Advice on the *Water Act 2007* (Cth): lessons from the South Australian Royal Commission

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I hope to take you on a journey of discovery. It is essentially a journey which follows my own mental processes in working out what to make of the report of the South Australian Murray-Darling Basin Royal Commission. For some of you who paid particular attention to the issues covered by the report, this may well be old news and for that I apologise. I hope that there are some of you who, like me, did not follow in great detail the controversies surrounding the development of the Murray-Darling Basin Plan, for whom it will be an adventure.

Like any discussion of law or public policy these days, I have to start with a reference to Donald Trump. You will recall that, following the non-release of the Mueller report and the release of what has now been found to be the thoroughly misleading William Barr summary of the Mueller report, Donald Trump promoted the exclamation 'No Collusion, No Obstruction'. That has been a remarkably effective political slogan with his well and truly rusted-on supporters.

Having mentioned Donald Trump, it is also necessary to mention an equally great public figure: the Wizard of Oz. You will recall, of course, that Dorothy's journey to see the 'wonderful Wizard of Oz' ends when the Wizard is revealed to be a small middle-aged man hiding behind a curtain. That is in one sense a disappointment but also a revelation.

I will return to both Donald and the Wizard later in my remarks and establish their relevance to the present topic.

You may recall that, before the world entered the parallel universe of the current United States presidency, legal scholars were able to have concerned discussions about the rule of law in the context of the reaction of the United States government to the attacks in 2001 and what has been described as the 'war on terror' which followed. The role of lawyers in facilitating the excesses of executive conduct under the Bush presidency has been well documented.

In his book *Bad Advice: Bush's Lawyers in the War on Terror*, Harold Bruff, a professor at the University of Colorado, has analysed the advice given to George W Bush in this period.[1] In the first part of the book Bruff articulates the general principles that should apply to lawyers advising the president. In the second half of the book he examines the legal advice given on particular issues that confronted President Bush during the course of his presidency. These included:

a. electronic surveillance by the National Security Agency without warrants;

b. indefinite detention of enemy combatants;

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1 H Bruff, *Bad Advice: Bush's Lawyers in the War on Terror* (University Press of Kansas, 2009).

c. attempts to avoid the strictures of the Geneva conventions;

d. the use of military commission rather than federal courts or courts martial to try persons accused of terrorism;

e. the use of 'enhanced interrogation techniques' (torture) to prevent terrorist attacks; and

f. the relationship between legal advice that pushed the envelope and the abuses that occurred at Abu Ghraib prison.

No doubt you will recall that these issues were significant ones during the course of the Bush presidency and significant for the assessment of the merit of his presidency in retrospect.

Bruff's criticism was that in each case the legal advice was developed in secret by a small group of lawyers who had elite credentials but lacked experience of the world and the law. They did not consult others to make up for their lack of experience. When lawyers outside the small group sought to provide input or comment, the inside lawyers ignored it or treated it as of little value. The opinions that were drafted adopted an extreme view of executive power without recognising or giving due regard to the arguments to the contrary. The lawyers failed to give proper careful consideration to the possible consequences of the advice.

Among the cast of characters was John Yoo, who was a lawyer at the Office of Legal Counsel (OLC) between 2001 and 2003. It was during that period that the major legal initiatives in the war on terrorism had been taken.[2] Yoo was significant in the drafting of a number of the OLC opinions. It gives you some indication of his possible approach to executive power that he was former law clerk for Justice Clarence Thomas. He is described by Bruff as a person with 'a very high level of confidence in the views he might reach'[3] with a theory of executive power which 'differs, at times sharply, from the conventional academic wisdom' and with a tendency to 'oversimplify or distort positions with which he disagrees'.[4]

The opinions which came out of the OLC during this period were music to the ears of the vice president and those in the executive branch who had political goals dependent upon adoption of a very broad understanding of executive power.

'The system' ultimately reined in those opinions, some of them being formally abandoned by the new leadership of the OLC. The subject matter of others was eventually subject to rulings by federal courts.

What is significant about the opinions is that they illustrate the influence of legal opinions or advice in the period prior to the formal means of accountability catching up with them. Such opinions shape and provide a veneer of legitimacy to executive action at the critical time. They guide action in real time rather than reviewing it in retrospect. Their influence is very significant because, with an executive government rhetorically committed to the rule of

2 Ibid 122.
3 Ibid 106.
4 Ibid.

law, executive action is unlikely to occur if it is identified at the time as likely to go beyond available legal authority. On the other hand, legal advice that conduct is lawful or an opinion that it is lawful will provide sufficient political cover for the executive to proceed in the manner consistent with its political goals. It allows the executive to maintain its rhetorical commitment to the rule of law while allowing it to operate at the margins of or beyond legal authority.

Bruff recognises that 'legal advisers can confer legitimacy on political actions. For the advice to have legitimating effect, however, it needs to be provided from a stance of professional detachment, not sycophancy'.[5] He emphasises the significance of the professional responsibility of lawyers advising the presidency. He identifies that, after the John Yoo period, in 2006 a number of former officers within the OLC formulated and published a number of principles to guide lawyers in that office. Among those principles were the following:

(a) When providing legal advice to guide contemplated executive action the OLC should provide an honest appraisal of the applicable law even if it will constrain the executive's pursuit of desired policies. The advocacy model of lawyers-crafting plausible legal arguments to support the client's desired action inadequately promotes the president's constitutional obligation to ensure that the legality of executive action.

(b) Advice should disclose and candidly and fairly address the full range of legal sources and substantial arguments on all sides of the question.

(c) The advice should counsel compliance with the law and the insufficiency of the advocacy model applied with special force where advice (or conduct based upon it) was unlikely to be reviewed by the courts.

(d) The responsibility extended to facilitating executive action. Therefore, where possible the advice should recommend lawful alternatives to legally impermissible executive branch proposals.

Having read Bruff's book, I was very interested to hear of the strong criticism made by the South Australian Royal Commission of what was described as either an advice or an opinion from the Australian Government Solicitor (AGS). For convenience, and not necessarily accurately, I will refer to it as the 2010 Advice. Although, in political terms, it was an issue of ancient history, I was prompted by the report of the Royal Commission to ask: Was this criticism justified? Why was this advice the subject of such open and public scrutiny? Were there lessons, akin to those provided in Harold Bruff's book, that could be learned from the criticism of the advice?

My researches have indicated, unfortunately, that the lessons to be learned are mainly about politics and less about law. Nevertheless, I do have some suggestions that may be of utility, particularly in cases where legal advice is obtained with the intention of releasing it publicly.

The Royal Commission

In January 2018, the South Australian government established a Royal Commission to examine a number of matters relating to the terms of and compliance with the Basin Plan prepared under the *Water Act 2007* (Cth) and whether it was likely to achieve the objects and purposes of the Act.[6] It was established in response to a 2017 ABC *Four Corners*

5 Ibid 14.

6 South Australia, Murray-Darling Basin Royal Commission, *Murray-Darling Basin Royal Commission Report* (2018) 5–7.

investigation which uncovered that irrigators (notably in the report, New South Wales cotton farmers) were taking billions of litres of water which had been earmarked for the environment.[7] A subsequent report found that there was a lack of transparency surrounding water management and poor levels of enforcement of the plan generally in New South Wales and Queensland.[8]

The Royal Commissioner was Bret Walker SC. He reported on 29 January 2019. The report makes for gloomy reading. The Commissioner recorded his 'deep pessimism whether the objects and purposes of the Act and Plan will be realized. There are many ways in which a study of the grand national endeavour in question leaves a decidedly sour taste'.[9]

One of the central issues, if not the central issue, in contention relating to the management of the Basin is the amount of water taken out of the system for consumptive purposes. In the *Water Act 2007* this is determined by the setting in the Basin Plan of long-term average sustainable diversion limits, which must in turn reflect an 'environmentally sustainable level of take' (ESLT). That is a defined term.[10] It is the level of water that can be taken from a water resource which, if exceeded, would compromise:

(a) key environment assets of the water resource; or

(b) key ecosystem functions of the water resource; or

(c) the productive base of the water resource; or

(d) key environmental outcomes for the water resource.

Prominent in the Royal Commission's report is the conclusion that:

> The [sustainable diversion limit], as set in 2012, did not reflect an [ESLT] and was thereby unlawful. The passage of time has not cured that illegality, nor has any adjustment or process that has occurred in the interim. Chapter 7 demonstrates that what was unlawful then remains unlawful now.
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> Statutory authorities, such as the MDBA [Murray-Darling Basin Authority], charged with legislative functions and a huge expenditure of public money, should not disregard the law. The MDBA's expression of confidence to this commission that the 2012 Basin Plan is consistent with the Water Act and that they 'consider it more useful to focus on the implementation of the current arrangements' is over-confident, and undesirably complacent.'[11]

A significant part of the report is devoted to an analysis of the Water Act. It includes an analysis of the 2010 Advice, saying:

> The [2010 Advice] contains a number of dubious propositions about the meaning and effect of particular provisions in the Water Act and relevant international conventions, and an unlikely and incorrect conclusion about the role of economic and social considerations in determining the [ESLT].

7 Australian Broadcasting Corporation, 'Pumped', *Four Corners*, 24 July 2017 (Linton Besser).
8 Murray-Darling Basin Authority, 'Basin Plan Evaluation 2017' (MDBA Publication No 52/17, 2017.)
9 Murray-Darling Basin Royal Commission, above n 6, 11.
10 *Water Act 2007* (Cth) s 4.
11 Murray-Darling Basin Royal Commission, above n 6, 225.

Not surprisingly, the Commissioner explains the basis for that opinion in some detail in his report, documenting a paragraph-by-paragraph criticism of the content of the 2010 Advice.

Context for the 2010 Advice

The 2010 Advice was prepared at a time of heated debate and concerted political manoeuvring in relation to the preparation of the Basin Plan under the Water Act and the proper determination of the basis for the ESLT — the amount of water that could be extracted from the river system for consumptive use. Public discussion of the issue took place by reference to the extent to which existing consumptive use would need to be reduced. In 2010 the Murray-Darling Basin Authority (MDBA) suggested a reduction in consumptive use of between 3000 and 4000 GL.[12] The proposal was met by an adverse reaction in areas that would be affected by a reduction in the amount of water available for consumptive uses. As a result of a substantial change in government position in 2010, in relation to which the 2010 Advice played a part, an ESLT was set requiring only a reduction of 2750 GL in consumptive uses.[13]

The 2010 Advice comprises a document dated 25 October 2010. It is entitled 'The Role of Social and Economic Factors in the Basin Plan'. It was produced in a political context in which, because of the protests occurring about the proposed Basin Plan, the Minister felt obliged to respond to in a politically decisive way.

When requesting legal advice from AGS, the Minister made it clear that he intended to release that advice publicly.[14] He made it clear that, whatever the advice said, he would table it the same day that it was received. This was in fact done.

The 2010 Advice was controversial in that, as deployed by the Minister, it was used to legitimise a change in approach to the preparation of the Basin Plan that would permit a greater quantity of water than had previously been proposed to be extracted from the Murray–Darling Basin system.

The Minister's statement

Having received the 2010 Advice, on 25 October 2010 at 3.20 pm, the Minister made a statement to Parliament. He referred to the MDBA having delivered its guides to the draft plan 18 days previously. He recorded that, following the release of the plan, 'there has been a wave of strong reactions across the country'.[15] He said that if the political consensus which emerged following the Water Act was allowed to collapse then there was the possibility that the final Basin Plan would be disallowed. Relevant to the 2010 Advice he then said:

12 Ibid 170; see also Murray-Darling Basin Authority, 'Guide to the Proposed Basin Plan: Volume 2 — Technical Background' (MDBA Publication No 61/10, 2010) (RCE 2) 36.
13 Murray-Darling Basin Royal Commission, above n 6, 187.
14 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *A Balancing Act: Provisions of the Water Act 2007* (2011) 68.
15 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 October 2010, 1305 (Tony Burke, Minister for Sustainability, Environment, Water, Population and Communities).

> Part of the problem in maintaining consensus on these issues has been uncertainty in the community and around the parliament about whether the Water Act does in fact demand the plan adopt a triple bottom line approach of taking into account environmental, social and economic impacts of reform. The MDBA has been reported as saying that the Act requires a focus on environmental issues first, with limited attention to social and environmental factors. For this reason I sought legal advice from the Australian Government Solicitor to determine whether the interpretations referred to publicly by the MDBA matched the requirements of the Act. I also stated here in the House that following receipt of the advice I would make it public. This morning I received the advice. It was made available to the opposition, Greens and Independents earlier today and I now table the advice. Broadly, the advice outlines that the Water Act:
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> - gives effect to relevant international agreements,
> - provides for the establishment of environmentally sustainable limits on the quantities of water that may be taken from basin water resources,
> - provides for the use of the basin water resources in a way that optimises economic, social and environmental outcomes,
> - improves water security for all uses, and
> - subject to the environmentally sustainable limits, maximises the net economic returns to the Australian community.
>
> Much has been made of the international agreements which underpinned the Water Act and it has been suggested that these agreements prevent socioeconomic factors being taken into account. In fact, these agreements themselves recognise the need to consider these factors.
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> The Act specifically states that in giving effect to those agreements, the plan should promote the use and management of the basin water resources in a way that optimises economic, social and environmental outcomes. It is clear from this advice that environmental, economic and social considerations are central to the Water Act and that the Basin Plan can appropriately take these into account. I do not offer the advice as a criticism of the MDBA. What is important now is how the MDBA now responds to this legal advice.[16]

Indicating the difficulties created by the change of position, following the ministerial release of the 2010 Advice the Chairman of the MDBA stated that the MDBA would 'clarify with the AGS any divergence between that advice in the position previously advised'.[17] The Chairman subsequently resigned and a former Labor minister from New South Wales was appointed to that position. The Chief Executive also subsequently resigned for 'personal reasons'.[18]

The Senate report

In February 2011, the Senate referred the provisions of the Water Act to the Senate Legal and Constitutional Affairs References Committee for an inquiry and report. The committee reported in June 2011. The majority report was by coalition members. A minority report was written by the Labor Party members. A separate dissenting report was made by Senator Hanson-Young and some additional comments were provided by Senator Xenophon.

The committee recommended the release of legal advice provided by AGS to the MDBA in the period following the Minister's statement to the Parliament. It recommended the

16 Ibid.
17 Senate Legal and Constitutional Affairs References Committee, above n 14, 29; see also Murray-Darling Basin Authority, 'MDBA Welcomes Minister's Statement' (Media Release, 26 October 2010).
18 Senate Standing Committee on Legal and Constitutional Affairs, above n 14, 30.

appointment of an independent panel of legal experts to review the advice on the Water Act and subsequent amendment of the Water Act in light of that advice. It recommended strengthening the constitutional validity of the Act. The report outlines, in typical Senate committee fashion, the various contentions put to it in the submissions. In particular, it provides extracts of the opinions about the proper interpretation of the Act provided in the various submissions.[19] In a manner which is notable in hindsight, the dissenting report of the Labor members refers to the 2010 Advice as 'Summary Advice' or 'summary legal advice'.[20]

A misconception and some speculation

Quite clearly the 2010 Advice played a prominent role in the government's pivot. It was not all of the advice given by AGS. The Commonwealth made a conscious decision to not release any other advice by AGS before or after the 2010 Advice.

The first challenge was to get a copy of the advice. It had been made public and although not readily available it was found on the Parliament House website.[21] That the document was that which had been tabled in Parliament was subsequently confirmed by the Parliamentary Records Office. The fact that the 2010 Advice was not readily publicly available has a significant consequence that public understanding of its content and significance is defined by the other documents and reports which make reference to it rather than by the terms of the document itself.

Having obtained a copy of the advice I discovered, to my dismay, that the two authors of the advice were people I know and whose reputations were impeccable and expertise undoubted. They were certainly not outliers such as John Yoo. That only stimulated me further to work out what was going on.

The other thing that was immediately apparent, and inconsistent with how the 2010 Advice had been described in the Senate report and the Royal Commission report, was that the advice was not in a form in which any legal advice or legal opinion would usually be provided. While it did include the authors' names at the end of it, and the AGS logo was prominent on the first page, it was not addressed to anyone, did not identify any particular question upon which advice or opinion was sought and was more in the form of a discussion paper that might have been produced by the legal policy section of a government department.

That impression was only reinforced by the structure and content of the document. I must say that, consistently with the policy paper nature of the document, its structure does not involve any clear line of reasoning. It makes reference to the general framework provided by the objects, purposes and specific requirements of the Water Act. It refers to the way in which the Act implements international agreements and how that includes some references to economic matters. It contends for the proposition that neither the *Convention on Biological Diversity* nor the *Ramsar Convention on Wetlands of International Importance* requires economic and social considerations to be ignored. (I note that this is a rather carefully crafted

19 See in particular ibid 41.

20 Ibid 69.

21 'The Role of Social and Economic Factors in the Basin Plan' (AGS, 25 October 2010) <http://www.aph.gov.au/DocumentStore.ashx?id=dd6cb9d1-a591-48de-97aa-ec31cf91e259>.

negative proposition.) Of critical importance to the political controversy that was raging, it says something about the setting of sustainable diversion limits. On that point it contains four paragraphs. It specifically makes reference to the thorniest issue of how the ESLT is determined. It makes reference to some of the statutory provisions relevant to determining whether environmental assets are 'key' for the purposes of the definition of ESLT. It must be pointed out that this is only one aspect of the relevant definition. Nevertheless, having set out some of the general provisions that might influence how those are determined, the 2010 Advice continues:

> However, the MDBA and the Minister are also required to give effect to the other objects, where possible, within the specific requirements of the Water Act, and where relevant to the provision at hand. Another object relevant to determining which environmental assets are key is the object of optimising economic, social and environmental outcomes while giving effect to the relevant international agreements (s 3(c)). While the specific obligations such as those under s 21 still apply, this objective affects the scope of what the MDBA and the Minister could identify as key environmental assets. For example, the MDBA and the Minister could not identify an environmental asset as key if this was not necessary to achieve the specific requirements of the Water Act (such as those under s 21) and would have significant negative social and economic effects.'[22]

It is only this last paragraph and, most significantly, the last nine words which contain any opinion of substance as to the operation of the Act. That is a conclusion which is the subject of significant criticism in Chapter 3 of the Royal Commission's report.

Consistent with its nature as a legal policy paper, there is no explanation of the reasons for this conclusion having regard to the text and structure of the legislation and no consideration of any contrary arguments. For a document which has generated so much controversy, the most surprising feature of the 2010 Advice is its lack of content. Notwithstanding what the Minister said in Parliament, so far as the document itself is concerned, there was very little in the 2010 Advice for the MDBA to respond to.

It is at this point, in the absence of further explanation, I must speculate. There are several possible reasons why the document was prepared in the form that it is. It may be that the lawyers were, in fact, never asked to prepare advice or an opinion at all and were only asked to prepare a paper outlining all the ways in which social and economic factors might be taken into account. Another one is that the lawyers involved, either because of the nature of the request or because they were told that it would be made public, prepared the document in a manner that made it clear that this was not advice or an opinion in any ordinary sense. While without proper evidence about the reasons for its form it is only possible to speculate, the form of the document is likely to be of significance. It is a significance which, because of the manner in which the document was publicly marketed by the Minister, has not been recognised or emphasised. However, when recognised, the form of the document gives considerably more scope to defend criticism of what was said, or not said, in the document.

Now is the point to return to the Wizard of Oz. Like Dorothy in the Wizard of Oz, who pulls back the curtain and finds a little man rather than the Wizard of Oz, I have found that what has been referred to elsewhere in a manner which would indicate it is a significant piece of legal work looks and feels much more like a legal policy paper with little substantive content. It contains one paragraph of substantive content and very little reasoning. Like Dorothy, I

22 Ibid 9–10.

arrived at a destination somewhat different from the one that I had expected when I set out on my journey. Having set out to discover something as significant as John Yoo's 'torture memorandum',[23] I have found instead the legal equivalent of a middle-aged man hiding behind the curtain.

What are the lessons that can be learned?

Nevertheless, there are lessons that can be learned. The lessons that can be learned are in some ways similar to and in some ways different from those identified by Harold Bruff. In the present case, the issue is how publicly disclosed legal advice gets used as a political tool to assist in performing a political manoeuvre in circumstances where there was at least a rhetorical commitment to the rule of law. It is the immediate public disclosure and use of the advice which distinguishes the circumstances from those under President Bush.

I suggest the following lessons which relate to both the circumstances of the 2010 Advice and more generally in circumstances where lawyers asked to provide advice that is to be publicly released.

Treat requests for public opinions with care

It is not possible to say to a lawyer, 'Do not let the client release your advice or opinion publicly'. Obviously, the clients can do with your advice whatever they want. However, proceed cautiously when the client discloses in advance an intention to release your advice or opinion to the public. Remember that, in the circumstances, the client is trading on your reputation, not their reputation. The client is using your reputation to bolster their agenda. That is particularly obvious in the case of the 2010 Advice, which, notwithstanding that it was not advice in any ordinary sense, prominently displayed the AGS logo and identified its very credible authors. Unless you take particular care, there is a risk that your reputation will suffer as a result of the public release and political use of your advice or opinion. Associated with this is the fact that it is the client who will determine how your advice or opinion will be deployed and how it will be described. In the present case, the 2010 Advice was used to justify a political pivot away from what the Royal Commission found to be the correct interpretation of the Act. Yet the 2010 Advice really had very little to say about that issue. But that is how it was used. Notwithstanding its content, it became emblematic of a much-criticised approach to the operation of the Act.

That brings us back, as I promised, to President Trump's 'No Collusion, No Obstruction' slogan. The use of that slogan was a very effective political technique for the purposes of his supporters but bore little real relationship to the contents of the Mueller report. It illustrates the potential for there to be a difference between the content of a document and the political use of the document. Unless care is taken with documents containing complex legal concepts, political messaging can readily trump reality. That is a risk which manifested itself in the present case.

23 Bruff, above n 1, 239–47.

The potential risks of the public release of an advice or opinion can be reduced. My suggestions may well be matters of good practice in any event, but they are worth emphasising in the context of advices or opinions that are at risk of being publicly released.

Identify your instructions

First, the risks for the lawyer will be reduced if the lawyer specifically identifies instructions given by the client. This has the effect of defining and confining the scope of the task assigned to the lawyer. It provides a benchmark against which the lawyer's advice can be judged. It is notable that the 2010 Advice contained no such statement. It did not identify that it was advice. It did not identify that it had been requested by anybody for any particular purpose. It did not identify the question that it was answering. If it was to be treated simply as a legal discussion paper it did not, other than by its heading, identify its scope or why it was prepared. These features meant that there was a much greater degree of flexibility at a political level to define its character. It meant that the reputation of the authors and their organisation was more at risk from the political characterisation given to and use of the document that they prepared.

Steel man, not straw

Secondly, if preparing an advice or an opinion that is to be released to the public, make sure that the arguments to the contrary of the conclusion ultimately reached are articulated in their best form and explicitly addressed. In other words, do not ignore contrary arguments or set up a straw man. Identify the best arguments contrary to the conclusion ultimately reached — a steel man — and grapple with that. By fully addressing opposing arguments, a lawyer will increase the intellectual credibility of the advice or opinion and this will tend to mitigate the damage that may be caused by the political use of it.

Recognise uncertainty

Thirdly, addressing the opposing arguments will often mean that there is uncertainty as to the legal position. Usually in hard cases there are good arguments on both sides. Those should be recognised and the extent of uncertainty identified. That would be the norm for legal advice that is not to be publicly released, but it should also be no different if the advice is to be publicly released. The client will hate this.

Final points

I have two final points, both of which are general ones. They are points which are likely to be well known to those who routinely advise governments.

First, in cases where the advice will be to the executive government, particular care needs to be taken in relation to advice where the consequent executive action is unlikely to be readily reviewed. That is a situation which did not apply to the 2010 Advice, as it was a matter of public knowledge and discussion and there were parties readily able to challenge the government's course of conduct. The fact that there have not been such challenges is a comment on the remarkably benign state of litigation in Australia when compared, for example, to the United States. My point is that the burden of responsibility upon a lawyer advising the executive

government is all the greater when the lawyer knows that the circumstances are such that the executive action is unlikely to be able to be readily challenged in court. Lawyers advising the executive government have, in this regard, a greater burden than trial judges, who are able to make decisions in the knowledge that if they get it wrong then things can be fixed by the Court of Appeal. Much of the advice on the interpretation of statutes in a government context is, in a practical sense, never likely to be the subject of curial review. That is a fact which increases the burden of professional responsibility upon government lawyers.

Secondly, the experience in the United States demonstrates the importance and value of institutional continuity in government legal advice. Mr Yoo was only at the OLC for three years, but it is clear that the institutional constraints upon aberrant advice were insufficient. Institutional continuity and the professional culture of government solicitors is one of the important factors in constraining the political arms of government that, when under pressure, may have only a rhetorical commitment to the rule of law.