

RE-EVALUATING LOCAL GOVERNMENT AMALGAMATIONS: UTILITY
MAXIMISATION MEETS THE PRINCIPLE OF DOUBLE EFFECT (PDE)

Abstract

Public policy debates are often dominated by economic analysis of aggregate financial benefit. However, public policy formulated on this basis is frequently regarded as profoundly unsatisfactory by stakeholders. Focussing upon municipal amalgamation, this paper provides an alternative framework for public policy analysis which emphasises the importance of intent, process and uncertainty in decision making. We contend that an approach of this type better accommodates public opinion on contentious policy reform. Moreover, it reminds policy makers that even the most admirable economic outcome must still be achieved through a morally licit process.

Keywords: Normative political theory; public administration theory; local government amalgamation.

1. Introduction

Public policy concerning the question of municipal amalgamation is often founded on an implied ethic of utility maximisation. Utilitarians conceive of utility in terms of pleasure or happiness (Bentham, 1843, p. 70; Mill, 1972, pp. 1-27; Crane and Matten, 2010, 101).

However, in economics utility is generally substituted by monetary or financial data owing to the need for an objective measure. Further, economic logic centres on the assumption that the rational individual will *always* act in self-interest (Stigler, 1980). Thus, the economic analysis of public policy tends to focus on whether a proposed action will result in an aggregate monetary benefit for society.

Various empirical techniques are deployed to assess aggregate pecuniary benefit. For instance, in the Australian setting regression analysis aimed at identifying efficiencies arising from economies of scale has long been a mainstay of public policy analysis (for a review, see Byrnes and Dollery, 2002). Data envelopment analysis (DEA) has also been applied to the question of whether proposed municipal amalgamations will yield benefits for the community (see, for instance, Drew, Kortt and Dollery, (2015). Both empirical techniques are concerned exclusively with the monetary outcomes arising from public policy reform.

This general approach is in no way restricted to Australia. For instance, Kushner and Siegel (2005) evaluated the Ontario amalgamation using efficiency metrics; Andrews (2013) analysed amalgamations in England and Wales by employing measures of fiscal sustainability; Martin and Scorsone (2011) evaluated municipal consolidation in Michigan on the basis of expenditure data. A large number of examples can be pointed to globally (see, for example, Dollery and Robotti, 2008). In sum, all of the specific analyses, as well as the types of analysis they represent rest on an ethic of utility maximisation.

However, it is becoming increasingly apparent that public policy which *prima facie* aims to maximise utility may nevertheless be rejected by the broader population. This is borne out in several ways. First, as a result of discontent with public policy on the structural reform of local government, de-amalgamations have occurred in the Australian states of Victoria (Drew and Dollery, 2015a), Queensland (Drew and Dollery, 2014) and in the Canadian province of Quebec (Sancton, 2006). Second, echoing these episodes of discontent, communities express their dislike of amalgamations in opinion polls. For instance, in response to the recent proposal to amalgamate over 40 per cent of NSW municipalities, the peak advocacy organisation for local government in NSW cited support for amalgamation at just 18 per cent from a poll of 7,416 residents (Local Government NSW (LGNSW), 2015). Third, in their dealings with state government regulatory authorities, the overwhelming majority of individual local governments have mounted arguments to remain un-amalgamated, despite the financial inducements offered (see Independent Pricing and Regulatory Tribunal (IPART), 2015). Overall, this evidence suggests the need for an approach to public policy which goes beyond a mere consideration of utility outcomes – an approach which also recognises the importance of process and uncertainty.

The Principle of Double Effect (PDE), which has its origins in the work of Thomas Aquinas, offers a unique approach for conceiving the essential elements of ‘good’ public policy. PDE insists that ‘good’ public policy must aspire to more than merely maximising (monetary) utility, thus setting it apart from the dominant approaches of contemporary public policy analysis (Hausman and McPherson, 1993). In so doing, PDE squarely confronts conflicts between the ‘economic must’ and the ‘ethical ought’ (McMahon, 1986). Specifically, PDE prohibits acts which intend morally illicit means or ends, therefore distinguishing it from the utilitarian approach. PDE also requires that proportionally grave reason exists for countenancing an act which may give rise to *foreseeable* bad side-effects.

Thus, PDE pragmatically responds to the fact that we live in an uncertain world – that acts intended to produce one state of affairs may bring about unintended side-effects or entirely different outcomes from those intended. PDE is well suited to a public policy context, where the complexity of human behaviour and the uncertainty of real-world events can influence the outcomes of public policy (Boyle, 1980).

We explore this claim in the context of Australian local government. Like its counterparts in many Anglosphere countries, local government comprises the lowest tier of government in Australia (Twomey, 2012). Comparatively, Australian local government has limited responsibilities traditionally focussed on road infrastructure, solid waste removal and recreation facilities with the bulk of local government revenue derived from land tax (rates). Principal responsibility for health, education policing and fire protection resides with the state governments. Nevertheless, in common with many jurisdictions globally (see, for example, Dollery, Garcea and Le Sage 2008; Lago-Penas and Martinez-Vazquez, 2013) municipal amalgamations have been a feature of the local government landscape and intergovernmental relations (Dollery, Grant and Kortt 2013).

We also argue that the implications for policy could be extended to most democratic systems of government where forced amalgamation is a constitutional possibility. Additionally, because amalgamation is invariably predicated on enhancing efficiency and sustainability, there is good reason to believe that the current climate of fiscal austerity may promote further episodes of local government consolidation.

The paper is divided into five main parts. Section Two develops a working definition of PDE through considering 13th century natural law origins and the contributions of contemporary philosophers. Particular emphasis is placed on the problem of reliably establishing intent. Section Three develops three scenarios which emphasise the importance

of intent and proportionality in using PDE to determine whether public policy is morally licit. Section Four applies PDE to the current debate regarding the proposal to amalgamate up to 40 per cent of existing NSW municipalities. We conclude our discussion of PDE with remarks on its explanatory power and potential insights it may offer for public policy architects.

2. The Principle of Double Effect (PDE)

Our initial task is to present an exposition and refinement of PDE as a form of ethical theorising. Before commencing this task, it is important to stress that the principal objective of this paper is to contrast contemporary policy analysis, in particular that associated with municipal amalgamation, with PDE. Whilst we have noted the putative superiority of PDE to the ethical approach grounded in utilitarianism, we do not claim that PDE is the only ethical decision-making tool (for an overview of public policy and ethical theory, see Hausman and McPherson (1993)); nor indeed that it is the best one (for a review of the relative merits of PDE, see Woodward (2001)). However, we do claim that PDE not only explains public objection to policy which aims to maximise utility, but also offers important insights for public policy architects.

These introductory caveats aside, *prima facie* PDE is appealing because the world is far from certain and actions can often result in unintended states of affairs. Sometimes these unintended states of affairs can be reasonably foreseen (more on this later), presenting the agent with a seemingly unresolvable moral dilemma. These sorts of dilemmas are readily found in matters related to medical ethics (for instance, in questions of abortion or passive euthanasia – see, for example, Foot, 1978). A large body of literature also relates to business ethics – for instance, the debate on whether it is morally licit for a company to market a drug with extreme deleterious health consequences (see, for instance Masek, 2006; Valasquez and Brady, 1997).

However, to date PDE does not appear to have been formally applied to questions of public policy. This is somewhat surprising, given that public policymaking invariably creates winners and losers and involves pursuing a desirable community benefit despite probable harmful side-effects. In this paper we specifically consider municipal amalgamations that may achieve the benefit of more sustainable and efficient local government but also involve foreseeable consequences (such as temporarily suspending democratic rights or imposing one municipality's debt on residents of a second council). Yet it is clear that PDE is also applicable to a range of public policy questions, including tobacco controls, federal grant schemes, terrorism laws and public health budgets. It is acknowledged that the utilitarian position – that the right thing to do is to maximise welfare – can and often is employed in public policy decision-making. However, it is equally clear that a strict welfare maximising approach can lead to absurd and unpalatable results (Foot, 1985; Beabout, 1989).

2.1. *Origins and definition of PDE*

PDE is often attributed to the 13th century work of Aquinas, widely considered to be the greatest of the scholastic philosophers (Russell, 2008)¹. A staunch advocate of Aristotelianism, the Angelic Doctor rejected Platonism even as it appears in the work of St Augustine. St Thomas' work culminated in the Theory of Natural Law, the first precept of which is:

Good is to be done and pursued, and evil is to be avoided (Summa theologiae, 1-2, question 94, article2)

This, according to St Thomas, is the first of the basic self-evident principles of practical reason belonging to Natural Law. It is an active principle prescribing that practical reason be intentional and directed toward an end (Grisez, 1965). The natural law origins of PDE are important because they explain a lot of the later criticism of secular applications of PDE.

Moreover, it is instructive to examine the actual context of Aquinas' *duplex effectus* because it emphasises the need for PDE as well as illuminating critical matters of *intent* and *proportion*:

... nothing hinders one act, from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended, and not according to what is beside the intention ... And yet, though proceeding from a good intention, an act may be rendered unlawful if it be out of proportion to the end. (Summa theologiae, question 64, article 7)

Modern formulations of PDE are plentiful and much of the criticisms of PDE are bound up with the difficulty of precisely articulating the concept (Quinn, 1989). It is quite possible that a perfect formulation is yet to be developed (Marquis, 1991); however, a hybrid of the seminal contribution of Boyle (1980) and the later work of Masek (2010), Bennett (1995), Valasquez and Brady (1997) and Marquis (1991) provides a robust framework for our public policy application. Each of these authors emphasised different aspects of PDE in their work. For his part, Masek (2010) highlighted the need to take all steps to avoid the bad effect if possible. The need for mitigation was brought into sharp focus by Bennett (1995), who argued that the means principle is defensible only when the probability of the side-effect is less than certain. Valasquez and Brady (1997) emphasised the proportionality rule, whilst Boyle (1980) highlighted the importance of 'intent' over 'result'. Finally, Marquis (1991, 169) provided a compelling argument that 'the four conditions found in the historical definition of the doctrine of double effect can be reduced to two'. Combining these ideas we arrive at the following working definition:

It is morally permissible to undertake an action when one foresees that the undertaking may bring about at least one state of affairs, such that, if this state of affairs were

intrinsic to the action undertaken, the action would be rendered impermissible, if and only if (i) the ‘bad’ state of affairs is not intended but brought about as a side-effect (and that all efforts have been made to mitigate the undesired side-effect) and (ii) there is a proportionally grave reason for undertaking the action.

Having advanced this definition, we now examine its intricacies as they pertain to (1) the assessment of consequences generally (2) proportionality and (3) the issue of intent on the part of those that execute public policy.

2.2. PDE and the assessment of consequences

Examining our definition, the first condition (i.e.: ‘the ‘bad’ state of affairs is not intended but brought about as a side-effect (and that all efforts have been made to mitigate the undesired side-effect’)) specifically prohibits intending morally illicit acts as either the means to an end or the end itself consistent with the first precept of the Natural Law (Valasquez and Brady, 1997). However, unlike public policy grounded in utilitarianism, it does not define (or indeed assume) ‘good’ or ‘bad’ and therefore requires a normative theory. For his part, Aquinas identified five fundamental goods (human life, the union of male and female, care of one’s offspring, a well ordered society and knowledge ‘particularly knowledge of G-d (Valasquez and Brady, 1997, 87), although it is clear that secular society would reject at least two of the formulations. Having said this, it is equally clear that most members of western societies would offer little objection to the ‘goods’ of care of minors and other vulnerable individuals, a well-ordered society and the pursuit of knowledge. Further, it is not unreasonable to suggest that ‘democratic practice’ and the preservation of property rights are ideals held by most citizens (although in this context we will assert, rather than argue, both these points)².

The major change to Boyle’s (1980) seminal contribution in the definition we have advanced above is the caveat that all efforts ought to be made to mitigate the undesired side-

effect. This is an important qualification, missing from most discussions on PDE. It has implications for intent and prevents the abuse of PDE as an instrument for *ex post* justification (Masek, 2000; Arjoon, 2007; Valasquez and Brady, 1997).

2.3. *PDE and questions of proportionality*

The second condition of our formulation of PDE introduces the proportionality rule – the idea that the benefits of the ‘good’ end state of affairs must completely dominate the harm associated with the ‘bad’ foreseen side-effects (Tully, 2005). In and of itself, this second condition is utilitarianism (Masek, 2006). However, where PDE differs is in its prohibition on intentionally committing immoral acts, no matter how much ‘good’ is predicted to result. Once again, determining what constitutes a grave reason can be settled only through recourse to normative ethics (Boyle, 1980) – although from our preceding discussion it seems reasonable that notions of preserving life, caring for the young and vulnerable, democratic practice, a well-ordered society, knowledge and the (arguably) preservation of property rights would all qualify as ‘grave reasons’.

Proponents of PDE cite first its preparedness to deal with externalities and second to face the problems of value conflicts as its greatest attributes (Valasquez and Brady, 1997). In this regard it has been noted that PDE is very helpful in assisting agents to choose between conflicting duties associated with the ethical ‘ought’ and the economic ‘must’ (McMahon, 1986). It is easy to see how these sorts of conflicts might manifest in a public policy setting, where democratic principles may be challenged by questions relating to the ongoing financial sustainability of local government. As noted earlier, utilitarians would claim that the right thing to do in such cases is to maximise overall welfare and this is undoubtedly the argument that public policymakers would fall back on if asked whether a municipal reform program was justified (see, for instance, OLG, 2014). However, running roughshod over democratic principles, imposing the debt of one municipality onto its neighbour or dissolving long-

standing local democratic communities all seem to assault deeply embedded principles of our ordinary morality (Foot, 1985). Indeed, public angst over previous municipal consolidations seems to suggest that many citizens reject the premise that maximising overall welfare is the only relevant criterion for determining whether a public policy decision is right (Drew, Kortt and Dollery, 2013).

2.4. *PDE and questions of intent*

Questions of intent (rather than simply outcomes) seem to be particularly important to our intuitive understanding of the morality of an act. For instance, we don't ascribe the same moral culpability to a driver who purposely runs down a toddler during the day to fulfil a pathological desire to kill as we would to a driver who accidentally runs over a toddler who has strayed onto a highway during a night of inclement weather – the consequence is the same (a dead toddler) therefore our intuitive conclusion must be based on intent (for further discussion of this point, see Beabout 1989).

However, the matter of intent (particularly when set in contrast with foreseen side-effects) is exploited by opponents of PDE. For instance, Davis (1984, 121) stated: 'until deontologists provide us with an account of what (they think) it is for an agent to act with a particular intention (rather than with mere foresight), we cannot hope to be able to assess the soundness of deontological views as a class, or the plausibility of any particular constraint'. This sentiment is echoed by other opponents – perhaps most prominently Bennett (1995, 223) who noted that where 'the bad by-product of the means is inevitable and believed to be so' then the means principle 'is indefensible'. Bennett (1995, 223) does concede that 'the picture changes however when we turn to pairs of cases where the probability of harm changes'. In this formulation, the argument proposed runs something like this: If the agent knows for certain that a bad state of affairs will inevitably eventuate as a side-effect, then it is impossible to delimit the means from the result of the means.

Yet the arguments proposed by Bennett (1995), Marquis (1991), Davis (1984), Foot (1978) and others rely on equating the foreseen with the inevitable. As we have already emphasised, PDE responds to the fact that we live in an uncertain world. Thus Foot (1978, 31) is forced to concede ‘that in real life the certainties postulated by philosophers hardly ever exist’. Foreseeing that a state of affairs may result from an action (perhaps foreseeing that going for a walk when wet weather is forecast will result in one getting wet) does not mean that the state of affairs will actually eventuate (perhaps the forecast is wrong or perhaps the agent takes efforts to mitigate the foreseen bad side-effect by bringing an umbrella). Intent, however, significantly increases the probability of the state of affairs eventuating, for ‘whether a goal is an end in itself or only a means, action aimed at it must follow it and be prepared to adjust its pursuit if deflected by altered circumstances’ (Nagel, 1980, 132). This provides one rationale for why an intended bad state of affairs is morally worse than a merely foreseen probable bad state of affairs – because the intended ‘bad’ state is much more likely to eventuate, given that the agent who intends such a state will respond to any attempts to deflect her from her aim.

A second and perhaps more compelling reason why intent is a morally significant distinction can be found in the first precept of the Angelic Doctor’s Natural Law. This he expressed as: *Good is to be done and pursued, and evil is to be avoided* (Summa theologiae, 1-2, question 94, article 2). In an echo of Aristotle’s virtue ethic, Beabout (1989, 50) noted that ‘a person becomes virtuous through habitually intending good acts’. Nagel (1980, 133) expressed a similar view in his observation that ‘what feels particularly wrong about doing evil intentionally even that good may come of it is the headlong striving against a value that is internal to one’s aim’. Thus when one considers PDE in the context of Natural Law it becomes evident why there should be a morally significant distinction between what is intended (good) and what is foreseen but not intended (some lesser evil). It is a significant

distinction because the self-evident foundational precept of practical reason is that action be intended towards good ends.

However, this still leaves those who wish to defend PDE with the problem of explaining how intent can be discerned from that which is merely foreseen. Anscombe (in Quinn, 1989, 340) suggested that intent is revealed by asking the agent ‘why are you doing this act?’ Yet this ploy to uncover intent will fail if the agent is acting without internally pondering the reason for their actions (the ‘irresponsible agent’, Beabout, 1989) or where the ‘philosophically sophisticated’ agent prevaricates (Quinn, 1989). Intent could also be uncovered *ex post* by viewing the agent’s response when deflected by altered circumstances (should they occur). Donagan (cited in Marquis, 1991) stated that intent could be revealed by asking whether the agent would consider their plan carried out if the bad state of affairs did not eventuate. It is also apparent that our carefully constructed caveat to the first condition of the PDE can reveal intent – for if there is any evidence that pains have been taken to mitigate or avoid foreseeable side-effects then this clearly suggests that such effects were never intended³.

If it is established that the ‘bad’ side-effects were merely foreseen rather than intended, it is still necessary to apply the proportionality constraint – that is, the ‘good’ of the intended end state of affairs needs to dominate over the bad which may eventuate as a result of ‘foreseen’ side-effects. Clearly preserving life will constitute a sufficiently grave reason to allow for even quite serious foreseeable side-effects where PDE is applied in the domain of medical ethics. However, when applied to public policy the outcomes are unlikely to include life-preserving scenarios – certainly in the case of local government ‘grave reasons’ may include the financial sustainability of the sector (fundamental to a well-ordered society) and bad side-effects may involve matters such as one-off amalgamation costs, short-term disruption to services, lower service levels and higher municipal taxes for some residents.

More generally, intent is difficult to unequivocally establish. Nevertheless, this does not entail that it ought not to be the subject of conjecture and refutation as an element of establishing the ethical and moral status of public policy. This we seek to demonstrate after developing a set of scenarios specifically designed to illustrate the potential for applying PDE in public policy evaluation.

3. Application of PDE to public policy of municipal amalgamation

We have thus far argued that architects and analysts of public policy can usefully apply PDE to public policy decisions which involve a conflict of values. Further, the simultaneous focus on outcomes *and* procedures sets it apart from welfare economics, which is concerned entirely with outcomes. The following three scenarios demonstrate how PDE can be used to evaluate municipal reform programs:

Mayor A has been a thorn in the state government's flesh on a number of issues and is also vociferously anti-amalgamation. Mayor A has x aligned constituents. In the adjacent council, Mayor B is politically aligned with the state government and has $2x$ aligned constituents.

Scenario 1

Mayors are directly elected by their constituents. The state government removes both Mayor A and Mayor B mid-term from office and constitutes a new municipality, knowing that Mayor B will likely be elected as Mayor of the amalgamated municipality by virtue of her majority of aligned constituents. The state government's aim is to remove Mayor A from office although the government believes that amalgamation may enhance financial sustainability.

Scenario 2

The state government removes Mayor A and Mayor B mid-term and installs Administrators over a lengthy period in order to make fiscal changes which they claim are necessary for

amalgamation. Well over a year later elections are held for the newly amalgamated municipal entities. The stated and actual intent is to enhance municipal sustainability.

Scenario 3

The state government waits until the end of the municipal term. A referendum is then held in each local government area on the matter of municipal amalgamation. Where referenda are successful new elections for the newly constituted, larger local government areas are held. It is likely that Mayor A, with a minority of aligned constituents, will not be elected. The stated and intended aim is to enhance financial sustainability through amalgamation.

In Scenario 1 the intended state of affairs is the subversion of a democratically elected representative. Most normative frameworks would view this as a morally illicit act, either because it is contrary to the democratic process or because it deprives an individual of their rightful entitlement. The government's belief that the course of action may also result in a positive state of affairs (a more sustainable municipal sector) is irrelevant under PDE.

Because Scenario 1 fails to meet the first condition of PDE, it is not essential to consider the second condition (proportionality) in order to form a judgement regarding the morality of the public policy.

In Scenario 2 the intended state of affairs is a more sustainable municipal sector, which is likely to be recognised by most citizens as a 'good': A sustainable municipal sector is clearly a necessary component of a well-ordered society. However, Scenario 2 also involves a 'bad' side-effect, the lengthy suspension of democratic representation (during the period of Administration). Evaluation according to PDE turns on whether or not this 'bad' side-effect was intended or merely foreseen. In this regard we are not provided with any evidence to suggest that efforts were made to avoid or mitigate the duration of the administration.

Further, Administrators can be appointed only by the Minister for Local Government (where

legislative provision is already in place) and/or the introduction of legislation. This suggests that the suspension of democratic representatives must have been a deliberate act. In sum, it appears that Scenario 2 has a laudable outcome but that the means to achieving the state of affairs was not morally licit. Because PDE requires both criteria to be met, Scenario 2 is deemed illicit (even though ‘proportionality’ seems to have been satisfied).

Scenario 3 shares the same desirable end state of affairs (more sustainable councils). However, the means to achieving the state of affairs is very different. There is no mid-term suspension of democratic representatives and in fact a democratic process is used to validate the proposed amalgamations. There is a foreseeable bad side-effect, the likelihood that Mayor A will not receive a new term of office; yet, there is no evidence of intent. Further, it is important to note that this is only a *foreseeable* outcome: in an uncertain world it is by no means certain. Mayor A may campaign effectively, secure the preferences of new entrants to the Mayoral race or Mayor B may decide not to run for office. Moreover, Mayor A has completed the term of office so it is not at all certain that the decision to amalgamate impinges on any entitlement. Finally, in terms of the proportionality constraint it would seem that the end (a financially sustainable municipal sector) is sufficiently grave to outweigh the foreseen bad side-effect (of an individual potentially not gaining re-election).

The most interesting element of all three scenarios is that they are not entirely hypothetical. Indeed, the first two scenarios bear close resemblance to actual municipal amalgamations in Australia. For instance, Scenario 1 maps very closely with the events surrounding the 2007 Queensland amalgamations that involved a clear element of political payback (Prasser, 2007). Further, no empirical evidence was ever tendered by the reform architects to support the claim that the amalgamations would enhance the sustainability of the local government sector. Indeed, Drew and Dollery (2014a) argued that the diseconomies of scale experienced by Sunshine Coast Regional Council were entirely predictable and an

important factor in the citizen discontent which eventually led to its de-amalgamation. Had sustainability been the intended aim it is inconceivable that the architects would have neglected to perform at least a rudimentary analysis (see Drew, Kortt and Dollery, 2013, for an example of the sort of analysis which might have been expected).

Similarly, Scenario 2 also maps closely to actual events in the history of Australian municipal reform – in this instance, to the radical municipal reforms of the Kennett government in 1994 which saw the number of Victorian municipalities reduced from 210 to just 78. The amalgamation program involved *inter alia* the suspension of democratic representatives during an 18-month administration period (Tiley and Dollery, 2010). There is no evidence that any efforts were made to mitigate this lengthy period (especially so when one considers the fact that the later amalgamations in Queensland occurred in just three months) (see Dollery, Kortt and Grant, (2011) for a summary of the Victorian amalgamation process). It is noteworthy that in both cases (Queensland and Victoria) the state governments responsible for the municipal reforms were subsequently voted out of office. It is also worth noting that the Victorian amalgamations gave rise to the first de-amalgamation in the history of Australian municipal government (Drew and Dollery 2015a) and that the Queensland amalgamations were causally linked to four subsequent de-amalgamations (Drew and Dollery, 2014a).

The third scenario represents the ‘ideal’ process for local government amalgamation – at least from a PDE perspective. However, while the act of holding referenda in all affected local government areas is an important element to this particular scenario being morally licit, this by no means entails that an appeal to the electorate represents a resolution to all questions of public policy or amalgamation in particular. In the eyes of many observers of local government in Australia and indeed globally, this would cede too much credibility to participatory forms of democratic engagement such that it could be labelled as populist, at the

expense of other forms of the same, in particular corporate decision-making (see, for example, Grant, Dollery and Kortt, 2014; Haus and Sweeting 2006).

The question now arises as to how closely the proposed NSW amalgamations represent the PDE ideal.

4. NSW municipal reforms

Like several of its counterparts in other Australian jurisdictions, NSW local government has undergone extended processes of inquiry for the purposes of reform, principally at the hands of the Independent Local Government Review Panel (ILGRP), which operated from March 2012 to October 2013. If one critically examines the material produced by the NSW Government in response to the ILGRP (2013) proposed municipal amalgamations, it is clear that its intended end state of affairs is ‘strong councils providing the services and infrastructure communities need’ (OLG, 2014, 2). This end seems to accord with the ‘good’ of a well-ordered society and is therefore morally licit. If we accept this assessment of the desired end state of affairs, then the matters of intent and proportionality will be critical to conclusions regarding whether the program is acceptable under PDE.

Three side-effects of the municipal reform program are easily identified from the literature: the possibility that the proposed amalgamations will not enhance financial sustainability (Drew and Dollery, 2014b), the likelihood that many of the amalgamations will result in over-scaled councils with a concomitant decrease in efficiency (Drew, Kortt and Dollery, 2015) and the likelihood that distorted accounting accrual data will result in the imperfect assessments of sustainability (Drew and Dollery, 2015b). These ‘side-effects’ of the proposed reforms have all been empirically demonstrated. However, they are by no means certain: statistical tests involve judgements at the 5 per cent level of statistical significance (which recognises a tolerability for drawing incorrect conclusions from the data)

and there is no way of knowing for certain that the actual result will not be different owing to a change in the service levels provided, sale of surplus assets or staff reductions, for example. Further, it would be very difficult to argue that the government intends the deleterious results, no matter how probable they may seem, given that their re-election prospects will be heavily affected by assessments regarding the success (or otherwise) of their municipal reform agenda. In terms of proportionality, the prospect of *some* possible over-scaled councils, *some* incorrect assessments of sustainability and *some* instances where sustainability is not materially affected seems to be heavily outweighed by the intended end state (a more sustainable municipal *sector*). Therefore the foreseeable side-effects detailed above do not preclude the NSW municipal reforms under PDE.

Two other important side-effects of this public policy also appear relevant. First, amalgamating any two (or more) municipalities will effectively result in residents of one municipality being forced to take on a proportion of the debts of the second municipality. For instance, should the proposed amalgamation between Oberon and Bathurst councils proceed, then Oberon residents will assume part responsibility for \$22 million in outstanding loans and an estimated cost of \$72 million to increase Bathurst Council's assets to a satisfactory standard (Bathurst Council 2014).. This is a near-certain side-effect; certainly, some quantum of debt will be effectively imposed on some residents by mergers with their neighbours.

Bennett (1995), Marquis (1991), Davis (1984) and Foot (1978) argue that where the foreseeable side-effect is inevitable (and believed to be so by the agent) then the distinction between intended and foreseen is not morally relevant. If we accept this argument, then we would probably conclude that imposing debt from one party to another means that the NSW municipal reforms are not morally licit. If, however, we accept the counter arguments based on probability or the first precept of Natural Law, then the program may still qualify as

morally permissible. In this latter case permissibility will turn on whether or not the side-effect of imposing debt is intended and/or proportional.

In Section 2 we explored a number of methods for discerning the intent behind an action. First, we could ask ‘why is the government progressing the municipal reforms?’ It would be very unlikely that the elicited response would be ‘to impose debt on neighbouring residents’. We could also assess intent by viewing the government’s response if by some miracle the Bathurst debt were suddenly paid out – would they change their actions to ensure that debt was still imposed on the residents of Oberon? Moreover, would the government still consider carrying out their reforms if the amalgamation occurred without imposing debt? The answer to all these questions would seem to suggest that the side-effect of imposing debt is unintended. Finally, and most conclusively, the government has taken action to mitigate the side-effect by offering a \$5.3 million contribution towards the newly amalgamated community, should they proceed with the amalgamation. Admittedly, the quantum of the contribution pales in significance to the likely imposed debt and amalgamation costs (for instance, the mean cost of the 2008 Queensland amalgamations was estimated at \$8.1 million (for a discussion, see Drew and Dollery, 2014b, p. 286). However, it is evidence of efforts designed to mitigate the foreseeable side-effect. If it is conceded that the negative side-effect is unintended, then the proportionality of the states of affairs is still a matter to be resolved. In this regard, the financial sustainability of the sector as a whole would seem to be a grave enough matter to warrant the foreseeable side-effect of effectively imposing debt onto some residents.

The last side-effect relevant to our ethical evaluation of the NSW local government reform program is the matter of diluted democratic representation. The *Local Government Act 1993* (S 224(1)) prescribes a maximum of 15 councillors for any given municipality (Parliament of New South Wales, 1993). However, amalgamations such as the proposed

North Sydney Group (comprising Hunters Hill, Lane Cove, Ryde (part thereof), Willoughby, Mosman and North Sydney councils) have a combined existing representation of 61 councillors. Thus, should the amalgamation proceed residents of the new entity will have political representation effectively reduced by about 75 per cent. This negative side-effect is clearly a near certainty (unless the state government passes an amendment to the facilitative legislation). Therefore (following Bennett, 1995), it is hard to defend a useful distinction between intended and foreseen in this case.

Moreover, the matter of diluted political representation has been raised in the Upper House Committee hearings on the proposed reforms (see Parliament of NSW, 2015) as well as in the mainstream media (*Daily Telegraph*, 2015; *Northern Star*, 2015; Ten News (2015)) so it cannot be argued that the government is unaware of the side-effect. In addition, the power to mitigate the side-effect is entirely within the authority of the NSW Government, yet it has taken no steps to introduce changes to Section 224(1) of the *Local Government Act 1993*. We thus conclude that under the first criterion of PDE the proposed public policy is not morally licit, thus obviating the need to consider proportionality.

1. Conclusion

De-amalgamations, opinion polls and media reports prosecute the case that municipal amalgamations which *prima facie* aim at maximising aggregate utility may still be objected to by the broader population. This in turn suggests that the existing criteria for deciding whether public policy is 'good' may not be aligned with public expectations. This paper has demonstrated that PDE can yield an evaluation of public policy consistent with those who dissent on municipal amalgamations – a consistency which cannot be achieved through considering utility maximisation alone.

Our application of PDE to the current municipal reform program in NSW suggests that the envisioned end state of affairs ('strong councils providing the services and infrastructure

communities need’; Office of Local Government, 2014, 2) is consistent with a well-ordered society and is therefore good. However, our analysis of side-effects paints a very different picture. In particular, the second side-effect –diluting political representation – does not seem permissible under PDE given that it is a certainty in the absence of mitigating legislative amendment. Moreover, it is an important point to which dissenters have appealed.

The lessons for policymaking seem clear. First, moral approaches such as PDE can serve to remind policy architects of the fact that *prima facie* laudable ends – such as maximising aggregate utility – in and of themselves may not be sufficient to avoid vocal dissent by sections of the community. Thus, PDE can help to ensure that sufficient attention is placed on the need to achieve ends through morally licit process. Second, PDE reminds public policymakers that, in an uncertain world, acts intended to produce one state of affairs may bring about entirely unintended end-states; policymakers, therefore, should carefully consider foreseeable bad side-effects and take actions to mitigate same. Finally, PDE calls to mind the need for sufficiently grave reasons before embarking on any public policy which could result in ‘bad’ unintended consequences. In all these respects PDE offers important contributions to public policymaking which may not be recognised in an aggregate utility maximising approach.

Endnotes

¹ Bennett (1985) argued that the attribution to Aquinas is misplaced given that the Angelic Doctor does not himself contribute to the means principle – thus he concludes that the history of PDE stretched only back to the 19th century. For a contrary position see Mangan (cited in Tully, 2005).

² In the tradition of Locke, if it is conceded that we have ‘self-ownership’ then it follows that we must own our labour and hence the fruits of our labour (Russell, 2008). Further, classical natural law theory points towards property rights via our inherent faculties which orient us towards private ownership, the good of a ‘well-ordered’ society and our obligation to provide for whatever children we have

(Feser, 2010). Second, we readily concede that democratic practice is not a ‘good’ in the tradition of Aquinas. Moreover, attempts to derive an account of it as a good grounded in natural law (see, for example, Moots and Forster, 2010) do not easily counter radical and considered criticisms (see, for example, Connolly’s (1993, 68–85) discussion of de Sade *contra* Hobbes and Rousseau). However, notwithstanding the contestation of types of democracy, we suggest the definition for local democracy as put forward by Haus and Sweeting (2006, 267) is uncontroversial.

³ It is conceded that these measures might fail to uncover intent in the unusual situation where a ‘philosophically sophisticated’ agent prevaricates, *and* it is not reasonable to expect measures aimed at mitigating unwanted side-effects *and* altered circumstances do not occur. However, in a public policy context – such as municipal amalgamation – it is unlikely for *all* of these factors to occur. In particular, it seems improbable that the political process and media attention would not expose undesirable side-effects (which the agent could then take steps to mitigate).

References

- Andrews, R, 2013, Local Government Amalgamation and Financial Sustainability: The Case of England and Wales, *Public Finance and Management* 13, 2, 124-141.
- Aquinas, T. (McDermott, T (Ed)), 1989, *Summa Theologiae*, Notre Dame IN: Ave Maria Press.
- Arjoon, S, 2007, Ethical Decision-Making: A Case for the Triple Font Theory, *Journal of Business Ethics* 71, 4, 395-410.
- Beabout, G, 1989, Morphine Use for Terminal Cancer Patients: An Application of the Principle of Double Effect, *Philosophy in Context* 19, 49-58.
- Bennett, J, 1995, *The Act Itself*, New York: Oxford University Press.
- Bentham, J, 1843, Introduction to the Principles of Morals and Legislation, in *the Works of Jeremy Bentham Volume 1*. Edinburgh: William Tait.
- Boyle, J, 1980, Toward Understanding the Principle of Double Effect, *Ethics* 90, 527-538.
- Byrnes, J, Dollery, B, 2002, Do Economies of Scale Exist in Australian Local Government? A Review of the Research Evidence, *Urban Policy and Research* 20, 4, 391-414.
- City of Ryde, 2015, Fit for Our Future. Joint Submission City of Ryde, Hunter's Hill Council, Lance Cove Council. URL: < <http://www.ryde.nsw.gov.au/files/assets/public/fit-for-the-future/fftf-joint-submission.pdf?streamfile=true> >. Consulted 15 October 2015.
- Connolly, W, 1993, *Political Theory and Modernity*, New York: Cornell University Press.
- Crane, A, Matten, D, 2010, *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalisation*, Oxford: Oxford University Press.
- Davis, N, 1984, The Doctrine of Double Effect: Problems of Interpretation, *Pacific Philosophical Quarterly* 65, 107-123.
- Dollery, B. E, Robotti, L, 2008, *The Theory and Practice of Local Government Reform*, Cheltenham: Edward Elgar.

- Dollery, B. E., Garcea, E. and Le Sage, E. (eds). 2008, *Local Government Reform. A Comparative Analysis of Advanced Anglo-American Countries*. Cheltenham: Edward Elgar.
- Dollery, B. E., Kortt, M. and Grant, B., 2011, A Normative Model of Local Government De-amalgamation in Australia, *Australian Journal of Political Science* 46, 4, 601-615.
- Drew, J., and Dollery, B. E. 2014a, Separation anxiety: An empirical evaluation of the Australian Sunshine Coast regional Council de-amalgamation. *Public Money & Management* 34, 3, 395-396.
- Drew, J., and Dollery, B. 2014b, Estimating the Impact of the Proposed Greater Sydney Metropolitan Amalgamations on Municipal Financial Sustainability. *Public Money & Management*, 34, 4, 281-288.
- Drew, J. and Dollery, B. E., 2015a, Breaking Up is hard To Do: The Costs of De-amalgamation of the Delatite Shire Council. *Public Finance and Management* 15, 1, 1-23.
- Drew, J. and Dollery, B. 2015b, A Factor Analytic Assessment of Financial Sustainability: The Case of New South Wales Local Government. *Australian Accounting Review* (in print).
- Drew, J., Kortt, M. and Dollery, B. 2013, Did the Big Stick Work? An Empirical Assessment of Scale Economies and the Queensland Forced Amalgamation Program. *Local Government Studies*, DOI: <http://doi.org/10.1080/03003930.2013.874341>
- Drew, J., Kortt, M. and Dollery, B. 2015, No Aladdin's Cave in New South Wales? Local Government Amalgamation, Scale Economies and Data Envelopment Specification. *Administration & Society* DOI: 10.1177/0095399715581045
- Feser, E, 2010, Classical Natural Law Theory, Property Rights, and Taxation, *Social Philosophy and Policy*, 27, 1, 21-52.

- Foot, P, 1978, 'The Problem of Abortion and the Doctrine of Double Effect' in *Virtues and Vices and Other Essays in Moral Philosophy*. Berkeley: University of California Press.
- Foot, P, 1985, 'Morality, Action and Outcome' in *Morality and Objectivity: A Tribute to J L Mackie*, London: Routledge.
- Grant, B. Dollery, B. E. and Kortt, M. 2014, Recasting Leadership Reform in Australian Local Government: A Typology from Political Theory. *Local Government Studies*. DOI: 10.1080/03003930.2013.861820
- Grisez, G, 1965, First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2, *The Note, Natural Law Forum* 107, 168-201.
- Haus, M, Sweeting, D, 2006, Local Democracy and Political Leadership: Drawing a Map, *Political Studies* 54, 2, 267-88.
- Hausman, D, McPherson, M, 1993, Taking Ethics Seriously: Economics and Contemporary Moral Philosophy, *Journal of Economic Literature*, 31, 2, 671-731.
- Independent Local Government Review Panel (ILGRP) 2013, *Future Directions for NSW Local Government - Twenty Essential Steps*, Sydney: ILGRP.
- Independent Pricing and Regulatory Tribunal (IPART) 2015, *Fit for the Future. Council Proposals*, URL: <
[http://www.ipart.nsw.gov.au/Home/Industries/Local Govt/Fit for the Future](http://www.ipart.nsw.gov.au/Home/Industries/Local_Govt/Fit_for_the_Future)>.
Consulted 6 August 2015.
- Kushner, J, Siegel, D, 2005, Are Services Delivered More Efficiently After Municipal Amalgamations? *Canadian Public Administration*, 48, 2, 251-264.
- Lago-Penas, S. and Martinez-Vazquez, J. (eds), 2013, *The Challenge of Local Government Size. Theoretical Perspectives, International Experience and Policy Reform*. Cheltenham: Edward Elgar.

- Local Government NSW (LGNSW), 2015, *Government Ignores Community on Council Mergers*, Sydney: LGNSW.
- Marquis, D, 1991, Four Versions of Double Effect, *The Journal of Medicine and Philosophy*, 16, 515-544.
- Martin, J, Scorsone, E, 2011, Cost Ramifications of Municipal Consolidation: A Comparative Analysis, *Journal of Public Budgeting, Accounting & Financial Management*, 23, 3, 311-337.
- Masek, L, 2000, The Doctrine of Double Effect, Deadly Drugs and Business Ethics, *Business Ethics Quarterly*, 10, 2, 483-495.
- Masek, L, 2006, Deadly Drugs and the Doctrine of Double Effect: A Reply to Tully, *Journal of Business Ethics*, 68, 143-151.
- Masek, L, 2010, Intentions, Motives and the Doctrine of Double Effect, *The Philosophical Quarterly*, 60, 240, 567-585.
- McMahon, T, 1986, Creed, Cult, Code and Business Ethics, *Journal of Business Ethics*, 5, 453-463.
- Mill, J. S, 1972, in Acton, H. B. (ed), *John Stuart Mill: Utilitarianism, On Liberty, Considerations on Representative Government*. London: J. M. Dent & Sons. Everyman's Library.
- Moots, G, Forster, G, 2010, Salus Populi suprema lex: John Locke Versus Contemporary Democratic Theory, *Perspectives on Political Science*, 39, 1, 35-45.
- Nagel, T, 1980, 'The Limits of Objectivity' in *The Tanner Lectures on Human Values* p 126-135, Salt Lake City: University of Utah Press.
- Northern Star (Newspaper), 2015, *Anti-amalgamation Back-down in Debate Shows Government Intentions*, Goonellabah: Northern Star.

- Office of Local Government (OLG), 2014, *Fit for the Future – A Blueprint for the Future of Local Government*, Sydney: OLG.
- Parliament of New South Wales, 1993, *Local Government Act 1993*, Sydney: Parliament of New South Wales.
- Parliament of New South Wales, 2015, *General Purpose Standing Committee No. 6 Local Government*, Sydney: Parliament of New South Wales.
- Prasser, S, 2007, Democracy and Local Government - The Queensland Experience, *The Sydney Papers*, Spring 2007, 83-92.
- Quinn, W, 1989, Actions, Intentions and Consequences: The Doctrine of Double Effect, *Philosophy & Public Affairs*, 18, 4, 334-351.
- Russell, B, 2008, *History of Western Philosophy*, Routledge Classics: London.
- Sancton, A, 2006, “Municipal Mergers and Demergers in Quebec and Ontario”, Unpublished paper presented to the Annual Meeting of the Canadian Political Science Association, Toronto: York University, 1 June 2006.
- Stigler, J, 1980, *Economics or Ethics?* The Tanner Lectures on Human Values. Delivered at Harvard University.
- Sunday Telegraph (Newspaper), 2015, *Amalgamate or Perish: You’re Fired: An End to Revolting Councils*, Sydney: Sunday Telegraph.
- Ten (Television) News, 2015, *Councils to Fight Forced Mergers* at <http://tenplay.com.au/news/sydney/2015/7/27/councils-to-fight-forced-mergers>.
- Tiley, I, Dollery, B, 2010, Historical Evolution of Local Government Amalgamation in Victoria, Tasmania and South Australia, *Centre for Local Government Working Paper*, 01-2010.
- Tully, P, 2005, The Doctrine of Double Effect and the Question of Constraints on Business Decisions, *Journal of Business Ethics*, 58, 51-63.

Twomey, A, 2012, Always the Bridesmaid - Constitutional Recognition of Local

Government, *Monash University Law Review*, 38, 2, 142-180.

Valasquez, M, Brady, F, 1997, Natural Law and Business Ethics, *Business Ethics Quarterly*,

7, 2, 83-107.

Woodward, P, 2001, *The Doctrine of Double Effect: Philosophers Debate a Controversial*

Moral Principle, Notre Dame IN: University of Notre Dame Press.

Accepted version