LETTER OF ADVICE -
TO THE AUSTRALIAN GOVERNMENT AND THE COMMONWEALTH OF NATIONS INCLUDING THE COMMON LAW WORLD AND OUR WORLD'S LEGAL SYSTEMS.
IS THERE A NEED TO CLOSE THE BIGGEST LEGISLATIVE LOOPHOLE IN THE HISTORY OF OUR LEGAL SYSTEMS?
A SEPARATION OF POWERS AND CORPORATE LAW PERSPECTIVE – THE RISE AND FALL OF CORPORATE LAW

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The Rise and Fall of our Legal Systems and the Rule by Law Throughout the World: The Rise and Rise of a Constitutional Theory – A New System of Constitutional Government for the World to Follow.

Hypothesis: Can I Solve This Internationally Significant Australian High Court Constitutional Law Issue from a Separation of Powers Perspective? Will This Constitutional Theory and New Constitutional Government Become A New Constitutional Promise for Australia and Other Countries to Follow. You Be the Judge.

"As a Bare Minimum of the 53 Countries in the Commonwealth – None, Not One of These Countries, Have Developed Legislation on Legal Technique and Legal Reasoning – *This is the Biggest Legislative Loophole that Presently Exists Throughout the Commonwealth & Common Law World – Possibly Even a Worldwide Loophole*" Julio Altamirano Student-at-Law with Monash University/Deakin University at the Australasian Law Teacher's Association Conference and the Corporate Law Teacher's Association Conference.

Enhancing the 'Rule by Law' Throughout the World

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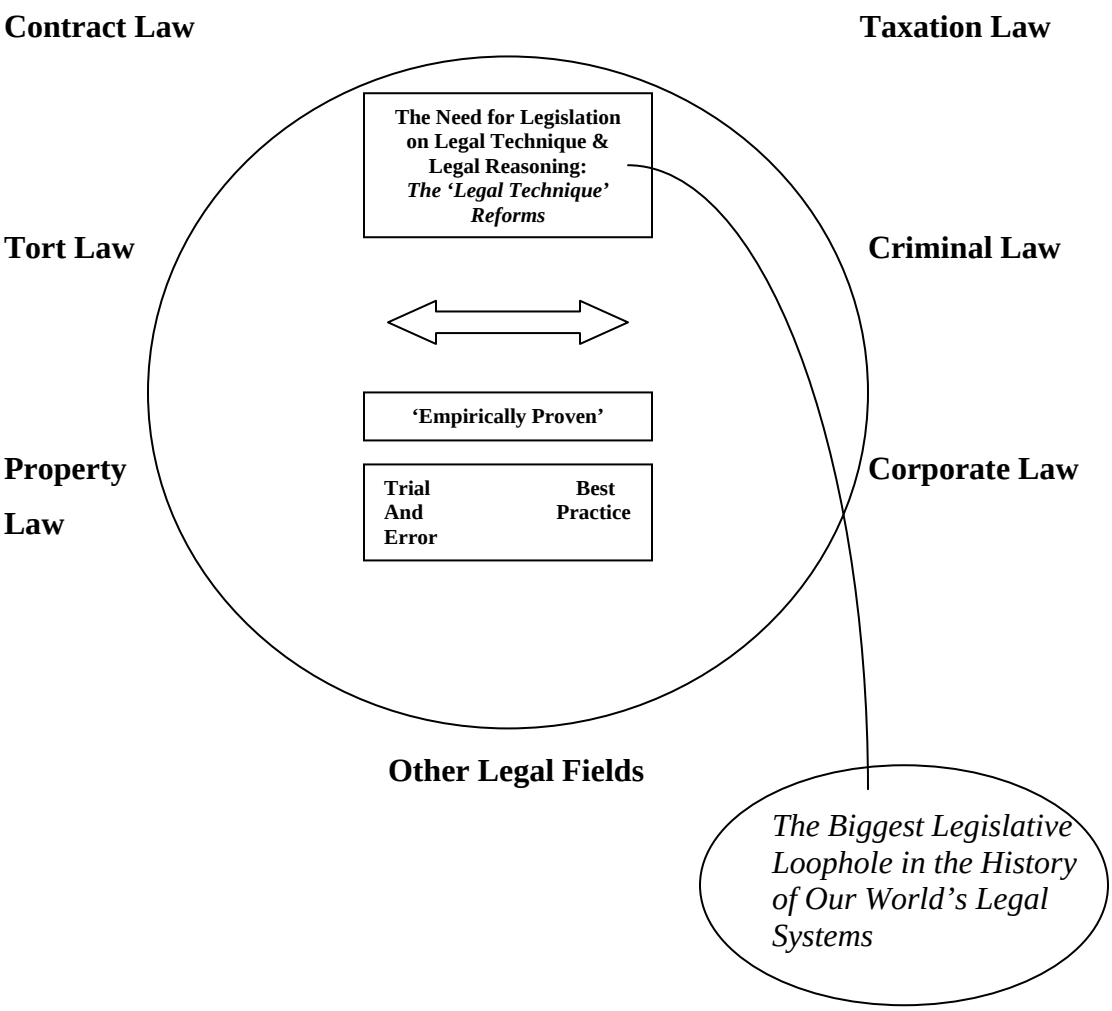

Paper submitted for presentation at the Corporate Law Teacher's Association (CLTA) Conference in Melbourne, February 4-6th 2007.

ABSTRACT: The following research continues to develop the 'trial and error' loophole and is the continuation of addressing the codification of legal technique and legal reasoning with the aim of developing an extensive code in relation to this field entitled *The Legal Technique Reforms* (as stand alone legislation rather than through a system of pleadings) aimed at the legal profession, the judiciary and all those tasked with interpreting the common law and legislation to reduce 'trial and error' and achieve 'best practice' in legal technique and legal reasoning and develop a system of logic that can be applied to every legal field. This extensive code will be developed from an array of materials including the common law, journal articles, books and internet materials to mention the key sources as previously discussed and promulgated at the Australasian Law Teacher's Association (ALTA) law conference held in Melbourne in July 4th-7th in 2006. This paper however, will, however as its underlying theme, more specifically address the constitutional law issues surrounding these reforms limited initially to federal separation of powers issues and the rule of law or rule by law. Initially, this paper will limit itself to these constitutional law issues, other constitutional issues will be addressed in further future papers due to time and word limitations. The key question to be answered: Can I solve this internationally significant constitutional law issue by keeping the separation of powers doctrine intact whilst enhancing the rule of law or rule by law and justice significantly for every legal field? My initial hypothesis is that I can. This paper will also put forward the argument that the reformation of corporate law here in Australia is flawed with the need for *The Legal Technique Reforms* as proposed in

previous papers to continue to achieve best practice in corporate law and governance as, depicted in Figure 1.1, the 'trial and error' methodology gap or loophole also plagues corporate law here in Australia and abroad, alongside other legal fields.

1.1 A Commonwealth Loophole. A Common Law Loophole. A Worldwide Legislative Loophole? – The Biggest Legislative Loophole in the History of Our World's Legal Systems.[1]

At present there are approximately 53 countries in the Commonwealth. There are yet to be introduced legislation on legal technique or, for that matter, on legal reasoning aimed at the legal profession and the judiciary in these Commonwealth countries, and possibly, in other countries throughout the World.[2] I will embark on a journey to codify legal technique and legal reasoning and develop what I have hypothetically called *The Legal Technique Reforms*. This will systematically involve the codification of Christopher Enright's book on legal technique but also involve other books, journal articles, cases and the common law and internet materials on legal technique and legal reasoning.[3] Why you may ask? Christopher Enright in a closure to his book entitled 'Legal Technique' states as follows:

[1] I understand that at the present time it is a Commonwealth Loophole and a Common Law Loophole – none of these countries have legislation on legal technique or legal reasoning yet I am unsure at this stage whether it is a Worldwide loophole – on the latter point, this is merely an initial hypothesis.
[2] As per conversation with and e-mail response from Michael Sayers of the Commonwealth Association of Law Reform Agencies (CALRA's) – none of the 53 Commonwealth of Nations law reform agencies is presently doing law reform into this matter.
[3] Christopher Enright, *Legal Technique* (2002).

> How should lawyers go about their task of working with law? Of interpreting, using, reading, writing and making law? Currently, lawyers learn techniques by trial and error. Lawyers are not taught technique at law school. What happens is clearly not best practice.[4]

I must emphasise the words 'trial and error' and 'best practice'. This is what I have called and developed: *The 'Trial and Error' Loophole* or alternatively *The 'Trial and Error' Methodology Gap* highlighting the need for legislation on legal technique and legal reasoning. See Figure 1.1. Trial and error is negligence on behalf of the legal profession. Much needed empirical evidence is needed to determine whether lawyers in fact do learn techniques by trial and error. This now takes me to the following point whereby I have found some empirical research that proves this 'trial and error' methodology evident in our Worldwide legal systems.

2.1 Preliminary Research to Prove That Lawyer's Learn Legal Technique Through 'Trial and Error'.

The following was taken from the Contract Law Examination feedback memorandum to law students:

The memorandum stated that approximately and a significantly astonishing 50% of candidates failed the 2004/2005 contract law examination – assessed as being poor, negative and critical.[5] And the reasons for the high level of failures:

The most common reasons for poor performance in this (and almost *any other law examination*) [emphasis added] are:

(1) poor knowledge/understanding of the law;

(2) poor legal technique;

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[4] Christopher Enright, *Legal Technique* (2002) Closure (cover) to his book.

[5] University of Buckinghamshire, *Examination Feedback Memorandum* (2006) <www.bcuc.ac.uk/docs/LW131%20Contract%20Law%20(GEF)%20SB%20-%2004-05.doc> at 5 May 2006.

(3) poor examination technique;

(4) weak transferable skills;

(5) and lack of commitment to the module or the course.[6]

The emphasis, it must be noted for this paper is on "poor legal technique".

3.1 The Deficiency of Christopher Enright's Approach and our Present Systems of Government – Failing to Tackle the 'Trial and Error' Loophole.

It is submitted by myself that the approach of Christopher Enright and other authors is deficient. Unfortunately, Christopher Enright, although making the statement that "lawyer's learn techniques through trial and error" failed to extrapolate this into a legal loophole – that is, the need for legislation. His book was published in 2002. It's deficiency is basically that it fails to tackle this "trial and error" loophole. The research shows, and if undertaken on a greater scale, will consistently show law students failing or having failed their law examinations – a significant reason being poor legal technique as discussed and highlighted. This empirical research was published and carried out in 2004/2005 two years after the publication of his book 'Legal Technique' and other books. We can thus determine that although I regard his book to be of a high standard, unfortunately it fails to close this 'legal' loophole and hence the need for *The Legal Technique Reforms* and for other countries around the World. Unfortunately our legal systems are failing us. The solution would be to develop and implement *The Legal Technique Reforms*. The following is my suggested resolution and action plan for the Australian Government and other Governments around the World including that of the Commonwealth of Nations.

[6] Above n 4.

4.1 Action Plan for Governments Around the World:

- Carry out a governmental inquiry or empirical research to prove whether law students and / or lawyers learn techniques through 'trial and error';
- If say 10% or more of lawyers have been found to be learning techniques through 'trial and error' then;
- Assess constitutional law to determine whether legislation on legal technique are constitutional and do not infringe any constitutional principles. Note here the separation of powers doctrine and noting the importance of exceptions to this doctrine, federalism and section 128 of the Australian Constitution and similar provisions found in other countries.
- Develop legislation on legal technique;
- Implement legislation on legal technique.

We can see from the diagram that at the epicentre of every legal system is legal technique and legal reasoning. See Figure 2.1. If there is no legislation on legal technique or if legal technique is based on trial and error or ad hoc, then the outcome of our legal systems and our legal systems as a means to achieving justice are flawed. The implications for our legal systems (Worldwide) are disastrous. Consequently, the "trial and error" loophole must be closed.

5.1 The Implications of the Trial and Error Methodology to our Legal Systems

The question: what are the implications of the "trial and error" loophole to our legal systems? See Figure 2.1. I will look at these implications from a corporate law

perspective in accordance with the theme of the conference.

Kirby J states in undertaking a book review of "Company Law in Australia: Principles and Applications" by Associate Professor Peter M McDermott "[t]he fact remains that company law is inescapably complex. Indeed, its complexity is treacherous."[7] He states that when he had studied company law, in particular the *Companies Act* 1936 (NSW), that particular legislation had only "248 pages in the consolidated statutes. It had 380 sections and 13 schedules."[8] Now the legislation, *The Corporations Act 2001* (Cth) covers about 2,550 pages comprising 1,500 sections. This is not to mention the detail and volume "of the substantial schedules to the Act".[9]

As discussed, the 'trial and error' loophole, that is that lawyers learn legal techniques through 'trial and error' will further exacerbate the increased complexity and the difficulty in carrying out legal method in relation to corporate law legislation.

In relation to this latter point, can you envisage the implications of *The Legal Technique Reforms* to society from a corporate law perspective and in general? See Figure 2.1 for an illustration. It applies to every legal field and every country in the World.

6.1 *The Legal Technique Reforms* for our Worldwide Legal Systems – Unanimous Support? You be the Judge.

It is hypothesised that should governments throughout the World make the public statement that empirical evidence is proving that "lawyer's learn techniques through trial and error" then considering good policy, there will be unanimous support for *The Legal Technique Reforms* throughout the whole common law world and similar legislation for other non-common law countries. The key question: Is this the future of legal technique and legal reasoning? I hypothesise that it will be. The development of the jurisprudence

[7] Peter McDermott, *Company Law in Australia: Principles and Applications*, (2005) High Court of Australia <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_18mar05a.html> at 7 January 2007.
[8] Ibid.
[9] Ibid.

of a system of logic, legal method, legal technique and legal reasoning by the respective highest court and other courts of the respective country and the systematic codification of that court's legal technique and legal reasoning will improve the quality and integrity of our legal systems developing a best practice rule by law and justice for every legal field.

7.1 Constitutional Law Issues – The Separation of Powers Issue and *The Legal Technique Reforms.*

Perhaps what has been the greatest impediment to the rule by law in Australia and possibly other constitutions throughout the World is the separation of powers doctrine. Furthermore, the ignorance of the law profession, governments and the judiciary that lawyer's do in fact learn legal techniques through 'trial and error' as empirically proven further exacerbates this problem. This paper, in addition to addressing the key constitutional law issue, that is, the separation of powers doctrine and the rule by law doctrine as opposed to the rule of law as articulated by A V Dicey, will address this fundamental flaw in constitutions throughout the World and can be regarded as the biggest legislative loophole in the history of our legal systems that at present remains unclosed. This paper will also, understanding the importance of maintaining the separation of powers doctrine intact seek to enhance the rule by law through this proposed legislation entitled *The Legal Technique Reforms* as proposed at the ALTA law conference in Melbourne, Australia in July 2006.

8.1 A New System of Constitutional Government: A New System that Enhances the Rule by Law Rather than Resulting in its Destruction – The Battle for Constitutional Principle.

As discussed above and illustrated, we can see that the present separation of powers doctrine actually results in the destruction of the rule by law and possibly even that of

liberty, the very principle that the doctrine was meant to serve. I will now look at the separation of powers doctrine and commence with a basic introduction to what is actually meant by the principles enunciated by this doctrine.

9.1 The Separation of Powers Doctrine.

Defining the Doctrine

> The doctrine of the separation of powers divides the institutions of government into three branches: legislative, executive and judicial: the legislature makes the laws; the executive put the laws into operation; and the judiciary interprets the laws. The powers and functions of each are separate and carried out by separate personnel. No single agency is able to exercise complete authority, each being interdependent on the other. Power thus divided should prevent absolutism (as in monarchies or dictatorships where all branches are concentrated in a single authority) or corruption arising from the opportunities that unchecked power offers. The doctrine can be extended to enable the three branches to act as checks and balances on each other. Each branch's independence helps keep the others from exceeding their power, thus ensuring the rule of law and protecting individual rights.[10]

The essential nature of the separation of powers doctrine has been articulated by Montesquieu, as follows:

> [T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be the end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[11]

As former Attorney-General of Australia from 1996-2003 Daryl Williams has stated "[i]n the absence of constitutional amendment, these things cannot be changed. The challenge for Australian governments, legislators and courts is to continue to play their respective

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[10]Graham Spindler, *Separation of Powers: Doctrine and Practice* (2000) Parliament of NSW Government <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/E88B2C638DC23E51CA256EDE00795896> at 25th of October 2006.

[11] Enid Campbell and Hoong Phun Lee *The Australian Judiciary* (2001) 36.

parts in making our written constitution work as an enduring instrument of democratic and effective government."[12] This, of course, will necessarily be my task when proposing a new system of constitutional government, a system where the doctrine of the separation of powers is maintained whilst significantly, it is proposed, enhancing the rule by law and the justice that results to every common law rule, common law policy, common law principle, common law precedent and in the interpretation and application of statutes to solve everyday common problems and issues. Furthermore, what must be importantly and critically noted for the resolution of the hypothesis is that Daryl Williams states "[i]n the absence of constitutional amendment, these things cannot be changed." Clearly as discussed he was referring to the proposition, and in what I emphatically agree with, is that a constitutional amendment can abolish and amend the separation of powers doctrine, including, as I propose, the development of a constitutional exception to the separation of powers doctrine. This new proposed system of constitutional government will keep the separation of powers doctrine intact whilst enhancing the rule by law for every legal field.

There has been some criticism of the separation of powers doctrine whereby some actually believe that Montesquieu "has been misunderstood, particularly by those who argue for the doctrine of the separation of powers."[13] The opposite of Montesquieu's view is summarized in the quote from Lord Action where he has stated: "Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men." (3 April 1887 in an letter to the Bishop of London, Mandell Creighton).[14]

However, Alois Riklin (2000) has stated that Montesquieu enunciated not a strict separation of powers but rather a careful "distribution of powers particularly" in relation to "balancing" "controlling", "tempering", and "combining" powers in a model of liberal political order where the three functions of government are sometimes separated and

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[12] Daryl Williams, *Separation of Powers: A Comparison of the Australian and UK Experiences* (2001) Australian Government Attorney General's Office <http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Speeches_2001_Speeches_Separation_of_powers_-_a_comparison_of_the_Australian_and_UK_experiences> at 25th of October 2006.
[13] Bryan Palmer, *Separation of Powers* (2006) Ozpolitics <http://www.ozpolitics.info/rules/sep.htm> at 26th of October 2006.
[14] Ibid.

sometimes combined."[15] With *The Legal Technique Reforms* in mind, this might be an instance where the three arms of government are "combined".[16] This will particularly be the case where the reforms so mentioned enhance the rule by law and improve the quality and integrity of our legal systems whilst also enhancing constitutionalism. The three arms of government will be "combined" through what I have called and termed, the 'Theory of the Judicial Meeting of Minds'. The critical issue, is this theory constitutional?

Conversations with the Commonwealth Association of Law Reform Agencies (CALRA's) – E-mail Response from the Honourable Michael Sayers.

From a Commonwealth perspective I have attached a copy of an e-mail conversation with the Honourable Michael Sayers of the Commonwealth Association of Law Reforms Agencies (CALRA's) who has stated and I emphasise that no country of the 53 countries in the Commonwealth have undertaken reform into this area. A quite significant legislative loophole. So, coming back to this issue: What does this theory propose?

10.1 The Judicial Meeting of Minds – A Soon To Be International Development: Unanimous Support? You be the Judge.

The judicial meeting of minds is best illustrated by Figure 3.1.

The judicial meeting of minds states that if the governments throughout the World systematically codify the highest court of their land's legal technique and legal reasoning and other courts according to the doctrine of precedent, then, in accordance with best practice, a government will achieve the meeting of minds between the highest court of the land with that of the legal profession. The articled clerk, law student, solicitor and barrister will effectively be trained in legal technique and legal reasoning by the highest court of their respective land. From an Australian perspective this will mean that the legal profession and the articled clerk including solicitors and barristers and all those

[15] Ibid.
[16] Ibid.

tasked with interpreting and using the law will be trained by Gleeson C J and Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ – The High Court of Australia and other judges. This is the transition to best practice in legal technique and legal reasoning. The rule by law as proposed is now best practice. See Figure 3.1.

It is clear from Montesquieu's work that his goal in elucidating the separation of powers doctrine was not in providing for a strict separation of powers doctrine but rather to create "a subtle network of separation and mixing, of 'checks and balances', that is, of restraints, counterweights, and balances."[17] This will be important when developing a workable system of legislation on legal technique and legal reasoning.

We can further add that the key characteristic of "the doctrine is founded upon the need to preserve and maintain the *liberty* of the individual." As Carney (1993) states the means to ensure the liberty of the individual is through the division and distribution of governmental power to ensure a non-tyrannical and non-arbitrary government.[18] However, as I have developed the 'trial and error' loophole or methodology, it can be argued, this in very fact is a form of arbitrary government. How? By lawyers learning legal technique through 'trial and error' and with the consequent effect to every legal field, government is not under a best practice rule of law but rather one that is corrupted by this very arbitrariness.[19] Of course, another key issue is whether this new constitutional system of government keeps the separation of powers doctrine intact and thereby preserving and maintaining "the *liberty* of the individual." My answer to this key issue and question is an emphatic yes. How? The Theory of the Judicial Meeting of Minds keeps the separation of powers doctrine intact as legal technique and legal reasoning is incidental to the exercise of the judicial power of the judiciary.

However, it can be argued in relation to the rule of law issue that this was perhaps not the rule of law that A V Dicey was advocating but rather is a differing conception of the rule of law. This different rule of law is summarised as follows:

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[17] Ibid.
[18] Gerard Carney, *Australasian Study of Parliament Group (Queensland Chapter) Separation of Powers in the Westminster System* (1993) Queensland Parliament <http://www.parliament.qld.gov.au/aspg/papers/930913.pdf> at 8th January 2007.
[19] Ibid.

The judiciary will also be under a rule of law, a best practice rule of law that improves the integrity of our legal systems. The rule of law that I am referring to is one that results from the interpretation and application of the common law and statutes and the arbitrariness that can be result without having legislation on legal technique and legal reasoning. This rule of law applies to the judiciary, the law profession and all those tasked with interpreting and applying the common law and statutes to achieve justice. This rule of law therefore has a number of characteristics:

1. It applies to the judicial arm of government including the judiciary, the law profession and also all those tasked with interpreting and applying the law and statutes;
2. It results from the arbitrariness of the exercise of judicial power in light of legal technique and legal reasoning;
3. It is a best practice rule of law that improves the integrity and quality of our legal systems.

Furthermore, and what I must necessarily address is that at present, in "regards powers, institutions and personnel" "there seems to be no current constitutional system which adopts this complete separation of powers." As Carney (1993) further adds, [s]ome of the early American States and the French constitution of 1791 tried to strictly give effect to this doctrine but failed." This argument that a strict separation of powers doctrine is perhaps unachievable adds weight to the argument that a system of legislation on legal technique can be made workable, particularly where it keeps the substance, although not the form, of the separation of powers doctrine intact. Carney adds, "[t]he strict doctrine is only a theory and it has to give way to the realities of government where some overlap is inevitable. But while permitting this overlap to occur, a system of checks and balances had developed (and needs to continue to develop)."

This brings us to the point that, as Patapan (1999) argues, there has been a marked shift from "a Blackstonian, common law conception of separation of judicial powers" to one enunciating "the principles elaborated in *The Federalist* and articulated in the American

Constitution."[20] Patapan (1999) in "*Separation of Powers in Australia*" initially examines these two conceptions of the separation of powers doctrine in Australia arguing that the founders of the Australian Constitution were faced with these two conceptions in formulating the Australian Constitution.[21] These two conceptions were "derived from the American Constitution and *The Federalist* (Hamilton, Madison and Jay 1982 [1788], hereafter *Federalist*), the other from British constitutionalism and Blackstone."[22] Accordingly, as Patapan (1999) makes it apparent, it is difficult to ascertain the founders' intentions in relation to which concept of the separation of powers doctrine was subsequently adopted.[23] It is noted that in the Australian Constitution the founders guaranteed an amalgamation "of British responsible government and American federalism".[24]

11.1 What Form of Separation of Powers Did the Founders Agree Upon?

Patapan (1999) concludes, in relation to this issue, that there is an aspect of ambiguity when trying to understand from the Convention Debates the "theoretical understanding of separation of powers" that was given thought to by the delegates of the Constitutional Convention, particularly by Inglis Clarke, Barton, Isaacs and Higgins whom all had an understanding of American constitutionalism.[25] Patapan (1999) does however provide some evidence to support the notion and the argument "that for the framers of the Constitution the common law judicial separation of powers proved to be a familiar concept that could be appropriated and applied to the American innovation of federalism."[26]

Patapan (1999) further argues that the conclusive Australian Constitution "did not resolve this ambiguity."[27] However, with responsible government it is certainly distinguishable

[20] Haig Patapan, 'Separation of Powers in Australia' (1999) 34 *Australian Journal of Political Science* 391, 391.
[21] Ibid.
[22] Ibid.
[23] Ibid, 392.
[24] Ibid.
[25] Ibid, 395.
[26] Ibid.
[27] Ibid.

with the American Constitution in that the Australian Constitution has "entertained an amalgam of political traditions and differing conceptions of separation of powers."[28] This issue has in particular presented a challenge and an opportunity to the High Court of Australia as the ultimate arbiter of the Australian Constitution to reconcile these "different traditions". So the question now before us: How has the High Court of Australia interpreted and shaped the separation of powers doctrine here in Australia and perhaps, more importantly, "[w]hat was the High Court's theoretical resolution of the tension between separation of powers and a 'law-making' judiciary?"[29] This latter issue raised due to the enormous amount of debate on whether judges do in fact make the law (judicial activism) and its departure of the declaratory theory of the law (judicial restraint).

As Patapan (1999) argues, a close analysis of the High Court's judgement in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) outlines the High Court of Australia's reconciliation of these issues.[30] In this case, the majority of the High Court of Australia concluded that "the separation of powers is designed to provide checks and balances, to disperse power and thereby protect the liberty of the individual."[31] Furthermore, as Patapan (1999) concludes, the High Court of Australia has re-evaluated the separation of powers doctrine speaking "in terms of checks and balances" highlighting a marked transformation of the concept of separation of powers in Australia.[32]

Therefore, in relation to this constitutional law issue, it is envisaged that legislation on legal technique and legal reasoning, hypothetically termed *The Legal Technique Reforms*, we can conclude that a constitutional amendment to the Australian Constitution will be effected as follows:

- The Australian Constitution will be amended through a constitutional referendum effecting as follows:

[28] Ibid, 396.
[29] Ibid, 400.
[30] Ibid.
[31] Ibid.
[32] Ibid, 406.

- Chapter III Courts will be given, as is presently the case, the constitutional power to develop the common law on legal technique and legal reasoning as is presently the case;
- the Australian Constitution will have a mandate that the legislator systematically codify this common law as it relates to legal technique and legal reasoning;
- the Governor-General will be given the power to dissolve the government of the day where there is a material departure from this constitutional mandate or some other plausible arrangement to maintain and ensure the independence of the Judiciary, liberty and the current separation of powers (by maintaining in essence our current system of constitutional government in substance);
- furthermore, where for instance the Chapter III courts accept this codification then there is nothing more to add in relation to this point, but where these courts do not accept this codification as necessarily representing the majority view then the mechanism in place will be for the court to refer the legislation back to the legislator to give effect to its intentions. Adherence to the codification of the Chapter III court's legal technique and legal reasoning will be ensured by the mechanism that the Governor-General be given the power to dissolve the government of the day where there is a material departure from the constitutional mandate discussed above;
- where there is no material departure but rather an immaterial departure then the common law on legal technique and legal reasoning will take precedence over the legislation;
- accordingly, in relation to this latter issue, the common law on legal technique and legal reasoning will therefore be as binding on the judiciary according to the doctrine of precedent and all those tasked with using, reading and interpreting statutes, common law and other legislation;
- furthermore, a constitutional exception to the separation of powers doctrine will be developed giving the legislator the power to draft and

> enforce legislation on legal technique and legal reasoning ensuring the maintenance of the separation of powers doctrine and keeping it intact in substance, but with the added benefit of ensuring the integrity of the rule by law.

Furthermore, this legislation can be compulsory or alternatively voluntary. It must be noted that the above constitutional reforms may not apply voluntary legislation and with different legislative consequences which will be addressed in a future paper. But, as it stands, a lawyer or articled clerk, etc… must be either very foolish to depart from *The Legal Technique Reforms* or on the other hand, very brilliant.

13.1 Do *The Legal Technique Reforms* Work?

Yes they do! I used the logic of *The Legal Technique Reforms* and my innovative thinking to allow for a system of government whereby the separation of powers doctrine is maintained whilst enhancing the rule by law and justice for every legal field. For further information on policy making see the book on 'Legal Technique' by Christopher Enright – but of course and once again, this is the subject matter of a further thesis by myself whereby I use logic to prove my constitutional theory and new system of government for Australia and other countries to follow. This is only the beginning.

14.1 Conclusion

We can thus conclude that our progress in the area of law reform in every legal field including that of corporate law and as highlighted by this paper and the extensive nature of corporate law is unsatisfactory. As it presently stands, lawyers and all those tasked with using the law continue to learn techniques through 'trial and error'. The failure of governments to address this problem is significant as highlighted by the e-mail to myself from CALRA's – the Hon. Michael Sayers (General Secretary) that stated that not one country in the Commonwealth (that is, 53 countries) had carried out reform into this area. Quite a significant legislative loophole.

Finally, just as a final note, I would like to state, and hoping that you keep a lookout for a future book on this subject matter, possibly the subject of a PHD, SJD or Master of Philosophy I will use the theories of logic to determine:

(1) Whether we need legislation on legal technique and legal reasoning termed *The Legal Technique Reforms;*

(2) Whether *The Legal Technique Reforms* are in fact constitutional from an Australian perspective.

My initial hypothesis is that our legal systems including our constitutions are illogical and systematically flawed. I firmly believe that it is now time to make the transition to *The Legal Technique Reforms.* My question to the Prime Minister of Australia, will Australia be the first country in the Commonwealth to adopt *The Legal Technique Reforms* and this new constitutional theory of government as a role model for other countries to follow? We must adopt the wait and see approach, although through this presentation and publication I hope to lobby all countries throughout the World to adopt the hypothetically named *The Legal Technique Reforms*.

Recall that it was Brennan J, referring to Sir Owen Dixon, former Chief Justice of the High Court of Australia who stated:

> Sir Owen Dixon commended, as the methodology for judicial development of the common law, 'high technique and strict logic'. That method guarantees the authority and acceptability of any change in the common law made by the courts. The 'strict logic' of which Sir Owen Dixon spoke includes, of course, inductive as well as deductive logic for strict logic is part of the methodology of change.[33]

However, I would like to defend *The Legal Technique Reforms* through the following final quote:

[33] Cook et al, *Laying Down the Law* (5th ed, 2001) 58.

"Logic has undergone continuous development and evolution for more than 2000 years, so that, today, there are well-established principles for differentiating good and bad reasoning of all kinds."[34]

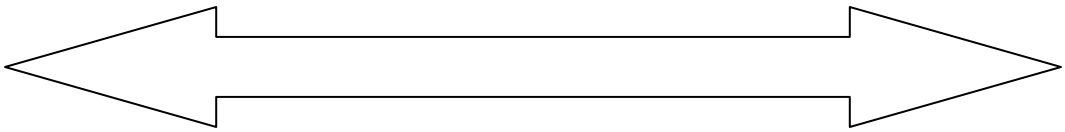
It is therefore now time for legislation entitled *The Legal Technique Reforms* to enhance and develop the system of logic that, I believe, many cognitive scientists, philosophers, political scientists, politicians and Governments, judges, barristers, solicitors, law students, ordinary people and others would emphatically defend.

This now concludes the paper.

[34] Michael Head and Scott Mann, *Law in Perspective Ethics, Society and Critical Thinking* (2005) 15.

Figure 1.1 The Trial and Error Loophole: Empirically Proven – *Is This Justice? Good Legal Reasoning?*

The Trial and Error Loophole



Trial and Error **Best Practice**

Figure 2.1 The Implications of *The Legal Technique Reforms* or Legal Technique to our Legal Systems

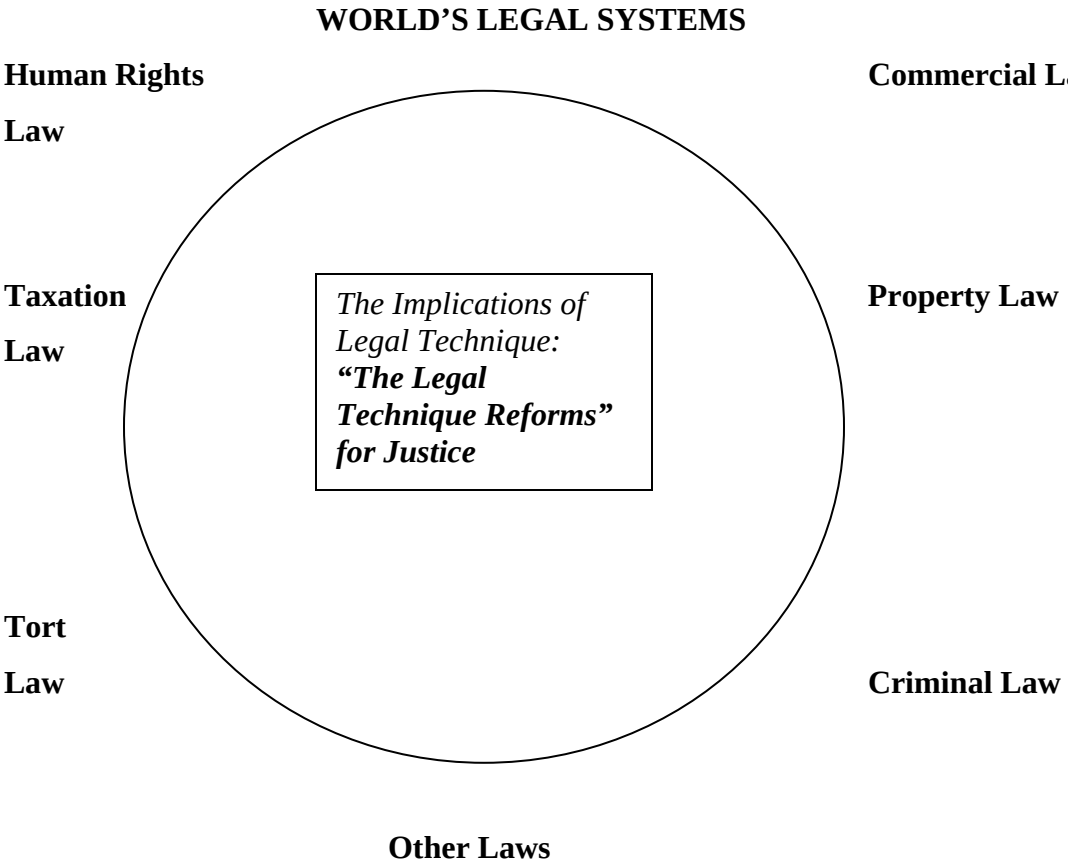
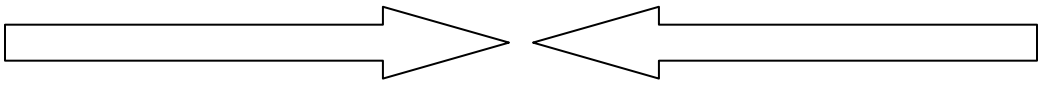


Figure 3.1 The Theory of the Judicial Meeting of Minds: Maintaining the Separation of Powers Doctrine Intact Whilst Enhancing the Rule by Law and Justice for Every Legal Field – *Constitutional?* You be the Judge.



Law Profession	**Implementation of Legislation on Legal Technique and Reasoning**	**High Court of Australia**

Figure 4.1 – E-mail Response by the Commonwealth Association of Law Reform Agencies

I shall keep your piece in mind in case I ever hear that a law reform Agency is working in a related area -- in which case I would consider passing it to them. I'm afraid that I have to tell you that I do not recall any law reform agency doing related work in the past.

Michael Sayers

Figure 5.1 Sample Legislation – for law students.

The Legal Technique Reforms

***The Applying Law to Facts Act* (Cth)**

(DRAFT BILL)

A New Legal System Based On Best Practice

An Act about providing a workable system of Legislation (Voluntary or Compulsory) on Legal Technique and Legal Reasoning for Students of the Law, Solicitors and Barristers and all those involved in interpreting, using, reading, writing and making the Law.

INTRODUCTION

PART 1-1 PRELIMINARY

Division 1 - Preliminary

SECTION 1-1 Short title

1-1 This Act may be cited as *The Applying Law to Facts Act.*

SECTION 1-2 Commencement

1-2 This Act commences on 1 July 2007.

PART 2-1 – WHAT THIS ACT IS ABOUT

Division 2 – What This Act Is About

SECTION 2-1 What this Act is about

2-1 This Act is mainly concerned with codifying the cases, theories and principles of legal technique, legal method and legal reasoning to achieve a workable model.

PART 3-1 – AIM OF THE APPLYING LAW TO FACTS ACT

Division 3 – Aim of the Applying Law To Facts Act

SECTION 3-1 Aim of the Applying Law To Facts Act

3-1 At present no country throughout the Commonwealth or Common Law World and very few countries internationally (if any) have developed legislation on legal technique and legal reasoning. This is the discovery of stand alone legislation on legal technique and legal reasoning entitled *The Legal Technique Reforms* and seek to improve the integrity and justice of our legal systems whilst reducing 'trial and error'.

3-2 It is based on the concept of the rule by law through legal technique.

PART 4-1 – CORE PROVISION

Division 4 – Core Provision

SECTION 4-1

4-1 This section describes the Issue Rule Analysis Conclusion methodology.

4-2 **Issue:** This involves identifying the facts and circumstances that "brought these parties to court".

4-3 **Rule:** This involves identifying "What is the governing law for the issue".

4-4 **Analysis:** This involves determining whether the rule applies to the facts at hand.

4-5 **Conclusion:** This last point involves answering the question: "How does the *court's holding* modify the rule of law?"

4-6 The Facts of a Case Suggest an Issue

4-7 Identifying Issues: Step Number One:

4-8 The key to identifying issues is being capable of identifying "which facts raise which issues".

4-9 It must be noted that with the complexity of the law, the elimination or addition of a fact "(such as time of day or whether someone was drinking) can eliminate or add issues to a case thereby raising an entirely different rule of law."

4-10 The Issue is Covered by a Rule of Law

4-11 Identifying the Rule of Law: Step Number Two:

4-12 The simplified key to identifying the rule is to ask what is the law? But the following questions may assist:

4-13 "What are the *elements* that prove the rule?"

4-14 "What are the *exceptions* to the rule?"

4-15 "From what *authority* does it come? Common law, statute, new rule?"

4-16 "What is the underlying *public policy* behind the rule?"

4-17 Are there *social or moral considerations*?

4-18 Compare the Facts of the Case to the Rule to Form the Analysis

4-19 Analysing: Step Number Three:

4-20 "Which facts help prove which elements of the rule?"

4-21 "Why are certain facts relevant?"

4-22 "How do these facts satisfy this rule?"

4-23 "What types of facts are applied to the rule?"

4-24 "How do these facts further the public policy underlying this rule?"

4-25 "What's the counter-argument for another solution?"

4-26 **From the Analysis You Come to a Conclusion as to Whether the Rule Applies to the Facts**

4-27 Issues to consider in arriving at a conclusion:

4-28 What's the holding of the case?

4-29 Has the holding modified the existing rule of law?

4-30 What is the procedural effect of the holding? Is the case overturned, upheld or remanded for retrial?

4-31 Does the holding further the underlying policy of the rule?

4-32 Do you agree with the outcome of the case?[35]

[35] Lawnerds.com, IRAC Formula (2006) Lawnerds.com <http://www.lawnerds.com/guide/irac.html#TheIRACFormula> at 24th November 2005.

Figure 6.1 Letter of Advice to Australian Prime Minister John Howard.

The Hon John Howard MP
Prime Minister
Parliament House
CANBERRA ACT 2600 GPO Box

LETTER of ADVICE to the 193 LEGAL SYSTEMS THROUGHOUT the WORLD

(This letter of advice will be sent to the 193 legal systems throughout the World to lobby for Justice and the Rule of Law through – *The Legal Technique Reforms*: A System of Logic).

Dear Prime Minister John Howard and Prime Ministers; Presidents Throughout the World

I have found a **significant legislative loophole** that remains unclosed and according to good policy should be closed in some form or the other. This legislative loophole, as it applies to every legal field, is perhaps the biggest legislative loophole in the history of the World's legal systems – this is based in fact as per the enclosed thesis / research paper and an e-mail response that I have received when lobbying the Commonwealth Association of Law Reform Agencies (CALRA's) – the Honourable General Secretary Michael Sayer's stated that according to his recollection he does not think that of the 53 countries throughout the Commonwealth not one had done reform into this matter. He has advised me that should any country in the Commonwealth take an active stance in addressing this loophole my research would accordingly be sent to the relevant party / organisation.
The purpose therefore of this letter is to take a more active stance in relation to this research.

I must further add, as a sidenote, that this research has been presented at a number of law conferences including the ALTA Law Conference at Melbourne, Australia in July 2006 and to be presented at the CLTA Law Conference at Melbourne, Australia in February 2007.

This loophole I have hypothetically closed through the proposed legislation entitled *The Legal Technique Reforms* (see sample enclosed of draft bill but, of course, increasingly being expanded upon to greater levels) – the systematic codification of Australian Court's (through the doctrine of precedent) legal technique and legal reasoning these reforms are based on the following quote by Sir Owen Dixon:

> Sir Owen Dixon commended, as the methodology for judicial development of the common law, 'high technique and strict logic'. That method guarantees the authority and acceptability of any change in the common law made by the courts. The 'strict logic' of which Sir Owen Dixon spoke includes, of course, inductive as well as deductive logic for strict logic is part of the methodology of change.[36]

Unfortunately, however our legal systems are illogical and this must be one of the biggest legislative loopholes in the history of not only the Australian legal system but possibly a Worldwide legislative loophole.

These reforms, the codification of legal technique and legal reasoning can be hypothetically termed:

- *The Legal Technique Reforms*
- *The Judicial Reasoning Reforms*
- *The Legal Reasoning Reforms*
- *or other similar names.*

As legal technique and legal reasoning applies to every legal field, it is hypothesised that this legislation, in some form or the other, closes what I have also hypothetically called

[36] Cook et al, *Laying Down the Law* (5th ed, 2001) 58.

and boldly proven through empirical evidence the 'trial and error' loophole, that is that approximately 50% of law students, lawyers and all those tasked with interpreting the law learn legal techniques through 'trial and error'. This was reported at the University of Buckinghamshire and I am certain that most academics would agree including as Christopher Enright in a closure to his book entitled 'Legal Technique' further states.

> How should lawyers go about their task of working with law? Of interpreting, using, reading, writing and making law? Currently, lawyers learn techniques by trial and error. Lawyers are not taught technique at law school. What happens is clearly not best practice.[37]

We can clearly see that without a system of logic, legal method, legal technique or legal reasoning – as the case may be – lawyers do in fact learn techniques by 'trial and error'. I am hoping, as I have solved the separation of powers issue by proposing a system of government whereby the separation of powers doctrine is maintained in substance and thus maintaining LIBERTY whilst enhancing the RULE OF LAW and JUSTICE for every legal field that these reforms be considered by your office and Parliament. I am certain that these reforms will be very valuable to these extremely important three principles and it is, according to my understanding, time to reform our legal systems and Constitutions.

I am hoping that the Government of the Day at least consider my proposals and should only be rejected based on the principles of good policy, logic, democracy, justice, liberty and not to mention adherence to the rule of law. Furthermore, recall that it is the science

[37] Christopher Enright, *Legal Technique* (2002) Closure (cover) to his book.

of logic that has allowed us to develop ground-breaking research in fields not only in law but in other walks of life too. See the following quotation for an illustration:

"Logic has undergone continuous development and evolution for more than 2000 years, so that, today, there are well-established principles for differentiating good and bad reasoning of all kinds."[38]

This, like most other research and quotations prove that we can have legislation on legal technique and legal reasoning, coupled with the fact that I have solved the separation of powers issue by ensuring liberty and a system of logic for every legal field and of which is of international significance.

Well, just to finish off this letter, I would like you to enjoy my thesis / research paper and would like to conclude by saying that I would like to see Australia or Chile for that matter, my home countries that I love so much to be the first countries throughout the World to develop this legislation – a system of logic for the law. My question, is it a time for change? Is it a time for the most significant constitutional referendum of our times?

[38] Above n 34.

Please also be advised that a copy of this letter is being sent to all Presidents and Prime Ministers around the World. Well, anyhow, please get back in touch with me once your office / Parliament has considered my letter of advice to the following postal address:

Mr Julio Altamirano (Jnr)

91 Narina Way

Epping Victoria 3076

AUSTRALIA

Tel: (03) 9408 8819 in Melbourne, Australia.

E-mail: jealt1@student.monash.edu

I would very sincerely like a response in due course as I am certain that *The Legal Technique Reforms* (or similar named legislation) will affect the lives of ordinary Australians in one way or another throughout their life.

Sincerely

JULIO ALTAMIRANO (Jnr)