Judging a Book by its Cover: The Challenges of Prohibiting Firearms by their Appearance

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Abstract

This article explores the legal and administrative challenges associated with prohibiting firearms based on their appearance. The article begins by discussing recent events in Tasmania that put the spotlight on laws prohibiting certain firearms following this approach. It then examines the legislative context of Tasmania's Firearms Act 1996*, including the development of gun control laws. This is followed by an examination of the challenges faced and identified by other jurisdictions in enforcing comparable laws. The most notable challenge identified is the inconsistency in prohibition arising from subjective decisions about a firearm's appearance. Finally, the article puts forward two possible public policy reasons behind the decision to enforce a prohibition of firearms by appearance. Whilst there is considerable literature on the broader debates around gun control and the effectiveness of Australian gun laws, there is relatively little literature that examines the interplay between legislation, administration, and policy.*

Keywords

Firearms; Guns; Gun Control; Appearance; National Firearms Agreement; Firearms Act; Challenge; Prohibition

I INTRODUCTION AND BACKGROUND

Never judge a book by its cover. This familiar adage warns against passing judgment based on the appearance of an object or person. The basic argument is that appearances may not accurately reflect an object's true function or content. In February 2017 Tasmania Police published a document stating their intent to enforce a prohibition on firearms that 'substantially duplicate' the appearance of a prohibited firearm.[1] Whilst other Australian jurisdictions have identified challenges with laws prohibiting firearms by their appearance since 2008, there is minimal literature discussing the challenges these laws create for government

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1 Department of Police, Fire, and Emergency Management, 'Firearms Categorisation Guidelines' (Guidelines, A16/125616, Tasmanian Government, 2 February 2017) 3.

decision-makers, the judiciary, and firearms owners.[2] Most literature on firearms concerns matters such as public health,[3] compliance,[4] and impact on suicide[5] and homicide rates.[6] A Special Report in 2005 by the Auditor-General does touch on some of the problems associated with enforcing the legislation generally, but there is no mention of the problems associated with the specific provision prohibiting firearms by appearance or the re-categorisation of firearms generally.[7]

There is no head of power under the *Australian Constitution* that would provide the Federal Parliament with the power to promulgate national firearms legislation. For this reason, firearms legislation in Australia is the responsibility of each of the States and Territories. Prior to the introduction of the *Firearms Act 1996* (Tas) ('the Act'), function had been the only factor for categorising firearms in Tasmania. The Act provides for the prohibition of certain firearms based on their appearance, but the provision has only been enforced recently. In October 2016 Tasmania Police made public draft guidelines ('the Draft Guidelines') stating that the provision would now be enforced.[8] The Draft Guidelines made it clear that certain firearms would soon be prohibited based solely on appearance, rather than function. Function refers to 'the manner in which the firearm operates' and includes the operating mechanism or mechanics of the firearm.[9] For example, a firearm that requires a bolt or lever to be cycled manually after

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2 *H K Systems Australia Pty Ltd v Debus* (2008) 172 FCR 363.

3 Christopher Reynolds, 'Public Health Law in the New Century' [2003] 10 *Journal of Law and Medicine* 435; David Hemenway, *Private Guns, Public Health* (University of Michigan Press, 5th ed, 2010).

4 Megan Davies and Jenny Mouzos, 'Firearms Legislative Review' (Special Report, Australian Institute of Criminology, June 2007) 6.

5 Helen Klieve, Jerneja Sveticic and Diego De Leo, 'Who uses Firearms as a Means of Suicide? A Population Study Exploring Firearm Accessibility and Method Choice' (2009) 7 *BMC Medicine* 52; Helen Klieve, Michael Barnes, and Diego De Leo, 'Controlling Firearms Use in Australia: Has the 1996 Gun Law Reform Produced the Decrease in Rates of Suicide with this Method?' (2008) 44 *Social Psychiatry and Psychiatric Epidemiology* 285.

6 Jeanine Baker, and Samara McPhedran, 'Australian Firearm Related Deaths: New Findings and Implications for Crime Prevention and Health Policies Following Revisions to Official Death Count Data' (2015) 10(1) *International Journal of Criminal Justice Sciences* 1; Kate Warner, 'Evaluation of the Introduction of Tasmanian Firearm Control Legislation: the *Guns Act* 1991' (Project, 28/91, Criminology Research Council, 1 March 1999) 4; Kate Warner, 'Firearm Deaths and Firearm Crime after Gun Licensing in Tasmania' (Paper presented at the 3rd National Outlook Symposium on Crime in Australia, Canberra, 22 March 1999) 2; Satyanshu Mukherjee and Carlos Carcach, 'Violent Deaths and Firearms in Australia Data and Trends' (Publication, No 4, Australian Institute of Criminology, October 1996) 1.

7 Auditor-General, 'Gun Control in Tasmania' (Special Report, No 55, Parliament of Tasmania, May 2005) 1.

8 Matt Maloney, 'Tasmanian Government to Refine Gun Restriction Rules', *The Advocate* (online), 24 January 2017 <http://www.theadvocate.com.au/story/4422501/more-gun-rule-changes-ahead/>.

9 Law Reform Commission of Western Australia, *Review of the* Firearms Act 1973 *(WA)*, Project No 105 (2016) 81.

every round in order to fire is considered to have the function of a bolt action or lever action firearm respectively. A firearm that can fire numerous bullets with one pull of the trigger — and without manually cycling a mechanism after each round is fired — has the function of a fully-automatic firearm, colloquially referred to as a machine gun.

Unlike function, appearance refers to 'the outward look of the firearm only, how it is viewed through casual observation'.[10] Appearance does not incorporate any element of a firearm's mechanism or mechanics. It is sch 1(6) of the Act that prohibits a firearm that 'substantially duplicates in appearance a firearm referred to in [Schedule 1(1)]'.[11] Schedule 1(1) refers to fully-automatic firearms.[12] Neither Tasmania Police nor the Minister for Police and Emergency Management ('the Minister') have publicly stated why this provision is now going to be enforced. It is unclear if there have been any credible public safety concerns or risks arising from the lack of enforcement of the provision. Arguably, enforcement could be in response to other jurisdictions enforcing similar provisions within their respective legislation, as evidenced by cases such as *Eichner v Registrar of Firearms (Administrative Review),*[13] and *Killen And Commissioner of Police* ('*Killen*').[14] It could also be argued that in light of recent events, such as the 2014 Sydney Siege and events overseas, the community is more aware of and alert to the dangers of firearms possession. However, until it is explicitly stated by Tasmania Police or the Minister it can only be speculated why the prohibition is now being enforced.

The Draft Guidelines state that certain characteristics would contribute to determining if a firearm substantially duplicates a fully-automatic firearm in appearance.[15] These characteristics include:

- A pistol grip
- Fore-end shroud
- Detachable extended magazine shroud or similar
- Skeleton/adjustable/folding stock[16]

Whilst the Draft Guidelines state that these characteristics 'contribute' to the assessment of whether a firearm substantially duplicates a firearm in sch 1, there are other reasons these characteristics may have been selected.[17] One reason is that these features can assist with the commission of firearms-related offences. For example, an adjustable or folding stock

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10 Ibid.
11 *Firearms Act 1996* (Tas) sch 1(6).
12 Ibid sch 1(1).
13 [2016] ACAT 98.
14 [2013] WASAT 118.
15 Firearms Services (Tas), 'Guide to Schedule 1(6) of the Firearms Act 1996 (Prohibited Firearms)' (Draft Guidelines, Firearms Services 14 July 2016).
16 Ibid 2.
17 Ibid 1.

makes a firearm shorter, and therefore more easily concealable in a bag or coat. This would also be consistent with the recent changes to the firearms import regime which now includes adjustable and folding stocks.[18] Another possible reason is that these characteristics might make a firearm look more intimidating to members of the public.

The Draft Guidelines drew criticism from the firearms community who objected on a number of grounds.[19] The firearms community argued that these characteristics are items that can be added or removed on some firearms to suit the specific needs of the shooter.[20] Common reasons for these additions include to aid and enhance the shooting ability of people with disabilities, older shooters, and Olympic and professional competition shooters.[21] The negative impact on some minority shooters is one of the key reasons there was a backlash from the firearms community to the Draft Guidelines.

Second, the Draft Guidelines prohibit a firearm if it substantially duplicates the appearance of a fully-automatic firearm, but not a specific fully-automatic firearm.[22] This means a firearm might not resemble any one particular machine gun, but it could be prohibited because it shares certain characteristics with machine guns generally. The challenge is that most firearms share at least some characteristics with fully-automatic firearms, such as a barrel and a stock. The provision provides for potentially unlimited power by police to prohibit any firearm. This is because the police could prohibit a firearm based on the appearance of individual parts, rather than the entirety of the firearm substantially duplicating a known fully-automatic firearm.

Third, the term 'substantially duplicates' is not defined in the Act. This means it is at the discretion of Tasmania Police Firearms Services to interpret the meaning of 'substantially duplicates' and determine if a firearm falls under sch 1(6) of the Act. A clear definition or comparator would greatly assist in objective decision making and enforcement of the provision. The possible subjective nature of the test of 'substantial duplication' raises concern over fairness and consistency in decision making of prohibition. Case studies from other Australian jurisdictions demonstrate the inherent challenges surrounding decisions to prohibit firearms based on appearance due to the subjectivity this invokes, as discussed in part III of this article.

In February 2017 Tasmania Police published the *Firearms Categorisation Guidelines* ('the Guidelines'); the official guidelines for the Tasmania

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18 Australian Customs and Border Protection Service, 'Changes to the Firearms Import Regime — July 2013' (Explanation of Amendment Regulations, 2013) 1.
19 Maloney, above n 8.
20 Ibid.
21 Ibid.
22 Firearms Services (Tas), above n 15.

Police interpretation and operation of sch 1(6). Tasmania Police adopted a number of changes to the Guidelines as a result of community feedback. The Guidelines do not look at specific characteristics to determine if a firearm falls within sch 1(6) as they had under the Draft Guidelines.[23] Instead, a firearm must substantially duplicate a known fully-automatic firearm and not just share characteristics with numerous fully-automatic firearms.[24] Further, the decision making of the Manager of Firearms Services is aided by the assistance of the Firearms Categorisation Assessment Committee.[25]

The Guidelines make clear that all firearms can be prohibited provided they substantially duplicate a known fully-automatic firearm. For example, a Category A rifle could be prohibited — regardless of its operating mechanism, calibre, or magazine size — if the rifle substantially duplicates a known fully-automatic firearm. Similarly, a Category H pistol could be prohibited if it substantially duplicates a known fully automatic pistol (commonly referred to as a 'machine pistol'). One of the perverse outcomes of enforcing sch 1(6) is that a lower category firearm, such as a Category A, may be prohibited because it substantially duplicates a known fully-automatic firearm. Yet a firearm in a higher category, such as Category B, which potentially has a faster operating mechanism, larger calibre ammunition, and larger capacity magazine is not prohibited because it has a unique appearance.

It is clear the Guidelines reflect feedback from the community and firearm owners by addressing initial concerns raised by the Draft Guidelines. However, the overall question of why it is necessary to prohibit a firearm based on its appearance remains unanswered. Answering this question serves two functions. First, an answer identifies the purpose or public policy rationale which can have an important impact on the interpretation and application of the provision by the judiciary. Second, an answer provides a foundation for critical analysis of the provision. This assists in keeping Parliament accountable for ensuring the law is fair and reasonable to those affected. This second function is particularly important when read in light of the challenges and issues associated with prohibiting a firearm by appearance, as discussed later.

II THE CONTEXT OF THE TASMANIAN LEGISLATION: PROHIBITING FIREARMS BASED ON APPEARANCE

Whilst the issue of prohibition by appearance has only entered public debate in Tasmania recently, the provision has existed — without enforcement — since 1996. To understand the legislative context of the

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23 Department of Police, Fire, and Emergency Management, above n 1, 5.
24 Ibid.
25 Ibid 4.

provision, some background on gun laws in Australia is useful. The first major restrictions on firearms in Tasmania's history occurred in 1991 with the introduction of the *Guns Act 1991* (Tas) ('the Guns Act'), with the exception of handguns which had been regulated since 1932.[26] The *Guns Act* followed a series of bills and legislation to enforce gun control. The *Guns Amendment Act* passed in 1988, but without proclamation. The *Firearms Control Bill* was introduced into the Tasmanian Parliament in 1990, but it failed to pass. It was only in 1991 that the *Guns Act* created Tasmania's first significant gun control laws.

One possible explanation for the success of the *Guns Act* is that it was a direct response to the recommendations of the National Committee on Violence.[27] There were 290 deaths in Tasmania involving firearms in the eight years leading up to 1990.[28] Of the 290 deaths, 26 were caused by homicide or 'assault death'.[29] The National Committee on Violence strongly advocated for licencing and registration of firearms. Prior to the *Guns Act,* licences and registration of firearms was not required. The second reading of the bill in the House of Assembly argued that the aims of the *Guns Act*, at least in part, were to reduce deaths and accidents from firearms, reduce violence in homes and the broader community, and reduce access to guns by 'undesirable people'.[30] These aims, particularly reducing access to guns to reduce gun-related violence, certainly appears to indicate that Parliament was aware of the recommendations of the National Committee on Violence.

The *Guns Act* prohibited possession and use of a firearm without a licence or permit.[31] It was possible under the *Guns Act* to receive a permit to possess and use a fully-automatic or prohibited firearm.[32] The *Guns Act* interprets a prohibited firearm as any self-loading centre fire rifle, other than fully automatic, declared prohibited by order of the Minister.[33] Under s 4 of the *Guns Act* a firearm could be prohibited by the Minister based on design, style, or model.[34] However, for the prohibition to take effect, the order of the Minister had to be approved by both houses of Parliament.[35]

The first change under the *Guns Act* came on 7 May 1996 in response the Port Arthur massacre in April that year. The Minister exercised power under s 4 of the *Guns Act,* with the approval of Parliament, to prohibit certain firearms.[36] The Port Arthur massacre involved a lone individual

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26 *Firearms Act 1932* (Tas).
27 Kate Warner, 'Shooting Tasmanians' (1993) 18(2) *Alternative Law Journal* 72, 73.
28 Mukherjee and Carcach, above n 6, 34.
29 Ibid.
30 Warner, above n 27, 74.
31 *Guns Act 1991* (Tas) s 7.
32 Ibid ss 28, 29.
33 Ibid s 4(1).
34 Ibid s 4(2).
35 Ibid s 4(4).
36 Warner 1999, above n 6, 2.

using two semi-automatic firearms to kill 35 individuals at the Port Arthur Historic Site in Tasmania. The makes and models of firearms used were not prohibited; they could be legally bought and sold. However, the specific firearms used were not legally purchased as the sale was not in accordance with the requirements of the *Guns Act*. The buyer did not have a firearms licence and the seller did not check to see if the buyer held a licence.[37] The firearms used at Port Arthur were semi-automatic, but similar looking models were manufactured as fully-automatic. The Port Arthur Massacre was the catalyst for national firearms change.

Following the events of Port Arthur, the Australasian Police Ministers Council held a special meeting on 10 May 1996. The resolutions passed at this meeting are referred to as the National Firearms Agreement ('NFA'). As State Parliaments have jurisdiction over firearms, the only reaction of the Commonwealth Parliament was to amend the *Customs Act 1901* (Cth) and restrict the importation of certain firearms. State Parliaments were responsible for promulgating their own legislation to enforce the NFA. The NFA produced three principle resolutions: i) the imposition of bans upon certain types of firearms; ii) the creation of a national system of firearms registration; iii) criteria for the categorisation of firearms. Whilst it is not explicitly stated in the resolutions, two of the key aims of the NFA are to increase public safety around firearms and to create a template for uniform firearms legislation in Australia.

The first resolution of the NFA was to ban fully-automatic and semi-automatic firearms.[38] The argument was that such firearms only belong in the hands of three groups of persons: police and other government agencies, the military, and shooters with a specified purpose.[39] The resolution does not ban other types of firearms, such as bolt-action rifles, that are also used by military and law enforcement. The ban only relates to semi-automatic and fully-automatic firearms. Second, the NFA created a national system of firearms registration. Part of the purpose was to 'ensure effective nationwide registration of all firearms'.[40] In practice, this means that a Category A firearm registered in Queensland should also be a Category A firearm if subsequently registered in Tasmania or anywhere else in Australia. Third, the NFA divides the categorisation of firearms into five main categories: A, B, C, D, and H.[41] Certain firearms, such as fully-automatic firearms , fall outside the scope of these five categories and are generally regulated under schedules to each State's Firearms Act.[42]

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37 Wikileaks, *Martin Bryant Complete Interview: A Transcript of the Police Interview with Martin Bryant*, Wikileaks <https://wikileaks.org/wiki/Martin_Bryant_complete_interview>.

38 Australasian Police Ministers Council, 'Special Firearms Meeting: Resolutions' (Report, Australasian Police Ministers Council, 10 May 1996) 2.

39 Ibid 3.

40 Ibid.

41 Ibid 5.

42 See, eg, *Firearms Act 1996* (Tas) sch 1(6).

Category A and B firearms are not prohibited generally. These two categories include: air-rifles, rim-fire rifles other than self-loading, shotguns, centre-fire rifles other than self-loading, and shotgun and rifle combinations.[43] Categories C and D are prohibited generally with the exception of occupational shooters and collectors.[44] Category D firearms under the NFA include: 'self-loading centre fire rifles designed or adapted for military purposes or a firearm which substantially duplicates those rifles in design, function or appearance'.[45]

For Tasmania, this resolution in the NFA is the first instance of appearance explicitly being relevant to the categorisation of a firearm. Section 4 of the *Guns Act* prohibited a firearm based on design, style, or model, but none of these factors explicitly refer to appearance without potentially incorporating some element of function.[46] The NFA is not clear on why appearance is considered a necessary factor for determining if a firearm falls under Category D. However, a possible explanation is provided by the findings of the Parliamentary Research Service in their Current Issues Brief ('the Brief') published on 7 May 1996. The Brief notes that:

> Reports of the shooting at Port Arthur indicate that the suspect was using high powered semiautomatic rifles with large capacity magazines. These weapons are usually referred to as military-style rifles because they have most of the characteristics of weapons developed for the use of troops in the armed forces of various countries.[47]

A couple of relevant points arise from this statement. The first is that at the time the Brief was written, it was not entirely clear what firearms had been used at the Port Arthur Massacre. Without clearly identifying the type of firearms used, it is challenging to create and promulgate legislation that will effectively prohibit those specific types of firearms in the future. The second point is that the Brief assumes that 'high powered semiautomatic rifles' are synonymous with 'military-style weapons'.[48] Again, the problem is that not all high powered semi-automatic rifles are military-style so presuming the two terms are synonymous further diluted the Parliament's capacity to effectively target and prohibit specific types of firearms. Even today, the terms 'high powered' and 'military-style' lack definitions within the legislation. The Brief notes the previous difficulty experienced in determining how to prohibit military-style firearms:

> There has been some confusion about the nature of military-style weapons in past attempts to regulate them. For instance, Customs Regulations before

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43 Australasian Police Ministers Council, above n 38, 5.
44 Ibid.
45 Ibid.
46 *Guns Act 1991* (Tas) s 4.
47 Jennifer Norberry, Derek Woolner, and Kirsty Magarey, 'After Port Arthur - Issues of Gun Control in Australia' (Current Issues Brief No 16, Parliamentary Research Service, Parliament of Australia, 1996) 2.
48 Ibid.

> 1990 described such weapons as those 'incorporating a pistol grip in its design', although this was not a characteristic of earlier military semi-automatic rifles.[49]

This is consistent with other writings at the time that argue 'military-style' is based on 'appearance and accessories rather than… function'.[50] The brief does not go into detail as to how military-style firearms could be regulated but it does set out some important arguments as to why military-style firearms should be prohibited. The arguments put forward by the brief articulate why:

> There seems to be agreement between Commonwealth and State governments that military-style weapons should be prohibited. The issue would now appear to be how to withdraw those weapons which are in Australia from the civilian population, and how to monitor whatever approach is adopted to ensure that this objective has been met.[51]

The inference can be drawn that the incorporation of 'self-loading centre fire rifles designed or adapted for military purposes or a firearm which substantially duplicates those rifles in design, function or appearance' as category D firearms under the NFA is the attempt by the Australasian Police Ministers Council to prohibit military-style firearms.[52] However, whether the States adopted this specific wording, and therefore the intent of the provision, is another matter.

Tasmania adopted the resolutions of the NFA in the *Firearms Act 1996*.[53] For the most part the Act promulgates the NFA in Tasmania. However, there are a few minor differences relevant to the argument here. Under the Act a Category D firearm is:

a) A self-loading centre-fire rifle;
b) A self-loading shotgun with a capacity of more than 5 rounds of ammunition;
c) A pump action shotgun with a capacity of more than 5 rounds of ammunition;
d) A self-loading rim-fire rifle with a magazine capacity of more than 10 rounds of ammunition. [54]

There is no mention of a firearm being Category D if it substantially duplicates in design, function, or appearance, a self-loading firearm designed or adapted for military purposes. The only reference to appearance is under sch 1(6). This provision states: '[a prohibited firearm is] any firearm that substantially duplicates in appearance a firearm referred

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49 Ibid 3.
50 Simon Chapman, *Over our Dead Bodies* (Pluto Press, 1st ed, 1998) 73.
51 Norberry, Woolner, and Magarey, above n 47, 4.
52 Australasian Police Ministers Council, above n 38, 5.
53 *Firearms Act 1996* (Tas) Long Title (b).
54 Ibid s 17(1).

to in item 1'.[55] Item 1 reads: '[a prohibited firearm is] any machine gun, submachine gun or other firearm capable of propelling projectiles in rapid succession during one pressure of the trigger'.[56]

It is the interpretation of these two provisions that is in contention. It is clear that sch 1(6) draws upon elements of the NFA, but lacks consistency in wording. The purpose of the Act is to give effect to the NFA, so it is inconsistent that the provision was not copied verbatim from the resolution. It is also confusing that the purpose of the Act is to create consistency in firearms laws between jurisdictions, yet the wording in the Act is unique to Tasmania, and so only goes some of the way to achieving consistency in laws with other jurisdictions. The inconsistency between the NFA and the Act creates confusion around the interpretation and operation of the provision. It is not clear what the Tasmanian Parliament hoped to achieve by rewording the NFA in the Act. One possible explanation is that the use of 'self-loading' is designed to include both semi and fully-automatic firearms. Whilst Category D has only been interpreted as referring to semi-automatic firearms, technically on its natural and ordinary interpretation, self-loading includes both semi and fully-automatic. Category D refers to both semi and fully automatic firearms, yet only fully automatic firearms fall within the prohibition under sch 1(1) and thus restricting Category D to only refer to semi-automatic firearms. Despite this, even if the Tasmanian Parliament had promulgated the NFA verbatim in the Act, prohibiting firearms by their appearance would still create challenges, as evidenced by the experiences of other jurisdictions.

III The Experiences Of Other Jurisdictions in Enforcing their Provisions Prohibiting Firearms by Appearance

Tasmania is not the first Australian jurisdiction to begin enforcing — and encountering the challenges with — a provision prohibiting firearms based on appearance. Each jurisdiction has different wording for the provision that prohibits firearms based on appearance. South Australia, is the exception and does not have a specific provision to prohibit a firearm should its appearance alone resemble a prohibited firearm.[57] Appendix A tables each jurisdiction's legislation and corresponding provision(s). The experiences detailed here highlight some of the challenges, particularly around uniformity and fairness, in prohibiting firearms based on appearance.

A *Case One: H K Systems Australia Pty Ltd v Debus*

The Commonwealth has jurisdiction over customs and imports and can use this power to detain the importation of a firearm based on its appearance.

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55 Ibid sch 1(6).
56 Ibid sch 1(1).
57 *Firearms Act 2015* (SA).

In *H K Systems Australia Pty Ltd v Debus* an importer of firearms appealed against the Commonwealth's decision to detain the importation of Heckler & Koch model R8s into Australia.[58] The R8 is a Category B firearm by function but the Commonwealth argued that it was not in the public interest to import such firearma as 'they represent an increased risk due to their military appearance and design'.[59] The Commonwealth does not have jurisdiction over firearms legislation specifically so the power under s 77EA of the *Customs Act 1901* (Cth) was exercised. Provision 77EA permits customs to detain goods if it is in the public interest to do so. The R8 example is only the second time the power under s 77EA has been exercised. The first time the power was exercised the Commonwealth prohibited the importation of kava due to the potential impact on indigenous communities.[60]

The Applicant in *H K Systems Australia Pty Ltd* argued that without a comparator or definition there is no way to achieve consistency in the administration or application of the law. The Court rejected this argument, stating:

> the decision that the R8 had a military style appearance was a matter of visual judgment. The Minister had before him pictures of the R8 which allowed him to make that judgment as a matter of impression.[61]

The Court specifically noted that the decision is not one weighed against any specific comparator or definition. The Applicant also noted that nearly 300 military firearms were imported into Australia in 2008 for civilian use. Those firearms could quite logically be considered as having a military appearance and yet all of them cleared customs without being detained. Due to a lack of consistent application of s 77EA to all firearms with a military appearance, the Applicant argued that the Commonwealth discriminated against them by detaining the importation of the R8. The Court noted the difficulty in proving discrimination and stated:

> whilst HK Systems has failed to establish that the Minister's decision was made to discriminate against it, the picture which has emerged leaves a sense of unease in relation to the administration of s 77EA.[62]

The Commonwealth did not provide reasons why the R8 was specifically selected to be detained. The Court noted that it was not necessary for them to do so. However, the Court stated that such an approach 'lacks transparency in the administration of the section.'[63]

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58 *H K Systems Australia Pty Ltd v Debus* (2008) 172 FCR 363.
59 Ibid 366.
60 Ibid 372.
61 Ibid 371.
62 Ibid 374.
63 Ibid.

This case raises one of the dangers of detaining or prohibiting anything based on appearance: it can act as a veil for discrimination. The Applicant was ultimately unsuccessful, but the arguments presented by both parties raise two important considerations for provisions prohibiting firearms based on appearance. First, prohibiting a firearm based solely on appearance without a definition or comparator leads to inconsistencies in administration and application. Second, there is potential for discrimination. Both arguments resonate in later cases dealing with the issue of prohibition based on appearance.

B *Case Two: Killen and Commissioner of Police*

Appearance litigation occurred again in the 2013 case of *Killen* in Western Australia. Mr Killen was refused an application to hold a firearm on the grounds that it 'closely resembles' a Category D firearm, which Mr Killen was not permitted to possess. Primarily, *Killen* is about jurisdiction to hear the matter. However, in determining if the Tribunal had jurisdiction the Court had to consider who had authority to make the decision. The Tribunal noted that: 'the Firearms Regulations do not set out with absolute clarity who the responsible officer is to consider an application of a Category B firearm that may "closely resemble" a Category D firearm'.[64] Where it is not clearly identified who makes the decision of close resemblance of appearance (or in the case of Tasmania, substantial duplication in appearance), the subjective decisions made by individuals result in inconsistencies.

The Tribunal also briefly touched on the fact that the Western Australian laws use two different phrases. Regulation 26B(2) uses the phrase 'closely resembles' whereas sch 3 uses the phrase 'substantially duplicates'.[65] These phrases highlight the difficulty of distinguishing the meaning of different wordings in closely related legislative tests for appearance. Whilst the Tribunal does not go into detail on the differences, the distinction raises the question about the threshold of 'substantially duplicates'. It is not clear at what point a firearm closely resembles, but does not substantially duplicate, another firearm.

C *Case Three: Eichner v Registrar of Firearms*

Unlike *Killen*, the case of *Eichner v Registrar of Firearms* from the Australian Capital Territory primarily concerns the issue of substantial duplication. Mr Eichner, the Applicant, was refused a permit to acquire a Barrett M98B .338 Lapua Magnum bolt action rifle by the ACT Registrar of Firearms on the grounds that it is a prohibited firearm. The *Firearms Act 1996* (ACT) states that a prohibited firearm includes:

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64 *Killen* [2013] WASAT 118, [11].
65 Ibid [12].

> 8. A firearm that substantially duplicates in appearance (regardless of calibre or manner of operation) a firearm referred to in item 1, 5 or 6 [of Schedule 1].[66]

Items 1, 5, and 6 of sch 1 include:

> 1. a machine gun, submachine gun or other firearm capable of propelling projectiles in rapid succession during 1 pressure of the trigger.[67]
> 5. a self-loading centre-fire rifle of a kind that is designed or adapted for military purposes.[68]
> 6. a self-loading shotgun of a kind that is designed or adapted for military purposes.[69]

The Registrar gave Mr Eichner five reasons for refusal to issue a permit. Four of these were rejected by the Court. Ultimately, the decision was made in favour of the Respondent because the Barrett M98B substantially duplicated a self-loading centre-fire rifle of a kind that is designed or adapted for military purposes.[70] There was no contention that the firearm Mr Eicher applied for was a Category B firearm by function, and that he was authorised to possess and use a Category B firearm. The Respondent sought the advice of Mr Murphy, an expert in firearms, who provided some grounds as to why the Barrett M98B substantially duplicated the appearance of a military firearm. These included:

- The M98B is manufactured by the same company that manufactures military sniper rifles;
- The M98B and similar models are currently issued worldwide to various militaries;
- The M98B is manufactured with 'military and tactical styling cues' taken from currently issued military rifles;
- The M98B is marketed towards the growing market for military and tactical style firearms. [71]

The Tribunal went on to state:

> Mr Murphy also noted that the .338 Lapua Magnum rifle and the [currently issued military sniper rifle], although of a different calibre and method of operation, share similar overall lengths and visual characteristics in their appearance. He listed a significant number of similarities. The .338 Lapua Magnum rifle is also in his opinion similar in appearance when compared to other military type rifles.[72]

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66 *Firearms Act 1996* (ACT) sch 1(8).
67 Ibid sch 1(1).
68 Ibid sch 1(5).
69 Ibid sch 1(6).
70 *Eichner v Registrar of Firearms (Administrative Review)* [2016] ACAT 98, [2].
71 Ibid [11].
72 Ibid.

Mr Eichner in response provided evidence of eleven .338 Lapua Magnum rifles already registered in the ACT.[73] Further evidence is provided that there are firearms owners within the ACT who possess and use firearms that are the basis for sniper rifles in other militaries around the world.[74] Mr Eichner also put forward the familiar argument that 'there was a very large element of subjectivity in the decision, this gives enormous discretion to individual police officers, and that in this case it had been exercised unreasonably.'[75]

It is easy to see how Mr Eichner perceived the Registrar as treating him unfairly in the circumstances. Other rifles that should be prohibited on the basis of substantial duplication, including other Barrett M98B rifles, had not been prohibited at the time. Mr Eichner noted that two of the ACT *Firearms Act* principles include improving public safety, and facilitating a national approach to firearms.[76] Mr Eichner went on to question how prohibiting a firearm by appearance, not function, serves to improve public safety. The argument is also put forward that due to the subjective nature of decision making, prohibition by appearance will not result in a national approach to firearms. The Tribunal dealt with this argument by stating:

> It is likely that the decisions of the courts or tribunals of other jurisdictions, and perhaps decisions of their regulators, as to the interpretation of provisions of their firearms legislation will be relevant to the interpretation of similar provisions of the Firearms Act.[77]

If the interpretation of a provision requires a matter to be brought before a court or tribunal for every new firearm that may be prohibited because of appearance, then the provision is neither efficient nor effective. Courts and tribunals could quickly become clogged with firearms owners disputing the subjective decision that their individual firearm is prohibited because of appearance unless there is some set comparator or definition applied by administrators.

D *Western Australian Law Reform Commission: Review of the Firearms Act 1973 (WA)*

This challenge of prohibition by appearance is one of many points raised by the Western Australian Law Reform Commission in their report *Review of the Firearms Act 1973* (WA). This report is the most recent publication that specifically addresses the issue of prohibiting firearms on appearance. There are two key findings: first, that there is a lack of uniformity in decision making, and second, that prohibiting a firearm based on its appearance does not fulfil the public functions claimed by proponents. One major observation of the Commission's report is that whilst most

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73 Ibid [13].
74 Ibid.
75 Ibid.
76 *Firearms Act 1996* (ACT) s 5(1).
77 *Eichner v Registrar of Firearms (Administrative Review)* [2016] ACAT 98, [12].

Australian jurisdictions have some capacity to re-categorise or prohibit firearms based on appearance, there is no uniformity in the wording or interpretation of the provisions. For example, the Australian Capital Territory prohibits firearms based on the fact that it has a military appearance; whereas in Tasmania, whether the appearance is military or not is irrelevant, and in South Australia there is no provision to categorise a firearm according to appearance.

The Commission goes on to note that the perception amongst firearm owners is that the subjective nature of such provisions 'does not reflect the ordinarily understood standards of administrative decision-making.'[78] This creates an ineffective and inconsistent system for prohibiting firearms. The Commission comments that without 'checks and balances' such subjective decision making is unlikely to be accepted by the community.[79] This results in continuous litigation and disputes which increases administration and litigation costs for all parties. Furthermore, the purpose of NFA is to achieve uniformity in gun laws across the nation. Uniformity is not, and will not, be achieved whilst such subjective provisions and terms, such as 'substantially duplicate', are present within the legislation without an accompanying definition or comparator for application by administrators.

Prohibiting by appearance could still be purposeful if it fulfils some public function other than uniformity. However, the Commission's report rejects the public functions fulfilled by prohibiting a firearm based on its appearance as put forward by proponents. The report notes that one of the arguments for prohibition by appearance is causing fear to the general public. As found in every state, the Western Australian legislation — in this instance the *Criminal Code* — outlines the parameters for when a firearm may and may not be lawfully carried in public.[80] The report does not identify an instance where a firearm of a particular appearance may be carried lawfully in public and where it is likely to cause any greater fear to the public than any other firearm. The report states:

> The Commission is thus not convinced that a firearm which closely resembles a prohibited firearm in appearance and which is used in circumstances within the scope of lawful activity is likely to cause any greater fear to a person than any other firearm.[81]

The Commission also noted that the relevant test for the degree of fear caused by a firearm is objective rather than subjective. However, the Commission argues that the relevant legal question is not the degree of fear a firearm may cause, but the likelihood of creating fear.[82] In this instance the Commission notes that context is more important than appearance.

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78 Law Reform Commission of Western Australia, above n 9, 85.
79 Ibid.
80 *Criminal Code Act Compilation Act 1913* (WA).
81 Law Reform Commission of Western Australia, above n 9, 83.
82 Ibid 84.

There are already legislative provisions detailing deterrents and parameters for the context in which a firearm may be carried in public. The report states: 'the Commission is of the view that the appearance of a category A or B firearm is just as likely to cause fear in the eyes of the public as a firearm that closely resembles a prohibited firearm.'[83]

The Commission also notes there is an argument advanced by proponents that removing the provision allowing for prohibition of firearms based on appearance could have a 'negative impact on policing'.[84] The argument is that the police would respond differently to a situation describing a Category A or B firearm than that of a firearm with a fully-automatic firearm appearance. In response to this argument the report states:

> The Commission is of the view that any firearm if used unlawfully is likely to result in a similar policing response. The Commission is confident that the Police response would quite properly be no less in the event that a person is using a self-loading rim fire rifle with a magazine capacity of 10 rounds than if this same firearm had a military type appearance.[85]

Accordingly, the Commission's recommendation is that the relevant provision should be deleted from the Act.[86] It states explicitly:

> The Commission favours a technical, evidence-based approach that limits subjective and ad hoc decision making, and recommends that Western Australia negotiates at the national level for the removal of the 'appearance' provision from [the Act].[87]

It is clear from the experience of other jurisdictions that provisions allowing for the prohibition of firearms based solely on appearance are difficult to enforce. These provisions result in inconsistent interpretations that appear to fail in fulfilling the public functions as claimed by proponents.

IV Identifying A Possible Public Policy Rationale for Prohibiting A Firearm by its Appearance

Without official commentary to analyse it, the public policy rationale behind enforcing sch 1(6) in Tasmania remains unclear. However, two inferences can be drawn from the evidence to identify a possible rationale. The first inference is that the enforcement of sch 1(6) is in response to other jurisdictions enforcing similar 'substantial duplication' provisions. The cases listed here, such as *H K Systems Australia Pty Ltd,*[88] *Killen,*[89] and

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83 Ibid.
84 Ibid.
85 Ibid.
86 Ibid 85.
87 Ibid.
88 *H K Systems Australia Pty Ltd v Debus* (2008) 172 FCR 363.
89 *Killen* [2013] WASAT 118.

Eichner,[90] are all evidence of other jurisdictions enforcing prohibitions on firearms because of their appearance. Arguably the policy rationale behind sch 1(6) is the alignment of Tasmania's firearms laws to those of other jurisdictions. This is also consistent with the Act's purpose of promoting uniform laws around Australia.[91] However, this is a basic public administration continuity interpretation of the policy intent of the legislation which sheds little light on why governments would choose to enact laws that appear so problematic to interpret and enforce.

The second public policy rationale is linked with recent events that have placed firearms within the public spotlight. Three recent events include the 2014 Sydney Siege, the controversy surrounding the import of the Adler A110 shotgun, and the Las Vegas Strip shooting. The perpetrator of the Sydney Siege used a pump-action shotgun, which is currently a Category D firearm.[92] The Adler A110 shotgun created controversy because of the number of cartridges it can hold and the speed at which it can be fired.[93] As a lever-action shotgun the Adler would be a Category A firearm. The Las Vegas Strip shooting is the deadliest shooting in the United States of America and it put the spotlight on gun control laws around the world. In particular, the use of 'bump stocks' placed international attention on the ability to modify otherwise legal firearms.[94] These tragic and controversial events placed firearms, firearm ownership, and firearm categorisation in the public spotlight. For this reason, the enforcement of sch 1(6) could be a government demonstration of a hard-line stance against firearms to reassure public safety. In this instance the enforcement of sch 1(6) in Tasmania, and the similar provisions in other jurisdictions around Australia, serves a more intangible public safety benefit. Such a benefit more aligns with legislation aimed at reducing the occurrence of moral panics then firearms legislation aimed at reducing firearm related deaths.

V CONCLUSION

The numerous challenges identified here indicate the Tasmanian Government is likely going to struggle to enforce a prohibition on firearms based on their appearance. Legal inconsistencies between jurisdictions, a

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90 *Eichner v Registrar of Firearms (Administrative Review)* [2016] ACAT 98.

91 *Firearms Act 1996* (Tas) Long Title.

92 Jessica Kidd, 'Sydney Siege Inquest: Ballistics Expert Fires Sawn-off Shotgun used by Man Haron Monis in Lindt Café' *ABC News* (online), 2 September 2015. <http://www.abc.net.au/news/2015-09-02/siege-inquest-sees-monis-shotgun-fired-using-dummy-bullets/6743732>.

93 Stephanie Anderson, 'New Rapid-Fire Adler Shotgun on its Way to Australia after Sidestepping Government Ban' *ABC News* (online), 6 October 2015 <http://www.abc.net.au/news/2015-10-06/rapid-fire-shotgun-heading-to-australia-after-sidestepping-ban/6831360>.

94 'Las Vegas Shooting: these were the Guns Used in America's Worst Shooting in Modern History' *ABC News* (online), 5 October 2017 <http://www.abc.net.au/news/2017-10-04/las-vegas-shooting-what-do-we-know-about-the-guns-that-were-used/9013764>.

lack of administrative uniformity, and difficulty in identifying a public function are all significant challenges. Ultimately, it is not impossible to enforce sch 1(6) in Tasmania and the respective provisions in other jurisdictions, with consistency, uniformity, and purpose. However, serious thought needs to be dedicated to overcoming the challenges identified in this article. A national approach is necessary to ensure legal consistency between jurisdictions, particularly if the courts and tribunals are to follow the advice of the Tribunal in *Eichner* and utilise the decisions from other jurisdictions to assist their own decision-making.

Additionally, dedicated resources need to be committed to ensure there is no opportunity for discrimination in the enforcement of the provision. An ad hoc system of prohibition does not provide for the necessary transparency or certainty to maintain public confidence. Further, the Government remains open to criticism by failing to provide a justification or public policy rationale for the enforcement of sch 1(6). Whilst possible rationales are identified here, they are only inferences drawn from the available evidence rather than conclusive justifications or reasons. Ultimately, these are likely to either relate to the alignment of laws with other jurisdictions, or to addressing public safety concerns around firearms. However, if a justification or rationale is provided by the Government, all parties can work together to source a solution that reduces risks whilst minimising potential challenges. At a broader level, governments need to be held accountable for their decisions to enact and enforce legislation without providing any explanation or rationale.

Whilst it has been over 20 years since sch 1(6) was enacted, the Parliament and Police of today must still be held accountable to the public for the existence and enforcement of this provision. If challenges surrounding the provision are identified before legal proceedings commence, courts and tribunals are better equipped to overcome these challenges and properly perform their duties in both accountability and dispute resolution. Critical analysis of the challenges posed by sch 1(6) could result in the creation of a body of evidence to argue convincingly for and against the value of maintaining its existence and enforcement.

APPENDIX A: APPEARANCE PROVISIONS

Jurisdiction	Act	Section	Wording
ACT	*Firearms Act 1996*	Schedule 1(8)	'A firearm that substantially duplicates in appearance (regardless of calibre or manner of operation); a firearm referred to in item 1, 5 or 6'
NSW	*Firearms Act 1996*	Schedule 1(7)	'Any firearm that substantially duplicates in appearance (regardless of calibre or manner of operation); a firearm referred to in item 1, 5 or 6'
NT	*Firearms Act*	Schedule 1(7)	'A firearm that substantially duplicates in appearance (regardless of calibre or manner of operation); a firearm mentioned in item 1, 5 or 6'
QLD	*Weapons Categories Regulation 1997*	Section 5(1)(a)	'A self-loading centre-fire rifle designed or adapted for military purposes or a firearm that substantially duplicates a rifle of that type in design, function or appearance'
SA	*Firearms Act 2015*	None	None
TAS	*Firearms Act 1996*	Schedule 1(6)	'Any firearm that substantially duplicates in appearance a firearm referred to in item 1'
VIC	*Firearms Act 1996*	Section 3B(1)	'(1) The Chief Commissioner, by instrument, may declare a firearm or type of firearm that would otherwise be a Category A longarm, Category B longarm or Category C longarm to be — (a) a Category D longarm; or (b) a Category E longarm — if the Chief Commissioner is satisfied that the firearm or type of firearm subject to the declaration is designed or adapted for military purposes, or substantially duplicates a firearm of that type in design, function or appearance'
WA	*Firearms Regulations 1974*	Schedule 3(7)(D1) Section 26B(2)	'A self-loading centre fire rifle designed or adapted for military purposes or a firearm that substantially duplicates such a firearm in design, function, or appearance' 'A licence, permit or approval relating to a firearm cannot be issued, granted or given if — (a) in the opinion of the Commissioner, the firearm closely resembles a firearm that is prohibited under regulation 26'