ronald Francis, Associate Professor Arthur Tatnall and Dr Kumi Heenetigala and all the Members of the Review Board and those experts in their field who contributed so much to the Journal during its first ten years.

With the change in name, it is timely to refresh the Board. The Journal is seeking a new Editor and inviting new and old Members to join a new Editorial Board. People who are interested in applying for these positions are invited to send an application with a CV to the Editor: Professor Anona Armstrong ([anona.armstrong@vu.edu.au](mailto:anona.armstrong@vu.edu.au)) College of Law and Justice, Victoria University.

All articles published in this journal are subject to a process of blind review by at least two reviewers before selection for publication by the Editorial board.

Submissions are welcome for research articles of between about 5,000 and 10,000 words in any area relevant to the journal's wide coverage. Potential articles should, in the first instance, be sent to: Kumi Heenetigala, Victoria University: [kumi.heenetigala@vu.edu.au](mailto:kumi.heenetigala@vu.edu.au)

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# Journal of Law and Governance

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# Editorial

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## Contributions to the Business of Ethics

Morals, laws and ethics determine what is good or right for human beings and society, what goals people and society ought to pursue, what rules should govern desirable behaviour and what actions they ought to perform. However, they are not the same.

Morals are derived from the conventional social norms and expectations that guide behaviour. People of different ethnic backgrounds hold different views about many social norms, such as marriage, the right way to do business, etc. Morals are often associated with the views or precepts of religions. A religion is the set of beliefs, feelings, dogmas and practices that define the relations between human beings and a sacred or divine entity. Religions promise that current behaviours will lead to future rewards or punishments.

Laws are the written standards, codes and regulations of government organisations by which people are expected to govern themselves and their institutions. Good laws are expected to reflect the moral values and norms of society but not necessarily religious values. Unlike religions laws threaten immediate punishment for non compliance.

Morality and laws differ from ethics. Ethics is based on reasoned arguments leading to principles that can be applied to guide behaviour. Leading ethical theories that are often contrasted are utilitarianism, which promotes taking decisions based on the greatest good for the greatest number, and deontological theories in which motives rather than consequences provide a rationale for decisions. Other theories emphasize human rights, justice and fairness. In each case, ethics provides a philosophical rationale for the justification of ethical principles, decisions, and resolution of problems. Unlike morals and laws, ethics is concerned with human and social conduct that is done knowingly and voluntarily.

Business ethics is not a special set of ethical rules but the application of ethical rules to a business context. If a society's ethical rules say that dishonesty is unethical and immoral, then anyone in business, who is dishonest with employees, customer, creditors, stockholders, or competitors, is acting unethically and immorally. If protecting people from harm is considered to be ethical, then a business firm that recalls a defective product is acting in an ethical way.

Corporate governance is an ethical pursuit because it is about the principles governing the relationships between shareholders, management and other stakeholders. Issues concerning the relationships with society include hostile take-overs, industrial espionage, political contributions, pollution and corporate social responsibility. Within corporations, issue can refer to workplace safety, child labour, bribery and corruption. Many of these governance issues are also the focus of company laws. The difference is that governance decisions are voluntary, and like ethics, based on principles rather than being prescriptive.

The papers in this edition reflect these principles. The first paper by Heenetigala et al reports the results of a study to develop environmental, social and governance (ESG) measures of the corporate social responsibility initiatives of listed mining companies in Australia. ESG measures attempt to recognise how corporate decisions to promote corporate social responsibility add value not only to society but to the bottom line in companies. This is a particular issue for mining companies who are better known for their environmental damage and devastation of local communities. Measurement of ESG is not usually among the skill sets of financiers and managers and this study is seen as an attempt to show how it can be done.

The second paper by Khreish presents a study of the relationships between a bank, the bank staff, and the bank's customers and how good relationships lead to co-creation of value for the bank and its

customers. Trust and mutual benefit were key elements in the relationship. The third paper also examined the actions of large corporations. In this case, the paper addresses the dominance in the food distribution chain of the large supermarkets in Britain. The authors, Hallsworth and Wong argue that such dominance is an ethical issue as it is a form of tyranny that not only limits the choices of the population at large but illustrates the exercise of power beyond what is right.

The final paper by Gery and Zeleznikow provides an argument for the right of prisoners to have access to the Internet. While their rights to safety, dignity, education, privacy, wellbeing and freedom of speech must be satisfied, these must be balanced by the possibility of possible harm that could be caused by misuse. The authors conclude that the competing rights between the rights of the individual, in this case a prisoner, and the rights of the community can be managed by appropriate supervision.

The papers in this issue of the Journal address ethical problems that emerge for large corporations. There is little doubt that the power and influence of large corporations pose distinct ethical problems. Whether corporations will commit to good governance practices such as corporate social responsibility initiatives, respect and responsibilities for relationships between corporations and customers or responses to human rights issues, remains to be seen.

Professor Anona Armstrong AM  
Victoria University

Editor



# An Investigation of Environmental, Social and Governance Measures of Listed Mining Sector Companies in Australia

Kumudini Heenetigala, Chitra De Silva Lokuwaduge  
Anona Armstrong and Amali Ediriweera  
Victoria University, Australia

## Abstract

*The aim of this paper is to determine the extent of ESG reporting and to determine the nature and type of ESG indicators used to report ESG disclosures of listed mining sector companies in Australia. The study was conducted with secondary data collected from integrated or sustainability reports of Top 100 Companies in the Diversified Metal and Mining Sector for the year 2013. A pilot study was conducted with 12 companies which were top end of market capitalisation and compared with total of 30 companies. Findings revealed that majority of the companies had a sustainability report and the trend is towards integrated reporting and majority of the companies at the top end of market capitalisation reported on non-financial disclosures. However, the measures used for environmental and social indicators is an issue because the same indicator was measured differently by companies even in the same industry, whereas, indicators used for governance was of regulatory nature and was comparable. This study showed that there is a clear need for uniform measures to report ESG indicator.*

## Key Word

Environment Social and Governance, Non-financial reporting, ESG measures, GRI Guidelines, Mining Companies

## Introduction

Environmental Social and Governance (ESG) reporting is not a new phenomenon. Even though, ESG has been around for some time, attention to these issues was highlighted as a result of the Global Financial crisis (GFC) (Galbreath 2013). The International Corporate Governance Network (ICGN), United Nations Environmental Program Finance Initiatives (UNEP FI), United Nations Principles of Responsible Investment (UN PRI) and Carbon Disclosure Project (CDP) are some of the international organisations seeking improvement in various types of ESG disclosures and are signatories to initiatives to enhanced ESG disclosures (Chartered Accountants of Canada 2010).

Expectations by investors for corporate disclosures beyond what is disclosed in financial reporting has also driven much attention to disclosures of ESG information by corporates, especially the institutional investors tend to look at longer investment horizons (Chartered Accountants of Canada 2010). Furthermore, advisors such as

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Goldman Sachs, factor ESG information in their investment decisions. They believe that “the indicators they use to assess performance with respect to Environmental, Social and Corporate Governance issues are essential to analyse a company’s ability to sustain competitive advantage over the long term”(Goldman Sachs 2008).

In the past it was beyond the fiduciary responsibility to consider ESG factors in investment decisions by trustees. However, as a result of legal interpretations on the principle of fiduciary responsibility of investment trustees, today it may not be considered a breach of fiduciary responsibility not to consider ESG matters in their investment decisions by the trustees (UNEPF Asset Management Working Group 2009).

According to the study conducted by Chartered Accountant of Canada (2010) interviewees indicated that they use range of ESG information. Governance was the most standardized and available category, environmental disclosures were mainly due to pressure from regulators and market participants as a result of climate change and are becoming more available and standardized and social information was the least standardized category especially in related to provision of relevant metrics. However, disclosure of non-financial information can be complex sometimes hard to understand and implement. A key feature of non-financial information is that, it can be specific to the operation of each particular company which can result in disclosures varying from company to company. Hence, representation could be inconsistent across companies. Apart from the above company's may use different definitions and labels to disclose non-financial information that may not be quantifiable or monetized which hamper comparability (Yen 2004). Therefore, aim of this paper is to determine the extent of ESG reporting and the nature and type of ESG indicators used to report ESG disclosures.

## What is Environmental Social and Governance?

The concept of ESG is described using different terminology in various context such as risk valuation, socially responsible investment and corporate socially responsibility (Galbreath 2013). It is a key indicator of risk management, management competence and non-financial performance (Galbreath cited in Lundstrom and Svensson 2014). Lundstrom and Svensson (2014) states environmental, social and governance refers to three broad dimensions of corporate behaviour. Capital markets use Environmental, social and governance as a generic term to evaluate corporate behaviour and to determine the future financial performance of companies (Financial Times 2014). Accordingly, "ESG factors are the performance metrics used to evaluate a company's performance in different dimensions". These factors are used to evaluate the sustainability and ethical impact of a corporation (Lundstrom and Svensson 2014). Financial Times (2014) reports ESG factors as a subset of non-financial performance indicators which include sustainable, ethical and corporate governance issues such as managing the company's carbon footprint and ensuring there are systems in place to ensure accountability. ESG covers many issues related to environment (Carbon emissions, water use and pollution, climate change and energy), social responsibility (human rights, gender equality, health and safety, fair trade principles, product safety, minorities) and corporate governance (board independence, corruption and bribery, reporting and disclosure, shareholder protection) (Galbreath 2013).

According to UNEP FI and Mercer (2007) the term ESG "emerged globally to describe the environmental, Social and corporate governance issues that investors are considering in the context of corporate behaviour. They states that there is no definitive list of ESG issues exists, but they typically display one or more of the following characteristics:

- Issues that have traditionally been considered non-financial or not material
- A medium or long-term time horizon
- Qualitative objects that are not readily quantifiable in monetary terms
- Externalities (costs borne by other firms or by society at large) not well captured by market mechanisms
- A changing regulatory or policy framework
- Patterns arising throughout a company's supply chain (and therefore susceptible to unknown risks)
- A public-concern focus

## Why are ESG indicators important?

ESG is considered important to the investment community, because ESG issues are seen as financially material to an investment portfolio (O'Dwyer, Owen et al. 2011). Yen (2004) states that information provided by accounting and financial reporting data shows a declining ability to report information that is useful in assessing firm value and management performance. Intangible assets accounts for significant proportion of a value of a company and are becoming important in the current business environment, especially due to the long-term perspective taken by investors (Bassen and Kovacs 2008), but traditional accounting methods fail to capture their value (Kossovsky, cited in Bassen and Kovacs 2008).

Another important consideration for the importance of ESG indicators are that according to the efficient market theory, all known information is reflected in share prices and new information also has the potential to impact the value of shares. Even though extra-financial information may not affect the price during the normal operation of the business, in case of existence of reputational or monetarily quantifiable litigation risks, investment professionals tend to turn their attention to information that can have an impact. As a result, companies tend to make an effort to provide disclosures of extra-financial information that are not captured in the financial data through the corporate social responsibility, environmental, sustainability and corporate governance reports (Bassen and Kovacs 2008).

The Chartered Accountant of Canada (2010) states, according to the view of British Columbia Investment Corporation, ESG issues directly impact long-term investment returns. A similar view was reported by companies and financial institutions participated at a workshop that was conducted by UNEP FI and WBCSD. The participants in the workshops argued that "ESG factors can have long-term consequences on a company's financial performance, either for better or for worse. They considered that ESG factors are at the core of business. However, the depth and breadth of ESG factors are not fully valued by investors and company management. Companies believe that mainstream asset managers currently under or overvalue the long-term intrinsic value of companies because they fail to routinely integrate ESG factors into their investment analysis and decision-making" (UNEP FI and WBCSD 2010).

## Motivation for ESG Disclosures

Deegan (2002) refers to motivation for undertaking voluntarily reporting on social and environmental activities as desire to comply with legal requirements, "economic rationality" consideration, a belief in an accountability or responsibility report, desire to comply with borrowing requirements, to comply with community expectations, as a result of certain threats to the organisation's legitimacy, to manage particular stakeholder groups, to attract investment funds, to comply with industry requirements or particular codes of conduct, to forestall efforts to introduce more onerous disclosure regulations and to win particular reporting awards. He states that it may be unrealistic to state that one motivation dominates the others, but many of these motivations may be interrelated.

Furthermore, a study conducted by Chartered Accountants of Canada (2010) reported on five main reasons for use of ESG information by investors. They were to inform risk and return potential, evaluate management quality, engage with companies and inform proxy voting, develop customised investment products or portfolios and assess asset managers. This study agreed with the February 2009 issue of The McKinsey Quarterly which states 80% of CFO's (more Europeans than North Americans) believe that ESG information serves as a proxy for the quality of a company's management. Accordingly, Corporate Knights (2010) reports, Goldman Sachs looks for managements' responses to ESG performance in five broad categories when assessing quality of

management. These are corporate governance, leadership, employee recruitment and retention, stakeholder relationships and environmental management.

## Theories of ESG

There are many theories that explain company's motivation to disclose ESG information (Jenkins HM 2004). They relate to regulation and standards, legitimacy and stakeholders. Therefore, in this study we draw the attention to social contract theory, legitimacy theory and stakeholder theory.

### Social Contract Theory

Social contract theory sees society as a series of contracts between members of society and society itself (Gray, Owen & Adams 1996). There is a school of thought which sees social responsibility as a contractual obligation the firm owes to society (Donaldson 1983). If the society is not satisfied with the way the organisation operates, the society will revoke the contract with the organisation. This might be evidenced through reduction or eliminating consumer demand, suppliers of factors eliminating the supply of labour or financial capital to the business, lobbying for increased taxes, fines or laws to prohibit those actions that do not conform with the expectations of the community (Deegan 2002).

### Legitimacy Theory

Legitimacy theory is based upon the notion that there is a social contract between the society and an organisation. A firm receives permission to operate from the society and is ultimately accountable to the society for how it operates and what it does, because society provides corporations the authority to own and use natural resources and to hire employees (Deegan 2004). If society feels that an organisation has breached its side of the social contract, then the survival of the organisation will be threatened. Thus legitimacy is considered to be a resource which an organisation is dependent upon for survival (Dowling and Pfeffer 1975). Proponents of legitimacy theory refers to the society and compliance (Gray, Kouhy et al. 1995).

Matthews (1993) defines legitimacy theory as follows: "Organisations seek to establish congruence between the social values associated with or implied by their activities and the norms of acceptable behaviour in the larger social system in which they are a part. In so far as these two value systems are congruent we can speak of organisational legitimacy. When an actual or potential disparity exists between the two value systems there will exist a threat to organisational legitimacy". Accordingly, Lindblom (1994) states that an organisation has legitimacy, when "an entity's value system is congruent with the value system of the larger social system of which the entity is a part". If society feels that an entity has breached its side of the social contract, then the entity's legitimacy is under threat. Events such as the Alaskan oil spill in Valdez in 1989, for example, may have a detrimental impact on society's perception of both an organisation and the industry to which it belongs (Patten 1992).

The legitimacy theory emphasizes that an organization must consider the rights of the public at large, not merely the rights of the investors. Failure to comply with societal expectations may result in sanctions being imposed in the form of restrictions on firms operations, resources and demand for its products. Social and environmental researchers particularly tend to utilize legitimacy theory, to explain why corporate management undertake certain actions such as disclosing particular items of social and environmental information. It does not provide prescription about what management ought or should do and is a positive theory which seeks to explain or predict particular managerial activities (Deegan 2014).

Much empirical research has used legitimacy theory to study social and environmental reporting, and proposes a relationship between corporate disclosures and community expectations (Deegan 2004) and according to Tilling (2004) legitimacy theory provides a powerful mechanism for understanding

voluntary social and environmental disclosures made by corporations. According to Deegan (2002) due to the desire to legitimise an organisations operations, legitimacy theory has been used as the theoretical basis for the environmental social disclosures. Furthermore, Lindblom (1994) and Patten (2005) has also suggested practice of environmental disclosures as a tool of legitimisation. Therefore, in relation to legitimacy theory, a strategy used for legitimacy is disclosure.

## **Stakeholder theory**

ESG disclosures made by the companies are regarded as issues important to a wide range of stakeholders. They cover issues that are more than economic concern and also can impact economic concerns (Gray, Kouhy et al. 1995; Jenkins HM 2004). Therefore, a theory that provides similar insights to legitimacy theory is stakeholder theory. A stakeholder is any group of individuals who can affect or is affected by the activities of the firm, in achieving the objectives of the firm (Freeman 1984). Apart from the shareholders, a company has responsibility to suppliers, customers, employees, the government and the community, which means under the social responsibility model they must be accountable to the other stakeholders (Thorne, Ferrell et al. 2011). Accordingly, Shareholder wealth maximization way of thinking is changing to stakeholder wealth maximization, where company value management system is based not only on economic profit maximization, but also on ESG maximization. ESG maximization can be reached only if stakeholder engagement process is implemented in the management system of the company (Martirosyan and Vashakmadze 2013).

The Study by John Evans and Peiris (2010) reported, a significant positive relationship between broader ESG factors and firm valuations indicating that higher rated companies are associated with higher earnings multiples, suggesting that ESG factors impact corporate financial performance, therefore, relevant for consideration of investment decision-makers. This shows that in order to be successful, companies not only have to be responsible to shareholders, but also rely on management of a variety of stakeholders who have a stake in the social and financial performance of the firm (Donaldson and Preston 1995).

Gray, Owen et al. (1996) states that “the more important the stakeholder to the organization, the more effort will be exerted in managing the relationship. Information is a major element that can be employed by the organization to manage (or manipulate) the stakeholder in order to gain their support and approval, or to distract their opposition and disapproval”. Accordingly, manager’s will have an incentive to disclose information on various programs and initiatives to those stakeholders who have a particular interest in the organisation to indicate that they are conforming to stakeholder expectations (Deegan 2002).

However, Gray, Kouhy et al. (1995) states that it is incorrect to treat legitimacy theory and stakeholder theory as two distinct theories. They argue that there is an overlap between legitimacy theory and stakeholder theory.

## **What are the ESG Issues**

Importance of ESG has brought the attention of academics, analysts and regulators to define areas that are topical for reporting of ESG. As a result, they have identified issues related to ESG that are important to companies and investors in their decision-making. European Federation of Financial Analysts Societies (2009) identified nine topical areas of ESG issues that apply to all sectors and industries which are energy efficiency; greenhouse gas (GHG) emissions; staff turnover; training & qualification; maturity of workforce; absenteeism rate; litigation risks; corruption and revenues from new products. Global Reporting Initiative (GRI) guidelines require companies to report on specific standard disclosures which are economic, environmental and social. Social category is further divided into four sub categories which are labour practices and decent work, human rights, society and product responsibility (Global Reporting Initiative 2013).

Furthermore, a study conducted by Chartered Accountants of Canada (2010) identified number of issues related to oil and gas industry. Environmental issues were related to climate change, renewable energy, water, pollutant releases, biodiversity, site remediation and decommissioning, land use, chemical regulations, resource use and efficiency, vehicle fuels and engine technologies and market for environmental services. Social issues included labour, stakeholder relations, operations in emerging markets, pipeline safety, energy security, anti-corruption, human rights.

Bonime-Blanc (2014) provides a snapshot of ESG issues in Table 1. She considers a more inclusive view for governance and includes legal and regulatory issues.

**Table 1: Environmental, Social and Governance Issues**

<b>Sampling of environmental, social and governance (ESG) issues</b>		
<b>Environmental</b>	<b>Social</b>	<b>Governance</b>
Climate Change issues	Human rights	Anti-corruption
Sustainability	Labour rights	Anti-money laundering
Environmental laws & regulations	Child labour	Anti-fraud
Toxic waste laws & regulations	Health & safety	Regulatory compliance
	Discrimination, Harassment & Bullying	Conflict of interest
		Corporate governance
Andrea Bonime-Blanc 2014		

**Benefits of ESG disclosures:**

ESG create value for companies through increase in sales, decrease in costs or reduced risks as well as ESG programs that are best, creates financial values for a company in ways the market already assesses them (Bonini, Koller et al. 2009). According to Owen (2007) “there is a strong business case to implement sustainable management practices in relation to environmental social and governance issues”, because firms can do well while doing good, which means that sustainability can increase profits and present opportunities for value creation and have an impact on company’s revenue. According to case studies conducted by Bonini, Koller et al. (2009) environmental, Social and governance programs can also support growth, improve returns on capital, reduce risk or improve quality of management.

According to McKinsey Global Survey Results“ the most widely known way that environmental, social and governance programs create value is by enhancing the reputation of companies and their stakeholders’ attitudes about their tangible actions” (Bonini, Koller et al. 2009). They also state that, financial valuable objectives such as better regulatory settlements, price premiums, increased sales, reduced risk of boycott and higher retention of talents partly depends on the reputation of the company for ESG programs that meet the needs of the community and those that go beyond regulatory requirements and industry norms.

**Issues related to ESG disclosures**

The study conducted by Chartered Accountants of Canada (2010) reported various issues related to ESG disclosures. They reported that companies used various different units to report ESG

performance and also provided ESG data in the form of ratios, charts or other graphical forms, instead of using absolute numeric values. Another important issue was the lack of standardized, comparable, sector based metrics that are updated regularly. Even though GRI's sustainability reporting guidelines and accompanying protocols have helped in standardization of ESG reporting, companies tend to report GRI compliance in different degrees. To be comparable ESG information needs to be transformed into consistent units. Ability to obtain data is important, because asset managers and ESG research providers can only assess the companies that have the ability to obtain data. Companies that have adopted ESG disclosures and management practices, benefit from access to larger and growing pool of investment capital. Timeliness is an issue for integration of ESG information with financial and operational data for investors. Some companies do not publish the sustainability report at the same time as annual reports and some may publish every two years.

Apart from the above, an issue that is considered crucial when disclosing ESG information is materiality (Chartered Accountants of Canada 2010). Materiality of ESG issues can differ substantially between industries. For example resource intensive industries such as mining have a different exposure to environmental, social and governance factors than for the commercial real-estate sector (Owen 2007). Accordingly, GRI worked with a number of stakeholders to identify the most material ESG issues in different sectors, which resulted in G4 Sustainability Reporting Guidelines (Global Reporting Initiative 2013). However, where companies and investors are able to agree on a materiality of a ESG factor, the management of that factor is often not explained by companies in comparable terms, for example, an explanation of why an issue is more material now than before or how one company manages ESG factors better than its competitors and the use of comparative language (UNEP FI and WBCSD 2010).

Another important issue is the measurement. Unlike financial data, there are no generally accepted measures for ESG data. Studies report differing measures used to report ESG information (Vintro and Comajuncosa 2010).

## **ESG Measurement**

Peter Drucker once said "What you can't measure, you cannot manage. What you can't manage, you cannot change." (Blanc, Cozic et al. 2013). Unless you are able to measure you do not know if something is getting better or worse. You do not know if you are successful unless it is defined and tracked.

Bonini, Koller et al. (2009) states that even though executives and investors believe that the impact of ESG programs are long-term and indirect, therefore measurement is impossible, their research suggest otherwise. They states that impact of environmental programs can be measured in the short-term using traditional business metrics such as cost efficiency.

The study conducted by Chartered Accountants of Canada (2010) reported on the performance indicators used by the companies. They used relevant performance indicators and measures for each issue and in some cases they used their own industry wide performance indicators and measures. An example of performance indicators used for labour and employee relations were percentage of employee turnover, percentage of workforce unionized, the ratio of lowest wage to minimum wage and ratio of jobs offered to jobs accepted. Interviewees also stated that assessments are usually made on a sector by sector basis in order to identify the best and worst class of companies. A study conducted by Bonini, Koller et al. (2009) reported the impact of Environmental, Social and Governance work using social responsibility dash-board. The dash-board includes metrics for workplace engagement, ethics and integrity; supplier diversity; environmental impact; employee-community involvement; stakeholders' perspective on social responsibility; and community giving. These metrics track the company's progress in meeting its social mission and helping people live a healthier living. The dash-board is used by the board and the senior executives to measure the performance and as a guide for discussions on future priorities, programs, resources and results.

Bonini, Koller et al. (2009) also state that progress has been made by companies in relation to tracking operational metrics such as tons of carbon emitted, or social indicators for example number of students enrolled in a program. However, it is difficult to link the metrics and indicators to real financial impact. They also state that there are “others who also insist the effect of such programs are either too direct to value or too deeply embedded in the core business to be measured meaningfully”.

Daniel (2012) reported on a case study conducted with Interserve, they held workshops to understand what data are practical to collect. Key questions were on how to address quantifiable and qualitative information including whether to score, monetise or explain information so that meaningful insight accompanies the figures. They also stated that some are not collected in a structured way across business, while other data are more reliable. Furthermore, Spiers from interserve reported “ We want to use measurement as a helpful decision-making tool but not as the be all and end all what we do. It’s just a way of looking at things. Measurement and data are certainly important but not the reason we are doing this”.

Hřebíček, Soukopová et al. (2011) also state that to be comparable across all companies and also useful for mainstream investment analysis, ESG data needs to be transformed into consistent units and is presented in a balanced and a coherent manner for ESG indicators.

## **Different ESG Guidelines**

Currently, there are no uniform criteria that could be applied to measure ESG indicators. This is addressed by various organisations. Dow Jones Sustainability Index, KLD-Nasdaq Social Index, Domino 400 Social Index, FTSE4Good Index and Global Reporting Initiative (GRI) are some of the bodies that have proposed various measures for CSR indicators. The indicators developed by these organisations were commonly used as reference for Stock Market investments (Vintro and Comajuncosa 2010). However, widely used framework for sustainability reporting is the framework developed by GRI. It is a framework that can be applied to organisations in all sectors, sizes and regions (Hřebíček, Soukopová et al. 2011). GRI also has developed specific standard disclosures for Mining and Metal sector. In March 2011, they released a more updated version G3.1. The framework included Reporting Guidelines and sets out the principles and indicators that could measure and report on economic, environmental and social performance (Global Reporting Initiative 2013). Even though GRI has been a useful tool in improving the standardisation of reporting in many sectors, compliance with G3.1 differs between companies as well as due to use of different interpretations of the tools applied for standards for their reporting (Hřebíček, Soukopová et al. 2011). In 2013, the updated version of GRI guidelines G4 Sustainability Reporting Guidelines and G4 Sector Disclosures for mining and metal sector companies wishing to use as guidelines was launched (Global Reporting Initiative 2013).

## **Mining Sector in Australia**

Mining sector contribution to Australian economy is relatively high. Mining boom has had a significant impact on the living standards of Australians. Mining industry contributes to nearly 6% of Australia’s GDP and more than 35% of receipts from export. It’s contribution to national employment was about 1.3% and 20% of market capitalisation was contributed to mining comprising of nearly one-third were listed companies (Galbreath 2013). However, the negative impacts of mining operations have brought the attention of institutional investors to focus on ESG issues.

Mining industry is associated with many challenges related to economic, environmental and social issues. Even though it has economic benefits related to employment and wealth creation, on the other hand it has variety of environmental impacts, including depletion of non-renewable resources, disturbance of the landscape and above-average threats for health and safety of workers and citizens (Azapagic 2004). Depletion of mining resources as a result of mining is a major concern for sustainability development. Mining is regarded as one of the most environmentally and socially



disruptive activities undertaken by business. According to Warhurst A. (2001) incidents related to environmental disasters & human rights are related to mining or petroleum industries. Maintaining a licence to operate is a constant challenge for mining sector companies. For example resistance by social organisations, impact on the agriculture, pollution, health impacts and lack of community engagement (Jenkins and Yakovleva 2006).

Furthermore, Jenkins HM (2004) reports that CSR in the mining industry is about balancing the diverse demands of communities and protecting the environment whilst making profit. Therefore, from the perspective of mining sector, CSR is about responding to the shareholders as well as stakeholders including employees, customers, affected communities and the general public on issues such as human rights, employee welfare and climate change (Hamann R. 2003). Azapagic (2004) has identified many different stakeholder related to mining sector as industry stakeholders, employees, trade unions, contractors, suppliers, customers, shareholders, creditors, insurers, local communities, local authorities, government and NGO's.

## **Methodology**

### **Sample and Data Collection**

As discussed above, companies in the mining sector has a strong impact on the environmental, social and governance issues, due to the nature of activities undertaken by business. Many environmental disasters or human rights incidents involving mining have contributed to debates about social and environmental responsibility (Jenkins and Yakovleva 2006). To investigate the extent of disclosure of non-financial information and the indicators used to measure non-financial information of mining companies in Australia, the sample was selected from Top 100 companies in the Diversified Metal and Mining sector companies listed on the Australian Securities Exchange (ASX). The pilot study was conducted with 12 top tier companies in the metal & mining sector based on the market capitalization and the final study was conducted with 30 companies.

This study was conducted from secondary data collected from annual reports or sustainability reports for year 2013. Annual reports are considered to be more publicised and visible document and provide important social and environmental information and are produced more regularly by companies (Tilt 1994; Neu, Warsame et al. 1998).

### **Results and Analysis**

This paper reports the results from the pilot study which was conducted with the top 12 companies and compares with the final sample of 30 companies. Results of the study reported the extent of ESG reporting by the mining companies in Australia and the measures used for indicators.

#### **Demographics**

First of all the demographics of the sample was examined for the pilot study and the final sample. Demographic of the pilot study reported majority (33.3%) had their headquarters in Melbourne, 16% in Perth, 8.3% in NSW, Brisbane and Sydney and 25% had their headquarters outside Australia, whereas the final sample showed majority (46.7%) had their headquarters in Perth, 20% in Melbourne, 20% in NSW, Brisbane and Sydney and 13.3% had their headquarters outside Australia.

Employees were compared for both samples. Majority (75%) of the companies in the pilot study had less than 10,000 employees and one company had more than 50000 employees in the pilot study, whereas in the final sample also majority (53%) of the companies had less than 10,000 employees, 4 reported between 10000 and 50000 and one company had more than 50000 employees. However, 9 companies did not report on the total number of employees.

Pilot study reported 50% (6) had less than 1000 US \$ million net sales and 16.7% (2) had more than US \$m 20,000 net sales, whereas in the final sample 73% (22) had less than 1000 US \$ million net sales and 6.7% (2) had more than US \$m 20,000 net sales.

## Reporting

Investigation of the reporting practices of the pilot study showed 83.3% (10) had a separate sustainability report and 16.7% (2) had integrated reports. However, the final study showed that 43.3% (13) had a separate sustainability report and 40% (12) had integrated reports. Sixteen Percent (5) did not have either.

Types of operations reported in the pilot study were extractive 91.7% (11) and recycling 8.3% (1). Final study showed that the types of operations reported were extractive 96.7% (29) and recycling 3.3% (1). Size of the operational site was reported by 50% of the companies in the pilot study and was two reported the size of the operational site in Km<sup>2</sup> and four reported in Hectares, whereas 23.3% (7) the reported Size of the operational site in the final study and this was reported by three in Km<sup>2</sup> and four reported in Hectares.

## Environmental indicators

Environmental indicators refer to disclosures relating to the impact of businesses interaction with the natural environment, environmental protection as well as use of resources.

This study captured the use of renewable and non-renewable material. In the pilot study two companies (16%) reported on renewable and three (24.9%) on non-renewable material. Final Study reported three companies (9.9%) on non-renewable and two (6.6) reported on renewable material. In both studies measures reported varied from Million tons, Kilo Tons to other and the value of the total material used were in either US\$ or AUD\$.

All (12) companies in the pilot study reported on fuel consumption for renewable and non-renewable sources. In the final study, fuel consumption for non-renewable sources was reported by 43.3% (13) and renewable sources was reported by 23.4% (7). The indicators used were Giga joules, Tera joules and Peta Joules by both studies. Total fuel consumption in the pilot study was 91.7% (11) whereas the final study reported 66.6% (20). Total fuel sold was reported in joules or MWh in both studies. They also reported on volume of water withdrawn. The pilot study reported surface water 58.3% (7), ground water 66.6% (8), rain water 16.7% (2), Municipal water supplies 33.3% (4), Sea water 41.7% (5) and recycled and reused water 58.3% (7). Total study reported surface water (36.7%,(11)), ground water (33.3% (10), rain water(6.7% (2), Municipal water supplies (16.6%(5), Sea water (16.6%(5) and recycled and reused water (26.7% (8). Measures used varied from kilo litres, Mega litres and Giga litres.

All companies except one in the pilot study reported on biodiversity value characterised by attribute of high biodiversity value areas outside protected areas. Pilot study reported 66.7% (8) on terrestrial, 8.3% (1) reported freshwater and 16.7% (2) reported both terrestrial and freshwater. Eighty percent (24) of the total sample reported on terrestrial, 3.3% (1) reported on freshwater and 13.3% (4) reported both terrestrial and freshwater.

The number of total sites that were assessed under the criteria needing Biodiversity Management Plan in the pilot study was reported in numbers 33.3% (4) and Hectares 16.7% (2). The total sample reported the number of total sites that were assessed under the criteria needing Biodiversity Management Plan in numbers by 20% (6) and in Hectares by 7% (2).

According to the GRI guidelines (G4) reporting on GHG emissions is based on the reporting requirement of the World Resource Institute (WRI) and World Business Council for Sustainable

Development (WBCSD) GHG Protocol Corporate Accounting and Reporting Standards (GHG Protocol). GHG Protocol classifies GHG emissions into Scope 1, Scope 2 and Scope 3. Scope 1, reports on direct GHG emissions and is related to operations that are owned and controlled by the organisation. All the companies in the pilot study reported on direct GHG emissions. However, 50% (6) reported in Tonnes, 8.3% (1) in Kilo Tonnes and 41.7% (5) in Mega Tonnes. Whereas only 76% of the companies in the total sample reported on direct GHG emissions and 53% (16) reported in Tonnes, 3.3% (1) in Kilo Tonnes and 20% (6) in Mega Tonnes and 23% (7) did not report.

Scope 2 reports on energy indirect GHG emissions resulting from the generation of Purchased or acquired electricity. Indirect GHG emissions were reported by 75% (9) of companies in the pilot study and 41.7% (9) reported in Tonnes and 33.3% (4) reported in Mega tonnes. In the total sample, indirect GHG emissions were reported by 66.7% (20) companies. Fifty percent (15) reported in Tonnes and 16.7 (5) reported in Mega tonnes.

None of the companies in the pilot study reported on Scope 3, emissions that are indirect and occurs outside the organization including both upstream and down-stream emissions, whereas, 16.7% (5) of the companies in the total sample have reported on Scope 3 emissions. GHG emission reductions achieved as a direct result of initiatives to reduce emissions were reported as a quantity or as percentage by 83.7% (10) of companies in the pilot study whereas only 36.7% (11) reported in the total sample in quantity or as percentage.

Four companies (33.3%) from the pilot study reported on Ozon depleting substances, one (8.3%) reported in Kilo Grams and three (25%) reported in Tonnes and 13.3% (4) of companies in the final sample reported on Ozon depleting substances. One (3.3%) reported in Kilo Grams and three (10%) reported in Tonnes.

Total volume of planned and unplanned water discharges were reported by seven (58.3%) companies in the pilot study and one (8.3%) reported in Kilo litres, five (41.7%) in mega litres and one (8.3%) in Gigs litres. Whereas total volume of planned and unplanned water discharges were reported by eight (26.6%) companies in the total sample and one (3.3%) reported in Kilo litres, six (20%) in mega litres and one (3.3%) in Giga litres.

Total weight of hazardous non-hazardous waste was reported by 75% of companies in the pilot study in tonnes, kilo tonnes, million tonnes and tonnes and litres. Whereas only 36.7% of the companies in the total sample reported on hazardous non-hazardous waste also in tonnes, kilo tonnes, million tonnes and tonnes and litres.

Only two (16.7%) companies in the Pilot study reported on spills and it was in litres. Final study reported three (10%) and all reported in litres.

### **Social Indicators**

Social indicators focus on wider responsibilities of business to the communities in which it operates, employees and to society in general (Azapagic and Perdan 2000). Social issues reported by companies were mainly on employees, human rights, health & safety, gender and employment of indigenous people.

Sixty seven percent (8) of the companies pilot study reported on total number of employees either as a percentage 16.7% (2) or a number 25% (3) or both 25% (3). Thirty three percent (4) reported by Gender, Eight percent (1) reported by Gender & age, eight percent (1) reported by Gender & region, eight percent (1) reported by Gender region & product and eight percent (1) reported by age, region & product. Sixty seven percent (20) of companies in the total sample also reported on total number of employees either as a percentage (43.3%) or a number (13.3%) or both (10%). They also reported by

gender (53.3%), Gender & age (3.3%), Gender & region (3.3%), Gender region & product (3.3%) and age, region & product (3.3%).

Employee turnover was reported by 24.9% of the companies by region (8.3%), gender & age (8.3%) and gender, age & region (8.3%) in the pilot study, whereas employee turnover was only reported by 9.9% (3) one by region (3.3%), one by gender & age (3.3%) and one by gender, age & region (3.3%). It was reported as a percentage and or as a number.

Health and Safety was reported in lost days, injury rate. Eighty three percent (10) of companies in the pilot study that reported on lost days and injury rate used million hrs (41.7%), total hrs (16.7%), per 200,000hrs (16.7%) and other (8.3%). In the total sample sixty Percent (21) of the companies reported on lost days and Fifty percent (15) of the companies reported on injury rate used million hrs, total hrs, per 200,000hrs and other.

Five (41.7%) companies reported on fatalities in the pilot study and five (16.6%) companies reported on fatalities in the total sample.

Training provided to employees in the pilot study was reported by 16.6% (2) of companies, whereas in the total sample 13.3% (4). Training on human rights policies were reported by 33.3% (4) of companies in the pilot study and 13.3% (4) of the companies reported in the total sample. In both samples, one reported the number of hours used for training and three reported as per employees.

Employment of indigenous people were reported by five (41.7%) of the companies in the pilot study. Two (16.7%) reported as a percentage, two (16.7%) reported as per numbers and one (8.3%) reported in both. Employment of indigenous people in the total sample was reported by six (20%) of the companies in the pilot study. Three (10%) reported as a percentage, two (6.7%) reported as per numbers and one (3.3%) reported in both.

Number of operations with implemented local community engagement was reported by 58.3% (7) of companies in the pilot study, whereas only 33.3% (10) was reported in the total sample.

### Governance indicators

Corporate governance in Australia is based on a more flexible approach which is a principle-based framework. The recommendations are not mandatory and is not intended to provide a reference point for companies about their corporate governance structures and practices. If a listed company considers that a recommendation is inappropriate to its particular circumstances, it has the flexibility not to adopt it - a flexibility tempered by the requirement to explain why – the “if not, why not” approach.

This study also investigated the governance practices of the sample of 30 companies, which is reported in the table 1. All the 30 companies reported on the structure of the boards relating to number of executive directors, non-executives, independent directors, board committees, females in the board. Tenure of the board was reported by 11 companies in the pilot study and 28 in the final sample. Number of committees responsible for decision-making on economic, environmental and social impacts was reported by all the companies in the pilot study and 28 companies reported in the final sample All the companies in the pilot study reported on the frequency of the director board’s review of economic, environmental and social impacts, risks and opportunities, whereas 96.7% (29) reported in the final sample.

**Table 1: Governance practices**

Governance Indicator	Pilot study (12)	Final Sample (30)
Board Structure	12	30
No of Executive Directors	12	30

No of Non-executive Directors	12	30
No of Independent Directors	12	30
No of Board Committees	12	30
No of companies with females on the board	12	30
Tenure on the board of directors	11	28
No of committees responsible for decision-making on economic, environmental and social impacts	12	28
the frequency of the director board's review of economic, environmental and social impacts, risks and opportunities	12	29

## Discussion

The main purpose of indicators is to provide information for decision-making regarding sustainability of companies' actions. Indicators also help to identify if the decision-makers have addressed the needs of multiple stakeholders that companies are responsible for. This study reported stakeholders as shareholders, employees and contractors, local communities, suppliers, government and regulators, industry, NGOs, education and research, media, civil society, customers and investment community. Comparable indicators also help those stakeholders in their decision-making whether they share same interest, different or conflicting interest. The companies in the sample mainly reported on indicators that were regulated, confirming the legitimacy theory. The pilot study which was conducted with companies in the top end of the sample were more compliant with the ESG reporting compared than when compared to the whole sample.

Analysis showed that regulatory compliance was a motivation for environmental and social reporting, for example 76.6% the companies reported on Direct Green House Gas Emissions, whereas all the companies in the top end reported in the pilot study reported. Eighty three percent in the pilot study reported on injury rates and only 50 % reported in whole sample, whereas compliance for corporate governance best practices were mainly the result of compliance with ASX Corporate Governance Principles and were reported by all the companies. Since the compliance with corporate governance code was a requirement for all companies listed on the ASX, all companies reported on the board structure. However, none of the companies reported on corruption, bribery, money laundering or fraud. This makes it unclear to the stakeholders, whether such activities were committed or if committed it has not been reported.

Most important issue for mining and mineral industries is the depletion of non-renewable resources, environmental impacts of air emissions, waste generation, disturbance to natural habitats resulting in loss of biodiversity (Azapagic 2004). This study also addressed the environmental reporting by mining companies related to non-renewable resources, GHG emissions, management of bio-diversity, ozone depleting substance, hazardous and non-hazardous waste, water usage and spills. However, except for direct GHG emissions, percentage of reporting was rather low.

Azapagic (2004) consider social issues from a micro and macro perspectives. Micro is referred to in the perspective of employees and macro concerns the society at large. Issues related to employees were the most reported in this study. Health and safety is an issue specific to mining industry. Accidents in the mining industry, poses above average risk to employees, resulting in high fatalities, were also reported by over forty one percent of the companies in the sample. Mining employees are also exposed to health concerns related to hostile working environment, however companies did not report on such data. Therefore it can be presumed that in relation to employees too many companies follow an implicit rule of reporting the least, but required information only. For instance, as explained above, injury rates and employee number or percentage by gender were the most reported categories.

Training related to employee education and skills development is an important issue for many companies due to the need for attracting high quality employees because of the negative image for the mining industry, however training related information was only reported by thirty thirteen percent of

companies. Many companies tend to mention that they implement such programs but hesitate to report those in details.

Gender disparity is an issue for mining industry, which is traditionally male dominated. This explains the limited disclosures on gender related information in this study to total number of employees, employee turnover and females in senior management. However, more than fifty percent of the sample has mentioned the diversity based on gender and all the companies reported on females in the director board, since diversity is a requirement to comply with corporate governance code for all companies listed on the ASX.

Protection of human rights is an issue that is considered important for mining companies. Therefore, training on human rights policies and reporting on various human rights issues is considered important. Only thirteen percent of the companies in this study considered training on Human Rights policies important as a result conducted training programs. Even though the other companies in the sample did not report facts and figures, they also have mentioned that they are conducting programs on training on Human Rights. Indigenous employment is related to diversity policies of the federal and state legislation covering workplace diversity and equal opportunity in Australia.

Social issues related to society at large were reported mainly on health and safety. Mining activities also posed health and safety risk for the local communities related to extraction activities or mineral products. Thirty three percent of the sample has recorded explicitly a number or a percentage of operations they have implemented with local community engagements, under the heading of society. However, some companies in the sample only declared whether they have such agreement or not.

In Australia corporate governance practices are based on ASX principles which are voluntary. However it is aimed to improve governance, accountability and transparency. ESG reporting is also influenced by global institutions such as GRI, UN Global Compact and the carbon Disclosure Project. Principle 3.1 of ASX corporate governance recognise the legal and ethical obligation of the company, however the recommended practices related to E & S are treated with minimal consideration among the companies in the sample, which poses the question whether in reporting E & S disclosures companies face difficulties related to measurement or related to cost benefits issues etc.

Results reported measurements used for indicators. Measures used for environmental and social indicators is an issue, because the same indicator was measured differently by companies even in the same industry, for example, GHG emissions were reported in Tonnes, Kilo Tonnes and Mega Tonnes; value of renewable and non-renewable material was reported in AUD or USD; water withdrawn was reported in Mega litres and Giga litres; training on human rights policies were reported in number of hours, percentages or as per employee. The above findings show that comparability even among the same sectors is difficult for the purpose of decision-making by investors and other stakeholders.

These findings suggest that extent of reporting is either driven by regulators or to gain a reputation for social responsibility for capital markets and media. Therefore it is questionable if all ESG information is being reported, especially related to negative impact.

This research shows that all the companies reported on non- financial reporting, however extent of reporting was different. The fact that majority had a sustainability report or an integrated report confirms that non-financial reports are in the increase and ESG issues are becoming important among various stakeholders of companies.

## Conclusion

Whilst majority of companies have a sustainability report, the trend for integrated reporting seems to be in the increase. Extent of ESG reporting varied but those of regulatory or compliance nature were the most reported ESG information as well as those influenced by other global institutions which promote good ESG practices and also investor driven. Examination of ESG information showed, the information that gives negative reactions of the stakeholders was either not mentioned or least mentioned in the reports with the purpose of providing an optimistic picture to the stakeholders.

To respond to challenges related to different sustainability issues and stakeholder concerns, it is important to be able to disclose information that can be comparable within the different industries and sectors. Reporting of disclosure of information are not meaningful unless they are comparable. Findings of this study show that there is no uniformity in the types of measures used in similar data. Chvatalov'a, Kocmanov'a et al. (2011) also report that "even though GRI served as an essential tool and a very useful means of improving the standardisation of company reporting, companies continue to have differing degrees of compliance with GRI and also may differ in their interpretation of the best means to apply the standards to their reporting". This study clearly shows the need for uniform measures for ESG indicators and to develop a framework that can be used to measure ESG indicators for mining sector companies in Australia.

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# Co-Creation of Value in Banking Relationships

Luay Khreish  
Credit Select, Australia

## Abstract

*The purpose of this study was to understand value creation on a dyadic level within banking relationships (that is between a business-banking relationship manager and a business-banking customer). It also aimed to provide business-banking specific definitions for the Co-Creation of Value (CCoV) within the said context. A quantitative survey questionnaire was developed and distributed to two respondent groups (business-banking relationship managers and business-banking customers) from a major Australian Bank. CCoV was found to be positively correlated with relationship longevity both from the relationship manager's and customer's perspectives. A limitation of this study is that due to the lack of extant literature on CCoV, only one measure for this construct was developed and utilised. This research will assist banks when formulating relationship strategy, in that, it provides an insight into customer perceived value. It also provides insight into banker perceived value. Therefore, customers will be able to reciprocate value thus enabling the development of deeper customer/bank relationships. There is little existing research that covers CCoV, particularly in a banking context, so this study provides a definition of CCoV within the said context. This will be important to theorists and bankers alike when theorists attempt to extend the knowledge of CCoV in banking context and when bankers are formulating relationship strategy.*

**Keywords:** Co-creation of value, Relationship marketing, Relationship banking, Relationship management, Banking & finance, Financial services, Commercial banking, Business banking, Relationship longevity, Governance.

## Introduction

The concept of *Co-Creation of Value* (CCoV) within the buyer-seller dyad appears to be under-researched in the relationship marketing literature and is in need of further study and clarification, particularly within a banking context. Very little is known about how the consumer engages in CCoV (Payne, Storbacka & Frow 2008). Therefore, this research will address this concept within a business-banking context in order to add to the limited literature concerning CCoV. Furthermore, it is essential that managers and board members recognise this aspect of relationship management in conjunction with a robust customer centric corporate governance strategy otherwise customer retention will prove difficult (Obioha & Garg 2014).

## Literature Review

The traditional value creation process entailed the production of a product/service by the seller and the subsequent consumption by the consumer. Here the roles of the seller and buyer were clearly defined. However today, with the advent of technologies such as the Internet, the consumer demands more

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input into the production of products/services as they now have the means to gather information and conduct research. These clearly defined roles became somewhat blurred. By interfering in the production/formulation of products and services, consumers are actually engaging in the process of defining value and creating value along with the seller. Thus CCoV occurs (Prahalad &

Ramaswamy 2000, 2004). Prahalad and Ramaswamy (2004) clearly stipulate what CCoV is not. “It is neither the transfer nor outsourcing of activities to customers nor a marginal customization of products and service. Nor is it a scripting or staging of customer events around the firm’s various offerings” (p. 6). They go on to say that the aforementioned customer-seller interactions are no longer satisfactory to today’s consumer and that the CCoV involves customer specific personalised interactions. They also emphasise that it is the co-creation *experience* and not the *offering* which is the basis of unique value for each customer.

The difference between customisation and personalisation is highlighted by (Prahalad & Ramaswamy 2000) where customisation “assumes that the manufacturer will design a product to suit a customer’s needs” (p. 83) whereas personalisation “is about the customer becoming a cocreator of the content of their experiences” (p. 84). It is here where value is created, that is, via experiences (Payne et al. 2008).

There are two focal frameworks for CCoV presented first by Prahalad and Ramaswamy (2004) and then by Payne et al. (2008). Prahalad and Ramaswamy (2004) formulated what they call the DART model which consists of the following *building blocks of co-creation*:

1. *Dialogue* – interactivity, engagement, and a propensity to act – on both sides of the customer-seller dyad;
2. *Access* – to information and tools;
3. *Risk assessment* – probability of harm to the consumer. Should consumers bear some of the risk considering that they are co-creators?
4. *Transparency* – sellers must aim to have a heightened level of transparency in terms of pricing and product/service information. The nature of the market these days is such that most of this information is available in some form or another and trying to mask it will only contribute to disengaging consumers.

Prahalad and Ramaswamy (2004) suggest that by coupling the above building blocks of co-creation in various ways, that this will develop new and important capabilities such as:

- *Access* and *transparency* – enhancement of consumer ability to make informed choices;
- *Dialogue* and *risk assessment* – enhancement of ability to engage in debate and co-develop public and private policy choices;
- *Access* and *dialogue* – enhancement of the ability to develop and maintain thematic communities; and
- *Transparency* and *risk assessment* – enhancement of the ability to co-develop trust.

Payne et al. (2008) present a three part process-based framework which is based on the notion that the buyer-seller dyad is a long term, dynamic and interactive set of experiences and consists of the following three components:

1. *Customer value-creating processes* – the processes which the customer engages in, in order to manage its business and its relationship with its supplier;
2. *Supplier value-creating processes* – the processes which the supplier engages in, in order to manage its business and its relationship with its customer;
3. *Encounter processes* – “the processes and practices of interaction and exchange that take place within customer and supplier relationships and which need to be managed in order to develop successful co-creation opportunities” (pp. 85-6).

## Context

In the 1990s, banks established business-banking units to specifically look after their business clients as historically, business clients were serviced by local branches which had high management turnover (as governed by the policy of the time) therefore impeding the ability of the banks to maintain relationships with their business clients. This new phenomenon was called *relationship banking* whereby bankers became more customer focused (Nielsen, Terry & Trayler 1998). In fact, scholars called for a new orientation from a bank focus to a customer focus as early as the 1980s as customers were beginning to lose faith in banks’ abilities “to serve them in the manner and with the products they want” (Day & Wills 1985, p. 5).

Furthermore, due to the generic and easily replicated nature of banking products, the saturation of branches in local markets, and the same money markets being accessed by the Big 4 banks i.e. National Australia Bank (NAB), Commonwealth Bank of Australia (CBA), Westpac Banking Corporation (WBC) and Australia and New Zealand Banking Group (ANZ) dictating rather generic prices, the 4Ps in the marketing mix (place, product, promotion and prices) were no longer proving an effective marketing strategy within the banking industry.

The point of difference became customer service, defined as “the long-term person-to-person relationship between a financial institution, its distributors and its customer” (Wong & Perry 1991, p. 12). Moreover, “...poor customer service is like a cancer within an organisation. Good customer service cures this cancer. Furthermore, good customer service fosters growth because each satisfied customer will tell at least five other people about the business, some of whom will become customers” (Wong & Perry 1991, p. 11).

The subject bank traces its history back over 175 years. It is one of the Big 4 Australian banks and employs over 40,000 people in Australia and overseas. Its business-banking department provides a full range of traditional banking services including risk management, to metropolitan based small to medium sized business clients with a turnover from AUD 5–45 million.

The business-banking service model structure currently offered by the Bank (that was the focus of this research) is one which offers small to medium enterprise (SME) customers as well as small corporate customers direct access to a relationship manager and an assistant manager which form the relationship team. This relationship team owns a portfolio of (on average) 50 customer lending groups which they service and provide all the customers’ business-banking needs (in conjunction with product specialists), from lending solutions, typically within the ranges of AUD 1–15 million, transactional banking solutions, foreign exchange, trade finance, interest rate risk management and asset finance to name a few.

It is this relationship, between the relationship manager and the customer that formed the focus of this research as this market segment is an integral part of the Bank’s offering (as it is for the rest of the Big 4 banks for that matter) and getting it right is essential for the growth and subsequent maintenance of market share and the ultimate success of the banks as commercial lenders. For this reason, the enhancement of the *frontline*, (the collective term often used to refer to all the relationship teams across business-banking which are located in different districts/regions across Australia), and its processes are typically under constant review by the leadership team. It is for this reason that this research attempts to provide further understanding of the under-researched construct – *Co-Creation of Value* – so as to provide the maximum input and output of value within customer/banker relationships and subsequently improve the depth of those said relationships.

## Conceptual Framework

With Prahalad’s and Ramaswamy’s (2004) considerations in mind, co-creation of value involves customer specific personalised interactions. It is the co-creation experience and not the offering which is the basis of unique value for each customer.

Therefore, within the context of this research, and as illustrated via Figure 1, Co-Creation of Value is where both the customer and the banker, in their dealings together, create what they perceive to be value thereby satisfying their individual and collective needs.

- For the customer, this means that they are able to leverage off the knowledge/experience and network of the relationship manager to the customer’s benefit; and
- For the banker, this means that they may have been granted access to the customer’s full banking requirement as opposed to sharing part of the banking requirement with a competitor, and commitment to the relationship.

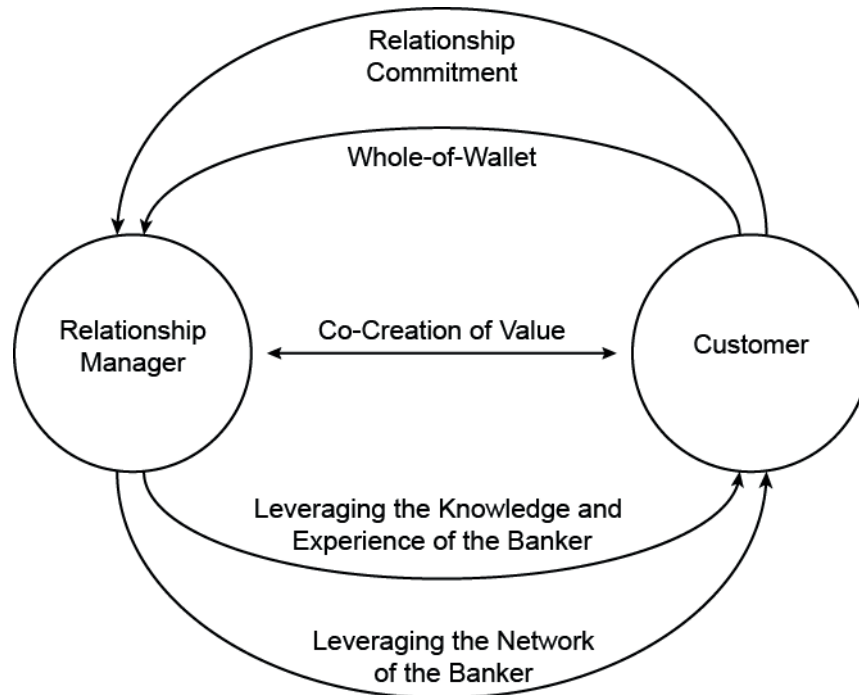


Figure 1: Co-Creation of Value: Exchange Factors

## Methodology

There were two quantitative questionnaires, one targeting the Bank's business-banking relationship managers and the other targeting the Bank's business-banking customers. The questionnaires were targeted at the total population of the respondent groups (for whom correct contact details were available, i.e. valid email addresses) that is, 319 relationship managers and 5,662 business-banking customers (note that the survey was sent to 7,952 business-banking customers, however 2,290 emails were not received due to invalid email address information equating to a 29% error rate).

## Results

Out of the 319 relationship managers invited to complete the survey, 149 complete responses were captured resulting in a 47 per cent response rate. From the 5,662 customers invited to complete the survey, 68 complete responses were captured resulting in a one per cent response rate.

The following business-banking specific definition for CCoV (as arrived at by the researcher and discussed in the Conceptual Framework section of this paper) was put to the customer sample:

You and your relationship manager create value together when you are able to leverage off the knowledge/experience and network of your relationship manager to your benefit while the relationship manager enjoys full access to your banking requirements and your commitment to the relationship

Sixty two per cent of the customer sample agreed with this definition thereby suggesting that this definition is an appropriate one within a business-banking context. Further, the CCoV construct was found to be highly correlated with a *long-term value adding relationship* ( $r = 0.947$ ).

Similarly, the relationship manager sample were presented with a similar business-banking specific definition for *co-creation of value* (as arrived at by the researcher and discussed in the Conceptual Framework section of this paper):

You and your customer create value together when you enjoy full access to your customer's banking requirements and their commitment to the relationship, and they are able to leverage off your knowledge/experience and network

Ninety-six per cent of the relationship manager sample agreed with the above definition. This suggests validation of the above definitions for CCoV within a business-banking context. Furthermore, the CCoV construct was found to be highly correlated with a *long-term value adding relationship* ( $r = 0.768$ ).

## Discussion & Implications

It is acknowledged that further research is required in order to better understand this under-researched concept within not only a banking context but in general.

Notwithstanding, we can see from the results in the previous section, that both the customer and relationship manager samples seemingly agree on the same idea of what is CCoV, in that we observe that customers perceive value in being able to leverage off the knowledge/experience and network of their relationship manager. The reciprocal creation of value is then observed, in customers' agreements to assist their relationship manager in attaining value from the relationship by affording the relationship manager full access to the customer's banking requirements, and the customers' commitment to the relationship, thereby co-creating value.

Equally, relationship managers perceive value in enjoying full access to their customers' banking requirements and the customers' commitment to the relationship whilst providing reciprocity in the creation of value by assisting their customers in attaining value from the relationship by enabling their customers to leverage off the relationship manager's knowledge/experience and network.

The above serves to reinforce Prahalad's and Ramaswamy's (2004) considerations in that, it is the co-creation experience and not the offering which is the basis of unique value for each customer. This suggests that banks need to provide value to their customer not only via the token fee waiver or rate reduction, but also via experience based value interactions such as, networking functions, information sessions or personalised introductions to other customers within the bank or portfolio that may have complementary businesses. However, this not only extends to banks but also to their customers in that, customers should seek to add value to their banker by also affording them reciprocity in this regard and also allowing them access to their network and commitment to the relationship as CCoV appears to be a two-way street.

## Conclusion and Recommendations for Future Research

There is little existing research that covers CCoV, particularly in a banking context, so this study set out to define CCoV within the said context.

Thus it was proposed by this research that within a banking context, CCoV occurs where the customer and their relationship manager create value together when the customer is able to leverage off the knowledge/experience and network of the relationship manager to the customer's benefit while the relationship manager enjoys full access to the customer's banking requirements and the customer's commitment to the relationship.

Further to this, the relationship manager may also find value in the customer's network and as such access to the same should be reciprocal.

This study has contributed to the extant literature on value, what it is and how it is co-created within the relational dyad. This contribution is important as the existing theory is quite scarce in this area (Payne et al. 2008). The study has confirmed that the CCoV between a business-banking relationship

manager and their customer is positively correlated with relationship longevity both from the relationship manager's and customer's perspectives.

A limitation of this study is that due to the lack of extant literature on CCoV, only one measure for this construct was utilised for each respondent group. Therefore factor or reliability analysis was not appropriate. Further research needs to be conducted on this concept as a primary focus in order to better understand it, as it is a factor that promotes relationship 'stickiness' and reciprocity. Another limitation is the low customer response rate (1.2%). Future studies may wish to provide incentives for customer responses in order to increase the response rate which will in turn provide for a more robust customer sample.

It is recommended that future researchers look to the development of further research measures relevant to this concept. It is also recommended that future research utilises a mix of quantitative as well as qualitative data collection methods as quantitative data is limited in the sense that once it is received, clarification of the responses are not generally provided. However, if the quantitative survey questionnaire can be followed up with a qualitative interview in order to clarify any interesting points, this will provide for a more robust data set and subsequent analysis. Customer focus groups are another mechanism by which future research can attain maximum clarification of survey responses and may also result in a higher response rate.

From a practical business perspective, senior management and/or board members may wish to utilise the definitions proposed within this study (tailoring them to their specific organisational needs). This would assist in ensuring that the organisation's corporate governance policy does not neglect the relational aspect of business, thereby establishing a strong customer-centric policy, and eventually positively influencing the organisation's culture as a result.

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# Tyranny of Corporate Dominance Exemplified by Food Supply in Modern-Day Britain

Alan Hallsworth

University of Portsmouth, United Kingdom

Alfred Wong

Friends of Aboriginal Health, Canada

## Abstract

*Food supply incorporates both production and distribution. During the past few decades, large corporations have steadily gained control over food supply. This increased dominance is a result of, among other things, the continuation of neoliberal free-market government policies. Because of the legal mandate of modern corporations, the psychopathic pursuit of profit for their shareholders is a natural undertaking. In particular, four multiples now control a significant segment of the grocery market in Britain. Because of such pervasive presence, the major multiples are shaping the preference and choices of the grocery buying public. Such corporate dominance is a form of tyranny whenever it limits the free will and choices of the population at large. Despite periodic vocal public indignation and outcries against such “abuses”, many middle income citizens continue to drive cars to large supermarkets to do virtually all their grocery shopping conveniently under “one roof”. The scope of action available to the public to redress this imbalance is greatly circumscribed.*

## Keywords

Agriculture, corporation, food supply, social justice, trade

## Introduction

Recent decades have witnessed increasing public outcries in Britain about the ever increasing dominance of large supermarket<sup>1</sup> multiples in the grocery sector. Destruction of traditional urban landscapes and neighbourhood grocery stores, are among the many alleged misdeeds committed by these large food retailers. There are many appeals for ethical practices of honesty, fairness, etc. as public entitlements. Before any redress of these contentious practices could be undertaken, certain perplexing questions would need to be answered: where do ethical obligations, if any, originate? are behaviours of these large supermarket multiples totally abnormal?

Is business ethics an oxymoron? The foundation of western European, (for present purposes, British), civilization is rooted in Christianity; so how were Christian ethics themselves formed and shaped?

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Prior to the advent of Christianity, ethics had evolved for millennia and been codified generally in ecclesiastical media as a means to maintain social peace and order (Freeman 2009: Chapter 2). In the earliest form, Christian ethics had essentially evolved from the older Judaic practices in the Levant, in which cooperative common weal was the foundation. The form of Christianity eventually introduced to Britain was the

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<sup>1</sup> Supermarkets are typically multiple food retailers which are owned wholly by a large corporation. In this paper, ‘corporation’ denotes a business entity, privately held or publicly traded, which has substantial annual revenue.

results of many revisions, modifications and wilful interpretative translations from Aramaic and/or Hebrew to Greek and subsequently to Latin. Thus, (Christian) ethics do not appear to have a primeval origin in natural laws. Friedrich Nietzsche (1844-1900) wrote succinctly that ethics and morality are relative in time and space, as they are shaped by, among other things, prevailing cultural and social conditions. In essence, what are acceptable ethical norms today may have been roundly condemned in past years *vice versa*. Ethics are often added or subtracted by fiat for economic and/or political expediency.

The principles of Christian ethics evolved further in Britain largely along the “Estates” social structure throughout the following centuries until the dawn of the Age of Enlightenment (syn. Age of Reason) in the 17th and 18th centuries, when reason and individualism were heralded over tradition. Early public discourse over the (in)compatibility of the “New Age” with prevailing Christian practices could be found in the works of such notable British philosophers as Thomas Hobbes (1588-1679), John Locke (1632-1704) and David Hume (1711-1776). The virtues of liberal free-market capitalism were first described at length by Adam Smith (1723-1790) during the era of the Industrial Revolution in Britain. The peculiar British utilitarian concept of ethics and morality was entrenched further by the works of Jeremy Bentham (1748-1832) and John Stuart Mill (1806-1873).

Nevertheless, the “good” ethics of charity, obedience, piety, generosity, honesty, fairness, etc., reflecting, to a large extent, the teachings in the very early days of Christianity (Calvalier et al. 1990) have since become canonized - albeit continually modified and often diluted - at least in the formal teachings of the Christian churches in Britain. An example is the rapid decline of obedience from ecclesiastical teachings in the aftermath of the short-lived 1381 English peasants’ revolt (Bisson, 1998: Chapter 7). In modern times, interpretation and personal practices of Christian ethics remain highly influenced by British utilitarianism of the 17th and 18th Centuries. Rationality is sought largely through the insidious glorification of personal wealth, over all other humanistic concerns. It is always presumed that successive instant gratifications must cumulate into real long-term benefits.

The definition of (Christian) ethics remains elusive and variable, especially in the context of modern business practices. It follows that popularized “ethical investment” is also somewhat disingenuous as it is predicated on how “ethics” is defined, albeit temporary. In reality, “ethical investment” is often cloaked largely in the context of self-interest in gaining greater financial returns. Other negative external consequences are often selectively ignored. For example, if one invests in the establishment of a vacation hotel for foreign tourists in St. Lucia (Caribbean) ostensibly to facilitate the creation of gainful employment for the local people, this “ethical investment” could just as easily be portrayed as the extension of neo-colonial enslavement of the people of St. Lucia (Wong, 2015). Ultimately, *cui bono?*

According to the Concise Oxford Dictionary (9th Edition), tyranny is defined to be the cruel and arbitrary use of authority, and cruelty embodies the indifference to another’s suffering. It is obvious that dominance over food supply could not be considered to be inherently cruel or oppressive. However, tyranny as described by John Locke (1632-1704) might be more pertinent. Although Locke has also been depicted as a proto-liberal capitalist to justify the English ruling class of the day, he wrote aptly in his *Two Treatises of Government* that “..... tyranny is the exercise of power beyond right, which nobody can have a right to; and this is making use of the power any one has in his hands, not for the good of those who are under it, but for his own private, separate advantage.” (Locke 1689: Chapter XVIII, Sec. 199). Thomas Hobbes, too, wrote in this vein: seeing only the Monarch as living in an unfettered state of nature. The abuse of market power by corporations through pricing and other control instruments that ensure self-enrichment could thus be considered rightly to be a form of tyranny, since food is an essential of life. Witness the classical example of British Government’s indifference to the suffering of the Irish during the Irish potato famine in the mid-1800s (see, for example, Woodham-Smith, 1962; Delaney 2012). Food was readily available for purchase; but the poorest Irish without paid employment had no money to buy the essentials of life. The free market ideology thus determined who lived or died. As Elster (2007: 174)

had noted, “when the Irish fled the famine in the 1840s (it was) the poorest (who) stayed home to die”. The attendant depopulation of Éire may also have purposefully served the interests of the Anglo-Irish aristocracy by allowing them to consolidate and expand their hegemony in Éire (see, for example, Kinealy 1997; Ó Murchadha 2011; Coogan 2012; Kelly 2012).

Since the Industrial Revolution, corporations have progressively supplanted governments as “tyrants”, usually with the connivance of governments themselves. An analogy that stresses this corporation-tyranny link is offered by the familiar 1946 mining song ‘Sixteen Tons’ by Tennessee Ernie Ford <http://www.cowboylrics.com/lyrics/classic-country/sixteen-tons---tennessee-ernie-ford-14930.html>.

“You load sixteen tons, what do you get  
Another day older and deeper in debt  
Saint Peter don't you call me 'cause I can't go  
I owe my soul to the company store”

A current example involves companies conducting resource extraction activities (e.g., mining and logging) in remote regions of developed countries such as Australia and Canada, or in developing countries such as Indonesia and Peru, which routinely demand that their workers must purchase all foods from the company store at whatever exploitive prices set by the company. Predictably there are no other food supplies at these remote sites where access is controlled by the company.

Here we examine the tyranny of corporate dominance, as exemplified by the food sector, on modern-day society in Britain, with particular reference to supermarkets. The principal issues to be discussed are the role, if any, of ethics of corporate practices, psychopathology of profit seeking, and the evolution of corporate power during the last quarter of the 20th Century.

## Food supply in contemporary Britain

Food supply incorporates both production and distribution. The local production of foods has diminished greatly during the past few decades with improvements in transportation logistics (Hallsworth and Wong 2012) and substantial rises in the cost of local farm labour (Wong and Navarro 2014). For example, fresh vegetables can now be grown efficiently in Spain and shipped economically by lorries to the British market (Hallsworth and Wong 2012). The other critical element of distribution affecting food supply is shaped to a large extent by the rapid rise of mega food businesses, which invariably dictate production, including location, quantity and farm-gate pricing.

It is generally recognized that the power of large agri-food production businesses such as Premier Foods Group Ltd. and Unilever PLC is enormous and that this sector is not without its critics (see for example Lymbery and Oakeshott 2014). It is however questionable if their power surpasses that of food retailers since the latter unilaterally control access to the shelf space of stores in which fresh or processed foods are displayed and sold to the public at large.

Food supply in Britain evolved in line with, and to an extent limited, the expansion of great cities. Before the advent of modern refrigeration/preservation technologies, key produce such as milk had, of necessity, to be supplied from farms locally – even in London where butter came from Epping. Such trends have been chronicled by Atkins (2003). One result was that now-urbanised parts of London were associated with agriculture (artichokes came from Camberwell, apples from Dulwich and so on.) Seasonality was an accepted determinant of availability. Refrigeration and, earlier, canning/salting (e.g., salmon from Canada, and beef from Argentina) meant that foodstuffs could be transported over distance and urban farm spaces could be infilled. Structurally, the food retail system first depended on peripatetic, then fixed, market stalls where farmers brought produce for sale (now being re-established in caricatural weekend farmers’ markets). As the economy grew, the small shop came to dominate the system. Multiple ownership of many small shops under the same fascia – typified by Sainsburys - (still one of the leading British grocery retailers) was the next trend. These retailers switched format

into the supermarket in the post-war period and, from the 1970s, began opening large, automobile-based superstores. Note that the market share of the leading chains in Britain, even as recently as 1980, was not dominant. For example, in 1982, Tesco had about 9% of the market share. By 2008, the market share of Tesco had reached nearly 27%. The losers in the consolidation process were not just independent neighbourhood shops but the 60 or so (smaller) supermarket chains driven from the market or taken over by default. In 2011, the big 4 supermarket chains (viz., Tesco, Sainsburys, ASDA and Morrison) controlled more than 65% of the British grocery market. Such business entities continue to expand relentlessly: backed by their already enormous financial resources, large portfolios 'land-banked' sites in town centres and peripheries, and the absence of any effective legal restraints. Expansion was routinely undertaken by organic growth and/or by sustained competitive pressure on traditional 'Mom & Pop' neighbourhood grocers. The net outcome is continued strengthening of corporate dominance in the retail food sector. For decades, the issue of competition and collusion among supermarket multiples in England has stymied the Competition and Markets Authority (known as Competition Commission prior to April 1, 2014 and before that the Monopolies and Mergers Commission). Proving the lack of competition arising from collusion is fraught with considerable difficulties. Tepid vigilance of corporate misdeeds by regulatory bodies has often been cited to be a source of the problem. What is clear is that basic food stuffs are often procured from a limited number of producers through a limited number of distributors. "True" competition may not exist as daily or weekly variance on offered pricing is often deployed as a means to attract prospective food shoppers to the supermarket multiples. This tactic is identical to that of using "loss leader" to bring the buyers to the stores to purchase additionally other goods.

Corporate dominance is tyrannical because it limits the free choices of the public. This situation is becoming increasingly omnipresent due in part to the irreversible change of the agrarian society into an industrial society in Britain since the start of the Industrial Revolution.

As supermarkets become more powerful and more pervasive, the availability and quality of food consumed by citizens is dictated increasingly by the supermarkets in natural consideration of their own profit-driven needs. An example of insidious corporate control is the routine manipulation of retailers to guide the "preference" of buyers at the retail level to fit the corporate objectives. Previous studies by others have shown that consumer needs and preferences could be, and indeed are being, shaped ubiquitously by corporate self-interest (See for example, Harrison et al. 1997; Klein 1999; Hauge 2007; Hinesley 2012). There is also a prevalent counter-view that, instead, it is consumer preference itself that is driving corporate behaviour (see for example, Eckhardt and Mahi 2004; Gehlhar and Regmi 2005). This proposition, though inevitably popular with corporations themselves, does not bear scrutiny. Instead – just as consumers did not clamour for genetically-modified foods – most consumer preferences turn out to be driven by corporations. Consider the recent market entry of the river cobbler or basa (*Pangasius bocourti*), also known as the Mekong River catfish, into British markets. This fish was virtually unknown to consumers in these markets until recently.

There is considerable incentive for agri-food corporations to promote this lower-cost imported fish. The production cost, especially the labour component, is extremely low in Vietnam. The profit margins for distributors but especially for retailers are increased substantially despite the offered retail price being 30 to 40% lower than that of traditional fish such as haddock and cod. It can be conceded however that at a later stage, after initial product entry into the market, consumer preference has some influence, albeit minor, on changes in product quality, format and presentation. Even the well-meaning "Fairtrade" scheme to benefit agricultural producers in developing countries has been exploited cleverly by distributors and retailers to increase their corporate profit (Wong and Hallsworth 2013). Labelling of food, often with exaggerated or distorted claims of products is often made until challenged by the public at large. In a way, this practice reflects the prevailing attitude of corporate pursuit of greater profit by any and all means available.

How did we arrive at this situation? The control of food supply may be traced back firstly to the founding principles of modern corporations, and secondly, to the enormous power of the mega food retailers acquired during the rapid ascendancy of neo-liberal public attitudes and “business-friendly” government policies during the past few decades.

## Mandatory pursuit of profit

In the early history of Christianity, commerce based on extracting extraordinary profit was roundly condemned as immoral and generally un-Christian. St. Augustine (354-430 CE) even declared that “Business is in itself an evil” (Tuchman 1978: 37; VanderVeen and Porter 2001). During the Middle Ages in Britain, we find that any ‘social contract’ between war lords (later self-titled as “nobles”) and peasants merely extended to offering the latter basic food and security, in return for their obedience and servitude (Southern 1953; Bloch 1961; Tuchman 1978; Cantor 1993). Wider concepts of welfare or social justice were not in the lexicon then, under the rigid “Estates” social divisions of clergy, nobility and peasantry. The mercantile class in Britain was not formed from the Third Estate until the late Middle Age (Bisson 1998: Chapters 7 and 8).

## Fundamental mandate of the corporation

In most countries a business corporation is deemed by law to be a “person”<sup>2</sup>. Modern corporate behaviour is uniquely un-human because of its existence is based entirely on money which has no “feeling”. With startling honesty, Friedman (1962) enunciated six decades ago that any professed justification for social or environmental responsibility by any corporation was just nonsensical deception. The legal reality is that the only social responsibility of a modern corporation is to increase its profit (Friedman 1970). Bakan (2004) has argued that the profit-centric behaviour of a corporation fits well the profile of a psychopath as defined in the Diagnostic and Statistical Manual of Mental Disorders<sup>3</sup> of the American Psychiatric Association. Indeed one of the defining traits of a psychopath is action taken regardless of all externalities (Hare and Neumann 2008). Increased corporate power and (political) influence afford higher efficiency and effectiveness in the pursuit of profit. It follows that the behaviours of corporate businesses could not be expected to be “humane”. Wong and Hallsworth (2013) have provided a supporting discussion of the psychopathy of profit seeking of modern corporations.

In accord with Friedman, creation of jobs is not, and could never be, a mandate of any corporation. It follows that obsession with short-term profit goals by corporate executives to afford “instant gratification” to shareholders should be considered to be normal practice. There is no moral basis for corporate executives to undertake a different course of action. Perhaps it is naïve to believe that there is morality in the business of profit making. Note that the pursuit of short-term profits could even include self-dismemberment (e.g., divestment) of the corporation if it achieves the goal of maximizing immediate economic returns to the shareholders (see, for example, Hallsworth 1996: 28).

Some see the psychopathy of corporations (Bakan 2004) as self-contained in that the behaviour of people running the companies is essentially segregated from the behaviour of the whole corporation. Babiak et al. (2010) have however observed recently that corporate professionals also possess, or are encouraged to gain, many of the same psychopathic traits of the corporation employing them. This finding was perhaps not surprising as corporations always require people with certain predisposed psychopathic tendencies for profit maximization.

<sup>2</sup> Generally known in jurisprudence as *persona ficta*, of which it is accorded with a legal name and certain rights such as privileges and liabilities, similar to those of a natural person (*syn.* physical person). This legal concept is widely recognized in both common-law and civil-law countries. See, for example, Kornhauser and MacLeod (2010) and Fritsch (2011) for additional analyses of contemporary corporate personhood.

<sup>3</sup> Commonly abbreviated as DSM. The last major revision was the 4<sup>th</sup> Edition published in 1994. DSM-IV codes are widely used by mental health professionals to describe, among other things, features of a given mental disorder.

Despite many attempts to justify the existence of corporate social responsibility over the years (see for example, Smith 2003; Fontaine et al. 2006; Broomhill 2007; Chen 2007), the fundamental tenet of corporate behaviour remains unchanged. In our analysis, corporations might well undertake environmental or social justice activities, but if and only if such activities also increased the profitability of the corporation, particularly in the shortest possible time frame. As ever, Shakespeare has already explained this well. Hamlet<sup>4</sup> chances upon the King but the latter *appears to be* at prayer and therefore Hamlet declines to enact revenge. The King soon reveals, however, that his prayers were not sincere: “Words without thoughts never to heaven go”

Fiduciary requirements allow no variance of the short-term pressure for profits. In the current manifestation of free-market liberal economics, there is no room for, say, the Protestant work ethic of yesteryear which implies that people can derive non-monetary satisfaction simply from being gainfully employed (see also Chang 2010: 43). However, in view of the fluidity and relativity of ethics discussed earlier, any demand of ethical behaviour of corporations is weak, at best.

Many do indeed consider that the operation of a modern-day corporation should and could only follow Friedman’s doctrine, by the use of all means available (Carr 1968). According to free-market proponents, there should be few, if any, laws to governing the pursuit of maximum profit by private enterprises (Fieser 1996). Paradoxically, of course, private enterprises often promote restrictive laws – so long as they facilitate profit making, including protection from unfavourable future changes in government social-economic policies. Their influence is extensive: as Casey (2007: 87) put it when looking at the agri-food sector “...the growing ascendancy of the private sector in the agri-food sphere...power and dominance...manifest in (their) ability to construct ...food safety legislation which would appear to have leap-frogged public food safety standards in ...importance...relegating public food safety regulation to the second tier”. The ways in which this has happened in Britain, with powerful retailers interacting with Government is covered, for example, by Harrison et al. (1997) and Pal et al. (2001). Indeed, rent seeking such as political lobbying, bribery of government officials, etc. is considered to be a legitimate corporate activity in the free-market economy (Krueger 1974).

Even though a corporation is deemed to be a legal person, no corporation has *in toto* ever been jailed for any legal misdeeds<sup>5</sup>. Relatively minuscule fines which have been imposed after convictions for corporate crimes against the public, e.g., deceptive pricing practices, deceitful mislabelling of food content, intentional exaggerated nutritional claims, etc. These penalties are often treated in corporate financial records merely as a cost of doing business. In essence, contemporary financial penalties are ineffective in curbing corporate crimes. Indeed some corporate executives are even rewarded personally for financial achievements regardless of any corporate misdeeds. We may safely assume that there are numerous cases which are yet to be revealed. Interestingly nearly all publicly-exposed corporate criminal activities are blamed on the unauthorized action of rogue junior-level employees.

## Evolution of corporate power

Many have canonised Adam Smith as the founder of corporate self-interest, by generally ignoring his Theory of Moral Sentiments and instead reading [usually selectively] from his Wealth of Nations. Smith always suspected that businessmen would collude to raise prices if they could and his plea was actually for family-owned businesses to pursue their singular route to profits. Interestingly Smith had preached the importance of morality for all market participants, without which the free-market system would fail. Smith’s “morality” was rooted in the teachings of Christian Protestantism of the day (See, for example, Dawson 1972: 17-18). Curiously Smith also believed that the ever-present danger of shipwreck would deter any sensible country from becoming over-reliant on risky overseas trading.

<sup>4</sup> At the end of Act 3, Scene 3 of “Hamlet, Prince of Denmark”, a play written by William Shakespeare in about 1600.

<sup>5</sup> Unlike a natural person, a *persona ficta* could be “jailed” only by suspension of corporate registration or “exterminated” solely by de-registration of incorporation.

The devastating impact of “new” principles of free-market liberalism became evident almost immediately on British society. Well-known examples include the miserable conditions suffered by workers in England during the Industrial Revolution (Engels 1845). In England during the Industrial Revolution, profit was paramount as any externalities pertaining to the nutritional and environmental health of workers were considered to be inconsequential. Industrial workers were considered to be expendable. As noted above, in Ireland millions of people were eliminated through premature deaths by starvation, and permanent emigration of starving survivors to North America and Australia. The Whitehall policy of the time had been to require the starving Irish people to pay for readily available (imported) food with money that they regrettably did not have – essentially in strict adherence to the doctrines of free-market political economy.....(Christian) charity breeds slothfulness in the new Age of Enlightenment.

Though the drive to greater profitability at all costs is relentless (Schroeder 2003; Harris 2012) such attitudes have long been criticised. For example, Beaumont (1994: 8) has commented that cutting costs to achieve greater profitability often imposes significant injustices on others such as producers as well as consumers.

Rewarding bigness and power is, of course, inherent in the contemporary free-market liberal economic model. Their corporate leaders are routinely admired and lionized (McAleer 2012), but the negativities of their ruthlessness in the psychopathic pursuit of profit are rarely stressed.

The relentless march of free-market liberalism continued in the following century. Inequality in society became entrenched and expanded as Britain changed from an agrarian society to an industrial society. In the decade after WWII, there was a notable interruption in the trend towards increasing economic inequality (see Wilkinson and Pickett 2010). The patriotism fanned by the Second World War appeared to have caused a notable reduction in trends toward inequality. Example slogans such as ‘homes for heroes’ indicated that collective national sacrifice led to a degree of collective national reward. The creation of the welfare state by the Atlee Government (1945-1951) attests to this. Certainly businesses, too, seemed happy then to comply with the idea that full employment was a national goal to be collectively desired. However, trends towards equality began to reverse following the oil shock of the 1970s, the rise of inflation and other wider geo-political trends such as the re-invigorated mission for ‘free-market capitalism’ to destroy ‘evil communism’.

The most recent manifestation of free-market liberalism is the intertwining of corporate and state interest beginning in the 1980s. This sits in direct contradiction to the expectations of the Hayek (1944) ideology of market libertarianism as a vehicle for the destruction of the tyranny of State control. It may not be just Communist states that were undone by market libertarianism as claimed by many neoliberal ideologues. It may be noted that Hayek’s work was the foundation of liberal free-market policies undertaken by the Thatcher government in Britain in the 1980s - leading to wanton privatization and corporatization of State assets and services, and elimination of many legal restraints on corporate practices. The period of the Thatcher regime (1979-1990) witnessed in the rapid expansion of omnipotent corporations to become the “new gods of civilization”. This intertwining of business corporations and the State is reminiscent of the beginning of the intertwining of the Christian church and State in about 4th Century CE. In the end, the Church was subsumed and effectively became an instrument to legitimize many of the actions of secular authorities, i.e., the State (Guroian, 1994: 1-2). Subsequently the role of Church has all but fallen into irrelevancy. In the present case, the State has become increasingly an instrument of the power of corporations, whilst the independent free will of the people becomes subordinated to the pursuit of profit.

Since the late 1950s, corporations became steadily larger and gained increasing political influence. In particular, during the period of the Reagan Presidency (1981-1989) in the USA, corporate dominance rebound to its former levels with considerable fervour (Lynn 2012). It was not long after the start of Reagan’s presidency before a precipitous fall-off in prosecutions under the Robinson-Patman Act began (Hallsworth 1990: 555). The existing “fair trading” bases of US competition policy were

abruptly overthrown. This American period of aggressive “greed-is-good” capitalism coincided interestingly with that of the Thatcher regime in Britain. The interest of corporations has thus become increasingly indistinguishable from that of the State. Braudel (1977: 64) has observed appropriately that “...Capitalism only triumphs when it becomes identified with the state: when *it is* the state” (our emphasis). Furthermore, many modern-day governments have assumed many of the psychopathic traits of modern transnational business corporations. For example, in defiance of democratic principles, investment deals are currently being signed that are written in ways that prevent future, more socially-concerned, governments from overturning them (see, for example, Gagné 2012). For example, the current corporate attempts to retain ISDS<sup>6</sup> clauses in the proposed US-EU TTIP<sup>7</sup> trade agreement clearly show the possibility of ominous emergence of a new corporate-ruled totalitarianism. Klein (2007) has decried that the current oligopolistic power of modern corporations is leading the people into a new serfdom.

Because of increasingly large amounts of money being involved, the symbiosis of government and businesses continues in a circular fashion. In essence, the power and influence of big corporations in society at large increases as governments become ever more complicit in the practices of big businesses. The food sector is, we argue, closely involved. Busch and Bain (2004) for example, stress that to look at nation-states alone is inadequate because of the growing influence of the private sector and private institutions that are also shaping the global agri-food system. In respect of the British food system, the work of Marsden et al. (2012) is closely associated with analysis of State-Retailer relationships.

As corporations become larger, their influence on consumers and public policies increases substantially (Burt and Sparks 2003; Sparks 2008; Anon. 2012). In respect of food retail, a report for Consumers International (Nicholson and Young 2012) outlined the kinds of abusive practises in respect of suppliers that big retail multiples would indulge in if they were allowed to by State regulators (see also Sables 2014). In light of our observations, it should be no surprise that State regulators mostly do permit such abuses – which affects the consumers ultimately. Some of the abuses – available to large retailers but not small - noted by Nicholson and Young (2012: 26) are:

*Listing fees/ threat of de-listing;*  
*Demanding unforeseen discounts/ retrospective payments;*  
*Return of unsold goods to the supplier;*  
*Late payments;*  
*Promotion of retailer own brands or copycatting packaging on leading brands.*

Additionally, many critics have noted that big British food retailers can reduce their VAT payments by shipping via Jersey – one of the many legitimate tax havens controlled and condoned by successive governments. Indeed for many years, Dole, Chiquita and Fresh Del Monte in the food sector have legally been avoiding some British taxes by trading through subsidiary companies in the Channel Islands among other tax havens (Griffiths and Lawrence 2007). Again, this situation should not be unexpected when the only fiduciary duty of a corporation is to maximize profit for its shareholders.

Lynn (2012) sees such concentrated corporate power as dangerous and anti-democratic. The accusation of being anti-democratic is made whenever it appears that the civic agenda of elected public officials is effectively being controlled by corporate interests. In some cases this can include the financing of political candidates or paying undisclosed financial rewards to retired “business-friendly” politicians and their families.

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<sup>6</sup> Investor-state dispute settlement, a legal instrument allowing an investor to sue a foreign government if laws and regulations enacted in the future diminish the profit-earning ability of the investor.

<sup>7</sup> Transatlantic Trade and Investment Partnership, the free-trade agreement being negotiated in secret between the United States and the European Union.



The more that mergers take place the further we move from competitive markets with many products, many suppliers and many rivals in every sector (note that the efficiency argument behind mergers generally fails to stand up). Unfortunately, this problem is fundamentally circular as “monopoly is the end product of competition” (Harvey 2003: 96). In other words, heightened market competition also drives companies out of business (by bankruptcy, for example) to result in fewer business entities. This was amply demonstrated by the sub-prime meltdown which resulted in fewer but even more powerful banks. What is also clear is that this process goes on in a series of waves – as well chronicled 30 years ago by Dicken and Lloyd (1981: 66-69).

There are numerous means available to circumvent prohibitions on collusion (ironically, rules also prohibit co-operation between businesses even if that would give all suppliers a better deal). For example, the concept of horizontal cooperation between corporations (EC 2011) is neither innocent nor benign, because new EC regulation effectively legalizes the raising of entry barriers against new market participants with fewer financial resources, and the setting of “industry standards” by corporations who already have considerable financial resources and substantial market dominance. This practice may also be termed ubiquitously as ‘rent seeking’.

In many British businesses, the use of taxpayer funded income-support mechanisms to boost low paid workers, many, as noted, in retail, can be seen as a form of permanent corporate bail-out. Big 4 food retailers benefit, too, when they are allowed to keep most of the massive rise in land values that follows when they are permitted to open a large new store. In contrast to their lowly-paid, taxpayer-subsidised workers, corporate executives are routinely paid enormous financial compensation. In banking this can even come from the very same public funds allocated to bail-out their prior misdeeds. Of corporate remuneration, John Kenneth Galbraith (1908-2006), a noted Canadian-American economist, once remarked that it resembled ‘a warm personal gesture by the individual (viz., Chief Executive Officer) to himself (or herself)’. Interestingly, the situation is even more perverse since large corporations are not participating in funding the financial bail-outs: many (multinational) corporations themselves pay little or no corporate income tax. The legal tax evasion practices of large corporations have been raised again recently (Rushe 2012; Rawlinson 2012; Wright 2012) as more money (re-allocated from the concomitant reduction of essential public services provided by the government) is extracted from ordinary citizens to pay for the financial adventures and misadventures of modern corporations.

## Outlook

Predictions are difficult: few observers at the key turning point of the late 1970s would have anticipated virtual market dominance by four big British food retailers. The laissez-faire-driven reduction of choice and local distinctiveness that results from easy mergers and takeovers shows little sign of reversal. Competition Authorities have ignored calls for de-mergers and so market concentration goes on – most likely towards a big 2 given that 60 British supermarket store fascias have disappeared since WWII. That said, retailers are not immune to wider social and economic trends. The hypermarket/supercentre sector is predictably losing ground as rising fuel costs and the unaffordability of the overloaded shopping cart forces poorer shoppers to shorter, nearer, but smaller-volume shopping baskets. The poor are defecting to low-cost discounters such as Aldi and Lidl to charity shops, food banks and ‘pound shops’. Consequently the big four see minor erosions in market share. However, the defection to smaller ‘convenience’ style shopping is not necessarily a godsend for small independent specialists such as butchers. Shoppers still tend to use grocery generalists who sell pre-processed foods. In order to undercut specialists such as butchers, all of the Big 4 offer in-store freshly cut meat, for example. In order to control the emerging convenience-store sector, Tesco and others have been establishing smaller grocery stores, e.g., Tesco Metro, in many urban locations.

Where the low-mortgaged wealthy middle classes live in numbers (typically picturesque but expensive market towns in the affluent south), there has been some success in rejecting the Big 4 food retailers. For example, upscale Waitrose supermarkets seem to be thriving. Moreover, the shorter,

local, supply chains of specialists such as upscale butchers in such towns appeals largely to those concerned more about provenance than price. Optimism does not, however, extend far. The Big 4 still dominate an increasingly-privatised food supply chain. It is difficult for small-scale producers to move food efficiently in compliance with the terms and conditions set by the Big 4 demand such as holding large inventory buffer, “just-in-time delivery”, and assuming full financial burden for any corporate-ordered retail discounts.

For many decades, Britain has been a destination of choice for migrants. For example, in Southall (London), Indian grocers are predominant, with commensurately reduced presence of supermarket multiples. Migrants from the Indian subcontinent prefer grocery stores specialising in foods catering to Indian cuisine. It would be impracticable and not profitable for the Big 4 to engage with this segment of the market directly. It may however be added that in recent years certain supermarkets are carrying wider selection of Indian-specific foods – testimony to the widening popularity of Indian food. It may even be that subsequent generations of these immigrants are relying increasingly on established retail chains for staples and other “main stream” foods, as they move away from the traditional areas of in-migration. More recently large scale immigration from Poland has triggered the establishment of numerous independent groceries selling mainly Polish homeland foods. Hammersmith (London) is an example location where there is a high concentration of Polish national residents. Interestingly both Tesco and Sainsburys supermarkets continue to be present prominently in and around the Hammersmith tube (underground rail) station area.

### **Limited scope of remediation**

Elster (2007: 95-96) observed that “peasant rebellions in pre-industrial England were invariably unsuccessful ...and their leaders punished harshly... (yet) the rebellions had a long-term success in making the propertied classes behave more moderately than they would have done otherwise”. Although the discontent leading to the 1381 English peasants’ revolt was much more severe (Hilton 1973), there has been no emergence of contemporary widespread social unrest despite some public indignation over numerous corporate malfeasances and other excesses in the food sector. Not everyone, however, has seen the British population in general as a likely source of widespread protest on such matters. Possibly the most respected, almost revered, of postwar BBC political commentators was the late John Cole. On December 6<sup>th</sup> in the Orwellian year of 1984, he made a radio broadcast that was unforgettable by those who heard it. Whilst criticising Government secrecy, Cole also severely criticised the public themselves for their lack of concern. Too many were, he stated, like Orwell’s *proles*, who comprised 85% of the population, ‘quarrelling about the lottery.....watching endless pap on television, unable to string two thoughts together’. As he put it “...governments have grown more skilled in pulling the wool over the public’s half-open eyes”. Though protests did break out in Bristol in April, 2011, when Tesco attempted to open a store in some secrecy, it may well be that, as Cole feared, the present-day bourgeoisie have been largely co-opted and pacified. The total self-destruction of capitalism in the manner predicted by Karl Marx (Berlin 1963: Chapter 10) was perhaps wishful thinking. If a hegemonic global state is one day imposed, it will certainly not be a communist one on the Soviet model. Whatever the wider social and environmental costs, middle-income Britain still happily drives to shop in big-box supermarkets, often claiming that neighbourhood grocers are uncompetitive. In fact, popular television programmes in Britain sometimes feature ‘shopping basket’ inquiries that reveal prices to be higher in supermarkets than on traditional street markets. In reality, the principal reason for shopping in supermarkets is the convenience of being able to drive to free parking and buy everything in one store. This is abetted by the wide variety of goods offered, advertising that emphasises low prices, etc. Unlike many struggling neighbourhood stores, only giant food retailers can afford the features that result from the aggressive deployment of their power to procure lowest-price goods from around the World. The driving force for the giant food retailers is of course self-interest for increased profitability. The plight of local producers and local shops could not, and would not, be a consideration in their corporate decisions.

Appeal to Christian ethics, particularly in an increasingly multicultural society, is not practicable as the people have no inherent moral rights over the purchase of goods and services from large corporations. Interestingly, EU has a Bill of Rights of Airline Passengers since 2005. But there is no Bill of Rights for public buyers of foodstuffs. Such a Bill is acutely needed in the complete absence of underlying ethics in the psychopathic pursuit of corporate profit, to the detriment of the people at large. Seven decades ago, T.S. Eliot (1940: 10) lamented the ascendancy of secular liberalism to supplant benevolent Christian principles in English society. Interestingly Eliot had also predicted the ultimate self-destruction of secular liberalism and the subsequent re-formation of an ethical Christian society. But to date, there is little or no evidence that such an event has occurred or might occur. The obstacles to the revival of early Christian principles and ethics in the public sphere of contemporary liberal society are formidable (Guroian, 1994: Chapter 1). Return to the classical, truly competitive, capitalistic market society sought by campaigners such as Lynn (2012) and others would appear to be unattainable. Regrettably there will be no *Second Coming*.

Rectification of power imbalances between the people and the corporate controllers of food supply requires governmental or supra-governmental actions. Unfortunately, it is those governmental and supra-governmental agencies that force open markets by use of *Structural Adjustment Programs* (Chang 2010: 118) and other liberal free-market policies. Indeed, in 2011, the Court of Justice of the European Union ruled that Catalonia (Spain) was not allowed to ban hypermarkets in order to defend its regional food culture<sup>8</sup>. The common weal has become an antiquated rhetoric when the pursuit of instant personal gratification and the glorification of personal wealth are paramount. Thanks to such policies, the psychopathic pursuit of corporate profit has become an entrenched fixture of modern capitalism. There may be no clinical cure for this psychiatric disorder. The contemporary state of society in Britain does not afford any realistic opportunities for significant changes.

## Concluding remarks

Tyranny may be characterized as the diminution of free choice of citizens at large: offering an ironic twist to the Thatcher-Reagan ideology of destroying the tyranny of the State to give the people more free choices. Its replacement is the tyranny of the Corporate State, wherein citizens' exercise of free choice is once again limited. The essentials of life such as food must increasingly be purchased from a few suppliers who have decided *a priori* what precise mix of products and/or services to provide in order to achieve profit maximization. There is no practicable alternative. It is essentially impossible for citizens in an urban setting to grow their own foods for sustenance as a means to regain declined freedom of choice. The prevailing cash-based economy requires wage-earning employment.

The architecture of the modern corporation embodies mandatory practices which are fundamentally short-termist and opposed to the long-term social and economic well-being of citizens at large. By legal statutes, corporations are driven to pursue greater profit relentlessly and by whatever means available. It is to be expected that any social justice initiatives which do not increase corporate profit would be dismissed and undermined.

But what can now be done to restore some counter-balance to the over-bearing oligopolistic power of huge food-supply corporations? Unfortunately there are few means available to rectify this unsatisfactory situation within the framework of the same free-market economy that created the problem. Any appeal for corporations to adhere to conventional (Christian) ethics is unlikely to succeed. A major paradigm shift away from the capitalistic pursuit of short-term profits is surely needed. But the task to moderate the deeply-entrenched psychopathic pursuit of profit as the foundation of the modern corporation would be formidable. Containment by direct actions of consumers including boycotts, and vocal appeals to elected representatives to enact restraints on the current unfettered capitalism could, at best, only partially remedy the situation.

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<sup>8</sup> Judgment in Case C-400/08, *Commission v Spain*; <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/cp110023en.pdf>.

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# Prisoners' Rights: Access to Computers and the Internet

Jen Geary

The Trident Mediation Counselling and Support Foundation, Canada

John Zeleznikow

Victoria University, Australia

## Abstract

*The purpose in this paper is to provide an overview about prisoners' rights to utilize the Internet and security concerns that may arise with this. It is argued that prisoners should have limited access to the Internet, for such purposes as education, to maintain contact with their families, and to utilise information sources that may be located outside their institutions.*

## Key Words

Prisoners' rights, Rights to use computers and the Internet, Human rights, Computer misuse and need for security

## Introduction

The writers' foundational purpose in this paper is to provide an overview about prisoners' rights to utilize the Internet and security concerns that may arise with this. In this document prisoners are defined thus those who are '...remanded or sentenced to adult custody in a gazetted adult prison in Australia, operated or administered by State or Territory correctional agencies, including those operated by private service providers'.<sup>1</sup> There are three sections in this composition. In the first section, the writers focus on prisoners' rights to access computers and the Internet. In the second section, the writers' emphasis is on prisoners' rights to use computers and the Internet, across a few jurisdictions. Then in the third section, the writers mention computer misuse and the need for security. Finally, the writers draw their conclusions. It is argued that prisoners should have limited access to the Internet, for such purposes as education, to maintain contact with their families, and to utilise information sources that may be located outside their institutions.

Prisoners and their advocates suggest that they have rights to access computers and the Internet. Societies have been shaped by globalization and the advent of information technologies. However, these rights and technologies might be misused in prison environments. Perhaps one of the first steps towards prisoners' being able to access these technologies is the recognition that the public safety calls for computers and the Internet to be applied under careful supervision.

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In this paper, materials are taken mainly from Australia and the USA, although the subject matter has implications for other Western countries.<sup>2</sup> As of 2013 the Australian Bureau of Statistics indicated that there are over 30, 000 prisoners in

<sup>1</sup> Australian Bureau of Statistics, *Prisoners in Australia* (2006) <<http://www.abs.gov.au/ausstats/abs@nsf/DoSSbyTopic/8724931436CDF784CA256BD00027E909?Open>>.

<sup>2</sup> Office of the High Commissioner for Human Rights, *Prisoners' Right to Education* (2009) 3 United Nations <<http://www.ohchr.org/EN/NewsEvents/Pages/Prisonersrighttoeducation.aspx>>.

Australia.<sup>3</sup> In 2014 the American Psychological Association reported that in the USA there are about 2.2 million prisoners.<sup>4</sup> Conceivably, ‘...globally there are more than 9 million people in prison, either as pre-trial detainees or as sentenced prisoners.’ According to Geist (2002), ‘The Internet is a worldwide network of interconnected computers’.<sup>5</sup> The right of Internet access seems to be positioned at the intersection between, first (‘civil and political’, including freedom of speech) and second-generation rights.<sup>6</sup>

A focus on second-generation rights seems to be on monetary elements such as, individual access to services or benefits.<sup>7</sup> Prisoners should have opportunities to rehabilitate and this is linked to their second-generation rights. According to Rotman (1986) this right is recognised under the “...bill of rights of various countries and is a basic principle of customary international law.”<sup>8</sup> This form of law comprises duties that occur through recognised state practice, as distinct from responsibilities that are a feature of written global treaties.<sup>9</sup> Other civil liberties include the rights for prisoners, not to be subjected to discrimination, and to retain contact with their families, friends, and the broader environment in which their prisons are situated.

Perhaps all persons should have a right not to be discriminated against and to have equal protection under the law.<sup>10</sup> In Europe there is a right to family contact, which is recognised under their Convention on Human Rights<sup>11</sup>. There can be advantages to fostering family relationships. Families can provide emotional and instrumental support to prisoners and ex-prisoners. Online communications through computers and the Internet could help prisoners to preserve their linkages with their significant others from prisons. The Federal Bureau of Prisons offers prisoners access to the telephone and to email. The Federal Bureau writes, “The Trust Fund Limited Inmate Computer System (TRULINCS) application enables electronic messages to be exchanged between inmates and the general public in a secured manner”.<sup>12</sup> Families are often disrupted when individuals are imprisoned and technologies can be applied to develop relationships. In her thesis work, Geary (2015) asked a corrections professional, namely Raymond in an interview with him about the use of the Internet for family visitation.<sup>13</sup>

According to Raymond the Internet was used as “...electronic family booking systems”. Lenny was another corrections professional who in Geary (2015) referred to “The Prisoners’ Aid Rehabilitation Trust”. This organisation assisted prisoners’ families to visit their imprisoned family members by having provided practical support such as petrol vouchers. In one jurisdiction visits between some family members and prisoners depended on where the older prisoner was located. Under *arts 8 and 12*

<sup>3</sup> Australian Bureau of Statistics, *Australian Prison Numbers reach 30,000 for the first time*. (2013)

<://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2013~Media%20Release~Australian%20prisoner%20numbers%20reach%2030,000%20for%20the%20first%20time%20%28Media%20Release%29~10001>.

<sup>4</sup> American Psychological Association, *Incarceration Nation* (2014). <http://www.apa.org/monitor/2014/10/incarceration.aspx>.

<sup>5</sup> Michael Geist, *Internet Law in Canada* (3rd ed, 2002).

<sup>6</sup> Declan O’Sullivan, ‘Is the Declaration of Human Rights Universal’ (2000) 4 *The International Journal of Human Rights* 25, 34. See also Tom Calma, Human Rights, Multiculturalism and Indigenous Rights (Speech delivered at Reconciliation Strategy Launch, South Brisbane, 30 July 2008) 14 <http://www.hreoc.gov.au/about/media/speeches/race/2008/20080730\_MDA.html>; *Charter of the United Nations*, opened for signature 26 June 1945, 59 Stat 1031 (enacted into force 24 October 1945) 2; Hugh M Kindred, Phillip M Saunders, Jutta Brunnee, Robert J Currie, Ted L McDorman, Armand LC deMestral, Karin Mickelson, Rene Provost, Linda C Reif, Stephen J Toope, Sharon A Williams, *International Law Chiefly as Interpreted and Applied in Canada* (Emond Montgomery Publications, 7th ed, 2006) 84.

<sup>7</sup> Ibid.

<sup>8</sup> E. Rothman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation?* (1986). National Criminal Justice Service <https://www.ncjrs.gov/App/publications/abstract.aspx?ID=105987>.

<sup>9</sup> Cornell University Law School, *Customary international law* (2015) Legal Information Institute <https://www.law.cornell.edu/wex/customary\_international\_law>.

<sup>10</sup> *Universal Declaration of Human Rights* UN Doc A/810 at 71 (1948) s7.

<sup>11</sup> *European Convention on Human Rights 1950*. <sup>[17]</sup> *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, UN Doc A/6316 (enacted into force 23 March 1976).

<sup>12</sup> The Federal Bureau of Prisons, Stay in Touch (2015) <http://www.bop.gov/inmates/communications.jsp>.

<sup>13</sup> Jen Geary, *Older Prisoners: A Human Rights Perspective* (2015) Deakin University 22.



of the *European Convention of Human Rights* there is a right “...to private and family life”<sup>14</sup>. Prisoners in such Western jurisdictions, as the USA and Australia, could be assisted through computers and the Internet to maintain contact with their families and the outside world.<sup>15</sup>

For prisoners to, for example, remain arrest free, on their releases from prisons, there can be merit in their gaining access to distance learning programs.<sup>16</sup>

Prisoners access or otherwise, to education in prison environments may be shaped by prison administrations.<sup>17</sup> Added to this, their access to computers and the Internet may depend upon State policies towards them. If a retributionist model, where a focus might be on prisoners’ personal limitations is adopted, inmates may have little access to these technologies. In the early 20th century criminal activities were often linked to individual deficiencies rather than social dysfunction.<sup>18</sup> During the 1970’s greater attention was paid to the goal of rehabilitation (and debates about whether this was possible), before the “tough on crime” approaches, characterised by harsher sentencing, began to prevail in the 1990s.<sup>19</sup> It is nonetheless accepted that “...discipline shall be no more restrictive than what is necessary to ensure custody and order”.<sup>20</sup> In other words, punishment for wrongdoing is sufficient when individuals are imprisoned. The Prison Service has obligations to treat prisoners humanely and to develop their skills to become successfully reintegrated into the community.<sup>21</sup> Rights are often embedded in regulatory environments.

## A Prisoners’ Rights

Rights might exist in name only unless they are upheld through the courts. However, legislation and regulatory frameworks may not be adequate to address attitudinal factors that have an impact upon prisoners’ needs and rights. Human rights as they apply in this context may be linked to prisoners’ and detainees’ safety, dignity, education, privacy, and well-being.<sup>22</sup> Respect for the inherent dignity and privacy of persons are key human rights principles.<sup>23</sup> Prisoners have rights to be treated with regard for their personhood.<sup>24</sup> An example, of such a right is privacy.<sup>25</sup> Fry (1988) defines privacy as “... an absence of environmental irritants, including crowding” (p. 176).<sup>26</sup> Rights, such as, privacy and safety have been compared against each other. Prisoners’ right to privacy is unlikely to be recognized, in situations that constituted a security risk, particularly if there is clear and imminent harm to others. Another example of a right is prisoner’s access to library services. In some jurisdictions, prisoners can gain access to legal materials.<sup>27</sup>

The 1st amendment of the US Constitution includes such rights as those pertaining to freedom of creed, speech, media, and assembly and to appeal to the government for remedies to address complaints.<sup>28</sup> Restrictions on prisoners being able to access email and other online materials may

<sup>14</sup> S. Easton. *Prisoners’ Rights. Principles and Practice* (Routledge, 2011).

<sup>15</sup> Office of the Office of the United Nations High Commissioner for Human Rights, *Human Rights and Prisons* (2005) 11 <<http://www.ohchr.org/Documents/Publications/training11Add3en.pdf>>.

<sup>16</sup> Vincent Worth, ‘Supporting learners in prison’ in Roger Mills and Alan Tait eds *Supporting the Learner in Open and Distance Learning* (Pitman Publishing, 1996) 177, 177.

<sup>17</sup> Ibid.

<sup>18</sup> Melissa Munn, M. & Chris Bruckett, *On the outside. From Lengthy imprisonment to lasting Freedom* (UBC Press, 2013).

<sup>19</sup> Aday, R.H. & Krabill, J.J. ‘Older and Geriatric Offenders: Critical Issues for the 21st Century.’ (2013) in L. Gideon (ed). *Special Needs Offenders in Correctional Institutions*. (Sage, 2013) 203, 233.

<sup>20</sup> *Standard Minimum Rules for the Treatment of Prisoners*.

<sup>21</sup> Geary, above n 13. 26.

<sup>22</sup> Ibid 15.

<sup>23</sup> *European Convention on Human Rights* art 8.

<sup>24</sup> *Basic Principles for the Treatment of Prisoners* UN Doc A/RES/45/111 (1990) ss 1-2.

<sup>25</sup> Robert M Blitzer, ‘FBI Domestic and Foreign Counterterrorism Operations’ in Lynne Zusman (ed.) *The Fundamentals of Counterterrorism Law* (American Bar Association, 2014) 7, 11.

<sup>26</sup> L.J. Fry, L.J. ‘The concerns of older inmates in a minimum prison setting’ in B. McCarthy and R. Langworthy (eds.), *Older Offenders Perspectives in Criminology and Criminal Justice*. (Praeger, 1988) 164, 178.

<sup>27</sup> *Bounds v Smith*, 430 U.S. 817 (1977) 1 8 9.

<sup>28</sup> *The Bill of Rights* (enacted into force December 15 1791) amend 1.

offend 1<sup>st</sup> amendment rights under the US Constitution.<sup>29</sup> The 14<sup>th</sup> amendment comprises such rights as those linked to citizenship and to vote.<sup>30</sup> Individuals often have a right to freedom of speech and generally this should be upheld with prisoners.<sup>31</sup> The objects of the PLN include the provision of well-timed and precise legal information to prisoners.<sup>32</sup> PLN sources can be posted to prisoners who do not have access to the Internet.<sup>33</sup> Prisoners may contribute to Prison Legal News (PLN) and this covers legal developments.<sup>34</sup> Contributors to the Prison Legal News seem, to depend upon the Internet, to access materials.<sup>35</sup>

Under the 1<sup>st</sup> and 14<sup>th</sup> amendments prisoners should have rights to receive ‘...non-subscription bulk mail and catalogs’.<sup>36</sup> These rights may be limited to maintain security in jail.<sup>37</sup> Societies might have reasonable expectations that security measures are going to be adopted, if contextual factors, such as possible harm to the public might happen otherwise.<sup>38</sup> There are restrictions on what prisoners can communicate through email, phone, the Internet, by post and other communications technologies.<sup>39</sup> Prisoners seem to have had their mail withheld if it was not from family members and treating professionals’ regarded its content to be inappropriate.<sup>40</sup>

The United Nations seems to recognise the right to education for prisoners.<sup>41</sup> The Australian Law Reform Commission reported that there might be a shortfall of quality and accessible rehabilitation and healing services for prisoners.<sup>42</sup> Prisoners who are not supported, for example, on their releases from prisons could be vulnerable to becoming involved in violent acts across Western nations.<sup>43</sup> It is important to provide a means for rehabilitation that focuses on prisoners’ well-being and this includes the right of access to the Internet.<sup>44</sup> Dean who was a corrections professional, during an interview with the researcher, called for prisoners to have access to computers and the Internet (Geary, 2015). Dean said:

*I know one hundred inmates right now who would be taking online college courses if they were allowed to do it. Right now. Just not allowed to do it. That’s a travesty to me. That’s wasted time, wasted space, wasted opportunity because there is free education. I have the access to get a Harvard education on the Internet.*

Dean indicated that individuals could gain access through computers and the Internet to a State library system and lectures by experts in their fields.

Prisoners may benefit from having supervised access to the Internet and technologies, such as,

<sup>29</sup> *The Constitution of the United States of America*, (enacted into force 4 March 1789); Vesna Jaksic, Prisoners' Right to Internet Materials Contested (2006) *The National Law Journal* 4.

<sup>30</sup> *The Bill of Rights* (enacted into force December 15 1791) *amend 14 ss1-2*.

<sup>31</sup> Prison Law Office, *Major Cases and Achievement* (2009) 2, Prison Law Office <<http://www.prisonlaw.com/cases.html#disability>>.

<sup>32</sup> *Ibid* 3.

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

<sup>34</sup> *Danny Williams v James E McDonald, Williams v. Donald*, No. 5:01-CV-292-2 (M.D. Ga.) (2005) 1-2.

<sup>35</sup> *Ibid* 2.

<sup>36</sup> *Prison Legal News v. Lehman D a* 397 F.3d 692 s 1.

<sup>37</sup> See *Jones v North Carolina Prisoners' Labor Union Inc.* 433 US 119 (1977) ss 9- 11, 23-28; *Patrick Hugh Morrison v. Frank Hall Director of the Oregon Department of Corrections* 261 F.3d 896 (9th Cir, 2001) ss 1-2, 12, 18-19, 25, 30-31, 33, 36, 45, 60.

<sup>38</sup> *Privacy Act 1988* (Cth) principle 4 (a).<sup>[17]</sup>

<sup>39</sup> *Danny Williams v James E McDonald, Williams v. Donald*, No. 5:01-CV-292-2 (M.D. Ga.) (2005) 2.

<sup>40</sup> *Turner v Safley* 482 U.S. 78 (1987) s 3.

<sup>41</sup> *Basic Principles for the Treatment of Prisoners* UN Doc A/RES/45/111 (1990) s 6; Office of the High Commissioner for Human Rights, above n 2, 4-6.

<sup>42</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) 103 s 28.18 The Australasian Legal Information Institute.

<sup>43</sup> Raymond W Kelly, ‘Terrorism’s Threat to Cities Large and Small’ in Lynne Zusman (ed.) *The Fundamentals of Counterterrorism Law* (American Bar Association, 2014) 27, 27-30.

<sup>44</sup> Richard Edney, ‘Judicial deference to the expertise of correctional administrators: The implications for prisoners’ rights’ (2001) 5 *Australian Journal of Human Rights* 11 The Australasian Legal Information Institute <<http://www.austlii.edu.au/au/journals/AJHR/2001/5.html#Heading196>>.

computers.<sup>45</sup> These technologies can, for example, help prisoners to access continuing and distance education. Prisoners' opportunities to develop their educational potentials can help them to meet their personal and vocational goals. Through Open University Education, including instruction, which includes computers and the Internet, prisoners can transcend limitations that are associated with both time and space and earn educational qualifications.<sup>46</sup> Computers and the Internet, for example, can assist prisoners in theory, to have equal access to education, to others in communities outside of prisons.<sup>47</sup> These types of educational opportunities can assist prisoners to develop autonomy, and to have psychological refuges from often-harsh prison environments.

Prisoners may need to overcome challenges to utilise services that are offered through Open University Education.<sup>48</sup> These obstacles might include feelings of being isolated from others in educational environments and of being under pressure to meet deadlines; by which time they should have submitted their assignment.<sup>49</sup> These factors may lessen prisoners' motivation to successfully complete their studies.<sup>50</sup> Prisoners who are imprisoned for short periods of time might not be able to access timely educational supports and this could increase their personal stress. In the United Kingdom funding for educational purposes was directed towards prisoners who were "...serving medium- to long-term sentences..."<sup>51</sup> Furthermore, prison environments may have 'anti-intellectual cultures' and this can impede prisoners' learning opportunities.<sup>52</sup> Worth (1996) indicates that prisoners through Open University Education can be prepared for release into their communities.<sup>53</sup> There is also merit in prisoners having access to digital services.

Evidence before The United Kingdom House of Commons Justice Committee (2013-2014) called for prisoners to be connected like others in society to digital services.<sup>54</sup> Prisoners who have been imprisoned for a long period of time are not likely to be familiar with computers and the Internet. This could have negative implications for them at home or work. Computers and the Internet may hold an untapped potential for prisoners to be able to access a range of educational activities. Furthermore audio-visual software that is linked to computers and the Internet could help to develop contact between prisoners and their family and friends.<sup>55</sup>

## Access to Computers and the Internet: Western Jurisdictions

Diverse jurisdictions such as Ohio, California and Queensland have dealt with prisoners' access to the Internet differently. Some Western jurisdictions in, for example, Australia and the USA may focus on developing security interests, whilst helping offenders to develop as citizens.<sup>56</sup> The Internet can be an important communications tool to assist prisoners to maximize their 'potential and development'.<sup>57</sup> Computers and networks that are linked together may give rise to instantaneous communications.

<sup>45</sup> A. Murphy, *Technological Innovations in Prison Education*. Research Gate<[www.researchgate.net/...in\\_Prison.../d912f50c6a5ff0c32c.pdf](http://www.researchgate.net/...in_Prison.../d912f50c6a5ff0c32c.pdf)>.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid 178.

<sup>48</sup> Worth, above n 16, 177.

<sup>49</sup> Ibid 179.

<sup>50</sup> Ibid 180.

<sup>51</sup> Ibid 181.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid 187.

<sup>54</sup> United Kingdom House of Commons, Justice Committee *Older Persons Fifth Report of Session* Parl Paper Volume 11 (2013-2014) <<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmjust/89/89vw.pdf>>.

<sup>55</sup> J.B. Walther, 'Computer-mediated communication: Impersonal, interpersonal, and hyperpersonal interaction' 23 (1) *Communication Research* (1996) 3, 43.

<sup>56</sup> Correctional Service of Canada, *Mission, Values and Ethics Framework of the Correctional Service of Canada* (2015) Correctional Service of Canada <<http://www.csc-scc.gc.ca/acts-and-regulations/001-cd-eng.shtml>>; Department of Corrections, *Our Priorities*, Department of Corrections <<http://www.corrections.govt.nz/about-us/corrections-vision.html>>; National Institute of Corrections, *Mission and Goals* (2009) 3 National Institute of Corrections <<http://www.nicic.org/Mission>>.

<sup>57</sup> Office of the High Commissioner for Human Rights, above n 2, 5.

These communications can be sent to one or more recipients.<sup>58</sup> There could be a number of ways in which individuals might communicate with each other through electronic means.<sup>59</sup> Electronic communications may involve the exchange of information ‘...in the form of data, text or images by means of guided and/or unguided electromagnetic energy’.<sup>60</sup> Such communications could also include verbal messages through a ‘...automated voice recognition system’.<sup>61</sup>

Prisoners in some jurisdictions such as California may not be able to gain access to the Internet.<sup>62</sup> This restriction on access seems to be directed towards preventing prisoners from being able to conduct commercial activities. Possibly to safeguard security in jails in California a policy was in place to prevent prisoners from being able to access materials that originated from the Internet.<sup>63</sup> The District Court issued an injunction against the California Department of Corrections ‘...prohibiting inmates from receiving mail containing material downloaded from the Internet.’<sup>64</sup> The United States Court of Appeals, Ninth Circuit upheld this injunction and, it was found that this prohibition violated 1<sup>st</sup> amendment rights.<sup>65</sup> In Ohio prisoners in many non-government and government correctional institutions are restricted from being able to access the Internet. This is unless these prisoners are closely supervised and require access to the Internet for vocational purposes.<sup>66</sup>

US prisoners’ access to computers and Internet varies between jurisdictions. In Kansas prisoners who are designated by the authorities as being minimum-security can have access to the Internet.<sup>67</sup> Also prisoners in Louisiana who would be released within 45 days and who needed the Internet, for the purposes of job search, were able to access the Internet.<sup>68</sup> Furthermore, prisoners who live in Hawaii and Connecticut may have limited access to the Internet. Similar to Louisiana, these states seem to be experimenting with Internet access.<sup>69</sup> In California prisoners may have limited access to computers, although this does not seem to extend to the Internet.<sup>70</sup> In Queensland prisoners don’t have access to either computers or the Internet.<sup>71</sup>

## Possible Computer Misuse and Needs for Security

In the USA freedom of speech is considered to be of substantive importance.<sup>72</sup> However, there may be legislative limits to freedom of speech and of the press, for example, with fraud, spam, when information that would be considered to be offensive to a reasonable adult is published, and children seem to be exposed to age inappropriate materials.<sup>73</sup> The US Postal Service thought that post that was

<sup>58</sup> *American Civil Liberties Union, et al v Janet Reno, Attorney General of the United States*, 929 F Supp 824 (Pa, 1996) s 4.

<sup>59</sup> *Ibid* s 22, 75, 79.

<sup>60</sup> *Electronic Transactions Act 1999* (Cth) s 5 (1).

<sup>61</sup> *Ibid*.

<sup>62</sup> *Clement v California Department of Corrections* 364 F.3d 1148 (9<sup>th</sup> Cir, 2004) s 3.

<sup>63</sup> *Ibid* s 2.

<sup>64</sup> *Ibid* s 1.

<sup>65</sup> See *Ibid* ss 5, 6, 9, 16.

<sup>66</sup> *Ohio Administrative Code 5120-9-51*.

<sup>67</sup> B. Branstetter ‘The case for Internet access in prisons’. *Washington Post* (Washington) February 9 2015.

<<http://www.washingtonpost.com/news/the-intersect/wp/2015/02/09/the-case-for-internet-access-in-prisons/>>.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Cal. Admin. Code* tit. 15, s 3041.3.

<sup>71</sup> Queensland Government, *Daily Life in Prison* (2014). Queensland Government. <<https://www.qld.gov.au/law/sentencing-prisons-and-probation/prisons-and-detention-centres/daily-life-in-prison/>>.

<sup>72</sup> A. Holtz, *Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet* (2002). LexisNexis <<https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid=3B15&doctype=cite&docid=67+Brooklyn+L.+Rev.+855&key=cae1dcc3d330cfaabfaebfb9d36d985>>.

<sup>73</sup> See Richard Alston ‘The Government’s Regulatory Framework for Internet Content’ [2000] 23 (1) *University of New South Wales Law Journal* <<http://www.austlii.edu.au/au/journals/UNSWLJ/2000/1.html>>; Susan W Brenner, *Toward A Criminal Law for Cyberspace: A New Model of Law Enforcement?* (2004) Boston University <<http://128.197.26.34/law/central/jd/organizations/journals/scitech/volume101/brenner.pdf>>; *Broadcasting Services Act 2002* (Cth) s 3 (j), (l), (m); *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) sub-s 4 (2) (a); *Convention on Cybercrime* 23.XI.2001 (enacted into force 1 July 2004) art 8; *Crimes Legislation Amendment (Telecommunications*

being directed to a prisoner, contained communist opinions. A court upheld the right, of this prisoner not to be lawfully required, to 'request in writing' that he receive these postal materials.<sup>74</sup> The prisoner had a right of communication through, for example, the post, however these rights need to be limited if their recognition constitutes a clear and demonstrable risk to the public safety.

Computers and the Internet could be misused to commit torts or crimes. In *Gutnick v Dow Jones & Co Inc* [2001] the defendant - Dow Jones and Company preferred to have a defamation action heard in the USA rather than in Victoria, Australia.<sup>75</sup> The right of free speech is often limited in Australia.<sup>76</sup> The courts in Australia may prevent defendants from publishing material that they find to be defamatory.<sup>77</sup> In the US the courts might place more significance on freedom of speech than a tort such as defamation.<sup>78</sup> Defamatory materials once they are published on the Internet may be accessed throughout the world.<sup>79</sup> Copyright infringement might be considered to be a crime.<sup>80</sup> The hosting and operating of web sites with copyright protected materials, the downloading of music files and encouraging others to do so for financial gain, may constitute infringement.<sup>81</sup> The limits of prisoners' speech are to maintain safety, security, and to protect the public interest.<sup>82</sup> If these limits are not enforced this can give rise to conflicts of laws and jurisdictional issues.<sup>83</sup>

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*Offences and Other Measures*) Act (No. 2) 2004 (Cth) s 473.4; *Criminal Code Act 1899* (Qld), s 228 (a), 359 (c) (v); *Crowe v Graham* (1968) 121 CLR 375 s 5, 14; Facebook, *Statement of Rights and Responsibilities* (2009) s (3) 8, 11 (6), Facebook <<http://www.facebook.com/terms.php>>; Brian Fitzgerald and Ann Fitzgerald, *Cyberlaw: Cases and Materials on the Internet, Digital Intellectual Property and Electronic Commerce* (Lexis Nexis, 2002), 659, 662-670, 674-676, 712-713; Michael Kirby, 'Privacy in Cyberspace' (1998) 26 *UNSW Law Journal* 323, 325; Y.F. Lim, Y.F. *Cyberspace Law: Commentaries and Materials* (Oxford University Press, 2nd ed, 2002); *Spam Act 2003* (Cth) s 4; *Rutgers Computer and Technology Law Journal*; E-Security: Addressing Technology Risks for Successful E-Government Initiatives <<a href="https://www.qld.gov.au/law/sentencing-prisons-and-probation/prisons-and-detention-centres/daily-life-in-prison/" target="\_new">>; United States Department of Justice, *Internet and Telemarketing Fraud 2* (2009) United States Department of Justice <<http://www.usdoj.gov/criminal/fraud/internet/>>.

<sup>74</sup> See *Lamont v Postmaster General of the United States* 381 US 301 (1965) ss 2-6, 8, 12, 23.

<sup>75</sup> *Gutnick v Dow Jones & Co Inc*. [2001] VSC 305 s 115.

<sup>76</sup> Sophie Dawson, Aaron Kloczko & Blake Dawson Waldron, 'Beyond Gutnick: Enforcement of foreign defamation judgments in Australia' (2003) *Journal* 37 New South Wales Society for Computers and the Law.

<sup>77</sup> *Ibid* 32-3], 35-36; Binoy Kampmark 'Macquarie Bank v Berg: A Private International Law Critique' (2001) 8 *Murdoch University Electronic Journal of Law* 5 Murdoch University <<http://www.murdoch.edu.au/elaw/issues/v8n3/kampmark83nf.html>>.

<sup>78</sup> See Dawson, Kloczko and Waldron, above n 76, 3-33, 35-36.

<sup>79</sup> See Michael Geist, *Is There a There? Towards Greater Certainty for Internet Jurisdiction* (2001) 1; Kirby, above n 73, 326; *Macquarie Bank Ltd and Anor and Berg* [1999] NSWSC 526 s 12, 24; Organisation for Economic Co-operation and Development, *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* 1980 1 Organisation for Economic Co-operation and Development <[http://www.oecd.org/document/18/0,2340,en\\_2649\\_34255\\_1815186\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html)>.

<sup>80</sup> *Convention on Cybercrime* 23.XI.2001 (enacted into force 1 July 2004) art 10 (1); Free Software Foundation, *What is free software and why is it so important for society?* (2009) 3 Free Software Foundation <<http://www.fsf.org/about/what-is-free-software>>. See also *Copyright Act 1968* (Cth) s 31 (vi); *Computer Misuse Act 1990* (UK) s 3.

<sup>81</sup> See Free Software Foundation, *The GNU General Public License* (2007) s 0 Free Software Foundation <<http://www.gnu.org/copyleft/gpl.html>>; *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 s 2, 5, 8, 27, 88, 90, 99, 100, 108, 130, 131, 145.<sup>[SEP]</sup>

<sup>82</sup> *Procurier v. Martinez*: 416 US 396 (1974).

<sup>83</sup> See Apple Inc. *iPhone SDK Agreement Internal Use Only; No Redistribution*. *Apple Inc.* s 10.11 (2008)

<[http://www.wired.com/images\\_blogs/gadgetlab/files/iphone-sdk-agreement.pdf](http://www.wired.com/images_blogs/gadgetlab/files/iphone-sdk-agreement.pdf)>; Australasian Centre for Policing Research, *The Virtual Horizon: Meeting the Law Enforcement Challenges* 101 (2000) Australasian Centre for Policing Research <<http://www.joelschwarz.com/SpeechTestDocs/VirtualHorizonAustralia.pdf>>; Brenner, above n 73, 3, 40, 41, 63; Electronic Frontier Foundation, *The Challenge of Unlawful Conduct Involving The Use of the Internet A Report of the President's Working Group on Unlawful Conduct on the Internet* (2000) Computer Crime & Intellectual Property Section, United States Department of Justice s B2, D1 (A) <<http://www.politechbot.com/docs/unlawfulconduct.html>>; Facebook, above n 73, 15 (1); Richard Garnett, 'Regulating Foreign-Based Internet Content: A Jurisdictional Perspective' (2000) 8 *University of NSW Law Journal* 5, 7, 10, 14 University of New South Wales <<http://www.austlii.edu.au/au/journals/UNSWLJ/2000/8.html>>; Kampmark, above n 77, 4-5, Lim, above n 73, 325, 371; *Macquarie Bank Ltd and Anor and Berg* [1999] NSWSC 526 ss 8-9; Working Group on Unlawful Conduct on the Internet, *The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet* (2000) app F1 Computer Crime & Intellectual Property Section, United States Department of Justice <<http://www.politechbot.com/docs/unlawfulconduct.html>>; Francis Vierboom, *Internet jurisdiction only deeper in confusion* (2003) 1, 5 *Galexia* <[http://www.galexia.com/public/research/articles/research\\_articles-art28.html#Heading439](http://www.galexia.com/public/research/articles/research_articles-art28.html#Heading439)>; YouTube 'Terms of Service' *YouTube APIs and Tools* s 11 (2013) YouTube <<http://code.google.com/apis/youtube/terms.html>> .

Jurisdictional factors for a particular case may include those pertaining:

- to the appropriateness or otherwise of a forum;
- the choice of law;
- personal jurisdiction;
- the correct serving of subpoenas;
- where the end user is situated;
- whether tortious conduct such as defamation occurred.<sup>84</sup>

If a defendant has targeted the forum enjoying its benefits, the place of publication, reasonableness and broadly the parties' earlier connections with an authority, then he or she may have a link with a particular jurisdiction.<sup>85</sup> The elements that have a bearing upon jurisdictional issues include, the authority of administrative bodies to make laws, to preside over cases, to hear the subject matter, address personal issues, and to consider the convenience or otherwise of a particular forum for plaintiffs and defendants.<sup>86</sup> There may be specific contracts, or parts of criminal statutes, where a particular forum is specified.

Security to develop prisoners' rights may involve surveillance to limit inmates from becoming involved in sabotage and other violent acts.<sup>87</sup> Security might include collaborative networks between government and non-government organisations, information gathering, and expert appraisal to detect the misuse of computers and the Internet.<sup>88</sup> Security risks linked to computers and the Internet can be defined thus, '...the process of ensuring the confidentiality, integrity, and availability of electronic information and protecting it against malicious attackers who could use or alter the information to disrupt critical national infrastructure and industry.'<sup>89</sup> Prisoners for security reasons are often prevented from having the means to conduct financial transactions with others.<sup>90</sup> Other inmates may target prisoners who have access to monetary resources.<sup>91</sup>

Measures to develop security include the use of passwords and firewalls to limit access to particular kinds of data.<sup>92</sup> Internet content may be restricted by 'filtering facilities', the blocking of materials, 'services providers can limit access, net user groups can require passwords and restrictions'.<sup>93</sup> The filtering of online content might be thwarted by circumvention programs, which are perhaps easily located through the Internet.<sup>94</sup> There may be merit in noting down electronic transactions.<sup>95</sup> These kinds of notes may generate a legal record of security concerns, which can be applied to track down sources of Internet breaches. The jamming of materials might have negative legal and commercial implications.<sup>96</sup> It is often important to safeguard data with appropriate backup and retrieval

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<sup>84</sup> See Apple Inc., above n 83, s 10.9; *Convention on jurisdiction and the enforcement of judgments in civil and commercial matters* 1988 (entered into force March 1997) art 5; Garnett, above n 83, 4; Geist, above n 79, 10, 13, 16-17, 19, 21, 27-30, 36-37, 39-40, 47; *Gutnick v Dow Jones & Co Inc.* [2001] VSC 305 ss 6, 8, 13, 16, 17, 19, 20, 35, 36, 42, 51, 59, 62, 80, 81, 82, 83, 87, 97, 99, 101, 103, 106, 108, 110, 115, 116, 117, 119, 124, 126, 127, 130; Kampmark, above n 77, 4-5; Microsoft Corporation, *Software License terms (MSLT) for 2007 Microsoft Office Desktop application software* s 20, 42; Vierboom, above n 83, 5- 7, 10-15, 20, 22, 26.

<sup>85</sup> Ibid.

<sup>86</sup> Lim, above n 73, 22.

<sup>87</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 4; *Telecommunications Act 1997* (Cth) s 58A (5). [1] [SEP]

<sup>88</sup> See Kelly, above n 43, 32.

<sup>89</sup> Brenner; above n. 73.

<sup>90</sup> Corrective Services Bill 2006 (Qld) 16 [1] [SEP]

<sup>91</sup> Ibid.

<sup>92</sup> See *Broadcasting Services Act 1992 – Schedule 5* (Cth) s 3; *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 s 14, 74; Michael Sukkariéh, *Security Architecture and Models CISSP Domain* (2004); Vanderbilt University, *Next Generation Network: Frequently Asked Questions* (2015) Vanderbilt University <<http://ngn.vanderbilt.edu/Pages/NGN-FAQ.html>>.

<sup>93</sup> Kampmark, above n 77, 3.

<sup>94</sup> Lim, above n 73, 405; Joseph C Rodriguez, *A Comparative Study of Internet Content Regulations in the United States and Singapore: The Invincibility of Cyberporn* (2002) 10 United Nations Public Administration Network <<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN004062.pdf>>.

<sup>95</sup> Sukkariéh, above n 92, 1.

<sup>96</sup> Garnett, above n 83, 12.

processes.<sup>97</sup> Security awareness can be developed, for example, by implementing policies and practices linked to risk appraisal and avoidance, the recognition of hazards and education. There can be a role for educating custodial staff about safety issues, including those that are linked to the secure management of data.<sup>98</sup>

In Geary (2015) a corrections professional commented, “*We have lots of security breaches.<sup>99</sup> However, that hasn’t prevented prisoners from accessing the Web for educational purposes*”. Prisoners should be able to realise their rights to access education, communicate with others and visit with their families. Computers and the Internet can be tools to help prisoners to benefit from these rights. There can be a number of security concerns that arise when prisoners gain continued access to the World Wide Web and the Internet. One possibility of reducing security concerns is by automating access through code, which can differentiate between varying end users.<sup>100</sup> Generally, security architecture may serve to identify persons or organizations. This information might be disclosed to other parties, for example, when a request is made for a document.<sup>101</sup> Individuals may then rely on this information to offer or refuse access to documents.<sup>102</sup> The Committee on Cyberspace Law (2009) discusses management structures, enforcement and ways to safeguard end user identity.<sup>103</sup> President Obama seemed to place importance on security.<sup>104</sup> A funding priority with the White House is to make, the government and non-government sectors have a network substructure that is both durable and secure.<sup>105</sup>

Governments including ones in such countries as Australia and the USA are aware of some aspects that are linked to the misuse of computers. The United Nations Commission on International Trade Law is placing an emphasis on developing information security.<sup>106</sup> For security purposes, organisations may communicate to others, log or utilize such data as legally accessed materials ‘other than foreign intelligence information’.<sup>107</sup> Maybe there are limitations with excessive government monitoring of the Internet.<sup>108</sup> This may be particularly so, if the government places emphasis on eliminating all security threats rather than focusing on principles in public health; including collaboration and networking.<sup>109</sup>

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<sup>97</sup> Sukkarieh, above n 92, 1.

<sup>98</sup> Australasian Centre for Policing Research, above n 67, xxv, 74; Brenner, above n 73.

<sup>99</sup> Geary, above n 13, 60.

<sup>100</sup> Committee on Cyberspace Law, ‘Task Force on Federated Identity Management’ (Section of Business Law, American Bar Association, *Annual Meeting*, Chicago, July 31-August 3 2009).

<sup>101</sup> *Gutnick v Dow Jones & Co Inc.* [2001] VSC 305 s 8, 65, 66, 71.

<sup>102</sup> Committee on Cyberspace Law, above n 100.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> The White House, *Foreign Policy: Cybersecurity* (2015) The White House <<http://www.whitehouse.gov/issues/foreign-policy/cybersecurity>>.

<sup>106</sup> Nigel Martin, *Why Australia needs a SAGE: A security architecture for the Australian government environment* (2004) Research Gate

<[http://www.researchgate.net/publication/248544501\\_Why\\_Australia\\_needs\\_a\\_SAGE\\_A\\_security\\_architecture\\_for\\_the\\_Australian\\_government\\_environment](http://www.researchgate.net/publication/248544501_Why_Australia_needs_a_SAGE_A_security_architecture_for_the_Australian_government_environment)>; United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Secured Transactions 1 United Nations Commission on International Trade Law 1 United Nations Commission on International Trade Law* <[http://www.uncitral.org/pdf/english/texts/security-1g/e/09-82670\\_Ebook-Guide\\_09-04-10English.pdf](http://www.uncitral.org/pdf/english/texts/security-1g/e/09-82670_Ebook-Guide_09-04-10English.pdf)>.

<sup>107</sup> *Telecommunications (Interception) Amendment Act 2006* s 136 (1) (a).<sup>[1]</sup>

<sup>108</sup> Geist, above n 79, 7, 25.

<sup>109</sup> Joshua Glidden, ‘ICANN: apply public health response model to e-security’ *Computer World* <[http://www.computerworld.com.au/article/303543/icann\\_apply\\_public\\_health\\_response\\_model\\_e-security/](http://www.computerworld.com.au/article/303543/icann_apply_public_health_response_model_e-security/)>.

## Conclusions

Prisoners do not automatically lose these inalienable rights when they are imprisoned. Human rights instruments, such as, the UN *Charter of Rights and Freedoms* 1982 (C) could be societal codes that are intended to safeguard the liberties and freedoms of all citizens including prisoners.<sup>110</sup> It is important to note that the European Court of Human Rights has rejected the adoption of blanket policies to cover every unique circumstance that prisoners might encounter.<sup>111</sup> There are, of course, competing rights including those that are linked to individual and community liberties. There are tensions between the rights of the community to be protected and the rights of the individual.<sup>112</sup>

International instruments, such as, the *International Covenant on Civil and Political Rights*, are useful in understanding the current way in which services respond to prisoners' human rights.<sup>113</sup> There can be challenges linked to the need to balance security and the protection of privacy on the Internet.<sup>114</sup> There seems to be a call for funding bodies including government ones to address these security risks. The reliability of data could be compromised if it is not whole, and has been modified in some way, other than with supplemental information such as an approval letter or an unimportant alteration '...which arises in the normal course of communication, storage or display'.<sup>115</sup> To limit disadvantage in and outside of Western nations, there is a call for economic and financial initiatives, to limit social and legal tensions.<sup>116</sup>

The Justice Committee posits that prisoners should have access to computers and the Internet and that these technologies should be secure.<sup>117</sup> This could allow prisoners to have opportunities, which are similar to those enjoyed by others in the community to develop their education. This could be a much-needed support to assist prisoners to rehabilitate on their releases from prisons. Furthermore the Justice Committee said that it '...appreciates that there are security concerns but highlights the evidence submitted to it that these can be addressed.'<sup>118</sup> Overall, the Internet could be a service to which all individuals including prisoners should have access to communicate with their families, to develop their education, and to keep up with the news about, for example, topical issues. However, prisoners right of access to the Internet needs to be balanced against security concerns, for public safety that might emerge from upholding this right. In the USA unlike Australia prisoners have constitutional rights to the use of computers and the Internet, including email and other online materials. These rights might be limited for the purposes of security in prisons. The key conclusion that the writers draw in this paper is often prisoners should have access to the Internet unless this clearly undermines public safety.

<sup>110</sup> *Charter of Rights and Freedoms* 1982 (C).

<sup>111</sup> S. Easton, above n 14.

<sup>112</sup> HM Chief Inspector of Prisons. *No Problems – Old and Quiet. Older prisoners in England and Wales* (London Home Office, 2004); J. Vess, *Risk Assessment and Risk Management with Sex Offenders. Community Protection v's Offender Rights* (Deakin University Centre for Offender Reintegration, 2010).

<sup>113</sup> *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, UN Doc A/6316 (enacted into force 23 March 1976).

<sup>114</sup> See Apple Inc., above n 83, ss 3.3.6-3.3.7; Electronic Frontier Foundation, above n 83, s C; *European Convention on Human Rights* 1950, art 8; Fitzgerald and Fitzgerald, above n 73, 661; *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, UN Doc A/6316 (enacted into force 23 March 1976) art 17; Privacy International, *Memorandum of Laws Concerning the Legality of Data Retention with Regard to the Rights Guaranteed by the European Convention on Human Rights*, 2003 3 State Watch; <[http://www.statewatch.org/news/2003/oct/Data\\_Retention\\_Memo.pdf](http://www.statewatch.org/news/2003/oct/Data_Retention_Memo.pdf)>; Andrew Stone, 'ISPS and the balance between personal privacy and public law enforcement' (2003) 3 *NSW Society for Computers and the Law Journal* 54 New South Wales Society for Computers and the Law <[https://nswscl.org.au/index.php?option=com\\_content&view=article&id=113%3Aisps-and-the-balance-between-personal-privacy-a-public-law-enforcement&catid=26%3Adecember-2003-issue&Itemid=31](https://nswscl.org.au/index.php?option=com_content&view=article&id=113%3Aisps-and-the-balance-between-personal-privacy-a-public-law-enforcement&catid=26%3Adecember-2003-issue&Itemid=31)>; Vijay Varadharajan, *Advanced Cyber Security Research Centre Faculty of Science* (2015) Macquarie University <<http://www.comp.mq.edu.au/research/inss/>>.

<sup>115</sup> *Electronic Transactions Act 1999* (Cth) s 11 (3) (a)-(b).

<sup>116</sup> Tania M. Chacho and Michael J. Meese 'What Is the Mission: Why Is Counterterrorism So Difficult' in Lynne Zusman (ed.) *The Fundamentals of Counterterrorism Law* (American Bar Association, 2014) 33, 38.

<sup>117</sup> Scottish Parliament Justice Committee, *Inquiry into purposeful activities in prisons*, Parl Paper No 5 (2013) s 22 Scottish Parliament <>.

<sup>118</sup> *Ibid.* See also Chacho and Meese, above n 116, 40-41.





