OPINION

BOND LAW REVIEW: TEN YEARS ON

By William Van Caenegem[*]

The first issue of the Bond Law Review appeared in May 1989. During that same month, the School of Law taught its first undergraduate students. Then as now, the School stressed the importance of good teaching and dedication to students. But this was never to be at the expense of research and writing: the alacrity and determination with which the first Review was published bears testimony to that.

This all staff issue marks the tenth anniversary of the Review. Cover layout and formatting have been renewed to mark the occasion and to give the Review a more contemporary feel. As well as contributions from a large number of existing members of staff, the text of the 2000 Gerard Brennan Lecture at Bond University, given by the Chief Justice of Queensland, Mr Justice De Jersey, has also been included.

The Bond Law Review offered a new publishing opportunity to scholars and practitioners alike. The first issue, under the editorship of Jim Corkery, illustrated some of the characteristics of the School that have remained prominent. The article by Peter Dwight, 'Commercial Dispute Resolution in Australia, some trends and misconceptions', presaged ADR as an important topic of research and teaching in the School. The focus on corporate and commercial law was reflected in the articles by Tony Tarr ('Insurance law and the consumer'), Di Everett ('The role of deeds in property transactions – Contractual and Dispositive Acts') and Lee Aitken ('Loss or Damage under section 82 of the Trade Practices Act'). Interest in foreign law was represented by John McNulty ('The US' individual and Corporate Income Tax: Future Reform Possibilities'). And the article by Horst Lucke ('Ratio Decidendi: Adjudicative rationale and Source of Law') demonstrated that the Review would not resile from publishing more theoretical pieces. The Notes section of the Review acted as a platform for the publication of shorter contributions or

* Associate Professor of Law, Bond University. I wish to thank Professor Pamela Samuelson of the University of California, Berkeley, for her valuable comments. Opinions expressed in this note are entirely my own.

comments on recent cases, as illustrated by the pieces by Moore and Tarr ('General Principles and Issues of Occupational Regulation') and by Kwai-Lian Liew ('Destiny of Company's Affairs – in Whose Control?) in the first issue.

The School remains committed to publishing a high quality refereed journal. During sometimes turbulent times, it has continuously published two substantial issues for 10 years. Corporate, commercial, and, international law, as well as ADR have remained the Review's mainstay, with contributions from practitioners, academics and students. Di Everett took over the editorship from Jim Corkery in 1990 and in 1998 I took over, introducing a new Opinion section as a platform for discussion of topical issues. Throughout, book reviews have also been published. It is notable that Bond law school staff have contributed substantially to the Review over the years. This has enhanced the quality of the Review and demonstrates the importance attached to writing and research in the School. In 1999 alone, staff also published a number of books, including DE Allan & CC Wappett, *Securities over Personal Property*, Butterworths (1999), D Ong, *Trusts law in Australia*, Federation Press (1999), and JF Corkery, *Starting Law*, Scribblers Publishing (1999). Gerard Carney's *Members of Parliament: Law and ethics*, Prospect Media will be published in July 2000 by the Federation Press. There have also been recent new editions of existing textbooks, such as Farrar's *Company Law*, and Colvin, Linden & Bunney's *Criminal law: cases and materials.*

A journal such as the Bond Law Review is an important platform for the publication and exchange of ideas and information. A wide choice of Reviews and Journals to publish in, whether specialist or general, characterises a healthy tertiary education system. The opportunity to publish freely and to choose where and when to publish is an important academic value. As a consequence, Reviews and Journals contribute to the vital role that Universities fulfil as sources of independent scholarship and review.

This role is under pressure in today's university funding conditions. A private university such as Bond, not reliant on public funds, has an important place in the system of open, frank and transparent debate on current issues. But universities' acute need for tuition income, well understood at Bond but relatively new at public institutions, does make it more difficult to strike an appropriate balance between writing and

teaching. When financial pressure builds, the funding available for research is often the first to be cut. Not only should universities stem this trend, they should actively reverse it. As well as fulfilling a public interest function, research output has many potential benefits in the new commercial and digital environment. It enhances institutional reputation, attracting the best students at all levels; it improves teaching and the development of innovative subjects; it enhances staff satisfaction; and as universities now well understand, it opens up potential new revenue streams.

Yet perhaps the divide between teaching and writing is blurring in the digital environment. Much teaching in the future will be based on standardised, often team-based, modular and structured delivery over the Internet, not on individual and unique class performances. Production of comprehensive and elaborate materials for online delivery, will replace one-off, ephemeral lectures and tutorials. The task of producing materials for this type of Internet delivery will be demanding, complex and specific. The results are more public and more permanent than any classroom appearance. And in delivering teaching online, traditional research and writing will be put to use directly, as part of an overall 'package' delivered to the student. The interest of University administrators in the writings and other materials required for online teaching is not surprising: they focus on academic work as potentially lucrative intellectual property. There are dangers in this trend.

Nobody doubts that the Internet provides enormous opportunities for the dissemination of scholarship and education. Selling educational services on-line is also a big potential earner for institutions that can afford the infrastructure required. The income derived may support future research activities, but it may just as well fund competitive expansion of universities acting as commercial concerns. But the content provided by universities to remote students via the Internet must come from their academics. Do universities have a right to use copyright works of academics for this purpose without further ado? Does it serve the public interest if this happens?

Take for instance, Melbourne University's new IP Policy. It provides that the University has 'a non-exclusive, royalty free, worldwide and irrevocable licence to commercially exploit for the duration of the period in which the intellectual property rights subsist, the intellectual property,

either itself or with other academic institutions provided only that such exploitation is restricted to the University's educational purposes in delivering education programs, including, without limitation, the University's research, teaching and scholastic endeavours. In exercising its rights under the licence, the University recognises the moral rights of the author including the rights of attribution and integrity of authorship' (available at http://www.unimelb.edu.au/ExecServ/Statutes/s141.htm).

Any employed academic thus licenses all her academic works for commercial exploitation for educational purposes by her university. Potentially, she is also licensing *other* universities that form part of a consortium. This is a right universities have never obtained from academics before. It represents a bold seizure of staff's intellectual capital and an acute imposition on the use of academics' tools of trade. Although academics are granted ownership of their intellectual property, its value is greatly affected by the imposition of such onerous licensing conditions. The provisions naturally affect the financial interests of academic staff. Universities become on-line publishers; unlike traditional publishers, they bear no obligation to pay royalties. At the same time the university as publisher eats into the markets from which academics have earned royalties (meagre as they often are) through traditional publishing contracts.

But the risk is also that the function of research and writing as a forum for independent analysis and discussion may become diminished in the scramble to commercialise academics' intellectual property. The commercial exploitation of intellectual property affects academic freedom and independence of research and writing, because it wrests control over academic expression and publication away from the academics themselves (even if subject to the moral rights of integrity and acknowledgment) and puts it into the hands of administrators. Publications can be exploited commercially by a university without the ongoing collaboration of the author. Yet in a world of instantaneous global distribution and easy digital manipulation, academic control over writing after publication is an even more vital interest to academics, because it is so easily subverted. An academic's right to learn and to change and retract views is also impeded because the interests of an institution may trump the control of the author. As to the moral rights provision, any person with some knowledge of moral rights rules and presaged legislation, will know that references to the rights of integrity

and acknowledgment are little short of meaningless in this academic context. Targeted rules, that recognise the academic's right to turn a publication to account, but also to control who, how, where and in what form her publications appear, would be far more effective.

Granted that University administrators have a legitimate interest in some say-so over some of the copyright works that academics create. But it should be restricted to short term needs (for instance, if the academic concerned is away on leave, or because of illness), and should never extend beyond the term of employment of the academic. There should never be a license to 'commercially exploit' the works, for whatever purpose, and the license should not extend beyond lecture notes and course materials in which the academic author owns copyright, nor extend beyond the needs of the employing institutions, without further negotiation. If a university wishes to exploit academic works for on-line delivery in any form, it should enter into individual contractual agreements with staff concerned, allowing for fair compensation and addressing academic issues on an individual basis. In the pre-digital environment a workable arrangement between academics and universities existed: universities controlled the supply of courses, academics controlled the supply of their writings. Altering this balance in favour of universities' commercial interests should not be done lightly.

Otherwise, in the scramble for new sources of funding, universities risk finding themselves in the awkward position of opponents, rather than supporters of free academic expression, of independence of thought, and of fairness and openness in dealings with their most important intellectual asset - academic staff. This cannot be in the public interest. Fair and reasonable agreement about intellectual property is vital if independent research and publication are to be maintained and encouraged. And it is vital to the continued and fruitful existence of journals such as the Bond Law Review. Woe the day that academic publications serve no other purpose than grandstanding in support of the applications for promotion or advancement of their contributors.