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SISYPHUS IN THE AGORA? HOW THE UNITED NATIONS WORKING GROUP ON THE USE OF MERCENARIES FUNCTIONS AS A SPECIAL PROCEDURE OF THE HUMAN RIGHTS COUNCIL

ABSTRACT

The proliferation of private military and security companies ('PMSCs') in the wake of the end of the Cold War has prompted a variety of reactions concerning the regulation of PMSCs in the 'market for force'. Some underscore a lack of accountability of the industry and regard PMSCs as having an inimical impact on human rights; others argue that PMSCs are legitimate actors in international society, able to provide efficient and effective support for humanitarian intervention and peacekeeping. While the literature about PMSCs is voluminous, how the United Nations ('UN') Working Group on the Use of Mercenaries ('WGUM') performs its functions as a Special Procedure of the Human Rights Council ('HRC') and thereby seeks to contribute to the promotion and protection of human rights is one of the least studied aspects in the literature on PMSCs. This article argues that how the WGUM performs its functions as a Special Procedure can be ascribed to the Sisyphean dynamics of norm change in the 'agora'. The WGUM seeks to create a space in the agora for the elaboration of norms and legal discourse on the protection of human rights in the market for force. The WGUM's efforts to create that space in the agora would appear, however, to be a Sisyphean task in light of widespread opposition from key Western states to the WGUM's mandate, including the WGUM's efforts to develop a treaty norm that proscribes the outsourcing of inherently state functions to PMSCs.

I INTRODUCTION

Pursuant to its mandate as a Special Procedure of the Human Rights Council ('HRC'), the Working Group on the Use of Mercenaries ('WGUM') carries out fact-finding regarding the impact of mercenaries and private military and security companies ('PMSCs') on the enjoyment of human rights. Additionally, the WGUM advocates a draft of international principles that proscribes the

* In memory of my Dad, Peder Sorensen. *Tak for alt. Hvil i fred.*
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outsourcing of inherently state functions to PMSCs; these functions include direct participation in armed conflict and the interrogation of prisoners. The WGUM was established in 2005 by the United Nations ('UN') Commission on Human Rights ('CHR') with a thematic mandate to examine, inter alia, how PMSCs impact 'on the enjoyment of human rights, particularly the right of peoples to self-determination, and to prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities'.¹ The WGUM examines two broad concerns about human rights vis-a-vis PMSCs: human rights violations (allegedly) perpetrated by PMSCs on local civilian populations and on PMSC employees themselves.² Examples of the former include allegations of summary executions, arbitrary detention, torture, trafficking of persons and involvement in violations of self-determination.³ Examples of the latter include allegations of harsh working conditions, partial payment or non-payment of wages and inadequate health care in the field.⁴ In a report to the Human Rights Council ('HRC') in 2010, the WGUM presented its *Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council*.⁵ In seeking to create a space in the agora for the elaboration of a treaty norm on PMSCs, the WGUM trudges a Sisyphean path: it faces widespread Western opposition to its mandate and to a treaty norm on PMSCs, and faces widespread

¹ *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, CHR Res 2005/2, UN ESCOR, 61st sess, 38th mtg, Supp No 3, UN Doc E/CN.4/RES/2005/2 (7 April 2005) para 12(e) ('*Use of Mercenaries*').

² José L Gómez del Prado, 'Private Military and Security Companies and the UN Working Group on the Use of Mercenaries' (2008) 13 *Journal of Conflict and Security Law* 429, 433; José L Gómez del Prado, 'A United Nations Instrument to Regulate and Monitor Private Military and Security Contractors' (2011) 1 *Notre Dame Journal of International, Comparative, and Human Rights Law* 1, 17–23.

³ Gómez del Prado, 'A United Nations Instrument', above n 2, 17–23.

⁴ Ibid 23, citing Amada Benavides de Pérez, Chairperson, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Mission to Honduras*, UN Doc A/HRC/4/42/Add.1 (20 February 2007) 8 [19]. See generally Molly Dunigan et al, 'Out of the Shadows: The Health and Well-Being of Private Contractors Working in Conflict Environments' (Report, Rand Corporation, 2013) <http://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR420/RAND_RR420.pdf>.

⁵ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) annex ('*Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council*') ('*Draft PMSC Convention*'); Working Group on the Use of Mercenaries, *Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council*, UN Doc A/HRC/WG.10/1/2 (13 May 2011). All references to the *Draft PMSC Convention* in this article are to UN Doc A/HRC/15/25.

Western support for principle (soft law) and policy norms about PMSC industry self-regulation.⁶

The Ancient Greek gods had condemned Sisyphus to pushing a rock toward the summit of a mountain in the underworld, only to watch the rock roll back down to the foot of the mountain — and ceaselessly repeat the task. Sisyphus, founder and ruler of Corinth, was condemned to his futile and hopeless task due to his attempt to outwit both Hades and Zeus, not simply once but twice. Continuing with a futile and hopeless task could be seen as a paradoxical quest for human perfectibility⁷ or as an archetype of the absurdity of life,⁸ but even absurdity can take on a broader meaning. In his seminal reading of the myth of Sisyphus, Albert Camus portrayed Sisyphus as triumphing over the absurdity of his ceaseless labour: ‘All Sisyphus’ silent joy is contained therein. His fate belongs to him. His rock is his thing. ... The struggle itself toward the heights is enough to fill a man’s heart. One must imagine Sisyphus happy.’⁹ Some scholars have taken up Camus’ reading of the myth of Sisyphus to argue that, even if the constancy of human rights-oriented organisations and legal practitioners in seeking to effect lasting political transformation is a Sisyphean task, the very constancy of their efforts to reach a pinnacle of meaningful change enhances human dignity.¹⁰

⁶ On the agora, see below nn 37–8 and accompanying text. On treaty, principle and policy norms, see below n 26 and accompanying text. In line with the practice of the WGUM and much of the literature on the market for force, this article uses the acronym ‘PMSC’. Where appropriate, the article uses the acronyms ‘PSC’ (private security company), ‘PMC’ (private military company) and ‘PSSP’ (private security service provider). For the purpose of this article, PMSC is defined as ‘a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities’: *Draft PMSC Convention*, UN Doc A/HRC/15/25, annex art 2(a). ‘Military services: refers to specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities’: at art 2(b). ‘Security services: refers to armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities’: at art 2(c).

⁷ Elliott M Simon, *The Myth of Sisyphus: Renaissance Theories of Human Perfectibility* (Fairleigh Dickinson University Press, 2007) 27–49.

⁸ David Sherman, *Camus* (John Wiley & Sons, 2009) 21–54.

⁹ Albert Camus, *The Myth of Sisyphus* (Justin O’Brien trans, Penguin, 2000) 88–9 [trans of: *Le Mythe de Sisyphe* (first published 1942)].

¹⁰ Jerome J Shestack, ‘Sisyphus Endures: The International Human Rights NGO’ (1978) 24 *New York Law School Law Review* 89, 123; Jochen von Bernstorff, ‘Sisyphus was an International Lawyer. On Martti Koskenniemi’s “From Apology to Utopia” and the Place of Law in International Politics’ (2006) 7 *German Law Journal* 1015, 1024–5.

The efforts of the WGUM to reach such a pinnacle in the market for force have unfolded amidst contestation about how to regulate PSMCs. The PMSC industry grew at an exponential pace after the Cold War; as states reduced standing armies in size, former soldiers sought employment in the private sector and the neoliberal logic of outsourcing extended even further to the provision of military and security support services.¹¹ State and industry actors who support self-regulation see PMSCs as legitimate actors in international society, able to provide efficient and effective support for humanitarian intervention and peacekeeping;¹² in contrast, the WGUM and others warn that the privatisation of force is emasculating the state monopoly on legitimate violence.¹³ In the 1990s, the United States of America ('USA') shied away from helping to coordinate the international regulation of PMSCs.¹⁴ Evidently, and in the broader context of the post-Cold War era, the USA, as a leading player in the market for force, believed that the international regulation of PMSCs belonged in the too-hard basket.¹⁵ Certain events in Iraq, namely, the involvement of PMSC personnel in the Abu Ghraib torture and abuse scandal in 2003 and in the Nisour Square massacre in Baghdad in 2007, prompted the USA and others to turn toward the international regulation of the PMSC industry.¹⁶ That turn has not been towards the creation of a treaty regime on PMSCs: many Western states, particularly the United Kingdom

¹¹ Deborah D Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge University Press, 2005) 1–38; Laura A Dickinson, *Outsourcing War and Peace: Preserving Public Values in a World of Privatized Foreign Affairs* (Yale University Press, 2011) 23–39; Elke Krahnemann, *States, Citizens and the Privatization of Security* (Cambridge University Press, 2010) 196–201; P W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press, 2003) 49–70.

¹² For analysis of how PMSCs present themselves as 'new humanitarians', see Nicholas Maisel, 'Strange Bedfellows: Private Military Companies and Humanitarian Organizations' (2015) 33 *Wisconsin International Law Journal* 639; James Pattison, 'Outsourcing the Responsibility to Protect: Humanitarian Intervention and Private Military and Security Companies' (2010) 2 *International Theory* 1. See also Birthe Anders, 'Tree-Huggers and Baby-Killers: The Relationship between NGOs and PMSCs and its Impact on Coordinating Actors in Complex Operations' (2013) 24 *Small Wars and Insurgencies* 278, 279–89; James Pattison, *The Morality of Private War: The Challenge of Private Military and Security Companies* (Oxford University Press, 2014) 172, 192–6.

¹³ See generally Krahnemann, *States, Citizens and the Privatization of Security*, above n 11, 21–50, 241–85; Hannah Tonkin, *State Control Over Private Military and Security Companies in Armed Conflict* (Cambridge University Press, 2011) 54–263.

¹⁴ Deborah D Avant, 'Pragmatic Networks and Transnational Governance of Private Military and Security Services' (2016) 60 *International Studies Quarterly* 330, 330, 333–4.

¹⁵ See generally Avant, *The Market for Force*, above n 11, 33–8, 146–57, 226–8, 259–61; Dickinson, above n 11, 1–24, 30–9; Scott Fitzsimmons, 'The Market for Force in the United States' in Molly Dunigan and Ulrich Petersohn (eds), *The Markets for Force: Privatization of Security Across World Regions* (University of Pennsylvania Press, 2015) 144, 151–4; Singer, above n 11, 6–18, 174–81.

¹⁶ Avant, 'Pragmatic Networks', above n 14, 335; Dickinson, above n 11, 1–3, 60–1.

(‘UK’) and the USA, and others behind the growth of the PMSC industry, argue that industry-focused codes of conduct for PMSCs, created through intergovernmental and industry cooperation, suffice to make PMSCs accountable.¹⁷ *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict* (‘*Montreux Document*’) is an initiative of the Swiss Government and the International Committee of the Red Cross, and recalls existing IHL and human rights norms; however, the *Montreux Document* itself is a non-binding instrument.¹⁸ The *International Code of Conduct for Private Security Service Providers*¹⁹ (‘*ICoC*’) is an industry-focused initiative, developed with support from the Swiss Government and designed to ‘complement’ the *Montreux Document*;²⁰ but the *ICoC* but does not refer to PMSCs and frames itself as a self-regulatory initiative for Private Security Service Providers. The *ICoC Articles of Association*²¹ is the founding document of the *ICoC* Association, which oversees the *ICoC*. In short, key players in the market for force support the international regulation of PMSCs, but only to the extent that

¹⁷ For critical analysis, see Deborah Avant, ‘Netting the Empire: Relationships and US Roles Governing Small Arms and Military and Security Services’ in Deborah Avant and Oliver Westerwinter (eds), *The New Power Politics: Networks and Transnational Security Governance* (Oxford University Press, 2016) 103, 103–5, 117–28; Carsten Hoppe and Ottavio Quirico, ‘Codes of Conduct for Private Military and Security Companies: The State of Self-Regulation in the Industry’ in Francesco Francioni and Natalino Ronzitti (eds), *War By Contract: Human Rights, Humanitarian Law and Private Contractors* (Oxford University Press, 2011) 362, 362–80; Nigel D White, ‘Regulatory Initiatives at the International Level’ in Christine Bakker and Mirko Sossai (eds), *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms* (Hart Publishing, 2012) 11, 11–16.

¹⁸ *Montreux Document* (International Committee of the Red Cross, 2008) <<https://shop.icrc.org/document-de-montreux-sur-les-entreprises-militaires-et-de-securite-privees-2581.html>>. The *Montreux Document* has been brought to the attention of the UN General Assembly and the UN Security Council: see *Letter Dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations Addressed to the Secretary-General*, UN GAOR, 63rd sess, Agenda Item 76; UN SCOR, 63rd sess, UN Docs A/63/467 and S/2008/636 (6 October 2008) annex (‘*Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*’).

¹⁹ *International Code of Conduct for Private Security Service Providers* (9 November 2010) <http://www.icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf>.

²⁰ Nelleke Van Amstel and Tilman Rodenhäuser, ‘The Montreux Document and the International Code of Conduct: Understanding the Relationship between International Initiatives to Regulate the Global Private Security Industry’ (Public-Private Partnership Series, No 1, Geneva Centre for the Democratic Control of Armed Forces, 2016) i, 10–11, 32 <http://www.dcaf.ch/content/download/316057/4981054/file/DCAF_PPPs_Series_Paper_The_MD_and_ICoC_Understanding_the_Relationship.pdf>. Cf Avant, ‘Netting the Empire’, above n 17, 124 n 38.

²¹ *International Code of Conduct for Private Security Service Providers’ Association: Articles of Association* (February 2013) <http://www.icoca.ch/en/articles_of_association>.

states couch regulations in the language of soft law, voluntary agreements and self-regulation.²²

This article argues that examining the efforts of state and non-state actors to regulate the use of PMSCs in national and international communities can shed important light on the formation of norms in international law. In this way, the article contributes to a growing and important theoretical literature and to an empirical and problem-oriented literature about how international law develops.²³ This article neither gives an account of traditional theories of international law,²⁴ nor examines the relationship between *jus cogens* norms and *erga omnes* obligations,²⁵ but takes as a starting point the issue of how and why norms (broadly defined) matter in international society. Simply put, norms are shared expectations about ethical values and behaviour, and are created through a complex confluence of material, ideational and institutional factors. Norms can take a variety of forms. Treaty norms, for instance, are binding in treaty form whereas principle norms are evinced in customary or soft law (or both), and policy norms are evinced in policy statements issued by international organisations and industry bodies.²⁶ Whether the line between legal and

²² See, eg, Kavi Abraham, ‘Politics Lost?’ on *International Studies Quarterly Online* (31 October 2016) <<http://www.isanet.org/Publications/ISQ/Posts/ID/5356/Politics-lost>>; Avant, ‘Pragmatic Networks’, above n 14, 335–40; Hoppe and Quirico, above n 17, 362–80; Fitzsimmons, above n 15, 148–54, 158–9; Elke Krahnmann, ‘Choice, Voice, and Exit: Consumer Power and the Self-Regulation of the Private Security Industry’ (2016) 1 *European Journal of International Security* 27, 27–34.

²³ For theoretical literature, see Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013); Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford University Press, 2013); Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012); Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart Publishing, 2010). For empirical and problem-oriented literature, see Hin-Yan Liu, *Law’s Impunity: Responsibility and the Modern Private Military Company* (Hart Publishing, 2015); Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012).

²⁴ For critical analysis of traditional theories of international law, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, reissue with a new epilogue, 2005).

²⁵ On *jus cogens* norms, see *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 53, 64, 71. On *erga omnes* obligations, see *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 32 [33]–[34].

²⁶ Alexander Betts and Phil Orchard, ‘Introduction: The Normative Institutionalization-Implementation Gap’ in Alexander Betts and Phil Orchard (eds), *Implementation and World Politics: How International Norms Change Practice* (Oxford University Press, 2014) 1, 8–18. The above treaty/principle/policy typology is by no means exhaustive: norms can take any number of different forms — social, religious, ethical, moral,

non-legal norms is a ‘bright line’ or a ‘grey zone’²⁷ is an open question — the closing of which is beyond the scope of this article. Clearly, though, different norms are institutionalised through different forms; yet, it is not so much the *content* of any given norm but instead the *form* of a norm that tends to be a decisive factor in the successful implementation of the norm.²⁸ The conventional constructivist logic of norm change would say that norms (broadly defined) emerge through the advocacy efforts of norm entrepreneurs, and cascade in the international community once a critical mass of support from key actors has been achieved; finally, norm internalisation occurs when habit and institutionalisation make adherence to norms largely or wholly ‘automatic.’²⁹ Arguably, conventional constructivist logic takes an overly linear, if not teleological, view of norm change,³⁰ and does not adequately analyse the ‘dogs that do not bark’, namely, norms that are not successfully implemented by state and non-state actors — or norms that do not emerge in the first place.³¹ Taking a critical approach to examining how the WGUM performs its functions as a Special Procedure, and has attempted to create a tipping point for the development of a treaty norm on PMSCs, contributes to the understanding of why some dogs do not bark in international relations or in international law.³²

military or legal (domestic or international) — and sub-forms — international legal norms, for instance, can be either prescriptive, prohibitive or permissive. On the prescriptive/prohibitive/permissive typology of international legal norms, see Prosper Weil, ‘Toward Relative Normativity of International Law?’ (1983) 77 *American Journal of International Law* 413, 413. In addition to the above three international legal norms, Pauwelyn lists ‘exempting norms’, which ‘grant a right to states not to do something’: Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003) 159 (emphasis altered), citing Hans Kelsen, *Théorie Générale des Norms* (Presses Universitaires de France, 1996) 1.

²⁷ Joost Pauwelyn, ‘Is it International Law or Not, and Does it Even Matter?’ in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012) 125, 127–41.

²⁸ Alexander Betts and Phil Orchard, ‘Conclusions: Norms and the Politics of Implementation’ in Alexander Betts and Phil Orchard (eds), *Implementation and World Politics: How International Norms Change Practice* (Oxford University Press, 2014) 269, 271.

²⁹ Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organization* 887, 895–905.

³⁰ Betts and Orchard, ‘Introduction’, above n 26, 2.

³¹ Amitav Acharya, ‘How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism’ (2004) 58 *International Organization* 239, 241; Jeffrey T Checkel, ‘The Constructivist Turn in International Relations Theory’ (1998) 50 *World Politics* 324, 339. Cf R Charli Carpenter, ‘Setting the Advocacy Agenda: Theorizing Issue Emergence and Nonemergence in Transnational Advocacy Networks’ (2007) 51 *International Studies Quarterly* 99, 102.

³² This article is interdisciplinary in orientation but does not dwell on debates about the merits of interdisciplinarity, except to argue, contra Koskeniemi, that when viewed through a critical lens, international relations theories — in this case, constructivism — can convey a sense of the contested character of ‘legal *praxis*’. Koskeniemi

A treaty norm on PMSCs, as this article argues, is a dog that does not bark in international relations or in international law. The WGUM presented the *Draft PMSC Convention* to the HRC in 2010. The proposed treaty regime includes the creation of an Oversight Committee to oversee the international supervision of rules applicable to PMSCs and to the states or organisations that employ PMSCs.³³ The *Draft* remains a draft, however, and is likely to remain that way. Crucially, key Western UN Member States favour principle and policy norms in the shape of voluntary agreements and industry self-regulation, as opposed to a treaty norm that proscribes the outsourcing of inherently state functions to PMSCs and sets out a hard law approach in an attendant treaty regime. Given the opposition of key Western states to the WGUM's mandate,³⁴ and given the Western preference for 'mushrooming' regulatory initiatives in the shape of voluntary agreements, industry-focused codes of conduct and the like,³⁵ it is not surprising that the *Draft PMSC Convention* has stalled. That stalled status suggests that the import of the WGUM's efforts to discharge its mandate is not so much that WGUM barks as an entrepreneur for a treaty norm on PMSCs, or is effective in maintaining awareness in the agora about human rights issues in the market for force; rather, the WGUM is a Sisyphus-like actor in the agora. But is the WGUM engaged in a quest for perfectibility or is it mired in absurdity?³⁶ This article argues that Sisyphian dynamics of norm change in the agora underpin how the WGUM functions as a Special Procedure. The agora is a public meeting place for debate about actions for the good of the *polis* (to use the language of classical political philosophy) — or, put differently, the good that is owed towards everyone in the international community.³⁷ The dynamics of norm change in the agora refers to

seems to take issue not with interdisciplinarity per se (after all, his own œuvre draws heavily on French structuralism) but instead with how interdisciplinary international relations perspectives convey 'no sense of the eclectic and pragmatic character of legal *praxis*': Martti Koskeniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' (2012) 26 *International Relations* 3, 19 (emphasis in original).

³³ See generally Nigel D White, 'The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group's Draft Convention' (2011) 11 *Human Rights Law Review* 133, 141–3. The full name of the proposed Oversight Committee is 'Committee on the Regulation, Oversight and Monitoring of PMSCs': see *Draft PMSC Convention*, UN Doc A/HRC/15/25, annex art 29.

³⁴ See below Part IV(A).

³⁵ Anna Leander, 'Engaging the Contested and Material Politics of Private Military and Security Service Governance from a Pragmatist Perspective' on *International Studies Quarterly Online* (31 October 2016) <<http://www.isanet.org/Publications/ISQ/Posts/ID/5355/Engaging-the-Contested-and-Material-Politics-of-Private-Military-and-Security-Service-Governance-from-a-Pragmatist-Perspective>>. For analysis of the jurisgenerative nature and scope of codes of conduct, see Anna Leander, 'What Do Codes of Conduct Do? Hybrid Constitutionalization and Militarization in Military Markets' (2012) 1 *Global Constitutionalism* 91.

³⁶ See above nn 7–8 and accompanying text.

³⁷ See, eg, Jan Klabbers, 'Two Concepts of International Organization' (2005) 2 *International Organizations Law Review* 277, 282–4; Venzke, above n 23, 254–5.

how interactions between state and non-state actors, for example, in various fora on the privatisation of force, provides opportunities for building epistemic communities for debate and deliberation about action on norm creation and institutionalisation.³⁸ The WGUM's attempts to act in the agora as a 'catalyst for rights' and a 'catalyst for change' — to borrow two phrases that Ted Piccone uses to describe Special Procedures in general³⁹ — can be described as Sisyphean because very few, if any, key state and industry actors appear to take the WGUM seriously. Further, apart from publishing annual reports (including details of its country visits), issuing press releases and taking part in various UN and other fora on the market for force,⁴⁰ it is unclear how WGUM is in an agora that can effect consequential impact, or its activities create a groundswell of support for a treaty norm on PMSCs.

This article acknowledges, then, the challenges to norm creation in international law. The objective of this article, however, is not to take on the 'Herculean task' of deciding whether state practice on the use and regulation of PMSCs has developed to the point where one can, and mindful of *opinio juris*, speak of customary international law on the legitimacy of using PMSCs under prescribed conditions.⁴¹ Nor will the article examine the extension of tort liability to the provision of military

³⁸ On the agora function, see generally Hannah Arendt, *Human Condition* (University of Chicago, 2nd ed, 1998) 160; Zygmunt Bauman, *In Search of Politics* (Stanford University Press, 1999) 3–4, 86–100; Gerd Oberleitner, *Global Human Rights Institutions: Between Ritual and Remedy* (Polity Press, 2007) 35. On epistemic communities, see generally Mai'a K Davis Cross, 'Rethinking Epistemic Communities Twenty Years Later' (2013) 39 *Review of International Studies* 137; Peter M Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 *International Organization* 1; Clive Jones, 'Private Military Companies as "Epistemic Communities"' (2006) 8 *Civil Wars* 355.

³⁹ Ted Piccone, 'Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights' (Report, Brookings Institution, October 2010) <https://www.brookings.edu/wp-content/uploads/2016/06/10_human_rights_piccone.pdf>; Ted Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights* (Brookings Institution, 2012).

⁴⁰ See below Part IV(F).

⁴¹ See Corinna Seiberth, *Private Military and Security Companies in International Law — A Challenge for Non-Binding Norms: The Montreux Document and the International Code of Conduct for Private Security Service Providers* (Intersentia, 2014) 29–30, 230–4, 243–57. On the constitutive elements of customary international law, see *Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Judgment) [1985] ICJ Rep 13, 29 [27]; *Statute of the International Court of Justice* art 38(1)(b); Michael Wood, Special Rapporteur, *Second Report on Identification of Customary International Law*, UN Doc A/CN.4/672 (22 May 2014) 7–63 [21]–[80]. On the 'Herculean task' of elucidating customary international law, see Daniel Bodansky, 'Customary (And Not So Customary) International Environmental Law' (1995) 3 *Indiana Journal of Global Legal Studies* 105, 113; Manley O Hudson, Special Rapporteur, 'Article 24 of the Statute of the International Law Commission' [1950] II(2) *Yearbook of the International Law Commission* 24, 28 [38]–[39].

and/or security services by corporate actors,⁴² or evaluate the respective merits of the *Montreux Document*, *ICoC* and *Draft PMSC Convention*. Instead, this article focuses on how the WGUM performs its functions as a Special Procedure of the HRC. First, the article begins with an overview of the nature and scope of the Special Procedures. The term ‘Special Procedures’ refers to the system of independent experts with thematic or country-specific mandates from the HRC (preceded by the CHR) to investigate, report and advise the UN on human rights, whether civil, political, social, economic or cultural (or a combination thereof).⁴³ Second, the article gives further historico-legal context to the WGUM by discussing its genesis in the mandate of the Special Rapporteur on the Use of Mercenaries (‘SRUM’). Third, the article turns to the WGUM itself and how it seeks to perform its functions as a Special Procedure, including how the WGUM carries out fact-finding in relation to its thematic issue. How the WGUM performs its functions as a Special Procedure is one of the least studied aspects in the voluminous literature about PMSCs.⁴⁴ This article seeks to fill that gap in the literature because doing so casts light on the limits and possibilities of the mechanisms and methods used to examine the activities of PMSCs and their impacts on the fulfilment of human rights standards.

II THE NATURE AND SCOPE OF THE SPECIAL PROCEDURES SYSTEM

Narratives of progress and the rhetoric of justice as desirable and necessary for the good of the international community are a common thread in various laudatory

⁴² See Andrea Atteritano, ‘Liability in Tort of Private Military and Security Companies: Jurisdictional Issues and Applicable Law’ in Francesco Francioni and Natalino Ronzitti (eds), *War By Contract: Human Rights, Humanitarian Law and Private Contractors* (Oxford University Press, 2011) 471, 471–89; Kristine Huskey and Scott Sullivan, ‘United States: Law and Policy Governing Private Military Contractors After 9/11’ in Christine Bakker and Mirko Sossai (eds), *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms* (Hart Publishing, 2012) 331, 362–75; Liu, above n 23, 263–92.

⁴³ Mireille Fanon-Mendes-France, Rapporteur, *Report on the Twenty-First Annual Meeting of Special Rapporteurs/Representatives, Independent Experts and Working Groups of the Special Procedures of the Human Rights Council, Including Updated Information on the Special Procedures*, UN Doc A/HRC/28/41 (29 January 2015) 3 [1] (‘*Twenty-First Annual Meeting of the Special Procedures*’). For a concise history of the Special Procedures, see Elvira Domínguez-Redondo, ‘The History of the Special Procedures: A “Learning-by-Doing” Approach to Human Rights Implementation’ in Aoife Nolan, Rosa Freedman and Thérèse Murphy (eds), *The United Nations Special Procedures System* (Brill Nijhoff, 2017) 11, 18–35.

⁴⁴ Notable examples include Christine Bakker and Mirko Sossai (eds), *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms* (Hart Publishing, 2012); Dickinson, above n 11; Francesco Francioni and Natalino Ronzitti (eds), *War By Contract: Human Rights, Humanitarian Law and Private Contractors* (Oxford University Press, 2011); Liu, above n 23; Sean McFate, *The Modern Mercenary: Private Armies and What They Mean for World Order* (Oxford University Press, 2014); Pattison, *The Morality of Private War*, above n 12; Seiberth, above n 41; Tonkin, above n 13.

descriptions of the Special Procedures system.⁴⁵ The Special Procedures system has been described as ‘a success’,⁴⁶ ‘catalysts for rights’,⁴⁷ ‘catalysts for change’,⁴⁸ ‘a cornerstone of human rights protection’,⁴⁹ ‘the crown jewel of the [human rights] system’,⁵⁰ ‘a fundamental pillar of the international human rights machinery’,⁵¹ ‘the trusted eyes and ears of the international human rights community’,⁵² ‘first-line actors in the discharge of the international community’s responsibility to protect’⁵³ and ‘one of the UN’s most effective tools for the promotion and protection of human rights’.⁵⁴ A further common thread in the above descriptions of the Special Procedures is that mandate-holders are indispensable ‘norm entrepreneurs’, to use constructivist international relations terminology, in the promotion of human rights norms.⁵⁵ By calling attention to pressing issues and making explicit the implicit meaning or significance of new or reconfigured ways of normative thinking about pressing

⁴⁵ On the ‘rhetoric of justice’ in international legal discourse, see generally Venzke, above n 23, 198–223.

⁴⁶ Joint Standing Committee on Foreign Affairs, Defence and Trade, Human Rights Subcommittee, *Roundtable on Reform of United Nations Commission on Human Rights*, Canberra, 12 August 2005, 7 (John von Doussa QC, President, Human Rights and Equal Opportunity Commission).

⁴⁷ Piccone, ‘Catalysts for Rights’, above n 39.

⁴⁸ Piccone, *Catalysts for Change*, above n 39.

⁴⁹ Tania Baldwin-Pask and Patrizia Scannella, ‘The Unfinished Business of a Special Procedures System’ in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future of the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia, 2011) 419, 420.

⁵⁰ Kofi Annan, ‘Secretary-General, in Message to Human Rights Council, Cautions Against Focusing on Middle East at Expense of Darfur, Other Grave Crises’ (Press Release, SG/SM/10769-HR/4907, 29 November 2006) <<http://www.un.org/press/en/2006/sgsm10769.doc.htm>>.

⁵¹ Gay McDougall, Rapporteur, *Report of the Thirteenth Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme* (Geneva, 19–23 June 2006), UN Doc A/HRC/4/43 (26 October 2006) 6.

⁵² United Nations News Centre, ‘Poverty Is the Most Serious and Widespread Human Rights Abuse, UN Official Says’ (Press Release, 23 June 2006) <<http://www.un.org/apps/news/story.asp?NewsID=18982#.WT4LBnrsTzR>>, quoting the then UN High Commissioner for Human Rights, Louise Arbour.

⁵³ Bertrand G Ramcharan, *The Protection Roles of UN Human Rights Special Procedures* (Martinus Nijhoff Publishers, 2009) 4.

⁵⁴ Amnesty International, ‘2003 UN Commission on Human Rights: A Time for Deep Reflection — Background Briefing’ (Media Briefing, IOR 41/004/2003, 13 March 2003) <<https://www.amnesty.org/download/Documents/108000/ior410042003en.pdf>>.

⁵⁵ See generally Finnemore and Sikkink, above n 29, 893, 895–901, 914–15; Ann Florini, ‘The Evolution of International Norms’ (1996) 40 *International Studies Quarterly* 363, 375, 381–2, 386–7.

issues, norm entrepreneurs help to generate or create norms.⁵⁶ A précis of the history of Special Procedures shows that human rights norm advocacy is fraught with contestation between state and non-state actors over partisan interests and ideational factors. The analysis of the SRUM and WGUM in following sections further locates norm advocacy in the politics of international law: whether as a by-product or as an intended result of contestation, some norms — such as a treaty norm on PMSCs — remain inchoate and their entrepreneurs marginalised by hegemonic actors.⁵⁷

Special Procedures originated in the 1960s when the CHR began to challenge the ‘no power to act’ consensus. Key Western states maintained that the UN could only ‘promote’ human rights and had no power ‘to take any action in regard to any complaints concerning human rights.’⁵⁸ The UN Committee on Decolonization mounted a direct challenge to the consensus in 1965 when it requested that the CHR inquire into the situation of human rights in South Africa.⁵⁹ In 1967, the CHR appointed a rapporteur to inquire into the practice of apartheid in South Africa and subsequently created the Ad Hoc Working Group of Experts on the Treatment of Political Prisoners in South Africa;⁶⁰ the CHR transformed the latter into a special working group of experts in 1969, to investigate allegations of human rights violations in the Israeli Occupied Territories.⁶¹ In 1980, the CHR created the first thematic mandate: the Working Group on Enforced or Involuntary Disappearances. The primary impetus for creating the Working Group was the human rights situation

⁵⁶ Finnemore and Sikkink, above n 29, 893, 897. See also Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007) 81–3; Venzke, above n 23, 12–13. Here, I use ‘norm’ in a broad sense, as referring to shared expectations about ethical values and behaviour.

⁵⁷ On hegemony, see generally Koskenniemi, *From Apology to Utopia*, above n 24, 597–8; Martti Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011) 221–3.

⁵⁸ Economic and Social Council, *Report of the Commission on Human Rights to the Economic and Social Council on the First Session of the Commission on Human Rights, Held at Lake Success, New York from 27th January to 10th February 1947*, UN Doc E/259, quoted in Marc Limon and Hilary Power, ‘History of the United Nations Special Procedures Mechanism: Origins, Evolution and Reform’ (Report, Universal Rights Group, September 2014) 4 <http://www.universal-rights.org/wp-content/uploads/2015/02/URG_HUNSP_28.01.2015_page_by_page.pdf> (emphasis altered).

⁵⁹ Limon and Power, above n 58, citing Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights* (Intersentia, 2005) 11.

⁶⁰ Jeroen Gutter, ‘Special Procedures and the Human Rights Council: Achievements and Challenges Ahead’ (2007) 7 *Human Rights Law Review* 93, 97, citing *Communication Dated 3 February 1967 From the Acting Chairman of the General Assembly’s Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa*, CHR Res 2 (XXIII), UN ESCOR, 23rd sess, 914th mtg, Supp No 6, UN Doc E/CN.4/RES/2(XXIII) (6 March 1967). See especially CHR Res 2 (XXIII) para 3.

⁶¹ Gutter, above n 60, 97, citing *Question of Human Rights in the Territories Occupied as a Result of Hostilities in the Middle East*, CHR Res 6 (XXV), UN ESCOR, 25th sess, 1014th mtg, UN Doc E/CN.4/RES/6(XXV) (4 March 1969). See especially CHR Res 6 (XXV) para 4.

in a specific country, namely, the disappearances in Argentina's 'dirty war'. 'The issue-oriented or thematic approach', as Jeroen Gutter also points out, 'offered a less polarised method for monitoring major human rights phenomena worldwide and, therefore, became an attractive and politically feasible option for the Commission to pursue.'⁶² Other thematic mandates were soon to follow the Working Group: a Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions (1982),⁶³ a Special Rapporteur on Torture, and Other Cruel, Inhuman or Degrading Treatment (1985),⁶⁴ a Special Rapporteur on Religious Intolerance (1986)⁶⁵ and a Special Rapporteur on the Use of Mercenaries (1987).⁶⁶

The Special Procedures system came to be recognised as precisely that, a system, only in the early 1990s. The *Vienna Declaration and Programme of Action* recommended that the Special Procedures be strengthened as a 'system' and 'enabled to harmonize and rationalize their work through periodic meetings.'⁶⁷ The Special Procedures mandate-holders held their first annual meeting in 1994.⁶⁸ As part of the process of systematising their work, mandate-holders adopted a *Manual of Operation for Special Procedures* in 1999, at their sixth annual meeting. In essence, the *Manual* was adopted as 'a *vade mecum* for all mandate-holders'.⁶⁹ Also in 1999, but at the CHR's 55th session, the CHR's Chairperson imposed a time limit

⁶² Gutter, above n 60, 99–100.

⁶³ *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, With Particular Reference to Colonial and Other Dependent Countries and Territories: Summary or Arbitrary Executions*, CHR Res 1982/29, UN ESCOR, 38th sess, 59th mtg, Supp No 2, UN Doc E/CN.4/1982/29 (11 March 1982) para 2.

⁶⁴ *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CHR Res 1985/33, UN ESCOR, 41st sess, 55th mtg, Supp No 2, UN Doc E/CN.4/RES/1985/33 (13 March 1985) para 1.

⁶⁵ *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, CHR Res 1986/20, 42nd sess, 50th mtg, Supp No 2, UN Doc E/CN.4/RES/1986/20 (10 March 1986) para 2. In 2000, the CHR changed the mandate title to 'Special Rapporteur on Freedom of Religion or Belief': see *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, CHR Res 2000/33, UN ESCOR, 56th sess, 60th mtg, Supp No 3, UN Doc E/CN.4/RES/2000/33 (20 April 2000) para 11.

⁶⁶ *The Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, CHR Res 1987/16, UN ESCOR, 43rd sess, 52nd mtg, Supp No 5, UN Doc E/CN.4/1987/16 (9 March 1987) para 1 ('*Use of Mercenaries*'). For analysis of the SRUM, see below Part III.

⁶⁷ *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993) II [95].

⁶⁸ Nigel Rodley, Rapporteur, *Report of the Meeting of Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme, Geneva, 30 May – 1 June 1994*, UN Doc E/CN.4/1995/5 (15 June 1994).

⁶⁹ Nigel S Rodley, 'On the Responsibility of Special Rapporteurs' (2011) 15 *International Journal of Human Rights* 319, 321.

of six years for mandate-holders, '[t]o help maintain appropriate detachment and objectivity on the part of individual officeholders, and to ensure a regular infusion of new expertise and perspectives'.⁷⁰ The Chairperson stipulated as a 'transitional measure' that 'office-holders who have served more than three years when their current mandates expire will be limited to at most three years of further renewals in these posts.'⁷¹ Concerns about various aspects of the Special Procedures system persisted, however, and in 2002, the UN Secretary-General called for 'clear ground rules' for how Special Procedures report and function.⁷² But in the context of broader UN reforms, including the establishment of the HRC in 2006, reforming the Special Procedures system would prove to be an 'elusive goal'.⁷³

The impetus for further systematisation continued after the HRC replaced the CHR. In June 2007, the HRC outlined the rights and responsibilities of the Special Procedures in the *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council* (the 'Code').⁷⁴ Philip Alston warns that the *Code* is little more than an effort to 'hobble' the Special Procedures by limiting their working methods.⁷⁵ Indeed, the *Code* requires mandate-holders to 'address all their communications to concerned Governments through diplomatic channels'.⁷⁶ Elvira Domínguez Redondo shares Alston's concern about the *Code* but muses whether the *Code* shores up the Special Procedures as a system, insofar as the *Code* 'inadvertently provides' a clear legal and normative basis for the Special Procedures in their fact-finding efforts regarding allegations of breaches of human rights.⁷⁷ In light of the *Code*, the Special Procedures adopted a revised version of the *Manual of Operations of the Special Procedures* in 2008 at their 15th annual meeting, 'to explain and elaborate

⁷⁰ Commission on Human Rights, *Report on the Fifty-Fifth Session (20 March – 30 April 1999)*, UN Doc E/CN.4/1999/167 (1999) 378 [552] ('*Fifty-Fifth Session*').

⁷¹ *Ibid.*

⁷² *Strengthening of the United Nations: An Agenda for Further Change — Report of the Secretary-General*, 57th sess, Agenda Item 53, UN Doc A/57/387 (9 September 2002) 13 [55].

⁷³ Limon and Power, above n 58, 13.

⁷⁴ *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*, HRC Res 5/2, UN GAOR, 5th sess, 9th mtg, Supp No 53, UN Doc A/HRC/RES/5/2 (18 June 2007) annex ('*Draft Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*').

⁷⁵ Philip Alston, 'Hobbling the Monitors: Should UN Human Rights Monitors Be Accountable?' (2011) 52 *Harvard International Law Journal* 561, 582–601. See also Baldwin-Pask and Scannella, above n 49, 463–70; Elvira Domínguez Redondo, 'Rethinking the Legal Foundations of Control in International Human Rights Law — The Case of Special Procedures' (2011) 29 *Netherlands Quarterly of Human Rights* 261, 276–8 (but see 278–88); Maximilian Spohr, 'United Nations Human Rights Council: Between Institution-Building Phase and Review of Status' (2010) 14 *Max Planck Yearbook of United Nations Law* 169, 186–7, 214.

⁷⁶ *Code of Conduct for Special Procedures Mandate-Holders*, UN Doc A/HRC/RES/5/2, annex art 14.

⁷⁷ Redondo, 'The Case of Special Procedures', above n 75, 263 (see also 278–88).

upon these methods of work with a view to assisting the mandate-holders themselves, Governments, civil society and all other interested parties.⁷⁸ A further opportunity for systematisation was the 2011 review of the HRC, which noted the importance of the ‘integrity’ of the Special Procedures ‘system’ for enhancing the HRC’s ability ‘to address human rights situations on the ground’.⁷⁹ Arguably, though, the 2011 review has had a negligible impact on strengthening the Special Procedures as a system; ‘in practice’, as Marc Limon and Hilary Power explain, ‘the 2011 review achieved nothing more than a further crystallisation of opposing state visions of what the mechanism is and what it is there to do.’⁸⁰

III THE SPECIAL RAPPORTEUR ON THE USE OF MERCENARIES: THE GENESIS OF THE WORKING GROUP ON THE USE OF MERCENARIES

A The Mandate of the Special Rapporteur on the Use of Mercenaries

Special Procedures mandate-holders are indispensable norm entrepreneurs in the promotion of human rights standards; however, as the preceding section also explained, mandate-holders face considerable challenges as a system.⁸¹ This article is not suggesting that all mandate-holders can be likened to the mythological or philosophical figure of Sisyphus, but argues that how the WGUM attempts to discharge its mandate as a thematic Special Procedure is Sisyphean in scope and impact.

Before considering how the WGUM functions as a Special Procedure, it is instructive to consider the WGUM’s genesis in the context of the mandate of the SRUM. ESC Resolution 1986/43 asked the CHR to appoint a special rapporteur to investigate the use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination.⁸² The CHR established the SRUM in March 1987⁸³ and appointed Enrique Bernales Ballesteros as the SRUM’s first

⁷⁸ *Manual of Operations of the Special Procedures of the Human Rights Council* (August 2008) 4 [1] <http://www.ohchr.org/Documents/HRBodies/SP/Manual_Operations2008.pdf>.

⁷⁹ *Review of the Work and Functioning of the Human Rights Council*, HRC Res 16/21, UN GAOR, 16th sess, 47th mtg, Supp No 53, UN Doc A/HRC/RES/16/21 (12 April 2011) annex (*‘Outcome of the Review of the Work and Functioning of the United Nations Human Rights Council’*) 73 [24].

⁸⁰ Limon and Power, above n 58, 16.

⁸¹ On the challenges facing the Special Procedures, see below Pt IV(H).

⁸² *Use of Mercenaries as a Means to Violate Human Rights and to Impede the Exercise of the Right of Peoples to Self-Determination*, ESC Res 1986/43, UN ESCOR, 1st regular session of 1986, 19th plen mtg, Agenda Item 9, Supp No 1, UN Doc E/RES/1986/43 (23 May 1986) para 6.

⁸³ *Use of Mercenaries*, UN Doc E/CN.4/1987/16, para 1, endorsed in *Use of Mercenaries as a Means to Violate Human Rights and to Impede the Exercise of the Right of Peoples to Self-Determination*, ESC Res 1987/61, UN ESCOR, 1st regular session of 1987, 18th plen mtg, Agenda Item 17, Supp No 1, UN Doc E/RES/1987/61 (29 May 1987) para 5.

mandate-holder. Nearly a decade later, he began to augment his singular focus on the phenomenon of mercenarism in the postcolonial context by investigating ‘new forms’ of mercenary activities.⁸⁴ For instance, in October 1996, Bernales Ballesteros visited South Africa at the invitation of its government,⁸⁵ and carried out in situ investigations into allegations that Executive Outcomes, a security firm based in South Africa, had provided mercenaries to the Governments of Angola and Sierra Leone in exchange for mining concessions.⁸⁶

In the late '90s and beyond, Bernales Ballesteros continued to broaden his original mandate by monitoring what he and others regarded as ‘new forms’ of mercenary activities.⁸⁷ He rejected the corporate mien taken by some new military and security service providers in categorical terms, as ‘a threat to the self-determination of peoples and an obstacle to the enjoyment of human rights by peoples who have to endure their presence.’⁸⁸ In 2001, the Office of the UN High Commissioner for Human Rights (‘OHCHR’) convened the first meeting of experts on traditional and new forms of mercenary activities.⁸⁹ According to one expert at the meeting, the then current

⁸⁴ See, eg, United Nations Information Service, ‘Report on Mercenaries Presented to the Human Rights Commission’ (Press Release HR/CN/764, 14 March 1997) <<http://www.un.org/press/en/1997/19970314.hrcn764.html>>.

⁸⁵ Enrique Bernales Ballesteros, Special Rapporteur, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, Submitted by Mr Enrique Bernales Ballesteros, Special Rapporteur, Pursuant to Commission Resolution 1995/5 and Commission Decision 1996/113, UN Doc E/CN.4/1997/24 (20 February 1997) 11 [25] (*‘Use of Mercenaries’*).

⁸⁶ Ibid 4 [9]. Eeben Barlow, the director of Executive Outcomes Pty Ltd (‘EO’), told the Special Rapporteur that EO provided the Governments of Angola and Sierra Leone not with mercenaries but instead with ‘instructors’ to train Angolan government armed forces in mine detection and improve the effectiveness of Sierra Leonean government armed forces in the face of armed opposition: at 17–18 [51]–[53]. Barlow dismissed the accusation regarding the mining concessions as ‘absurd’: at 18 [52]. EO closed in 1998.

⁸⁷ See, eg, Enrique Bernales Ballesteros, Special Rapporteur, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/53/338 (4 September 1998) 13 [71]; Enrique Bernales Ballesteros, Special Rapporteur, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/54/326 (7 September 1999) 15 [52]–[53], 19 [75]; *Report of the Meeting of Experts on the Traditional and New Forms of Mercenary Activities as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, Geneva, 29 January – 2 February 2001, UN Doc E/CN.4/2001/18 (14 February 2001) 12–17 [56]–[71] (*‘Meeting of Experts on Mercenary Activities’*).

⁸⁸ *Use of Mercenaries*, UN Doc E/CN.4/1997/24, 26 [83].

⁸⁹ The meeting (in Geneva) was held pursuant to *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 54/151, UN GAOR, 54th sess, 83rd plen mtg, Agenda Item 115, Supp No 49, UN Doc A/RES/54/151 (29 February 2000) para 12.

CHR resolution that set out the SRUM's mandate defined it in a 'narrowly conceived' postcolonial manner by focusing on threats posed by mercenary activities to the constitutional order or territorial integrity of states, particularly in Africa.⁹⁰ Thus, as the same expert noted, Bernales Ballesteros was unable to give due consideration to how '[n]ew forms of mercenaries threatened not only the right of peoples to self-determination, but also a host of other human rights.'⁹¹ The expert meeting recommended, inter alia, that the CHR expand the SRUM's mandate when it was next due for a vote on its renewal, at the 57th session of the CHR, and 'include private security and military companies and all other new forms of mercenarism'.⁹² The recommendation was reflected to some extent in the renewal of the mandate by CHR Resolution 2001/3, which requested that Bernales Ballesteros 'continue taking into account in the discharge of his mandate the fact that mercenary activities are continuing to occur in many parts of the world *and are taking on new forms, manifestations and modalities*'.⁹³ The resolution did not specifically request, however, that Bernales Ballesteros investigate the impact of PMSCs on human rights.

Inchoate efforts to expand the SRUM's mandate to include fact-finding on PMSCs faced an intractable problem: how to situate the analysis of PMSCs in relation to the legal definition of 'mercenary'. The representative of Canada at a meeting of the CHR in March 2003 suggested the CHR expand the SRUM's mandate to include 'private military companies, private security services and military consultants'.⁹⁴ Bernales Ballesteros 'explained' in reply to Canada's representative 'that his terms of reference had been constrained by the very narrow wording of Additional Protocol I to the Geneva Conventions, which referred to one type of mercenary activity only'.⁹⁵ Evidently, 'one type of mercenary activity only' denoted the use of mercenaries, viz. those who meet the cumulative definition of mercenary, in situations of international armed conflict.⁹⁶ In a draft resolution in April 2003, the CHR requested that

⁹⁰ *Meeting of Experts on Mercenary Activities*, UN Doc E/CN.4/2001/18, 15 [65]. For the resolution, see *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, CHR Res 1998/6, UN ESCOR, 54th sess, 20th mtg, Supp No 3, UN Doc E/CN.4/RES/1998/6 (27 March 1998) para 3.

⁹¹ *Meeting of Experts on Mercenary Activities*, UN Doc E/CN.4/2001/18, 15 [65].

⁹² *Ibid* 25 [116].

⁹³ *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, CHR Res 2001/3, UN ESCOR, 57th sess, 43rd mtg, Supp No 3, UN Doc E/CN.4/RES/2001/3 (6 April 2001) para 13 (emphasis added).

⁹⁴ *Summary Record of the 11th Meeting*, UN ESCOR, CHR, 59th sess, 11th mtg, Agenda Items 3, 5 and 6, UN Doc E/CN.4/2003/SR.11 (27 March 2003) 6 [28] (Mr Westdal, representative of Canada). The meeting was held on 21 March 2003.

⁹⁵ *Ibid* 6 [29].

⁹⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1979 UNTS 3 (entered into force 7 December 1978) art 47(2) (*'Additional Protocol I'*).

all states ‘exercise the utmost vigilance against any kind of recruitment, training, hiring or financing of mercenaries’ by PMSCs.⁹⁷ The draft and subsequently adopted resolution⁹⁸ did not expand the SRUM’s mandate, most likely because the CHR thought it was more fitting for a decision on expanding the mandate to be taken when the mandate came up for renewal.

In 2004, at its 60th session, the CHR renewed the SRUM’s mandate for three years.⁹⁹ The renewed mandate was also expanded to include ‘particular attention to the impact of the activities of private companies offering military assistance, consultancy and security services on the international market on the exercise of the right of peoples to self-determination’.¹⁰⁰ Here, the expanded mandate echoed a recommendation in Bernales Ballesteros’s final report, that ‘[t]here is an urgent need to regulate private military assistance, consultancy and security companies and establish criminal liability for members of such companies.’¹⁰¹ The time limit for Special Procedures mandate-holders created in 1999, to ensure the influx of new perspectives into the Special Procedures system,¹⁰² prevented Bernales Ballesteros from continuing as the SRUM’s mandate-holder after 2004. Where he had equated private companies such as Executive Outcomes with mercenaries and had taken an abolitionist approach to both,¹⁰³ his successor, Shaista Shameem, was to take a ‘pragmatic approach’ to the privatisation of force.¹⁰⁴

⁹⁷ *Summary Record of the 47th Meeting*, UN ESCOR, CHR, 59th sess, 47th mtg, Agenda Items 5, 6, 13, 14, 17 and 19, UN Doc E/CN.4/2003/SR.47 (25 April 2003) 14 [68] (Mr Reyes Rodríguez, representative of Cuba). For the draft resolution, see *Draft Resolution — The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, CHR, 59th sess, Agenda Item 5, UN Doc E/CN.4/2003/L.7 (7 April 2003).

⁹⁸ *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, CHR Res 2003/2, UN ESCOR, 59th sess, 47th mtg, Supp No 3, UN Doc E/CN.4/RES/2003/2 (14 April 2003).

⁹⁹ *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, CHR Res 2004/5, UN ESCOR, 60th sess, 44th mtg, Supp No 3, UN Doc E/CN.4/RES/2004/5 (8 April 2004) para 2.

¹⁰⁰ *Ibid* para 18.

¹⁰¹ Enrique Bernales Ballesteros, Special Rapporteur, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination; Report Submitted by Mr Enrique Bernales Ballesteros, Special Rapporteur*, UN Doc E/CN.4/2004/15 (24 December 2003) 21 [70] (‘*Use of Mercenaries*’).

¹⁰² *Fifty-Fifth Session*, UN Doc E/CN.4/1999/167, 378 [552].

¹⁰³ *Use of Mercenaries*, UN Doc E/CN.4/2004/15, 10–11 [28]–[34], 13–15 [43]–[45]. On Bernales Ballesteros’ abolitionist approach, see Sarah Percy, ‘Morality and Regulation’ in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford University Press, 2007) 11, 24–6.

¹⁰⁴ Victor-Yves Ghebali, ‘The United Nations and the Dilemma of Outsourcing Peace-keeping Operations’ in Alan Bryden and Marina Caparini (eds), *Private Actors and Security Governance* (LIT Verlag, 2006) 213, 217, quoted in Elke Krahnmann, ‘From

As concerns private military companies, in the absence of a universally accepted and satisfactory definition of mercenaries and corresponding legislation, a pragmatic approach should be promoted in the interim. This should include encouraging company self-regulation rather than regulation imposed by external bodies, to promote a sense of ownership and sustainability in the implementation of agreed measures.¹⁰⁵

Shameem advocated a pragmatic approach but also adopted her predecessor's proposal that the UN revise the legal definition of mercenary. Shameem argued, for instance, that a revised definition include the 'new element ... of a "mercenary company"'¹⁰⁶ and 'demonstrate that mercenarism is a human rights issue, with implications for violations of, inter alia, the right to life and the integrity of the person and to national security, as well as for the right to self-determination.'¹⁰⁷ Shameem called for a 'politically feasible' definition,¹⁰⁸ namely, a definition likely to gain support from UN Member States, but evidently her proposed definition was not sufficiently feasible. The cumulative definition of mercenary in the *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*¹⁰⁹ remains unchanged, most likely because the *Convention* is widely seen as an outdated, inadequate mechanism for regulating the market for force.¹¹⁰

"Mercenaries" to "Private Security Contractors": The (Re)Construction of Armed Security Providers in International Legal Discourse' (2012) 40 *Millennium: Journal of International Studies* 343, 359.

¹⁰⁵ Shaista Shameem, Special Rapporteur, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/60/263 (17 August 2005) 17 [62].

¹⁰⁶ *Ibid* 9 [29].

¹⁰⁷ *Ibid* 9 [30].

¹⁰⁸ *Ibid*.

¹⁰⁹ *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, opened for signature 4 December 1989, 2163 UNTS 75 (entered into force 20 October 2001) art 1 ('*Mercenaries Convention*):

A mercenary is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (d) Is not a member of the armed forces of a party to the conflict; and
- (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

¹¹⁰ See, eg, Liu, above n 23, 176–7, 319, 322–3; Seiberth, above n 41, 62–6.

B *The End of the Mandate of the Special Rapporteur on the Use of Mercenaries*

Shameem served as Special Rapporteur for only one year. On 7 April 2005, Cuba introduced a draft resolution in the CHR, seeking to end the SRUM's mandate and replace it with a working group of five members drawn from the UN's different geographic regions.¹¹¹ The CHR adopted the draft 35 votes to 15, with two abstentions.¹¹² Yet only several months earlier, the third meeting of experts on traditional and new forms of mercenary activities had 'expressed support for the continued mandate of the Special Rapporteur'.¹¹³

There is scant, if any, documentation for why the CHR ended the SRUM's mandate. Writing in a 2009 journal article, José L Gómez del Prado, then a member of the WGUM, argued: 'There is no documentation explaining the sudden shift in the Commission on Human Rights after barely one year of the mandate.'¹¹⁴ Be that as it may, the summary record of the meeting on the draft resolution to terminate the SRUM's mandate provides some documentation: according to the summary record, the 'significant increase in mercenary activities in recent years' had necessitated the organisation of 'a series of seminars of experts to discuss issues related to the use of mercenaries and to develop norms for the protection of human rights against the activities of private security companies.'¹¹⁵ One implication here is that the growth of the PMSC industry had overtaken the fact-finding and other capabilities of a mandate held by one person. The corollary, and a further implication, is that a working group would be better suited than one person to formulating new norms to counter the impact of PMSCs on the enjoyment of human rights.

The resolution that ended the SRUM's mandate expressed the CHR's 'appreciation' to the OHCHR for convening the third meeting of experts on mercenaries,¹¹⁶ but had the CHR decided it would be more cost effective to replace both the SRUM and further meetings of experts with the WGUM? Travel and subsistence costs of the third meeting of experts were budgeted at US\$55 000, and conference servicing

¹¹¹ *Draft Resolution — The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, CHR, 61st sess, Agenda Item 5, UN Doc E/CN.4/2005/L.6 (4 April 2005). Note: it seems fair to say that *Expertise* should read *Exercise*.

¹¹² *Summary Record of the 38th Meeting*, UN ESCOR, CHR, 61st sess, 38th mtg, Agenda Items 4, 5 and 12, UN Doc E/CN.4/2005/SR.38 (18 April 2005) 4 [16] ('38th Meeting').

¹¹³ *Report of the Third Meeting of Experts on Traditional and New Forms of Mercenary Activities as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc E/CN.4/2005/23 (18 January 2005) 21 [68]. The meeting was held in Geneva from 6–10 December 2004.

¹¹⁴ Gómez del Prado, 'Private Military and Security Companies', above n 2, 432 n 7.

¹¹⁵ *38th Meeting*, UN Doc E/CN.4/2005/SR.38, 3 [11] (Mr Reyes Rodríguez, representative of Cuba).

¹¹⁶ *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 15.

requirements budgeted at US\$507 600;¹¹⁷ because the OHCHR's budget had not provided for these costs, meeting the costs required additional appropriations by the General Assembly.¹¹⁸ When the SRUM's mandate was terminated, US\$49 100 per year became 'available for other mandates under the category of activities considered to be of a perennial nature.'¹¹⁹ The WGUM's total travel and subsistence costs were budgeted at US\$147 900 for an entire three-year mandate; consultancies were budgeted at US\$45 000.¹²⁰ Additionally, the WGUM's annual meetings (five days for each meeting) were budgeted at US\$321 300 for an entire three-year mandate; travel and subsistence costs for the WGUM's chairperson were budgeted at US\$39 900.¹²¹ OHCHR budgets had not provided for the WGUM's various costs and thus meeting the costs would require additional appropriations by the General Assembly.¹²² It is unclear whether financial considerations were a factor in the CHR replacing the SRUM and additional meetings of experts on mercenary activities with the WGUM. It is not inconceivable, however, given the constant pressure of limited resources in the Special Procedures system,¹²³ that the CHR may have given some thought to financial considerations when deciding to end the SRUM's mandate.

The sudden end of the SRUM's mandate has prompted a variety of explanations. Gómez del Prado argued in his 2009 journal article¹²⁴ that a letter, 'Communication of Peace and Security Companies at the Conclusion of the Meeting with the Special Rapporteur (London, 27–28 June 2005)', annexed to Shameem's final report to the General Assembly¹²⁵ may account for the termination of the SRUM's mandate.

¹¹⁷ Commission on Human Rights, *Programme Budget Implications of Resolutions and Decisions Contained in the Report of the Commission on Human Rights at Its Sixtieth Session: Statement Submitted by the Secretary-General in Accordance with Rule 31 of the Rules of Procedure of the Economic and Social Council*, UN Doc E/2004/L.34 (20 July 2004) 2 [7]–[8].

¹¹⁸ *Ibid* 1 [2], 2 [9].

¹¹⁹ Commission on Human Rights, *Programme Budget Implications of Resolutions and Decisions Recommended for Adoption by the Economic and Social Council Contained in the Report of the Commission on Human Rights at Its Sixty-First Session: Statement Submitted by the Secretary-General in Accordance with Rule 31 of the Rules of Procedure of the Economic and Social Council*, UN Doc E/2005/L.34 (20 July 2005) 2 [4].

¹²⁰ *Ibid* 2 [5].

¹²¹ *Ibid* 2 [6]–[7].

¹²² *Ibid* 2 [8]–[9].

¹²³ For contemporaneous statements, see, eg, Sigma Huda, Rapporteur, *Report of the Twelfth Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme (Geneva, 20–24 June 2005)*, UN Doc E/CN.4/2006/4 (3 August 2005) 5–6 [15]–[18], 11 [47].

¹²⁴ Gómez del Prado, 'Private Military and Security Companies', above n 2, 432 n 7.

¹²⁵ Shaista Shameem, Special Rapporteur, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/60/263 (17 August 2005) annex II

According to the letter, mercenary is a ‘derogatory term’, which is ‘completely unacceptable and is too often used to describe fully legal and legitimate companies engaged in vital support operations for humanitarian peace and stability operations.’¹²⁶ Gómez del Prado contended that the letter ‘may not have been strange in having influenced members of the then Commission on Human Rights to terminate the mandate of the special rapporteur and establish a broadened mandate of a working group to deal with the issues of mercenarism.’¹²⁷ It is unclear how a letter dated 27–28 June 2005 could have influenced the CHR’s decision in April 2005 to terminate the SRUM’s mandate. Gómez del Prado would later argue (in a journal article published in 2011) that the CHR and HRC both ‘decided to reinforce the mandate on mercenarism and related activities by transforming it into a Working Group composed of five independent experts, taking into consideration the geopolitical dimensions of the UN.’¹²⁸ Elke Krahmman suggests that Shameem aligned herself too closely with the stated position of the peace and security companies and that the CHR ‘was apparently not happy with this and soon replaced Shameem [sic] with a working group’;¹²⁹ but precisely how unhappy the CHR was with Shameem is unclear, because she was appointed to the WGUM. Explaining why the SRUM’s mandate ended in a sudden manner is, then, a matter of some speculation; nonetheless, it is fair to say that the CHR regarded a working group as better placed than a single individual to investigate the impact of PMSCs on the enjoyment of human rights.

IV HOW THE WORKING GROUP ON THE USE OF MERCENARIES PERFORMS ITS FUNCTIONS AS A SPECIAL PROCEDURE OF THE HUMAN RIGHTS COUNCIL

A Introduction

European Union (‘EU’) Member States in the CHR had long wanted the SRUM’s mandate to be terminated, viewing the Sixth Committee as the most appropriate UN forum for addressing legal issues relating to mercenaries;¹³⁰ and for the same reason,

(‘*Communication of Peace and Security Companies at the Conclusion of the Meeting with the Special Rapporteur (London, 27–28 June 2005)*’) (‘*Communication of Peace and Security Companies*’).

¹²⁶ Ibid.

¹²⁷ Gómez del Prado, ‘Private Military and Security Companies’, above n 2, 432 n 7.

¹²⁸ Gómez del Prado, ‘A United Nations Instrument’, above n 2, 43. See also *Summary Record of the 37th Meeting*, UN GAOR, 3rd Comm, 62nd sess, 37th mtg, Agenda Items 68 and 69, UN Doc A/C.3/62/SR.37 (30 November 2007) 6–7 [35] (Mr Gómez del Prado, Chairperson of the WGUM) (‘37th Meeting’).

¹²⁹ Krahmman, ‘From “Mercenaries” to “Private Security Contractors”’, above n 104, 359.

¹³⁰ See, eg, *Summary Record of the 44th Meeting*, UN ESCOR, CHR, 60th sess, 44th mtg, Agenda Items 4, 5 and 14, UN Doc E/CN.4/2004/SR.44 (9 December 2005) 8 [40] (Ms Wheelan, representative of Ireland, speaking on behalf of the EU and Hungary). The meeting was held on 7 April 2004.

EU Member States opposed the creation of the WGUM.¹³¹ Empirical analysis of voting records on CHR and HRC resolutions on promoting Special Procedures mandates has the potential to reveal whether ideological or other patterns can be discerned in how regional groups and political blocs of UN Member States support different categories (or generations) of human rights.¹³² This article, however, takes a qualitative (albeit deskbound and open source) approach to examining how the WGUM performs its functions as a Special Procedure.

B The Working Group on the Use of Mercenaries' Analysis of its Thematic Issue

1 What the WGUM's Mandate Encompasses

The WGUM's mandate includes advocacy for human rights in the face of threats posed by mercenary and mercenary-related activities and by the PMSC industry. When the CHR established the WGUM in 2005, the CHR requested the WGUM 'meet for five working days before the next session of the Commission in fulfilment of the following mandate':¹³³

(a) To elaborate and present concrete proposals on possible new standards, general guidelines or basic principles encouraging the further protection of human rights, in particular the right of peoples to self-determination, while facing current and emergent threats posed by mercenaries or mercenary-related activities;

(b) To seek opinions and contributions from Governments and intergovernmental and non-governmental organizations on questions relating to its mandate;

(c) To monitor mercenaries and mercenary-related activities in all their forms and manifestations in different parts of the world;

(d) To study and identify emerging issues, manifestations and trends regarding mercenaries or mercenary-related activities and their impact on human rights, particularly on the right of peoples to self-determination;

(e) To monitor and study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights, particularly the right of peoples to self-determination, and to prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities ...¹³⁴

¹³¹ 38th Meeting, UN Doc E/CN.4/2005/SR.38, 4 [14] (Mr De Jong, representative of the Netherlands, speaking on behalf of the EU).

¹³² See generally Rosa Freedman and Jacob Mchangama, 'Expanding or Diluting Human Rights? The Proliferation of United Nations Special Procedures Mandates' (2016) 38 *Human Rights Quarterly* 164, 165, 169–70, 178–87.

¹³³ *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 12.

¹³⁴ *Ibid.*

Also included in the mandate are requests that the WGUM continue the SRUM's work on developing a new definition of 'mercenary';¹³⁵ that the WGUM communicate its progress on carrying out its mandate to both the CHR and the General Assembly on an annual basis;¹³⁶ and that the WGUM consult with governments, civil society and inter-governmental organisations in the course of carrying out its mandate.¹³⁷

How CHR Resolution 2005/2 set down the architectonics of the WGUM's mandate suggests that the Working Group's emphasis on human rights norm advocacy vis-a-vis its mandate emanates in a foundational way from the CHR, with the Working Group acting as the CHR's personal servant or major-domo, rather than from boundary setting from the Working Group itself. Renewing the mandate of a Special Procedure requires a resolution from the HRC,¹³⁸ and the WGUM cannot, or so it would seem, add a new dimension to its mandate by its own *fiat*. Expanding the mandate of any Special Procedure is the province of the HRC but negotiated with the mandate-holders in question and set out in a resolution from the HRC which requests (viz. authorises) the mandate-holders to take on new subjects of analysis.¹³⁹ However, the *Manual of Operations of the Special Procedures* allows mandate-holders to initiate studies relevant to the mandate: 'In addition to any other reports, mandate-holders may opt to devote a separate report to a particular topic of relevance to the mandate. Such studies may be initiated by the mandate-holder or undertaken pursuant to a specific request by relevant bodies.'¹⁴⁰ Rather than examine the textual minutiae of resolutions that have renewed the WGUM's mandate,¹⁴¹ this section examines how

¹³⁵ Ibid para 13.

¹³⁶ Ibid para 14.

¹³⁷ Ibid para 20.

¹³⁸ Claire Breen, 'Revitalising the United Nations Human Rights Special Procedures Mechanisms as a Means of Achieving and Maintaining International Peace and Security' (2008) 12 *Max Planck Yearbook of United Nations Law* 177, 181–2.

¹³⁹ *Institution-Building of the United Nations Human Rights Council*, HRC Res 5/1, UN GAOR, 5th sess, 9th mtg, Supp No 53, UN Doc A/HRC/RES/5/1 (18 June 2007) annex ('*United Nations Human Rights Council: Institution Building*') [54]–[55].

¹⁴⁰ *Manual of Operations of the Special Procedures*, above n 78, 20 [75].

¹⁴¹ *Mandate of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 7/21, UN GAOR, 7th sess, 41st mtg, Supp No 53, UN Doc A/HRC/RES/7/21 (28 March 2008) para 2 ('*Use of Mercenaries*'); *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 15/12, UN GAOR, 15th sess, 31st mtg, Supp No 53A, UN Doc A/HRC/RES/15/12 (6 October 2010) para 11 ('*Use of Mercenaries*'); *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 24/13, UN GAOR, 24th sess, 34th mtg, Supp No 53A, UN Doc A/HRC/RES/24/13 (8 October 2013) para 13 ('*Use of Mercenaries*'); *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 33/4, UN GAOR, 33rd sess, 38th mtg, Supp No 53, UN Doc A/HRC/RES/33/4 (5 October 2016) para 21 ('*Use of Mercenaries*').

the WGUM has analysed its thematic issue, namely, the impact of mercenary and mercenary-related activities and PMSCs on the enjoyment of human rights.

The WGUM's founding mandate was complex, and it would not be long before the Working Group was calling for an expanded mandate to consider the complexity of analysis needed to carry out the mandate. While CHR Resolution 2005/2 was pivotal in creating the architectonics of the WGUM's mandate, later calls for boundary setting and enlargement were to come from the mandate-holders themselves. The WGUM in its early years recommended that it be allowed to hold three sessions per year at five working days for each session.¹⁴² The HRC accepted the recommendation and made it part of the WGUM's mandate when the mandate was renewed in 2008.¹⁴³ Some have argued that the HRC expanded the mandate in 2008 to include the study of PMSCs,¹⁴⁴ but the requirement to study PMSCs was set out in the WGUM's original mandate;¹⁴⁵ what was really expanded in 2008 was the number of annual meetings that the WGUM was allowed to hold.

What the Working Group deems its thematic issue to encompass has evolved since 2005. Special Procedures mandate-holders, as mentioned above, can initiate studies as they deem necessary or when requested by 'relevant bodies.'¹⁴⁶ The WGUM's 2014 annual report to the General Assembly focused on the WGUM's 'yearlong study' of the UN's use of PMSCs in UN peacekeeping and other operations.¹⁴⁷ In July 2013 and March 2014, the WGUM had contacted UN officials and organised public panel events about the UN's use of PMSCs.¹⁴⁸ Why the 2014 report's summary described the study as 'yearlong' is puzzling, because the WGUM initiated its research on the matter in early 2010, when the WGUM contacted officials in the UN Department

¹⁴² See, eg, Amada Benavides de Pérez, Chairperson, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/4/42 (7 February 2007) 25 [76] ('*Use of Mercenaries*'); Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/61/341 (13 September 2006) 8 [25], 21 [101] ('*Use of Mercenaries*').

¹⁴³ *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 3.

¹⁴⁴ Daniel Matteo, *The Use of Private Military and Security Companies in International Security: Contestation and Legitimation of State Practice* (PhD Thesis, University of Westminster, 2015) 161 <http://westminsterresearch.wmin.ac.uk/15582/1/Matteo_Daniel_thesis2015PhD.pdf>; Gabor Rona, 'Remarks at the Montreux +5 Conference, 11–13 December 2013' (Statement/Message, 11 December 2013) <<http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14105&LangID=E>>.

¹⁴⁵ *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 12(e) (quoted above; see n 132 and accompanying text).

¹⁴⁶ *Manual of Operations of the Special Procedures*, above n 78, 20 [75].

¹⁴⁷ Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of Peoples to Self-Determination*, UN Doc A/69/338 (21 August 2014) 2 ('*Use of Mercenaries*').

¹⁴⁸ *Ibid* 3–4 [5].

of Safety and Security ('DSS') for information about UN regulatory policies and monitoring regarding its use of PMSCs.¹⁴⁹ (Writing in 2011, Åse Gilje Østensen asked whether assessing the UN's use of PMSCs fell within the WGUM's mandate; Østensen then mused that 'this body would inspire more confidence if UN use [of PMSCs] were taken into account.')150 The WGUM itself appears to have initiated its study of the UN's use of PMSCs, pursuant to requests from the CHR and then the HRC that the WGUM monitor the activities of PMSCs.¹⁵¹ Gabor Rona, appointed to the WGUM in September 2011,¹⁵² noted in a press conference in July 2015 that the WGUM had been informed by DSS officials that the UN uses PSCs and not PMCs;¹⁵³ Rona also noted that the WGUM was unable to directly state whether the DSS had provided the WGUM with information about how the UN determines when its use of PSCs is necessary as a 'last resort',¹⁵⁴ that is, when all other options, including sourcing civilian and military personnel from Member States, have been exhausted and the UN thus needs to hire PSCs.¹⁵⁵ That the WGUM has gathered information about the UN's use of PMSCs has served more than one function: the various fact-finding activities are part of WGUM's analysis of its thematic issue and part of its efforts to alert national and international communities to the impact of PMSCs on human rights.

¹⁴⁹ José Luis Gómez del Prado, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/18/32 (4 July 2011) 15 [68] ('*Use of Mercenaries*'); Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/65/325 (25 August 2010) 10–12 [30]–[37].

¹⁵⁰ Åse Gilje Østensen, 'UN Use of Private Military and Security Companies: Practices and Policies' (SSR Paper 3, Geneva Centre for the Democratic Control of Armed Forces, 2011) 61 <http://www.dcaf.ch/content/download/45662/678940/file/SSR_PAPER3.pdf>.

¹⁵¹ *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 12(e); *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 2(e).

¹⁵² Office of the High Commissioner for Human Rights, *Current and Former Mandate-Holders for Existing Mandates* <<http://www.ohchr.org/EN/HRBodies/SP/Pages/Currentmandateholders.aspx>>.

¹⁵³ Elzbieta Karska (*Chair of the Working Group*) and Gabor Rona (*Member of the Working Group*) — *Press Conference* (UN Web TV, 23 July 2015) 00:13:29–00:14:11 <<http://webtv.un.org/search/elzbieta-karska-chair-of-the-working-group-and-gabor-rona-member-of-the-working-group-press-conference/4370727480001?term=Working%20Gro%20up%20on%20the%20Use%20of%20Mercenaries>>.

¹⁵⁴ *Ibid* 00:16:10–00:16:43.

¹⁵⁵ *Use of Private Security — Report of the Secretary-General*, 67th sess, Agenda Item 130, UN Doc A/67/539 (22 October 2012) 2 [3].

It is unclear from the WGUM's 2015 annual report to the General Assembly on foreign fighters¹⁵⁶ whether the WGUM initiated the report or was asked to do so, but like its 2014 annual report to the General Assembly, the WGUM situated the 2015 report in the context of its efforts to monitor the impact of the market for force on the enjoyment of human rights.¹⁵⁷ A point of difference between the two reports is how the WGUM framed the reports. The WGUM declined to use the term 'mercenaryism' in the 2014 report to describe the UN's use of PMSCs, for instance, 'in complex emergency situations and post-conflict or conflict areas where the host Government was not in a position to provide for the security of United Nations personnel and assets.'¹⁵⁸ The WGUM framed the 2015 report as analysing the 'evolving phenomena' of 'mercenaryism'¹⁵⁹ and set the report in the context of the Syrian civil war and the insurgency in Iraq.¹⁶⁰ One month after the 2015 report was distributed, the HRC, on 15 September 2015, held an interactive dialogue on the rights of older persons and on the uses of mercenaries. The UK's representative at the dialogue remarked that the WGUM risks causing 'confusion' about its mandate by inquiring into foreign fighters and asked how the WGUM would focus on mercenaryism; in reply, the WGUM's then Chairperson, Elzbieta Karksa, argued that the phenomenon of foreign fighters is closely linked to the issue of mercenary and mercenary-related activities.¹⁶¹ The OHCHR's press release about the interactive dialogue did not elaborate the linkage, but as the WGUM's 2015 annual report to the General Assembly had explained:

Foreign fighters and mercenaries are both multifaceted phenomena that have many things in common, ranging from links to acts of terrorism and participation in armed conflicts that may negatively impact human rights, as well as to other criminal activities, including organized crime and smuggling networks.¹⁶²

Since the 2015 annual report was distributed in August 2015, the WGUM has carried out further research, including meetings, country visits and reports, on how foreign

¹⁵⁶ Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/70/330 (19 August 2015) ('*Use of Mercenaries*').

¹⁵⁷ See, respectively, *Use of Mercenaries*, UN Doc A/69/338, 3 [1]; *Use of Mercenaries*, UN Doc A/70/330, 3 [1].

¹⁵⁸ *Use of Mercenaries*, UN Doc A/69/338, 3 [2].

¹⁵⁹ *Use of Mercenaries*, UN Doc A/70/330, 2, 3 [1]–[4], 23 [88].

¹⁶⁰ Working Group on the Use of Mercenaries, 'Concept Note' (Panel Event on Foreign Fighters, UN Headquarters, New York, 23 July 2015) 1 <<http://www.ohchr.org/Documents/Issues/Mercenaries/WG/ConceptNoteForeignfighters.pdf>>.

¹⁶¹ Office of the High Commissioner for Human Rights, 'Human Rights Council Holds Interactive Dialogue on the Rights of Older Persons, and on the Uses of Mercenaries' (Press Release, 16 September 2015) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16436&LangID=E>>.

¹⁶² *Use of Mercenaries*, UN Doc A/70/330, 6 [15].

fighters impact on human rights.¹⁶³ The HRC renewed the WGUM's mandate in September 2015 in HRC Resolution 33/4,¹⁶⁴ but the resolution did not explicitly ask the WGUM analyse the foreign fighter phenomena; nor did the resolution even mention the phenomena in passing. Nonetheless, the WGUM continues to examine the foreign fighter phenomena, as part as the Working Group's analysis of the 'evolution of the phenomena of mercenarism' and the impact of mercenarism on the right of peoples to self-determination.¹⁶⁵

2 The Methods Used by the WGUM to Investigate the Subject of Its Mandate

The WGUM's investigation of the subject of its mandate has been contested from its outset, if not even before the CHR created the Working Group. Western Member States of the UN have long argued that it is the Sixth Committee — and not other UN organs — that should consider legal issues regarding mercenaries.¹⁶⁶ A further locus of contestation is the very name 'Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination'. The Working Group's name reflects, as Nigel White

¹⁶³ See, eg, *Summary Record of the 37th Meeting*, UN GAOR, 3rd Comm, 70th sess, 37th mtg, Agenda Items 70 and 71, UN Doc A/C.3/70/SR.37 (6 January 2016) 6–8 [31]–[47]; Working Group on the Use of Mercenaries, *Panel Event: Thursday 14 April 2016, Room XXIII, Palais des Nations, Geneva — Foreign Fighters and New Forms of Mercenarism*, Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/EventApril2016.aspx>> ('*Foreign Fighters and New Forms of Mercenarism*'); Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination on Its Mission to Belgium*, UN Doc A/HRC/33/43/Add.2 (8 July 2016) 3 [4]–[6], 4 [14]. Note: the mission to Belgium took place from 12–16 October 2015.

¹⁶⁴ *Use of Mercenaries*, UN Doc A/HRC/RES/33/4, para 21. Note: HRC Resolution 33/4 was adopted on 29 September 2015.

¹⁶⁵ See, eg, Human Rights Council, *Facts and Figures with Regard to the Special Procedures in 2016*, UN Doc A/HRC/34/34/Add.1 (31 January 2017) 22; Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/71/318 (9 August 2016) 4 [2]–[4], 11–16 [27]–[49]. For discussion, see Elżbieta Karska and Karol Karski, 'Introduction: The Phenomenon of Foreign Fighters and Foreign Terrorist Fighters — An International Law and Human Rights Perspective' (2016) 18 *International Community Law Review* 377, 283–5.

¹⁶⁶ See, eg, *Summary Record of the 27th Meeting*, UN GAOR, 3rd Comm, 42nd sess, 27th mtg, Agenda Items 12, 91, 92, 95, 96 and 97, UN Doc A/C.3/42/SR.27 (2 November 1987) 12–13 [59] (Mr Hoppe, representative of Denmark, speaking on behalf of the European Economic Community); *Summary Record of the 43rd Meeting*, UN ESCOR, 57th sess, 43rd mtg, Agenda Items 5, 9 and 11, UN Doc E/CN.4/2001/SR.43 (17 April 2001) 7 [31] (Mr Noirfalisse, representative of Belgium, speaking on behalf of the EU and associated states); *Summary Record of the 50th Meeting*, UN GAOR, 3rd Comm, 56th sess, 50th mtg, Agenda Items, 114, 118 and 119, UN Doc A/C.3/56/SR.50 (18 December 2002) 3 [9] (Mr Maertens, representative of Belgium, speaking on behalf of the EU).

points out, the WGUM's 'traditional concern ... with extending and entrenching the prohibition on mercenaries and mercenary activities.'¹⁶⁷ Former members of the WGUM, especially José L Gómez del Prado, describe PMSCs as 'new forms of mercenarism, in which "traditional" mercenaries were being absorbed by private security companies'.¹⁶⁸ Representatives of the PMSC industry perceive the WGUM as having conflated and continuing to conflate the legal activities of PMSCs with mercenary activities;¹⁶⁹ key Western states in the growth of the industry share that perception.¹⁷⁰ As James Cockayne and others point out, the WGUM's effectiveness is 'hamstrung' by the strong opposition of the PMSC industry and many Western states to the WGUM's monitoring of mercenary activities *and* the activities of PMSCs.¹⁷¹

On-site missions, especially country visits, are a vital part of how the WGUM investigates its thematic issue. At the WGUM's first session, 'members decided that the Working Group would undertake [country] visits largely on the invitation of Governments, but could also take the initiative to approach Governments when appropriate.'¹⁷² The WGUM usually carries out its country visits with two of its members over a period of five days. In some cases, the visits last over one week or more; for example, its mission to the USA took place from 20 July – 3 August 2009.¹⁷³ During their country visits, the members, in line with terms of reference for fact-finding missions by Special Procedures, meet with a variety of state actors

¹⁶⁷ White, 'Comments on the UN Working Group's Draft Convention', above n 33, 136.

¹⁶⁸ *37th Meeting*, UN Doc A/C.3/62/SR.37 (30 November 2007) 7 [37] (Mr Gómez del Prado, Chairperson of the Working Group on the Use of Mercenaries), quoted in Matteo, above n 142, 167.

¹⁶⁹ *Communication of Peace and Security Companies*, UN Doc A/60/263 (17 August 2005) annex II 21. See also Sarah Percy, 'Regulating the Private Security Industry: A Story of Regulation the Last War' (2012) 97 *International Review of the Red Cross* 941, 953–4.

¹⁷⁰ See, eg, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination on its Mission to the European Union Institutions — Addendum — Comments of the European Union Institutions to the Report of the Working Group*, UN Doc A/HRC/33/43/Add.7 (14 September 2016) 2 [3(b)]; *Summary Record of the 34th Meeting*, UN GAOR, 63rd sess, 34th mtg, Agenda Items 62 and 63, UN Doc A/C.3/63/SR.34 (29 January 2009) 3 [10] (Mr McMahan, representative of the USA) ('34th Meeting').

¹⁷¹ James Cockayne et al, *Beyond Market Forces: Regulating the Global Security Industry* (International Peace Institute, 2009) 9 <http://www.ipinst.org/wp-content/uploads/publications/beyond_market_forces_final.pdf>.

¹⁷² Amada Benavides de Pérez, Chairperson, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, UN Doc E/CN.4/2006/11 (23 December 2005) 9 [30] ('*Use of Mercenaries*').

¹⁷³ Shaista Shameem, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to the United States of America* (20 July to 3 August 2009), UN Doc A/HRC/15/25/Add.3 (15 June 2010) 4 [1].

(such as politicians, bureaucrats and representatives of armed forces), civil society actors (such as non-governmental organisations and national human rights institutions), representatives of the PMSC industry, and alleged victims of human rights violations.¹⁷⁴ Reports on country visits are a form of follow-up on country-visits, published online and as addenda to annual reports;¹⁷⁵ however, the fact that only one country has received more than one visit from the WGUM — the WGUM visited Honduras in 2006 and again in 2013¹⁷⁶ — raises questions about the extensiveness of the WGUM's follow-up to its country-visits.

A key focus of the WGUM's analysis of its thematic issue is examining the root causes of the growth of the PMSC industry. Through its on-site missions 'and information received', as the WGUM's 2007 annual report to the HRC explained:

the Working Group has observed at least three national conditions which allow the recruitment of personnel for these private companies: (a) unemployment, and/or underemployment, and the availability of low-wage labour trained in security and military functions; (b) a migratory population ready to work abroad; and (c) scarce or weak national legislation that allows largely unmonitored activities of PMSCs.¹⁷⁷

A critical approach to how human rights bodies study root causes¹⁷⁸ would suggest that the WGUM has conflated the root causes of PMSCs with the effects of the growth of PMSCs as an industry, or has identified certain causes only to put them aside. A more nuanced view would suggest that the WGUM since its establishment has shifted its focus on the root causes of the growth of the PMSC industry, to a focus on how to delimit the privatisation of force. Indeed, in 2005, the WGUM decided to undertake a comparative analysis of national legislation and regional perspectives

¹⁷⁴ See, eg, Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to Honduras (18–22 February 2013)*, UN Doc A/HRC/24/45/Add.1 (5 August 2013) 11–3 [36]–[45] ('*Mission to Honduras*'). For the terms of reference, see Fatma-Zhora Ksentini, Rapporteur, *Report of the Meeting of Special Rapporteurs/Representatives, Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme, Geneva, 20–23 May 1997*, UN Doc E/CN.4/1998/45 (20 November 1997) annex ('*Terms of Reference for Fact-Finding Missions by Special Rapporteurs/Representatives of the Commission on Human Rights*').

¹⁷⁵ For the reports published online, see Working Group on the Use of Mercenaries, *Country Visits*, Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/CountryVisits.aspx>>.

¹⁷⁶ See *ibid.*

¹⁷⁷ *Use of Mercenaries*, UN Doc A/HRC/4/42, 20 [59].

¹⁷⁸ See generally Susan Marks, 'Human Rights and Root Causes' (2011) 74 *Modern Law Review* 57, 60–3, 70–8.

on PMSCs,¹⁷⁹ and at regional ‘round tables’ over 2007–10, the WGUM discussed principles for a possible draft convention on PMSCs.¹⁸⁰

Pursuant to the resolution that established its mandate,¹⁸¹ the WGUM began holding regional conferences on PMSCs in 2007.¹⁸² General Assembly Resolution 62/145,¹⁸³ HRC Resolution 7/21¹⁸⁴ and HRC Resolution 10/11¹⁸⁵ requested, inter alia, the WGUM hold regional conferences. The first conference, which the OHCHR organised in ‘close collaboration’ with the WGUM,¹⁸⁶ was for the Latin American and Caribbean region and took place in December 2007 in Panama. The conference involved both state and non-state actors and addressed, inter alia, proposals for new international principles for ensuring that PMSCs respect human rights.¹⁸⁷ A conference in Moscow in October 2008 for the Eastern European Group and

¹⁷⁹ *Use of Mercenaries*, UN Doc E/CN.4/2006/11, 9 [34].

¹⁸⁰ *Use of Mercenaries*, UN Doc A/HRC/15/25, 7–8 [24]–[28]. For further discussion of the regional conferences, see below Part IV(C).

¹⁸¹ *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 12(b) (asking the WGUM ‘[t]o seek opinions and contributions from Governments and intergovernmental and non-governmental organizations on questions relating to its mandate’).

¹⁸² See José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Latin American and Caribbean Regional Consultation on the Effects of the Activities of Private Military and Security Companies on the Enjoyment of Human Rights: Regulation and Monitoring (17–18 December 2007)*, UN Doc A/HRC/7/7/Add.5 (5 March 2008) 6 [6] (*‘Latin American and Caribbean Regional Consultation’*), explaining that the Panama meeting, 17–18 December 2007, was held pursuant to *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 62/145, UN GAOR, 62nd sess, 76th plen mtg, Agenda Item 69, Supp No 49, UN Doc A/RES/62/145 (4 March 2008) (*‘Use of Mercenaries’*). However, GA Res 62/145 was adopted on 18 December 2007, which is contemporaneous with the Panama meeting. The likely basis for the Panama meeting is *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 12, and the draft of GA Res 62/145: see *Draft Resolution — Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, 3rd Comm, 62nd sess, Agenda Item 69, UN Doc A/C.3/62/L.62 (8 November 2007) para 15 (where the General Assembly thanked the OHCHR for convening the regional meeting in Panama, and asked the OHCHR ‘to convene other regional governmental consultations on this matter’).

¹⁸³ *Use of Mercenaries*, UN Doc A/RES/62/145, para 15.

¹⁸⁴ *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 7.

¹⁸⁵ *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 10/11, UN GAOR, 10th sess, 42nd mtg, Supp No 53, UN Doc A/HRC/RES/10/11 (26 March 2009) para 16 (*‘Use of Mercenaries’*).

¹⁸⁶ *Latin American and Caribbean Regional Consultation*, UN Doc A/HRC/7/7/Add.5, 2.

¹⁸⁷ *Ibid* 6 [9], 8–9 [20]–[28].

Central Asia Region¹⁸⁸ and a conference in Bangkok in October 2009 for Asia and the Pacific¹⁸⁹ discussed elements for a possible draft convention on PMSCs; both conferences involved state and non-state actors. The WGUM held discussions with state and non-state actors on progress on achieving the *Draft PMSC Convention* at conferences for the Africa Region in March 2010 in Addis Ababa¹⁹⁰ and for the Western European and Others Group in April 2010 in Geneva.¹⁹¹ A common thread of argument at the five regional conferences was that states should not outsource inherently state functions to PMSCs.

C *Advising Governments and Other Relevant Actors*

Stemming from its analysis of its thematic issue, the WGUM's advice about, inter alia, responses to the growth of PMSCs, includes recommendations that 'regulatory gaps' at national, regional and global levels be closed;¹⁹² that all states should 'exercise the utmost vigilance in banning the use of private companies offering international military consultancy and security services when intervening in armed conflicts

¹⁸⁸ Alexander Nikitin, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Eastern European Group and Central Asia Region; Regional Consultation on the Activities of Private Military and Security Companies: Regulation and Oversight (17–18 October 2008)*, UN Doc A/HRC/10/14/Add.3 (26 February 2009) 6–7 [16], 9 [22]–[24] ('*Eastern European Group and Central Asia Region*').

¹⁸⁹ Shaista Shameem, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Regional Consultation for Asia and the Pacific on the Activities of Private Military and Security Companies: Regulation and Monitoring (26–27 October 2009)*, UN Doc A/HRC/15/25/Add.4 (1 April 2010) 6–7 [19]–[26] ('*Regional Consultation for Asia and the Pacific*').

¹⁹⁰ Shaista Shameem, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Regional Consultation for Africa on the Activities of Mercenaries and Private Military and Security Companies: Regulation and Monitoring, 3–4 March 2010*, UN Doc A/HRC/15/25/Add.5 (2 June 2010) 10 [33]–[37] ('*Regional Consultation for Africa*').

¹⁹¹ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Regional Consultation for Western European and Others Group on the Activities of Mercenaries and Private Military and Security Companies: Regulation and Monitoring (14 April 2010)*, UN Doc A/HRC/15/25/Add.6 (5 July 2010) 6–8 [14]–[26] ('*Regional Consultation for Western European and Others Group*').

¹⁹² See, eg, Working Group on the Use of Mercenaries, *Annual Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/30/34 (8 July 2015) 21–2 [124], 22 [127] ('*Annual Report*'); Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/33/43 (13 July 2016) 21 [90] ('*Report*').

or actions to destabilize constitutional regimes’;¹⁹³ and that victims of human rights violations involving mercenaries or PMSCs should have access to effective remedies.¹⁹⁴ As regards accountability and redress measures, the WGUM sees an international convention on PMSCs as the keystone of the regulation of PMSCs.¹⁹⁵ The WGUM does not completely reject self-regulation but sees self-regulation by itself as insufficient; the WGUM recommends that self-regulation be combined with national laws and that the *ICoC* ‘be combined with an independent and authoritative “watchdog” in order to provide ‘a trustworthy and effective complaint and redress mechanism for victims’.¹⁹⁶

Some have argued that the WGUM of late has focused less on elucidating the impact of mercenary and mercenary-related activities on human rights, and more on developing principles that proscribe PMSCs from performing inherently state functions.¹⁹⁷ According to the WGUM, inherently state functions are ‘consistent with the principle of State monopoly on the legitimate use of force’ and include ‘direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, [and] knowledge transfer with military, security and policing application’.¹⁹⁸ Clearly, elaborating principles to deal with the impact of PMSCs on human rights is a core aspect of the WGUM’s mandate.¹⁹⁹ Western

¹⁹³ *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 27/10, UN GAOR, 27th sess, 39th mtg, Supp No 53A, UN Doc A/HRC/RES/27/10 (3 October 2014) para 5 (*‘Use of Mercenaries’*).

¹⁹⁴ Working Group on the Use of Mercenaries, *Submission by the Working Group on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/WG.10/2/CRP.1 (6 August 2012) 3 [2]–[3], 7 [17], 9 [24], 10 [26], 12 [35]–[36] (*‘Submission by the Working Group on the Use of Mercenaries’*).

¹⁹⁵ See, eg, *Annual Report*, UN Doc A/HRC/30/34, 22 [128]; *Report*, UN Doc A/HRC/33/43, 22 [96].

¹⁹⁶ Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/64/311 (20 August 2009) 10 [22] (*‘Use of Mercenaries’*).

¹⁹⁷ Krahmman, ‘From “Mercenaries” to “Private Security Contractors”’, above n 104, 360–2; Matteo, above n 144, 172–5, 178–9. See also Laurence Juma and James Tsabora, ‘The South African Defence Review (2012) and Private Military/Security Companies (PMSCs): Heralding a Shift from Prohibition to Regulation?’ (2013) 16 *Potchefstroomse Elektroniese Regsblad* 232, 250–3.

¹⁹⁸ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) 12 [51].

¹⁹⁹ See especially *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 2(a); *Use of Mercenaries*, UN Doc A/HRC/RES/33/4, para 21 (*‘[the HRC renews] for a period of three years, the mandate of the Working Group, for it to continue to undertake the tasks described by the Human Rights Council in its resolution 7/21 of 28 March 2008 and in all other relevant resolutions on the subject’*).

states argue, though, that providing recommendations on developing international law lies outside the competence of the WGUM. The USA, for instance, has said that the *Draft PMSC Convention* ‘prejudged the ongoing work of the Group’ and ‘strayed from the original mandate of considering the *possibility* of elaborating an international regulatory framework.’²⁰⁰

Leaving in abeyance debates about what is within the mandate and thus the competence of the WGUM, it is clear that the concept of ‘human security’ is inextricably linked with the WGUM’s advice to state actors and other relevant actors, including intergovernmental organisations (‘IGOs’) and the PMSC industry. As the WGUM emphasised in its report on its 2013 visit to Honduras (a follow-up to its 2006 visit):

[T]he right to security is an inherent human right of all and underpins the enjoyment of other human rights. Outsourcing the use of force to PMSCs seriously undermines the rule of law and the effective functioning of a democratic State institution responsible for ensuring public safety in accordance with international human rights standards and national laws.²⁰¹

The language of human security informs not only the WGUM’s advice, particularly regarding the *Draft PMSC Convention*, but also the WGUM’s advocacy on behalf of victims of violations alleged to have been committed by mercenaries or PMSCs.²⁰²

Advising the UN and state actors on how to strengthen laws regarding mercenaries is an ordinary part of the WGUM’s mandate. CHR Resolution 2005/2 requested the WGUM continue the SRUM’s work on ‘strengthening ... the international legal framework’ on mercenaries.²⁰³ General Assembly resolutions about ‘the use of mercenaries’ made on an annual basis have reiterated that request,²⁰⁴ as have the HRC resolutions that have extended the WGUM’s mandate.²⁰⁵ How much emphasis of

²⁰⁰ *Summary Record of the 45th Meeting*, UN GAOR, 3rd Comm, 66th sess, 45th mtg, Agenda Items 27, 64, 67, 68, 69 and 107, UN Doc A/C.3/66/SR.45 (7 February 2012) 6 [40] (Mr Sammis, representative of the USA) (emphasis added) (‘45th Meeting’).

²⁰¹ *Mission to Honduras*, UN Doc A/HRC/24/45/Add.1, 15 [53].

²⁰² See below Part IV(E).

²⁰³ *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 13.

²⁰⁴ See, eg, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 69/163, UN GAOR, 69th sess, 73rd plen mtg, Agenda Item 67, Supp No 49, UN Doc A/RES/69/163 (10 February 2015) para 15 (‘*Use of Mercenaries*’); *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 70/142, UN GAOR, 70th sess, 80th plen mtg, Agenda Item 71, UN Doc A/RES/70/142 (9 February 2016) para 17 (‘*Use of Mercenaries*’).

²⁰⁵ *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 4; *Use of Mercenaries*, UN Doc A/HRC/RES/15/12, para 12; *Use of Mercenaries*, UN Doc A/HRC/RES/24/13, para 16; *Use of Mercenaries*, UN Doc A/HRC/RES/33/4, para 17.

late the WGUM has placed on providing advice pursuant to those requests compared with providing advice on dealing with PMSCs, however, is open to question. In 2007, the WGUM, by its own admission, ‘agreed, as a short-term objective, to promote the ratification/accession of Member States’ to the *Mercenaries Convention*, the Working Group’s ‘long-term objective’ being to develop a protocol to the *Convention* ‘to address newer forms of mercenarism and the activities of private military and private security companies.’²⁰⁶

On the one hand, the WGUM’s mandate still contains the request that the Working Group continue with efforts to change the definition of mercenary in line with Bernalles Ballesteros’ 2004 proposal.²⁰⁷ The proposal had argued, for example, that a new definition ‘should avoid a systematic accumulation of competing requirements, which would always prevent the identification of a mercenary’ and ‘should be proposed as an amendment to the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*.’²⁰⁸ The *Mercenaries Convention* had retained the cumulative definition of ‘mercenary’ set out in *Additional Protocol I*,²⁰⁹ apparently because delegates to the Ad Hoc Committee on drafting the *Mercenaries Convention* felt that departing from the definition risked creating confusion if international law contained two different definitions.²¹⁰ On the other hand, as regards its ‘long-term objective’, the WGUM in the past several years has focused less on framing its recommendations in line with the 2004 proposal and more on developing principles for a new convention on the use, monitoring and oversight of PMSCs as ‘corporate actors whose operations pose potential threats to human rights.’²¹¹ The WGUM’s shift of focus may be due to changes in the composition of the Working Group, when its original mandate-holders reached their six-year time limit and the HRC replaced the mandate-holders.²¹²

²⁰⁶ Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/62/301 (24 August 2007) 5 [10]. See also José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, UN Doc A/HRC/7/7 (9 January 2008) 5 [9] (*‘Use of Mercenaries’*), re-iterating the above ‘longer-term objective’.

²⁰⁷ *Use of Mercenaries*, UN Doc A/HRC/RES/24/13, para 17.

²⁰⁸ *Use of Mercenaries*, UN Doc E/CN.4/2004/15, 15 [45] (emphasis added).

²⁰⁹ Art 47(2).

²¹⁰ Ad Hoc Committee on Drafting a Convention Against Mercenaries, *Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, UN GAOR, 36th sess, UN Doc A/36/43 (17 March 1981) 17 [53].

²¹¹ Rona, ‘Remarks at the Montreux +5 Conference’, above n 144.

²¹² Matteo, above n 144, 178–9. The six-year time limit for Special Procedures mandate-holders was imposed in 1999: see, *Fifty-Fifth Session*, UN Doc E/CN.4/1999/167, 378 [552].

In undertaking various fact-finding activities pursuant to its mandate, the WGUM has highlighted the existence of gaps — ‘grey zones’²¹³ or ‘lacunae’²¹⁴ — in domestic and international laws with respect to the use and regulation of PMSCs. The gaps in international law include how PMSCs fall outside — or ‘evade’²¹⁵ — the scope of the cumulative definition of mercenary.²¹⁶ Recent reports by the WGUM note the persistence of gaps in national laws, including ‘the lack of a clear and publicly accountable body dedicated to licensing, a mechanism for monitoring the post-licensing activities of private security companies and a national registration system for such companies.’²¹⁷ The critical import of the WGUM’s concern and advice about regulatory gaps is that the existence of interstitial spaces in domestic and international laws is inimical to the rule of law and undermines the protection of human rights;²¹⁸ thus, the WGUM argues, an international convention on the use of PMSCs is ‘the most efficient solution to the challenge of regulating PMSCs.’²¹⁹

The WGUM took the lead role in developing the *Draft PMSC Convention* and presented it to the HRC in 2010. One commentator, writing in 2015, suggests that present members of the WGUM have distanced themselves from their predecessors’ focus on the *Draft* as *the* means for regulating PMSCs,²²⁰ but one member of the WGUM writing in late 2015 said that the WGUM continues to regard itself as

²¹³ *Latin American and Caribbean Regional Consultation*, UN Doc A/HRC/7/7/Add.5, 7 [16].

²¹⁴ *Ibid* 8 [23].

²¹⁵ E L Gaston, ‘Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement’ (2008) 49 *Harvard International Law Journal* 221, 221, 242.

²¹⁶ *Mercenaries Convention* art 1; *Organization of African Unity Convention for the Elimination of Mercenarism in Africa*, opened for signature 3 July 1977, 1490 UNTS 95 (entered into force 22 April 1985) art 1(1); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1979 UNTS 3 (entered into force 7 December 1978) art 47.

²¹⁷ *Report*, UN Doc A/HRC/33/43, 6 [23]. At 5 [15]:

The present report focuses on the laws and regulations of six countries of the Commonwealth of Independent States (Azerbaijan, Kazakhstan, Kyrgyzstan, the Republic of Moldova, Tajikistan and Uzbekistan), four countries in the Asia and Pacific region (Australia, New Zealand, Nauru and Papua New Guinea) and the United States of America in North America.

NB: the report was distributed on 13 July 2016.

²¹⁸ See, eg, *Annual Report*, UN Doc A/HRC/30/34, 21–2 [124], 22 [127]; *Report*, UN Doc A/HRC/33/43, 21 [90].

²¹⁹ *Submission by the Working Group on the Use of Mercenaries*, UN Doc A/HRC/WG.10/2/CRP.1, 3 [5].

²²⁰ Matteo, above n 144, 178, citing a video call by the author with Felipe Daza, Coordinator of the Control PMSC coalition, 1 October 2014.

‘responsible’ for the *Draft*.²²¹ Although responsibility for developing the *Draft* has ‘shifted’ to the UN Open-Ended Intergovernmental Working Group on PMSCs (‘IGWG’)²²² and to ‘representatives of Governments’,²²³ the WGUM continues to support the *Draft* in IGWG meetings, where the WGUM acts as a ‘resource person’ for advocacy on the *Draft*,²²⁴ and in annual meetings of Special Procedures mandate-holders.²²⁵

D Alerting UN Organs and the International Community to the Need to Address Specific Situations and Issues

Just as analysing thematic issues or country situations is a key function of Special Procedures, so, too, is their ‘alerting’ function. Special Procedures, as the *Manual of Operations of the Special Procedures* explains, ‘alert United Nations organs and agencies and the international community in general to the need to address specific situations and issues.’²²⁶ Hence, Special Procedures ‘have a role in providing “early warning” and encouraging preventive measures’²²⁷ in a ‘proactive’ manner.²²⁸ The WGUM’s annual reports to the HRC and the General Assembly²²⁹ serve an alerting function insofar as the reports are a useful tool for canvassing preventive measures on human rights violations. By definition, though, the alerting function is time-sensitive. Arguably, the thoroughness of research and preparation needed for the

²²¹ Gabor Rona, ‘Foreign Fighters, Mercenaries, and Private Military Companies under International Law’ on *Just Security* (18 November 2015) <<https://www.justsecurity.org/27732/foreign-fighters-mercenaries-pmscs-ihl/>>.

²²² Østensen, above n 150, 62.

²²³ *Summary Record of the 36th Meeting*, UN GAOR, 3rd Comm, 65th sess, 36th mtg, Agenda Items 66 and 67, UN Doc A/C.3/65/SR.36 (7 January 2011) 13 [92] (Mr Nikitin, Chairperson-Rapporteur of the WGUM).

²²⁴ See, eg, Abdul S Minty, Chairperson-Rapporteur, *Summary of the Third Session of the Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies*, UN Doc A/HRC/WG.10/3/2 (2 September 2014) 4 [9].

²²⁵ *Twenty-First Annual Meeting of the Special Procedures*, UN Doc A/HRC/28/41, 5 [15]; Human Rights Council, *Report on the Twenty-Third Annual Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairpersons of Working Groups of the Special Procedures of the Human Rights Council (Geneva, 6 to 10 June 2016), Including Updated Information on Special Procedures*, UN Doc A/HRC/34/34 (31 January 2017), 6 [24].

²²⁶ *Manual of Operations of the Special Procedures*, above n 78, 5 [5].

²²⁷ *Ibid.*

²²⁸ *Ibid.* 21.

²²⁹ Working Group on the Use of Mercenaries, *Annual Reports*, Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/AnnualReports.aspx>>.

reports²³⁰ militates against the capacity of reports to provide ‘early warning’ in the requisite timely manner.²³¹

Public statements are useful tools for publicising information on human rights violations in a time-sensitive and proactive manner. Although the *Code* requires Special Procedures to address urgent appeals to governments through ‘diplomatic channels’,²³² mandate-holders can also issue urgent appeals, including appeals issued with other mandate-holders, through public statements when ‘a Government has repeatedly failed to provide a substantive response to communications’ about ‘grave’ situations’.²³³ If the WGUM’s press releases and statements page on the OHCHR website²³⁴ are any guide to the matter, the practice of the WGUM with regard to issuing public statements is twofold. First, the WGUM issues press releases and statements/messages individually (not in conjunction with other Special Procedures) about its on-site missions (completed or forthcoming),²³⁵ its concerns about gaps in the provision by countries of accountability measures for PMSCs²³⁶ and meetings about the regulation of PMSCs held by the WGUM or by other various actors in which the WGUM has participated.²³⁷ Second, the WGUM issues press releases

²³⁰ *Code of Conduct for Special Procedures Mandate-Holders*, UN Doc A/HRC/RES/5/2, annex arts 6(a), 8; *Manual of Operations of the Special Procedures*, above n 78, 11 [23]–[26], 20 [76].

²³¹ See generally Ingrid Nifosi-Sutton, ‘The System of the UN Special Procedures: Some Proposals for Change’ in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future of the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia, 2011) 389, 416.

²³² *Code of Conduct for Special Procedures Mandate-Holders*, UN Doc A/HRC/RES/5/2, annex art 14; *Manual of Operations of the Special Procedures*, above n 78, 14 [44]. In carrying out its advocacy function as a Special Procedure, the WGUM can issue letters of urgent appeal and letters of allegation to governments: see below Part IV(E).

²³³ *Manual of Operations of the Special Procedures*, above n 78, 15 [49]. See also *Code of Conduct for Special Procedures Mandate-Holders*, UN Doc A/HRC/RES/5/2, annex art 10.

²³⁴ Office of the High Commissioner for Human Rights, *OHCHR News 2014–Present* <<http://www.ohchr.org/en/NewsEvents/Pages/NewsSearch.aspx?SID=Mercenaries>>.

²³⁵ See, eg, Office of the High Commissioner for Human Rights, ‘UN Expert Group on Mercenaries on First Visit to the Central African Republic’ (Press Release, 6 October 2016) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20646&LangID=E>>.

²³⁶ See, eg, Office of the High Commissioner for Human Rights, ‘Blackwater Sentencing — UN Experts on Mercenaries Call for International Regulation of Private Security’ (Press Release, 14 April 2015) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15840&LangID=E>>.

²³⁷ See, eg, Office of the High Commissioner for Human Rights, ‘Expert Group on Mercenaries Debates the Issue of Foreign Fighters and Human Rights’ (Press Release, 20 July 2015) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews>>.

(or statements) jointly with other mandate-holders on commemorative occasions²³⁸ and on a variety of country situations.²³⁹

E Advocacy on Behalf of Victims of Human Rights Violations

Advocacy on behalf of victims of human rights violations alleged to have been committed by mercenaries and PMSCs is a critically important function of the WGUM's mandate and inextricably linked with its other functions. Central to the WGUM's advocacy for victims is the effort to remind states of their responsibility to provide redress. As the WGUM reported to the seventh session of the HRC, the execution of contracts with PMSCs does not absolve states of the responsibility to provide redress for victims of violations committed by the PMSCs acting under or beyond the scope of their contracts:

As pointed out by the Human Rights Committee, States have the responsibility to take appropriate measures or exercise due diligence to prevent, punish, investigate and redress the harm caused by acts of PMSCs or their staff that impair human rights. States which contract PMSCs to export their activities abroad have to respect their international legal obligations, which cannot be eluded by outsourcing some of its functions ...²⁴⁰

The WGUM cited the Committee's *General Comment No 31* on the nature of the general legal obligations imposed on State parties to the *International Covenant on*

aspx?NewsID=16249&LangID=E> (the press release was about a panel discussion held by the WGUM at the UN Headquarters in New York on 23 July 2015); Rona, 'Remarks at the Montreux +5 Conference', above n 144.

²³⁸ See, eg, Office of the High Commissioner for Human Rights, '“As the Covenants Turn 50, it is Time to Turn Norms into Action” — UN Experts' (Press Release, 9 December 2015) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16861&LangID=E>>; Working Group of Experts on People of African Descent, 'Human Rights Protection Must Gain New Momentum at World Humanitarian Summit — UN Experts: Statement by Special Procedures Mandate Holders of the Human Rights Council in Advance of the World Humanitarian Summit' (Press Release/Statement, 20 May 2016) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19997&LangID=E>>.

²³⁹ See, eg, Mads Andenas, Chair-Rapporteur of the Working Group on Arbitrary Detention, 'Open Letter by Special Procedures Mandate-Holders of the United Nations Human Rights Council to the Government and the Congress of the Republic of Columbia' (Press Release, 29 September 2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15116&LangID=E>>; Karima Bennoune, Special Rapporteur in the Field of Cultural Rights, 'UN Experts Urge Turkey to Adhere to Its Human Rights Obligations Even in Time of Declared Emergency' (Press Release, 19 August 2016) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20394&LangID=E>>.

²⁴⁰ *Use of Mercenaries*, UN Doc A/HRC/7/7, 22–3 [51] (citations omitted).

Civil and Political Rights.²⁴¹ The *General Comment* did not mention PMSCs but instead spoke of ‘private persons or entities’ and underscored the importance of art 2 of the *ICCPR*:

There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.²⁴²

To reiterate, then, in undertaking its advocacy function as a Special Procedure, the WGUM underscores the challenges facing the implementation of human rights standards in the market for force.

Advocacy on behalf of victims of violations, by calling for states to provide redress, underpins the *Draft PMSC Convention*. In addition to reaffirming the state monopoly on the legitimate use of force as well as promoting cooperation between states in the licensing and regulation of PMSCs, the stated purposes of the *Draft* include establishing mechanisms ‘to prosecute the perpetrators [of violations of human rights and IHL] and to provide effective remedies to the victims.’²⁴³ Titled ‘State Responsibility to Impose Criminal, Civil and/or Administrative Sanctions on Offenders and Provide Remedies to Victims’, Part IV of the *Draft* elaborates the theme, if not a norm, of redress in the market for force. The *Draft* does not provide for redress against PMSCs themselves, but Part VI, titled ‘International Oversight and Monitoring’, provides alternative pathways for redress. Part IV establishes a Committee on Regulation, Oversight and Monitoring of PMSCs to review the application of the Convention,²⁴⁴ and asks State Parties to implement provisions in their national laws to recognise the competence of the Committee to receive individual and group petitions when complainants have exhausted local remedies.²⁴⁵ The *Draft PMSC Convention* builds, then, on the norm of redress as embodied in art 2 of the *ICCPR* and elaborated in General Assembly Resolution 60/147.²⁴⁶ Importantly, the norm of redress can be

²⁴¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (*ICCPR*).

²⁴² Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 3 [8] (*General Comment No 31 [80]*).

²⁴³ *Draft PMSC Convention*, UN Doc A/HRC/15/25, annex art 1(1)(e).

²⁴⁴ *Ibid* art 29.

²⁴⁵ *Ibid* art 37.

²⁴⁶ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN GAOR, 60th sess, 64th plen mtg, Agenda Item 71(a), Supp No 49, UN Doc A/RES/60/147 (21 March 2006) annex (*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*).

found in sources of international law, particularly in treaty form and in customary international law,²⁴⁷ and other contributions to standard setting, such as General Assembly resolutions,²⁴⁸ HRC Resolutions,²⁴⁹ Economic and Social Council resolutions²⁵⁰ and general comments issued by human rights treaty bodies.²⁵¹ Arguably, the norm has not simply emerged in international society; rather, the norm has, or so constructivist international relations theory would suggest, cascaded in international legal discourse and reached a tipping point whereupon the norm can be internalised by key actors in international society.²⁵²

²⁴⁷ See generally Diane F Orentlicher, 'Addressing Gross Human Rights Abuses: Punishment and Victim Compensation' in Louis Henkin and John Lawrence Hargrove (eds), *Human Rights: An Agenda for the Next Century* (Washington DC: American Society of International Law, 1994) 425, 426–7, 430–1; Theo van Boven, 'Victim-Oriented Perspectives: Rights and Realities' in Thorsten Bonacker and Christoph Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse* (Asser Press, 2013) 17, 20–6.

²⁴⁸ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc A/RES/60/147; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 40th sess, 96th plen mtg, Agenda Item 98, Supp No 53, UN Doc A/RES/40/34 (29 November 1985) annex ('*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*').

²⁴⁹ *Business and Human Rights: Improving Accountability and Access to Remedy*, HRC Res 32/10, UN GAOR, 32nd sess, 42nd mtg, Agenda Item 3, Supp No 53, UN Doc A/HRC/RES/32/10 (15 July 2016); *Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 17/4, UN GAOR, 17th sess, 33rd mtg, Agenda Item 3, Supp No 53, UN Doc A/HRC/RES/17/4 (6 July 2011).

²⁵⁰ *Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, ESC Res 1989/57, UN ESCOR, 1st regular session of 1989, 15th plen mtg, Agenda Item 11, Supp No 1, UN Doc E/RES/1989/57 (24 May 1989); *United Nations Standards and Norms in Crime Prevention and Criminal Justice*, ESC Res 1998/21, UN ESCOR, Substantive session of 1998, 44th plen mtg, Agenda Item 14(c), Supp No 1, UN Doc E/RES/1998/21 (28 July 1998).

²⁵¹ Committee Against Torture, *General Comment No 2: Implementation of Article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008) 4–5 [15]; Committee on Economic, Social and Cultural Rights, *General Comment No 9: The Domestic Application of the Covenant*, UN Doc E/C.12/1998/24 (3 December 1998) 2 [2]; Committee on Economic, Social and Cultural Rights, *Report on the Sixteenth and Seventeenth Sessions (28 April – 16 May 1997, 17 November – 5 December 1997)*, UN Doc E/1998/22 (1998) annex IV ('*General Comment No 7 (1997): The Right to Adequate Housing (Article 11, Paragraph 1 of the Covenant): Forced Evictions*') 116–17 [16]; Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, UN Doc HRI/GEN/1/Rev.9 (Vol 1) (30 September 1992) 3 [14]; Human Rights Committee, *General Comment No 31 [80]*, UN Doc CCPR/C/21/Rev.1/Add.13, 3 [8].

²⁵² On the concept of norm cascade and internalisation, see Finnemore and Sikkink, above n 29, 887.

The absence of a legally binding convention on PMSCs that sets out, *inter alia*, avenues for redress for victims of human rights violations underscores the need for other avenues of advocacy for such victims. Those avenues include the WGUM's complaints procedure and use of communications (letters of urgent appeal and letters of allegation). The WGUM's 2006 annual report to the General Assembly sets out the WGUM's methods of work,²⁵³ including a complaint mechanism for addressing complaints about mercenary and mercenary-related activities or the activities of PMSCs. The report did not use the very term 'complaint mechanism' but instead stipulated that individual letters of communication 'may be addressed to the Working Group by a State, State organ, intergovernmental and non-governmental organization (NGO), or the individuals concerned, their families or their representatives, or any other relevant source.'²⁵⁴

In carrying out their advocacy function, Special Procedures issue communications by means of letters, which includes sending letters of urgent appeal and letters of allegation to states. The former are 'addressed to concerned Governments through diplomatic channels',²⁵⁵ calling upon them to 'intervene to end or prevent a human rights violation.'²⁵⁶ The latter 'are used to communicate information about violations that are alleged to have already occurred and in situations where urgent appeals do not apply.'²⁵⁷ Some Special Procedures have by necessity been especially prolific in their use of communications. From 1 June 2006 to 30 November 2016, the Special Rapporteur on the Situation of Human Rights Defenders sent 2991 communications. Over the same period, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions sent 1277 communications and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment sent 2145 communications.²⁵⁸ The WGUM has not been as prolific by comparison: it sent 73 communications in the same period.²⁵⁹ Nonetheless, discernible patterns of practice — gleaned from the WGUM's reports to the HRC on its communications²⁶⁰ and from reports on communications issued by the Special Procedures from 2010

²⁵³ *Use of Mercenaries*, UN Doc A/61/341, 5–7 [7]–[24].

²⁵⁴ *Ibid* 7 [17].

²⁵⁵ *Manual of Operations of the Special Procedures*, above n 78, 14 [44].

²⁵⁶ *Ibid* 14 [43].

²⁵⁷ *Ibid* 15 [46].

²⁵⁸ Human Rights Commission, *Communications Report of Special Procedures: Communications Sent, 1 June to 30 November 2016; Replies Received, 1 August to 31 January 2017*, UN Doc A/HRC/34/75 (17 February 2017) 9 ('*Communications Report of Special Procedures*').

²⁵⁹ *Ibid*.

²⁶⁰ Prior to 2010, the WGUM issued its communications reports as appendices in its annual reports to the HRC. From 2010 onwards, summaries of the WGUM's communications have been contained in joint communications reports of the Special Procedures.

onwards²⁶¹ — can be seen in the WGUM’s use of communications. The WGUM issues joint communications with other Special Procedures containing specific allegations or general concerns about human rights. The WGUM also issues its own communications to countries regarding specific allegations that nationals of a country, PMSCs headquartered in a country or PMSCs operating in a country contacted by the WGUM, may be involved in human rights violations. For instance, on 27 March 2014, the WGUM wrote to the USA Ambassador to the UN to request information about why three complainants (Mr Taha Yaseen Arraq Rashid, Mr Asa’ad Hamza Hanfoosh Al-Zuba’e and Mr Suhail Najim Abdullah Al Shimari) in a lawsuit against CACI Premier Technology, a PMC at Abu Ghraib in Iraq, ‘were allegedly refused entry into the United States ... to participate in their lawsuit’ against CACI.²⁶²

A notable example of a joint communication letter is from multiple Special Procedures, including the WGUM, to the Board of Directors of the European Bank for Reconstruction and Development (‘EBRD’), dated 5 May 2014, regarding the EBRD’s ongoing process to review its good governance policies.²⁶³ The example is notable because the Special Procedures’ letter is not to a government but to an international financial institution. Given the scope of the WGUM’s mandate, it is worth noting here that the letter’s paragraph regarding security personnel ‘welcome[d]’ the reference to the ‘Voluntary Principles and Security and Human Rights’ in the EBRD’s ‘performance requirement 2 on health and security’.²⁶⁴ The same paragraph suggested that the Voluntary Principles were by themselves not enough to ensure accountability of security personnel. The mandate-holders recommended, inter alia, that the performance requirement cite the *Montreux Document* and the *ICoC* and that ‘[t]raining of employees of private security companies should include the regulation

²⁶¹ Available online at Office of the High Commissioner for Human Rights, *Communications Reports of Special Procedures* <<http://www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx>>. All communications and replies are available online at Office of the High Commissioner for Human Rights, *Communication Report and Search* <<https://spcommreports.ohchr.org>>.

²⁶² Letter from the Working Group on the Use of Mercenaries to the Ambassador of the United States of America to the UN, 27 March 2014, 1 <https://spdb.ohchr.org/hrdb/27th/public_-_AL_USA_27.03.14_%286.2014%29.pdf>.

²⁶³ Letter from the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context to Sir Suma Chakrabati and Members of the Board of Directors of the European Bank for Reconstruction and Development, 5 May 2014 <https://spdb.ohchr.org/hrdb/27th/public_-_OL_EBRD_05.05.14_%284.2014%29.pdf>.

²⁶⁴ Ibid 5. The Voluntary Principles were established in 2000, as ‘a multi-stakeholder initiative (MSI) involving governments, companies, and non-governmental organizations that promotes implementation of a set of principles that guide oil, gas, and mining companies on providing security for their operations in a manner that respects human rights.’ US Department of State, *Voluntary Principles on Security and Human Rights* (20 December 2012) <<https://www.state.gov/documents/organization/196344.pdf>>. For the Principles, see *The Voluntary Principles on Security and Human Rights*, *The Voluntary Principles on Security and Human Rights* <http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary_principles_english.pdf>.

of the use of force, but also training in human rights and humanitarian law.²⁶⁵ The EBRD claimed in its reply, however, that performance requirement 2 ‘adequately covered’ the mandate-holders’ concerns.²⁶⁶

*F Activating and Mobilising the International and National Communities
and the Human Rights Council, and Encouraging Cooperation between
Governments and Other Actors*

In carrying out its mandated functions, the WGUM seeks to have a catalyst effect with regard to making the international community active or more active in addressing human rights issues in the market for force and encouraging cooperation among governments, civil society and IGOs. The WGUM’s efforts at encouraging cooperation underscore the oft-made request in General Assembly resolutions²⁶⁷ and HRC resolutions²⁶⁸ on ‘the use of mercenaries’ that states cooperate fully with the WGUM in the fulfilment of its mandate. On-site missions have the potential to produce a catalyst effect inasmuch as the missions afford the Special Procedures with opportunities to garner the attention of a wide variety of actors in national and international communities. As Ted Piccone says with regard to Special Procedures in general,

civil society actors ... devote considerable time and attention to informing the experts about the human rights problems in their country, preparing substantive reports, helping them make contact with victims, and suggesting ways to improve state compliance with international standards.²⁶⁹

The issuing of country reports helps mandate-holders to activate national and international communities after visits. The inclusion of recommendations of Special Procedures arising from country visits in the Universal Periodic Review (‘UPR’) process²⁷⁰ and in the OHCHR’s Universal Human Rights Index database²⁷¹ offers further opportunities to activate and mobilise various actors to cooperate with each

²⁶⁵ Letter from the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context to Sir Suma Chakrabati and Members of the Board of Directors of the European Bank for Reconstruction and Development, 5 May 2014, 5 <https://spdb.ohchr.org/hrdb/27th/public_-_OL_EBRD_05.05.14_%284.2014%29.pdf>.

²⁶⁶ Ibid 2.

²⁶⁷ See, eg, *Use of Mercenaries*, UN Doc A/RES/62/145, para 17; *Use of Mercenaries*, UN Doc A/RES/69/163, para 18; *Use of Mercenaries*, UN Doc A/RES/70/142, para 21.

²⁶⁸ See, eg, *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 8; *Use of Mercenaries*, UN Doc A/HRC/RES/10/11, para 17; *Use of Mercenaries*, UN Doc A/HRC/RES/15/12, para 17; *Use of Mercenaries*, UN Doc A/HRC/RES/24/13, para 20; *Use of Mercenaries*, UN Doc A/HRC/RES/27/10, para 20.

²⁶⁹ Piccone, *Catalysts for Change*, above n 39, 23.

²⁷⁰ Ibid 33.

²⁷¹ Office of the High Commissioner for Human Rights, *Universal Human Rights Index* <<http://uhri.ohchr.org>>.

other and with Special Procedures mandate-holders. But do those various opportunities also give state and non-actors cause to push back against, and call into question the competence of, the WGUM?

Presenting annual reports to the General Assembly and the HRC and contributing to joint communications reports of Special Procedures are key strands in the WGUM's efforts to activate and mobilise actors in national and international communities to address aspects of the human rights debate that relate to the WGUM's mandate. The decision to issue joint communications reports was taken at the sixteenth annual meeting of the Special Procedures, in 2009.²⁷² The WGUM's annual reports are statements of the Working Group's progress, but can, in whole or in part, also address thematic issues: the WGUM's 2014 annual report to the General Assembly focused on the UN's use of PMSCs;²⁷³ the WGUM's 2015 annual report to the General Assembly focused on the issue of foreign fighters;²⁷⁴ and thematic parts in the WGUM's 2013, 2014, 2015 and 2016 annual reports to the HRC elaborated the Working Group's ongoing global study of national laws and regulations relating to PMSCs.²⁷⁵

The WGUM initiated the global study in May 2012, when it sent letters to UN Member States requesting information on national legislation relating to PMSCs.²⁷⁶ The stated purpose of the global study is to gather research to 'assist in identifying best practices, provide a basis for research by stakeholders and will inform the report of the Working Group to the Human Rights Council at its 24th session, in 2013.'²⁷⁷ Pursuant to the global study, the WGUM not only releases summaries of findings in annual reports to the HRC and General Assembly, but also makes summaries of

²⁷² Najat M'jid Maalla, Rapporteur, *Report of the Sixteenth Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairpersons of Working Groups of the Special Procedures of the Human Rights Council (Geneva, 29 June – 3 July 2009)*, UN Doc A/HRC/12/47 (22 July 2009) 8 [24]–[26].

²⁷³ *Use of Mercenaries*, UN Doc A/69/338.

²⁷⁴ *Use of Mercenaries*, UN Doc A/70/330.

²⁷⁵ 2013 report: Anton Katz, Chairperson-Rapporteur, *Annual Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/24/45 (1 July 2013) 6–12 [19]–[52] ('*Annual Report*'); 2014 report: Patricia Arias, Chairperson-Rapporteur, *Annual Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/27/50 (30 June 2014) 5–19 [13]–[66] ('*Annual Report*'); 2015 report: *Annual Report*, UN Doc A/HRC/30/34, 5–21 [15]–[123]; 2016 report: *Report*, UN Doc A/HRC/33/43, 4–20 [18]–[88]; 2017 report: Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/36/47 (20 July 2017) 7–19 [19]–[73].

²⁷⁶ Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/67/340 (30 August 2012) 7 [15] ('*Use of Mercenaries*').

²⁷⁷ *Ibid* 7 [14].

regional studies available online²⁷⁸ and makes received examples of national legislation available online.²⁷⁹ Thus, the global study has the clear potential for activating and mobilising the international community to deal with regulatory gaps on PMSCs in national laws.

Participating in various fora about the regulation of PMSCs is another key strand of the WGUM's efforts to activate and mobilise the international community. That the WGUM participates in these fora is a reflection of the WGUM's mandate 'to consult States, intergovernmental organizations, non-governmental organizations and other relevant actors of civil society' when carrying out its functions as a Special Procedure.²⁸⁰ Although the WGUM is sceptical of the efficacy of self-regulation, it has participated in meetings on the *Montreux Document* organised by the Swiss Government, International Committee of the Red Cross ('ICRC') and the Geneva Centre for the Democratic Control of Armed Forces ('DCAF'), including a regional meeting in Ulaanbaatar, Mongolia, 12–13 October 2011²⁸¹ and the Montreux +5 Conference in Montreux, Switzerland, 12–13 December 2013.²⁸² When addressing the Montreux +5 Conference, Gabor Rona, a member of the WGUM, welcomed the adoption of the *Montreux Document* (in 2008) and the adoption of the *ICoC* (in 2010) as 'important complementary initiatives towards the improvement of standards' for the PMSC industry.²⁸³ Rona emphasised, however, that self-regulation is a 'necessary' but 'insufficient' basis for accountability.²⁸⁴

In addition to participating in various fora about the regulation of PMSCs, the WGUM, as part of its analysis of its thematic issue, has organised consultations and panel events on PMSCs and related matters. In 2007–11, the WGUM held five regional consultations on PMSCs with a variety of actors from national and international communities, on the WGUM's efforts to develop a legally binding international instrument on PMSCs.²⁸⁵ The WGUM convened an expert panel on

²⁷⁸ Working Group on the Use of Mercenaries, *National Legislation Studies on PMSCs*, Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalLegislationStudies.aspx>>.

²⁷⁹ Working Group on the Use of Mercenaries, *National Regulatory Frameworks on PMSCs*, Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalRegulatoryFrameworks.aspx>>.

²⁸⁰ *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 10.

²⁸¹ *Use of Mercenaries*, UN Doc A/67/340, 8 [20(c)].

²⁸² *Annual Report*, UN Doc A/HRC/27/50, 5 [12].

²⁸³ Rona, 'Remarks at the Montreux +5 Conference', above n 144.

²⁸⁴ *Ibid.*

²⁸⁵ *Eastern European Group and Central Asian Region*, UN Doc A/HRC/10/14/Add.3, 4–9 [4]–[29]; *Latin American and Caribbean Regional Consultation*, UN Doc A/HRC/7/7/Add.5, 6–9 [7]–[28]; *Regional Consultation for Africa*, UN Doc A/HRC/15/25/Add.5, 4–10 [7]–[37]; *Regional Consultation for Asia and the Pacific*, UN Doc A/HRC/15/25/Add.4, 4–7 [7]–[26]; *Regional Consultation for Western Europe and Others Group*, UN Doc A/HRC/15/25/Add.6, 4–8 [6]–[26].

31 July 2013 on the UN's use of PMSCs, and in a follow-up action, convened an expert panel on the same matter on 5 March 2014.²⁸⁶ On 1 December 2015, the WGUM held a panel event on its ongoing global study of national laws and regulations relating to PMSCs.²⁸⁷ Constructivist international relations logic would suggest that the importance of panel events and the five regional consultations is their collective effort to raise awareness of human rights issues in the market for force. However, given the opposition of Western states to the WGUM's mandate, it seems unlikely that the above and other panel events²⁸⁸ of only one day will have a significant effect in motivating state and non-state actors in the market for force to address human rights issues regarding PMSCs.

G The Working Group on the Use of Mercenaries' Follow-Up to Its Recommendations

Gauging the effectiveness of the WGUM's follow-up activities is a complex matter, particularly when set in the context of broader issues with follow-up in the HRC. One such issue concerns the terminology of 'follow-up'. Although HRC Resolution 5/1 set out the institution-building mechanisms of the Special Procedures,²⁸⁹ the resolution did not use the term 'follow-up'. The term was used only once in HRC Resolution 5/2, when a preambular paragraph stated that the HRC's methods of work 'shall be transparent, fair and impartial and shall enable genuine dialogue, be results-oriented, allow for subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms'.²⁹⁰

Follow-up on progress made in fulfilment of its mandate is a *raison d'être* of the WGUM's mandate. The very term 'follow-up' is conspicuous by its absence from the

²⁸⁶ Working Group on the Use of Mercenaries, *Study on the Use of Private Military and Security Companies (PMSCs) by the United Nations*, Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/StudyOnPMSC.aspx>>.

²⁸⁷ Working Group on the Use of Mercenaries, *Panel Event: Tuesday 1 December 2015, Room IX, Palais des Nations, Geneva — Regulation of Private Military and Security Companies*, Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/EventDec2015.aspx>>.

²⁸⁸ Working Group on the Use of Mercenaries, *Foreign Fighters and New Forms of Mercenarism*, above n 163; Working Group on the Use of Mercenaries, *Panel Event: Thursday 21 July 2016, Conference Room 3, United Nations Headquarters, New York — Privatization of War: Impact on Human Rights*, Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/EventJuly2016.aspx>>.

²⁸⁹ *United Nations Human Rights Council: Institution Building*, UN Doc A/HRC/RES/5/1, annex [39]–[64].

²⁹⁰ *Code of Conduct for Special Procedures Mandate-Holders*, UN Doc A/HRC/RES/5/2, Preambular para g, quoting *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Agenda Items 46 and 120, Supp No 49, UN Doc A/RES/60/251 (3 April 2006) para 12.

resolution that established the WGUM and from resolutions that have renewed and extended its mandate; however, the need for follow-up is implicit in the request made in the resolutions that the WGUM submit annual reports to the General Assembly and the HRC.²⁹¹ When the WGUM does use the term ‘follow-up’ in its reports,²⁹² it tends to use the term in its natural and ordinary meaning. The WGUM’s practice regarding follow-up goes beyond the WGUM itself carrying out follow-up activities (especially in the form of country visits and associated reports) and extends to system-wide efforts in the Special Procedures system to gauge whether, and if so, how governments and other actors have followed-up the recommendations from mandate-holders. Examples of follow-up include how recommendations of Special Procedures arising from country visits are included in the UPR process and in the OHCHR’s Universal Human Rights Index database,²⁹³ and that the joint-communications reports of Special Procedures ‘feed into’ the UPR process.²⁹⁴ Compilation reports authored by the Working Group on the UPR discuss, inter alia, how the country under review has cooperated with human rights mechanisms, including Special Procedures, for instance, identifying whether a country has responded to questionnaires from mandate-holders requesting information on thematic issues.²⁹⁵

Determining whether the WGUM’s follow-up to its recommendations are effective is a quantitative and qualitative matter that defies easy resolution; some observations, though, can be made about the effectiveness of the WGUM’s follow-up activities. Clearly, on-site missions serve an indispensable fact-finding role and thus are central to the WGUM’s mandate; in turn, country reports are an indispensable form of follow-up. However, the length of time — in some instances, more than a year — between the end of a country visit and the general distribution of the attendant

²⁹¹ *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 14; *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 10; *Use of Mercenaries*, UN Doc A/HRC/RES/15/12, para 19; *Use of Mercenaries*, UN Doc A/HRC/RES/24/13, para 22.

²⁹² See, eg, Alexander Ivanovitch Nikitin, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/10/14/Add.1 (27 February 2009) 4 [9]–[11], 11 [32]–[33]; *Mission to Honduras*, UN Doc A/HRC/24/45/Add.1, 5–6 [8]–[11]; Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/15/25/Add.1 (2 September 2010) 3 [6], 12 [67], 12–3 [72]; *Use of Mercenaries*, UN Doc A/64/311, 7 [13]–[14], 14–5 [39]–[43].

²⁹³ See above n 271 and accompanying text.

²⁹⁴ *Communications Report of Special Procedures*, UN Doc A/HRC/34/75, 6 [2].

²⁹⁵ See, eg, Shamsul Bari, Rapporteur, *Report of the Seventeenth Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairs of Working Groups of the Special Procedures of the Human Rights Council (Geneva, 28 June – 2 July 2010)*, UN Doc A/HRC/15/44 (19 July 2010) 9 [26]–[27].

report²⁹⁶ may militate against, or otherwise call into question, the effectiveness of country reports as a form of follow-up to country visits.²⁹⁷ An originary aspect of the WGUM's mandate is to follow-up on whether states have ratified the *Mercenaries Convention*.²⁹⁸ The need for this follow-up stems from the lack of a treaty body for the *Convention*. José L Gómez del Prado is reported as having said in a meeting of the Third Committee in 2007:

In contrast with main human rights instruments, the *Convention* had not established a treaty body, and the Working Group, as the only mechanism within the United Nations that dealt with mercenarism, attempted to address that gap by monitoring and follow-up activities in order to bring about universal adherence to the *Convention*.²⁹⁹

These activities include issuing recommendations in annual reports that countries ratify the *Convention*,³⁰⁰ and analysing national laws regarding PMSCs vis-a-vis, inter alia, whether the laws have ratified the *Convention*.³⁰¹ The continuing dearth of support from Western states for the *Convention* suggests, however, that the WGUM's follow-up activities to promote ratification are Sisyphean tasks.

That some aspects of the WGUM's follow-up efforts are Sisyphean, or lack a requisite degree of 'smartness', is also illustrated by the Working Group's follow-up to its annexure of the *Draft PMSC Convention* to its 2010 annual report to the HRC. The follow-up activities consist in the main of the WGUM participating in UN fora on the *Draft*, such as sessions of the IGWG,³⁰² and recommending that all states should

²⁹⁶ For example, the WGUM's report for its mission to Tunisia from 1–8 July 2015 was distributed on 2 August 2016. See Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination on Its Mission to Tunisia*, UN Doc A/HRC/33/43/Add.1 (2 August 2016).

²⁹⁷ See generally Piccone, *Catalysts for Change*, above n 39, 24.

²⁹⁸ *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, paras 13–14.

²⁹⁹ *37th Meeting*, UN Doc A/C.3/62/SR.37, 5 [33] (Mr Gómez del Prado, Chairperson of the WGUM) (emphasis added).

³⁰⁰ See, eg, *Use of Mercenaries*, UN Doc A/HRC/18/32, 6 [15], 10 [38], 14 [62], 18–9 [83]; *Annual Report*, UN Doc A/HRC/30/34, 23 [133]; Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to Côte d'Ivoire (7–10 October 2014)*, UN Doc A/HRC/30/34/Add.1 (17 August 2015) 5 [11], 17 [83].

³⁰¹ See, eg, *Annual Report*, UN Doc A/HRC/27/50, 5 [14], 7 [22], 14 [49]; *Annual Report*, UN Doc A/HRC/24/45, 6 [23], 12 [51]; *Annual Report*, UN Doc A/HRC/30/34, 5 [16], 9 [38], 14 [73], 15 [80], 21 [123]; *Report*, UN Doc A/HRC/33/43, 5 [17], 11 [44]–[45], 22 [20].

³⁰² See, eg, Elzbieta Karska, Chairperson-Rapporteur, 'Statement of the Chair of the Working Group on the Use of Mercenaries as a Means of Violating the Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination' (Statement

support the *Draft*.³⁰³ The *Draft* remains, however, a draft. According to the *Manual of Operations of the Special Procedures*:

Recommendations [arising from, and related to, country visits], whether addressed to governments, inter-governmental organizations or non-governmental organizations, should be SMART: specific, measurable, attainable, realistic, and time-bound. Not all issues that arise in the context of a visit may be best addressed through a specific recommendation, and mandate-holders should generally give priority to those proposals which meet the SMART criteria.³⁰⁴

While the *Manual* makes the ‘smart’ requirement with reference to recommendations on country visits and not advice per se provided by mandate-holders, the requirement offers an interesting prism through which to view the effectiveness of the WGUM’s follow-up efforts. On the one hand, the WGUM’s follow-up activities on the *Mercenaries Convention* and the *Draft PMSC Convention* appear to be specific but not attainable and realistic. On the other hand, the activities at least serve to underscore the WGUM’s recommendations in the HRC, General Assembly and elsewhere. A lack of ‘smart’ follow-up may be due less to the activities themselves and more to the long-standing opposition from Western states to the examination of legal issues about mercenary and mercenary-related activities by UN bodies other than the Sixth Committee.

H The Challenges Facing the Working Group on the Use of Mercenaries

Alerting UN bodies and the international community about the need to address specific situations and issues is not without its challenges. Some challenges facing the WGUM pertain to the Special Procedures as a system. The HRC tasks the Special Procedures to take a ‘proactive role’ in disseminating information on ‘specific situations and issues’;³⁰⁵ yet, some have argued that the process of circulating public statements to the OHCHR for dissemination is ‘cumbersome’.³⁰⁶ A perennial challenge to the effectiveness of Special Procedures is obtaining adequate funding.³⁰⁷ In 2016, the OHCHR allotted US\$14.441 million of regular budget funding (or 13.74 per cent

presented to the fourth session of the IGWG, Geneva, 27 April – 1 May 2015) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGMilitary/Session4/Statement_of_Chair_of_WG_mercenaries.pdf>.

³⁰³ See, eg, *Annual Report*, UN Doc A/HRC/27/50, 20 [75]; Rona, ‘Remarks at the Montreux +5 Conference’, above n 144.

³⁰⁴ *Manual of Operations of the Special Procedures*, above n 78, 25 [98].

³⁰⁵ *Ibid* 21, 21 [78].

³⁰⁶ Piccone, *Catalysts for Change*, above n 39, 116.

³⁰⁷ See, eg, *Twenty-First Annual Meeting of the Special Procedures*, UN Doc A/HRC/28/41, 10 [43], 11–2 [50]–[55], 15 [73]–[75]; Seong-Phil Hong, Rapporteur, *Report of the 22nd Annual Meeting of Special Rapporteurs/Representatives, Independent Experts and Working Groups of the Special Procedures of the Human Rights Council (Geneva, 8–12 June 2015), Including Updated Information on the Special Procedures*, UN Doc A/HRC/31/39 (23 May 2016) 11 [44], 14 [61].

of the total of the OHCHR's regular budget) and \$7.883 million of extra-budgetary funding (or 3.69 per cent of the total of the OHCHR's extra-budgetary funds) to the Special Procedures Branch.³⁰⁸ Ted Piccone points out that funding pressures leave the Special Procedures 'with no choice but to seek additional support from outside the UN system, a step that raises some concerns regarding transparency and equity.'³⁰⁹

A further perennial challenge to the effectiveness of Special Procedures relates to follow-up efforts. The need to devote more time and resources to follow-up on recommendations made by Special Procedures was noted by 'many states' in the 2011 5-year review of the HRC;³¹⁰ however, the extent to which follow-up activities have been built into the HRC's program of work can be questioned. Limon and Power also acknowledge the importance of systematic follow-up processes, but argue that 'systematic follow-up by Special Procedures remains "at present, negligible."³¹¹ Similarly, Ted Piccone notes that ensuring systematic follow-up is the 'Achilles' heel' of the Special Procedures system.³¹² Christophe Golay, Claire Mahon and Ioana Cismas acknowledge the problem of the scarcity of resources for follow-up efforts,³¹³ but point out that processes for follow-up, such as 'follow-up missions undertaken by the expert him/herself', are 'vital to increasing the impact of a country visit and assuring that recommendations are being implemented.'³¹⁴

The above challenges are a microcosm of problems that face the Special Procedures as a system, and belie the capacity of mandate-holders to fulfil their mandates in a timely manner. Other challenges to the capacity of the WGUM to fulfil its functions are specific to the WGUM. The USA, the UK and the EU Member States dispute the competence of the WGUM to develop new legal principles for the regulation of PMSCs,³¹⁵ and see existing IHL and human rights norms and instruments such as

³⁰⁸ Office of the High Commissioner for Human Rights, *OHCHR Report 2016* (2016) 92 (total funds available), 111 (Special Procedures funding) <http://www2.ohchr.org/english/OHCHRreport2016/allegati/Downloads/1_The_whole_Report_2016.pdf>.

³⁰⁹ Piccone, *Catalysts for Change*, above n 39, 124. See also Baldwin-Pask and Scannella, above n 49, 470–6.

³¹⁰ Limon and Power, above n 58, 19. See also Sihasak Phuangketkeow, Chair-Rapporteur, *Report of the Open-Ended Intergovernmental Working Group on the Review of the Work and Functioning of the Human Rights Council*, UN Doc A/HRC/WG.8/2/1 (4 May 2011) 74–80.

³¹¹ Ted Piccone, 'The Future of the United Nations Special Procedures' in Scott Sheeran and Sir Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge, 2013) 725, 727, quoted in Limon and Power, above n 58, 19.

³¹² Piccone, *Catalysts for Change*, above n 39, 99.

³¹³ Christophe Golay, Claire Mahon and Ioana Cismas, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights' (2011) 15 *International Journal of Human Rights* 299, 309.

³¹⁴ *Ibid* 311 (citations omitted).

³¹⁵ See, eg, *45th Meeting*, UN Doc A/C.3/66/SR.45, 6 [40] (Mr Sammis, representative of the USA).

the *Montreux Document* as able to provide a framework to regulate PMSCs.³¹⁶ Past and present members of the WGUM would likely argue that persistent questioning by Western states of the WGUM's mandate raises questions about the receptiveness of certain state actors in the international community to heed the full import of the WGUM's public statements — and the full import includes the necessity, as the WGUM sees it, for a binding international convention on the use of PMSCs.³¹⁷

V CONCLUSION

The proliferation of PMSCs in the wake of the end of the Cold War has tested the capacity of states and the international community to regulate private companies that offer a range of military and/or security services in conflict, post-conflict and other situations. Arguably, dealing in a comprehensive manner with the impact of PMSCs on human rights requires more than PMSC industry-focused self-regulation regimes and national efforts to recall existing principles of international law as they apply to the privatisation of force.

CHR Resolution 2005/2 created the WGUM only one year after the CHR had renewed the SRUM's mandate for three years. This volte-face has been attributed to dissatisfaction in certain quarters in the CHR to the SRUM's new mandate-holder taking a pragmatic approach to the regulation of PMSCs. The volte-face has also been attributed to recognition that creating a Working Group comprised of five independent experts would reinforce the long-standing individual thematic mandate on mercenary and mercenary-related activities. That the CHR initially authorised members of the new WGUM to hold only one session over a five-day period each year belies arguments that the WGUM was created to reinforce the individual mandate. In 2008, though, the HRC broadened the WGUM's mandate to three five-day sessions per year. Coupled with five regional consultations over 2007–10 with state and non-state actors regarding, inter alia, principles for a possible draft convention on PMSCs, the broadened mandate gave greater scope for the WGUM to carry out the analytical, advisory, alerting and other functions of a Special Procedure. Nonetheless, the WGUM has faced and continues to face considerable challenges. Although the WGUM's country reports are an indispensable form of follow-up to the Working Group's analysis of its thematic issue, the continuing dearth of support from Western states for the *Mercenaries Convention* and the *Draft PMSC Convention* suggests that the WGUM's follow-up activities to promote ratification of the former and adoption of the latter have not been particularly effective.

³¹⁶ 34th Meeting, UN Doc A/C.3/63/SR.34, 4 [13] (Mr McMahan, representative of the USA); *Summary Record of the 51st Meeting*, UN GAOR, 3rd Comm, 68th sess, 51st mtg, Agenda Items 27, 28, 65, 66, 68 and 69, UN Doc A/C.3/68/SR.51 (16 January 2014) 9 [58] (Ms Kazragienė, representative of Lithuania, speaking on behalf of the EU) ('51st Meeting').

³¹⁷ See, eg, Gómez del Prado, 'A United Nations Instrument', above n 2, 43, 52–6; Rona, 'Remarks at the Montreux +5 Conference', above n 144.

Two conclusions can be drawn from both the widespread Western opposition to the WGUM's mandate and the preference of key Western states for self-regulation, codes of conduct and voluntary agreement regimes on PMSCs. One conclusion is that creating the kinds of practices necessary to generate and sustain a treaty norm to reassert a state monopoly on the use of force is beyond the capacity of the WGUM. Another conclusion is that the WGUM's efforts to raise and maintain awareness in the agora about human rights in the market for force are Sisyphean. Indeed, the cumulative weight of the manifold challenges facing the WGUM is not unlike the rock that Sisyphus was condemned to rolling up a mountain in the underworld. Both conclusions seem to sit uneasily with a description of the crucial role of Special Procedures as catalysts for human rights. Clearly, though, the prospect for success of any given norm entrepreneur is the product of contestation between different actors with different interests and varying levels of power. Norm entrepreneurship does not always result in the institutionalisation and implementation of a norm, or even the unambiguous emergence of a norm. When a norm entrepreneur persists in its efforts over an extended period of time despite, or perhaps even because of, intractable opposition to its efforts, then it seems fair to say that that norm entrepreneur has taken on the role of a Sisyphus in the agora. But even Sisyphus was successful, in his own way. It seems counter-intuitive to depict Sisyphus as enjoying or achieving any measure of success, but it is instructive to recall here the message of Albert Camus' reading of the myth of Sisyphus: absurdity does not seem quite so pointless if a person enduring the absurdity believes the struggle for meaning was not for nothing — put differently, it is in accepting the struggle against an indifferent world that a principle of human existence can be found and shared with others who recognise the significance of doing what needs to be done.

FOUR LEGS GOOD, TWO LEGS BAD? ANIMAL WELFARE VS THE WORLD TRADE ORGANIZATION (FEATURING ARTICLE XX OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND ARTICLE 2 OF THE TECHNICAL BARRIERS TO TRADE)

ABSTRACT

This article explores whether animal welfare can be deployed as a legitimate restriction on trade under the World Trade Organization framework. Article XX of the General Agreement on Tariffs and Trade and Article 2 of the Technical Barriers to Trade are traversed; along with the two relatively recent cases of *US — Tuna II* (DS381) and *EC — Seal Products* (DS400/401). While the World Trade Organization has traditionally demonstrated a reluctance to legitimise animal welfare based restrictions, contemporary World Trade Organization case law signals the possibility of a shifting landscape. The article argues that further development of coherent principles is required for the benefit of both animal welfare and trade certainty. This is particularly so in relation to the inter-related issues of extraterritoriality and coercion.

I INTRODUCTION

All animals are equal, but some animals are more equal than others – George Orwell¹

Does the World Trade Organization (‘WTO’) recognise animal welfare as a legitimate reason to restrict trade? Until recently the answer was probably no. However, two recent cases, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*² and *European*

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¹ George Orwell, *Animal Farm* (Penguin Books 1945 (1955)) 114.

² Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011); Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R,

*Communities — Measures Prohibiting the Importation and Marketing of Seal Products*³ have considered the interactions between animal welfare and international trade in the context of provisions allowing WTO Members to impose trade measures aimed at certain non-economic goals. This article considers these cases and argues they represent a positive shift in the WTO's attitude towards animal protection.

In *US — Tuna II* and *EC — Seal Products* the WTO's Appellate Body ('AB') indicated that promoting animal welfare is a legitimate goal within the scope of the WTO agreements, on the basis that animal welfare measures are aimed at protecting 'public morals' or protecting 'animal life or health'. Yet the AB has failed to clarify whether established WTO principles concerning extraterritoriality and coercive measures will cause any difficulties for animal welfare-based trade measures. Consequently, this article argues for further clarification by the WTO so as to ensure Members have some certainty in relation to the validity and boundaries of such measures.

Structurally, Part II of this article will provide a brief history of animal welfare before placing animal welfare and the WTO into a broad frame. Part III of the article considers the relevant WTO agreements, namely the General Agreement on Tariffs and Trade ('GATT') and the Technical Barriers to Trade Agreement ('TBT'). It is suggested that although many animal welfare measures are likely to violate prohibitions on discriminatory trade measures and quantitative restrictions, such measures may be justified under exceptions designed to protect 'public morals' or 'animal life or health'. Part IV further explores the 'public morals' exception; and Part V investigates the WTO 'animal life or health' exceptions. In Part VI it will become clear that the potential thawing in the WTO's attitude to animal welfare is not without qualification. In particular, prior WTO case law concerning extraterritoriality and coercion may serve to undermine future animal welfare initiatives.

II ANIMAL WELFARE AND THE WTO IN CONTEXT

This part provides a brief historical account of animal welfare before placing animal welfare and WTO considerations into a macro context.

AB-2012-2 (16 May 2012); Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products from Mexico — Recourse to Article 21.5 of the DSU by Mexico*, WTO Doc WT/DS381/RW (14 April 2015); Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Recourse to article 21.5 of the DSU by Mexico*, WTO Doc WT/DS381/AB/RW, AB-2015-6 (20 November 2015) ('*US — Tuna II*').

³ Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013); Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) ('*EC — Seal Products*').

A A (Very) Brief History of Animal Welfare

Animal welfare tends to be construed as a contemporary concern. However, the third century jurist Ulpian spoke of the ‘nature of justice’ (*jus naturale*), which encompassed ‘that which nature has taught all animals; this law indeed is not peculiar to the human race, but belongs to all animals.’⁴ This principle of justice was perhaps taken too literally by some courts in the Middle Ages, which, on occasion, conducted criminal trials of animals that killed humans.⁵

Certainly by the late 1500s animal welfare began to make its way proper into English law,⁶ and by 1641 the jurisdiction of Massachusetts Bay enacted the ‘Body of Liberties’, which dealt with animal cruelty: ‘no man shall exercise any Tirranny or Crueltie towards any brute Creature which are usuallie kept for man’s use.’⁷

The next ‘rite’ of this law obliged persons who “leade or drive Cattell” to rest and refresh them periodically.⁸ Later, in 1824, the Royal Society for the Prevention of Cruelty to Animals (‘RSPCA’) was established.⁹ Charles Darwin discussed this development of animal cruelty morality in a lesser-known passage in *The Descent of Man* (1871), where he argued that moral expansion was a product of evolution just like the eye or the hand.¹⁰ Darwin’s theory went that over time humans broadened their social or community instincts to include the family, tribe and race.¹¹ Expanding upon this ‘moral evolution’, Darwin suggested that ‘sympathy beyond the confines of man ... to the lower animals, seems to be one of the latest moral acquisitions.’¹² As if to prove his point, the United Kingdom (‘UK’) Parliament enacted the *British Cruelty to Animals Act* in 1876.¹³

⁴ Roderick Nash, *The Rights of Nature: A History of Environmental Ethics* (Primavera Press, 1990) 17–18, n 13 (‘*The Rights of Nature*’).

⁵ Ibid.

⁶ Ibid 25. John Ray (1627–1705) learned about animistic philosophy and after spending a lifetime collecting and categorizing plants, he came to believe that animals and plants exist to glorify God. After reciting the dominant belief that ‘man has dominion of nature’, he stated that ‘wise men nowadays think otherwise’: at 21, n 25. Further, in 1766 Dr Humphrey Primatt ‘argued that all creatures, being works of God, deserved humane treatment. It was clear to him that since pain was “*Evil*”, cruelty to any form of life was “*ATHEISM*” and “*INFIDELITY*”’: at 23.

⁷ Ibid n 19.

⁸ Ibid.

⁹ Ibid 25.

¹⁰ Roderick Nash, *Do Rocks Have Rights?*, *The Center Magazine* (Nov–Dec 1977), cited in Henrich Károly, *Ethische und Poetische Gedanken zu einem Gegenstand Okonomischer Ausbeutung und Achtloser Misshandlung* (Kassel University Press, 2009) 115.

¹¹ Ibid.

¹² Ibid.

¹³ *The Rights of Nature*, above n 4, n 39.

Since the late 1800s the importance of animal welfare has become almost universally acknowledged. Almost all countries now have animal welfare laws,¹⁴ and there is even a proposal to introduce a Universal Declaration on Animal Welfare at the United Nations.¹⁵ There is also a growing recognition that animal welfare involves more than just the absence of cruelty or of physical suffering.

B *Animal Welfare and the WTO*

The World Organization for Animal Health ('OIE') defines animal welfare to mean how an animal is coping with the conditions in which it lives. The OIE considers that 'an animal is in a good state of welfare if ... it is healthy, comfortable, well nourished, safe, able to express innate behaviour, and if it is not suffering from unpleasant states such as pain, fear or distress.'¹⁶ In Australia, the RSPCA considers that an animal is in a good state of welfare if it has the five freedoms: freedom from hunger and thirst; freedom from discomfort; freedom from pain, injury or disease; freedom to express normal behaviour; and freedom from fear and distress.¹⁷

Historically, the relationship between animal welfare and international trade has been fraught. On the one hand, animal advocates have argued the WTO treats animal welfare as an 'illegitimate question'.¹⁸ On the other hand, the WTO has relied upon extraterritoriality arguments, for example, to suggest that states often over-reach from a trade perspective when it comes to animal welfare.¹⁹

The antipathy between animal welfare advocates and the WTO has partly resulted from decisions that United States ('US') dolphin and turtle protection policies were not compliant with the GATT.²⁰ This article, however, is not so much concerned with

¹⁴ Michael Bowman, Peter Davies and Catherine Redgwell, *Lyster's International Wildlife Law* (Cambridge University Press, 2010) 674–6.

¹⁵ Miah Gibson, 'The Universal Declaration of Animal Welfare' (2011) 16 *Deakin Law Review* 539, 542–3; World Organization for Animal Health, Resolution No XIV, 'Universal Declaration on Animal Welfare', adopted 24 May 2007.

¹⁶ World Organization for Animal Health, 'Terrestrial Animal Health Code' (2016) Article 7.1.1.

¹⁷ RSPCA Australia, *Five Freedoms for Animals* (12 June 2009) RSPCA Australia <http://kb.rspca.org.au/Five-freedoms-for-animals_318.html>.

¹⁸ Matthew Scully, *Dominion: The Power of Man, the Suffering of Animals and the Call to Mercy* (St Martin's Press, 2002) 184.

¹⁹ Andrew Linzey, 'An Ethical Critique of the Canadian Seal Hunt and an Examination of the Case for Import Controls on Seal Products' (2006) 2 *Journal of Animal Law* 87, 113; Peter Stevenson, 'The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare' (2002) 8 *Animal Law* 107, 108.

²⁰ GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted); GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted); Panel Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*,

environmental measures that seek to ensure the survival of species of animals as a whole.²¹ Rather, the focus is on trade-impact measures that aim to protect the welfare of individual animals, whether or not their species is threatened ('animal welfare measures').²² In particular, this article focuses on import or export restrictions and mandatory labelling requirements.²³

In the Australian context, the most relevant examples of animal welfare measures are restrictions on live exports and the potential ban on the import of cosmetics containing ingredients that were tested on animals. In 2011, Australia's live cattle trade to Indonesia was temporarily halted, following the release of footage showing Australian cattle being subjected to cruel slaughter practices.²⁴ Indonesia subsequently threatened to make a complaint to the WTO. Indonesia claimed that similar animal welfare conditions existed in other nations that imported live animals from Australia, and as such, it alleged that the ban was discriminatory.²⁵

The live cattle trade to Indonesia has now resumed, but live export from Australia is now regulated by the Exporter Supply Chain Assurance System ('ESCAS'), which is intended to promote improved animal welfare outcomes by ensuring that all livestock remain within an independently audited supply chain and the exporter has control of all supply chain arrangements.²⁶ It seems that the Australian government took

WTO Doc WT/DS58/R (15 May 1998); Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998).

²¹ For more on this issue, see generally Daniel C Esty, *Greening the GATT: Trade, Environment and the Future* (Institute for International Economics, 1994); Nathalie Bernasconi-Osterwalder et al, *Environment and Trade: A Guide to WTO Jurisprudence* (Taylor and Francis, 2012); Steve Charnovitz, 'Exploring the Environmental Exceptions in GATT Article XX' (1991) 25 *Journal of World Trade* 37; Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford University Press, 2009).

²² See generally Laura Nielsen, *The WTO, Animals and PPMs* (Martinus Nijhoff Publishers, 2007) 44.

²³ For a list of possible animal welfare measures, see Peter Van den Bossche, Nico Schrijver and Gerrit Faber, 'Unilateral Measures Addressing Non-Trade Concerns' (Study, Policy Coherence Unit, Ministry of Foreign Affairs of the Netherlands, 2007) 10–11.

²⁴ Phillip Coorey and Tom Allard, 'Live Cattle Ban to Stay', *Sydney Morning Herald* (online), 8 June 2011 <<http://www.smh.com.au/environment/animals/live-cattle-ban-to-stay-20110607-1fr8b.html>>.

²⁵ Tom Allard and Richard Willingham, 'Indonesia, Coalition Cry Foul Over Live Cattle Ban', *Sydney Morning Herald* (online), 9 June 2011 <<http://www.smh.com.au/national/indonesia-coalition-cry-foul-over-live-cattle-ban-20110608-1ft95.html>>.

²⁶ Australian Government, Department of Agriculture, 'Exporter Supply Chain Assurance System Report' (Report, January 2015) 6–7.

WTO law into account when designing ESCAS, and there has been some academic commentary on whether ESCAS is compliant with Australia's WTO obligations.²⁷

There have also been calls to suspend live animal exports to other countries on the basis of welfare concerns. For example, in 2016, the RSPCA called for a suspension of live animal exports to Vietnam after footage emerged showing Australian cattle being bludgeoned to death in abattoirs that had not been approved as part of the ESCAS system.²⁸ Animal welfare groups continue to call for a complete ban on live export.²⁹

Further, before the 2016 Australian Federal Election, both major political parties signalled their intention to restrict the sale of cosmetics tested on animals.³⁰ The Coalition Government is currently undertaking a consultation process, and the terms of the proposed ban have not yet been finalised.³¹ However, the government notified the WTO's Committee on Technical Barriers to Trade of its intention to ban the testing of cosmetics on animals in Australia in February 2017. The notification states that 'Australia welcomes views and contributions from trading partners in the consultation process.'³²

There have been previous attempts to introduce legislation restricting animal testing of cosmetics. The Australian Greens introduced a Bill into Federal Parliament in 2014 aimed at banning the import or sale of cosmetics tested on animals.³³ The Explanatory Memorandum to that Bill dealt with international trade law issues, indicating

²⁷ Celeste Black, 'Live Export and the WTO: Considering the Exporter Supply Chain Assurance System' (2013) 11 *Macquarie Law Journal* 77.

²⁸ James Thomas, 'RSPCA Calls for Suspension of Live Animal Exports to Vietnam After Cattle Bludgeoning', *ABC News* (online), 17 June 2016 <<http://www.abc.net.au/news/2016-06-17/cattle-bludgeoning-prompts-call-for-live-trade-suspension/7520272>>.

²⁹ Carmen Brown, 'Animal Welfare Activists Ramp up Campaign to Ban Live Export', *ABC Rural* (online), 5 January 2015 <<http://www.abc.net.au/news/2015-01-05/animals-australia-ramps-up-live-export-campaign/5997514>>.

³⁰ Annika Smethurst, 'Cosmetics Tested on Animals to be Banned in Australia', *Herald Sun* (online), 2 June 2016 <<http://www.heraldsun.com.au/news/cosmetics-tested-on-animals-to-be-banned-in-australia/news-story/a6362ab50a6146af5c83e60c8e40d93e>>.

³¹ Australian Government, Department of Health, 'Cosmetic Testing of Animals Ban November 2016 Consultations' (Report, November 2016) 1–2 <[http://www.health.gov.au/internet/main/publishing.nsf/Content/FC9633C2D3C5A4F5CA25805D000B3610/\\$File/November%20workshop%20consultation%20summary.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/FC9633C2D3C5A4F5CA25805D000B3610/$File/November%20workshop%20consultation%20summary.pdf)>.

³² *Notification*, WTO Doc G/TBT/N/AUS/104 (16 February 2017) [1].

³³ End Cruel Cosmetics Bill 2014 (Cth). See also Bianca Hall, 'Greens to Push for Ban on Cosmetics Tested on Animals', *Sydney Morning Herald* (online), 16 March 2014. <<http://www.smh.com.au/environment/animals/greens-to-push-for-ban-on--cosmetics-tested-on-animals-20140315-34uhk.html>>.

that the Greens were aware that WTO law could have implications for this measure.³⁴ Similarly, in 2016, the Australian Labor Party introduced a Private Member's Bill that would have banned the import and manufacturing of cosmetics and cosmetic ingredients, if animal testing had been conducted in relation to the cosmetic.³⁵

Other jurisdictions have also taken, or considered taking, animal welfare measures. In addition to banning the import of seal products,³⁶ the European Union ('EU') has banned the import of cosmetics tested on animals;³⁷ California has banned the sale of foie gras;³⁸ and Australia and the US have banned the import of dog and cat fur.³⁹ All of these measures could be in danger if animal welfare measures are not WTO-compliant.

III WTO AGREEMENTS RELEVANT TO ANIMAL WELFARE

This article, and Part III in particular, focuses on two substantive aspects of the WTO Agreement: the GATT and the TBT. Specifically Articles I, III, XI and XX of the GATT, and Article 2 of the TBT will be traversed. These are the most likely provisions to be scrutinised by a WTO panel and/or AB in relation to animal welfare measures.

A General Agreement on Tariffs and Trade

The non-discrimination obligations contained in GATT Articles I and III may be problematic for animal welfare measures. These provisions prohibit countries from discriminating between their trading partners, and from providing more favourable treatment to domestically produced, as compared to imported, products. In addition, Article XIII prohibits members from imposing import or export prohibitions or restrictions in a discriminatory manner as between trading partners.

³⁴ Explanatory Memorandum, End Cruel Cosmetics Bill 2014 (Cth).

³⁵ Ethical Cosmetics Bill 2016 (Cth).

³⁶ *Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products* [2009] OJ L 286/36; *Commission Regulation (EU) No. 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products* [2010] OJ L 216/1.

³⁷ *Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products* [2009] OJ L 342/59.

³⁸ Max Shapiro, 'A Wild Goose Chase: California's Attempt to Regulate Morality by Banning the Sale of One Food Product' (2012) 35 *Loyola of Los Angeles International & Comparative Law Review* 27.

³⁹ *Customs (Prohibited Imports) Amendment Regulations 2004 (No 4)* (Cth); Stevenson, above n 19, 126–7.

These non-discrimination provisions prohibit discrimination between ‘like’ products. Products are ‘like’ if there is a competitive relationship between them;⁴⁰ however, the WTO has traditionally been reluctant to consider non-product related (‘NPR’) process production methods (‘PPMs’) in the likeness assessment.⁴¹ This means that products distinguished from each other only by animal welfare standards met during their production will probably be considered ‘like’.⁴²

The interpretation of ‘likeness’ means that many animal welfare measures will be de facto discriminatory because they extend more favourable treatment to ‘like’ products from countries with higher welfare standards.⁴³ For example, non-animal tested cosmetics will probably be considered ‘like’ products to cosmetics that contain ingredients that were tested on animals. This means that a ban on the import of animal-tested cosmetics may be discriminatory, because it would favour imports from countries that prohibit, or do not engage in, animal testing.

Similarly, in the context of live export, for example, cattle will be considered ‘like’, notwithstanding any differences in the welfare standards and slaughter practices of importing countries.⁴⁴ As such, a ban on, or suspension of, live export to one country on the basis of animal welfare breaches will likely be de facto discriminatory, and in breach of Article XIII.

Article XI prohibits quantitative restrictions on imports or exports. This includes measures prohibiting or restricting the import or export of certain categories of products, and extends to measures made effective through quotas, import or export licences or other measures.

⁴⁰ Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (12 March 2001) [99].

⁴¹ GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) [5.15]. See also Steve Charnovitz, ‘The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality’ (2002) 27 *Yale Journal of International Law* 59, 85–92; Alan Swinbank, ‘Like Products, Animal Welfare and the World Trade Organization’ (2006) 40 *Journal of World Trade* 687, 687; Lesley Peterson, ‘Talkin’ Bout a Humane Revolution: New Standards for Farming Practices and How They Could Change International Trade as We Know It’ (2010) 36 *Brooklyn Journal of International Law* 265, 273–6.

⁴² Andrew Lurie and Maria Kalinina, ‘Protecting Animals in International Trade: A Study of the Recent Successes at the WTO and in Free Trade Agreements’ (2015) 30 *American University International Law Review* 431, 433.

⁴³ See Stevenson, above n 19, 111–18.

⁴⁴ Robert Cunningham, ‘Predicting the Predicament: The World Trade Organisation and Biotechnological Agriculture via the EC – Biotech Case’ (2006) 99 *Macquarie Journal of Business Law* 3, 108–14.

The prohibition on quantitative restrictions has been problematic for environmental measures in the past. For example, in *US—Tuna (Mexico)*⁴⁵ and *US—Tuna (EEC)*,⁴⁶ two GATT Panel decisions from the 1990s, US embargoes against tuna exported from countries without appropriate dolphin-safe tuna fishing policies were found to be quantitative restrictions. The US was concerned about purse-seine fishing of tuna, which involves encircling a school of tuna with a net, and then ‘pursing’ it closed, catching its entire contents.⁴⁷ In the Eastern Tropical Pacific Ocean (‘ETP’), tuna and dolphins are often found together.⁴⁸ As such, fishermen find schools of tuna by locating dolphins and encircling them in purse-seine nets, catching and killing them (a process known as ‘setting on’ dolphins).⁴⁹

US—Tuna (Mexico) concerned a US ban on the import of yellowfin tuna and tuna products harvested in the ETP with purse-seine nets by Mexico, among other countries. *US—Tuna (EEC)* concerned the US’s ‘intermediary nation embargo’, which prohibited the import of yellowfin tuna or yellowfin tuna products from ‘intermediary’ nations that had themselves, within the last six months, imported tuna or tuna products that were subject to a ‘direct’ embargo by the US.⁵⁰ Each of these measures was a violation of Article XI.⁵¹

Similarly, in *US—Shrimp I*,⁵² the US, under its endangered species legislation, required all US shrimp trawl vessels to use approved ‘Turtle Excluder Devices’ or other measures in certain areas where there was a significant turtle mortality associated with shrimp harvesting. Subsequently, the US imposed an import ban on shrimp harvested with commercial fishing technology which might adversely affect sea turtles. The import ban did not apply to nations with a fishing environment which did not pose a threat to the incidental taking of sea turtles, or to those which provided evidence of the adoption of a regulatory program comparable to the US program, and with comparable effectiveness. This was found to be a violation of Article XI.⁵³

⁴⁵ GATT Panel Report, *United States—Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted).

⁴⁶ GATT Panel Report, *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted).

⁴⁷ GATT Panel Report, *United States—Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) [2.1].

⁴⁸ *Ibid* [2.2].

⁴⁹ *Ibid*.

⁵⁰ *Ibid* [5.4].

⁵¹ *Ibid* [5.17]–[5.19]; GATT Panel Report, *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) [5.6]–[5.10].

⁵² Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/R (15 May 1998); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998).

⁵³ Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/R (15 May 1998) [7.11]–[7.17].

A total ban on the export of live animals from Australia would likely be considered a violation of Article XI. Even the ESCAS requirements could arguably be a quantitative restriction: the ESCAS includes an export licensing requirement which could be seen as restricting exports.⁵⁴

Despite Articles I, III, XI and XIII, the GATT contains exceptions that may allow animal welfare measures to be justified. Article XX is the most important in this regard, containing exceptions for measures necessary to protect public morals (Article XX(a)), and human, animal or plant life or health (Article XX(b)). To justify a measure under Article XX(a) or XX(b), a Member must demonstrate that the measure:

1. is aimed at the relevant policy area;
2. is ‘necessary’;⁵⁵ and
3. complies with the Article XX chapeau.⁵⁶

As will be seen, the TBT, although it has a narrower focus, has a similar structure to the GATT in relation to the non-discrimination obligations and is also likely to pose problems for animal welfare measures.

B Technical Barriers to Trade

The TBT is a specialised agreement that aims to reduce or eliminate unnecessary obstacles to trade in the form of technical regulations, standards, and the procedures for assessing conformity with technical regulations and standards. Articles 2.1 and 2.2 of the TBT apply to ‘technical regulations’. A technical regulation is defined as a ‘[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.’⁵⁷ Technical regulations may also include labelling requirements ‘as they apply to a product, process or production method’.⁵⁸

⁵⁴ Black, above n 27, 86–8.

⁵⁵ Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [6.455]; Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R, AB-2014-1, AB-2014-2 (22 May 2014) [5.169].

⁵⁶ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (29 April 1996) 22; Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [118]–[122].

⁵⁷ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*Agreement on Technical Barriers to Trade*) annex 1.1.

⁵⁸ *Ibid.*

Measures that require products to be labelled with animal welfare information, such as EU laws requiring eggs be labelled with the farming method used,⁵⁹ will be technical regulations. Interestingly, regulations that do not require products to bear a certain label in order to be marketed, but require satisfaction of certain conditions before a label is available, may also be considered mandatory. For example, in *US — Tuna II*,⁶⁰ the third instalment of the WTO dispute over US dolphin protection policies, the US had passed legislation imposing certain conditions for access to the US dolphin-safe tuna label. These conditions varied according to the method of harvesting, and whether the fishing occurred in the ETP or elsewhere. If the tuna product did not comply with the conditions, any reference to dolphins, porpoises or marine mammals on the label of the tuna product was prohibited.

Mexico challenged these requirements, alleging that they violated Article 2 of the TBT and Articles I and III of the GATT. Relevantly, the labelling laws were considered mandatory despite there being no requirement to use the label to place tuna on the US market, because the laws prohibited the use of any label on tuna packaging relating to marine mammals without meeting the relevant conditions.⁶¹ Under this expansive interpretation, most animal welfare labelling rules will likely be considered technical regulations.⁶²

The AB again considered the definition of ‘technical regulation’ in the *EC — Seal Products* decision. This case concerned an EU measure that banned the import of seal products (‘Seal Regime’) because of concerns about animal welfare during the seal hunt.⁶³ The Seal Regime contained several exceptions, including:

⁵⁹ Council Regulation (EC) No. 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products [2007] OJ L 299/1; Commission Regulation (EC) No. 589/2008 of 23 June 2008 laying down detailed rules for implementing Council Regulation (EC) No. 1234/2007 as regards marketing standards for eggs [2008] OJ L 163/6.

⁶⁰ Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011); Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012).

⁶¹ Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [7.100]–[7.145]; Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [190]–[199]. See also Meredith A Crowley and Robert Howse, ‘Tuna–Dolphin II: A Legal and Economic Analysis of the Appellate Body Report’ (2014) 13 *World Trade Review* 321, 323–5.

⁶² Thomas G Kelch, ‘The WTO Tuna Labeling Decision and Animal Law’ (2012) 8 *Journal of Animal and Natural Resources Law* 121, 136–7.

⁶³ Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L 286/36; Commission Regulation (EU) No. 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament and

- (a) an exception for seal products resulting from traditional hunts conducted by Indigenous communities ('the IC Exception');⁶⁴
- (b) an exception for seal products resulting 'from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources', if they are placed on the market on a non-profit basis ('the MRM Exception');⁶⁵ and
- (c) an exception for the import of seal products of an occasional nature and exclusively for the personal use of travellers or their families ('the Travellers Exception').⁶⁶

Canada and Norway made a complaint to the WTO, alleging that the Seal Regime violated the GATT and the TBT.

In relation to the definition of 'technical regulation', the most contentious issue was whether the Seal Regime laid down product characteristics or their related PPMs, including applicable administrative provisions. The Panel was of the view that it did. The Panel found that the prohibition on seal-containing products laid down a product characteristic in the negative form, by requiring that all products not contain seal. Further, the exceptions set out the 'applicable administrative provisions, with which compliance is mandatory'.⁶⁷ The Panel allowed certain seal products to be placed on the EU market by defining the category of seal that could be used as an input for such products, based on 'objectively definable features' such as the identity of the hunter and the nature of the hunt.⁶⁸ The Panel ultimately found that the Seal Regime was a technical regulation.⁶⁹

The AB reversed this finding. The AB ultimately characterised the Seal Regime as a measure which established the conditions for placing seal products on the EU market, based on criteria relating to the identity of the hunter or the type and purpose

of the Council on trade in seal products [2010] OJ L 216/1. See also Robert Howse and Joanna Langille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values' (2012) 37 *Yale Journal of International Law* 367, 390–4.

⁶⁴ *Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products* [2009] OJ L 286/36, art 3(1).

⁶⁵ *Ibid* art 3(2)(b).

⁶⁶ *Ibid* art 3(2)(a).

⁶⁷ *Agreement on Technical Barriers to Trade* annex 1.1.

⁶⁸ Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.103]–[7.112].

⁶⁹ *Ibid* [7.125].

of the hunt from which the product is derived.⁷⁰ The AB stated that there was no basis for suggesting that the identity of the hunter, the type of hunt, or the purpose of the hunt could be viewed as product characteristics.⁷¹ As such, the measure as a whole did not lay down product characteristics.⁷²

The AB declined the complainant's request to complete the legal analysis by finding the Seal Regime constituted a technical regulation within the meaning of the TBT.⁷³ In relation to the definition of 'technical regulation', however, it indicated the phrase 'or their related processes and production methods' referred to a process and production method that is related to product characteristics.⁷⁴ In other words, the process and production method must have a sufficient nexus to the characteristics of the product.

Although it is unclear what exactly would constitute a sufficient nexus with the physical characteristics of a product, it seems measures that directly restrict trade on the basis of process and production methods, and which do not affect the physical characteristics of the final product (non-product related process and production methods, or NPR PPMs), may not be technical regulations.⁷⁵ Most animal welfare measures are based on NPR PPMs, and thus are unlikely to be captured by the TBT. For example, a law which prohibits the import of cosmetics containing certain identified chemicals is probably a technical regulation. However, a law that allows the import of certain cosmetics but prohibits others on the basis of animal-testing will probably not be deemed a technical regulation.

The GATT, on the other hand, has a relatively general application, and will apply to import or export restrictions based on animal welfare. The GATT applies concurrently to technical regulations, but technical regulations will first be examined under the more specialised TBT provisions.⁷⁶

⁷⁰ Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.58].

⁷¹ *Ibid* [5.45].

⁷² *Ibid* [5.58].

⁷³ *Ibid* [5.61]–[5.70].

⁷⁴ *Ibid* [5.12].

⁷⁵ See also Gabrielle Marceau, 'A Comment on the Appellate Body Report in *EC — Seal Products* in the Context of the Trade and Environment Debate' (2014) 23 *Review of European Community & International Environmental Law* 318, 325–8.

⁷⁶ Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (12 March 2001) [80]; Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WTO Doc WT/DS257/AB/R, AB-2003-6 (19 January 2004) [134]; Panel Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/R (18 September 2000) [8.16]–[8.17]; Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [7.40]–[7.46]; Panel

Article 2.1 of the TBT is a non-discrimination obligation that is similar in scope to Articles I and III of the GATT. Unlike the GATT, the TBT does not contain an exceptions clause, but Article 2.2 of the TBT states that ‘technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.’ Article 2.2 contains a non-exhaustive list of legitimate objectives, including the protection of animal life or health. As such, Article 2.2 appears to contain steps one and two of the Article XX analysis considered above.

Both Articles 2.1 and 2.2 must be satisfied for a technical regulation to be TBT-compliant.⁷⁷ A literal reading of Article 2.1 would have the surprising consequence that all discriminatory measures would be non-compliant, even if they met the Article 2.2 requirements.⁷⁸ To avoid this outcome, the AB has held that a technical regulation that is de facto discriminatory may still comply with Article 2.1, if the discrimination stems exclusively from a ‘legitimate regulatory distinction’ in the sense of being ‘even-handed’.⁷⁹ This test appears to operate in a similar manner to the Article XX chapeau.⁸⁰

As discussed above, animal welfare measures will usually be deemed to have violated Articles I, III, XIII and/or XI of the GATT, and those classed as technical regulations may also violate Article 2.1 of the TBT. For this reason, the remainder of this article will focus on the exceptions contained in the agreements for measures aimed at certain regulatory objectives. The relevant exceptions can be discussed under two headings: ‘public morals exception’ (Part IV) and ‘animal life or health exception’ (Part V).

Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.64]–[7.69].

⁷⁷ Stefan Zleptnig, *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS, and TBT Agreements*, Nijhoff International Trade Law Series (Martinus Nijhoff Publishers, 2010) 370–1.

⁷⁸ Gabrielle Marceau, ‘The New TBT Jurisprudence in US — Clove Cigarettes, WTO US — Tuna II, and US — COOL’ (2013) 8 *Asian Journal of WTO and International Health Law and Policy* 1, 4.

⁷⁹ Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R, AB-2012-1 (4 April 2012) [173]–[182]; Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [213]–[216]; Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc WT/DS384/AB/R; WT/DS386/AB/R, AB-2012-3 (29 June 2012) [271]–[272]. See also Marceau, above n 78, 6–13; Joshua Meltzer and Amelia Porges, ‘Beyond Discrimination? The WTO Parses the TBT Agreement in US-Clove Cigarettes, US-Tuna II (Mexico) and US-COOL’ (2013) 14 *Melbourne Journal of International Law* 699, 715–17.

⁸⁰ Marceau, above n 78, 29.

IV PUBLIC MORALS EXCEPTION

While ‘public morals’ is omitted from the non-exhaustive list of legitimate objectives in Article 2.2 TBT, the *EC — Seal Products* Panel confirmed the protection of public morals does fall within the scope of the section.⁸¹ This finding was not addressed on appeal, but is supported by the AB’s statement that the balance between Members’ right to regulate and the desire to avoid unnecessary obstacles to trade is the same between the GATT and the TBT agreements.⁸²

EC — Seal Products was the first case to consider the relationship between animal welfare and public morals. In its decision, the AB found the Seal Regime violated GATT Articles I and III through the operation of the exceptions,⁸³ but was provisionally justified under Article XX as a measure necessary to protect the morals of the EU population.⁸⁴ As discussed below, the AB found the operation of the exceptions violated the chapeau of Article XX,⁸⁵ meaning the Seal Regime was non-compliant with the GATT. Despite this negative finding, the AB’s decision was welcomed by animal protection groups, who regarded it as confirming that animal welfare is a legitimate reason to restrict trade.⁸⁶ Prior to *EC — Seal Products* the predominant opinion appeared to be animal welfare could fall within the scope of the public morals exception, but this proposition had never been tested.⁸⁷ *EC — Seal Products*

⁸¹ Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.418].

⁸² Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R, AB-2012-1 (4 April 2012) [96].

⁸³ Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.588]–[7.609]; Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.78]–[5.130].

⁸⁴ Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.625]–[7.639]; Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.133]–[5.290].

⁸⁵ Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.291]–[5.339].

⁸⁶ See, eg, Humane Society International, Canada, ‘Historic WTO Ruling Upholds EU Ban on Seal Product Trade’, 22 May 2014 <<http://www.hsi.org/world/canada/news/releases/2014/05/wto-seal-trade-ban-ruling-052214.html>>; Sonja Van Tichelen, International Fund for Animal Welfare, ‘What the WTO Victory Means for Animal Welfare Beyond the International Seal Trade’, 10 June 2014 <<http://www.ifaw.org/australia/news/what-wto-victory-means-animal-welfare-beyond-international-seal-trade>>.

⁸⁷ Steve Charnovitz, ‘The Moral Exception in Trade Policy’ (1997) 38 *Virginia Journal of International Law* 689, 716–17; Kate Cook and David Bowles, ‘Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules’

established this proposition as true, and also made several important statements about animal welfare and public morals.⁸⁸

In order to advance the discussion of the public morals exception it is useful to discuss the tension between universalist and unilateralist perspectives.

A Universalists vs Unilateralists

Identifying the scope of the public moral exception has always proved challenging. This is a corollary of the ambiguous nature of the phrase ‘public morals’, along with the limited case law considering the exception. Unsurprisingly, the interpretive challenge has led to substantial academic debate.⁸⁹ A major point of disagreement is whether morals must be internationally accepted to fall within the exception.

Universalists such as Charnovitz and Wu consider the relevant moral norm must be near-universally accepted for Article XX(a) to apply, at least in the case of measures that focus on conduct occurring outside the territory of the Member taking the measure.⁹⁰ Other commentators favour a theory of ‘evidentiary unilateralism’, where each country can unilaterally define its public morals, but must provide evidence that the moral norm is genuinely held.⁹¹

(2010) 19 *Review of European Community & International Environmental Law* 227, 232–4; Robert Galantucci, ‘Compassionate Consumerism Within the GATT Regime: Can Belgium’s Ban on Seal Product Imports be Justified Under Article XX?’ (2008) 39 *California Western International Law Journal* 281, 289–92.

⁸⁸ Cecilia J Flores Elizondo, ‘European Communities — Measures Prohibiting the Importation and Marketing of Seal Products’ (2014) 11 *Manchester Journal of International Economic Law* 312.

⁸⁹ See, eg, Charnovitz, above n 87; Christoph T Feddersen, ‘Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT’s Article XX(a) and “Conventional” Rules of Interpretation’ (1998) 7 *Minnesota Journal of Global Trade* 75; Miguel A Gonzalez, ‘Trade and Morality: Preserving “Public Morals” without Sacrificing the Global Economy’ (2006) 39 *Vanderbilt Journal of Transnational Law* 939; Jeremy C Marwell, ‘Trade and Morality: The WTO Public Morals Exception after *Gambling*’ (2006) 81 *New York University Law Review* 802; Nicolas F Diebold, ‘The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole’ (2007) 11 *Journal of International Economic Law* 43; Mark Wu, ‘Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine’ (2008) 33 *Yale Journal of International Law* 215; Tyler M Smith, ‘Much Needed Reform in the Realm of Public Morals: A Proposed Addition to the GATT Article XX(a) “Public Morals” Framework, Resulting from *China-Audiovisual*’ (2011) 19 *Cardozo Journal of International and Comparative Law* 733; Tamara S Nachmani, ‘To Each His Own: The Case for Unilateral Determination of Public Morality under Article XX(a) of the GATT’ (2013) 71 *University of Toronto Faculty of Law Review* 31.

⁹⁰ Charnovitz, above n 87; Wu, above n 89.

⁹¹ Marwell, above n 89; Diebold, above n 89; Nachmani, above n 89.

Prior to *EC — Seal Products*, *US — Gambling* was the only case to discuss the requirements for establishing that a measure is designed to protect public morals, and it failed to give any clear guidance on this issue. The *US — Gambling* Panel defined public morals as ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’,⁹² and stated:

the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values ... Members should be given some scope to define and apply for themselves the concepts of ‘public morals’ and ‘public order’ in their respective territories, according to their own systems and scales of values.⁹³

Some writers interpreted this statement as endorsing a unilateral approach to public morals,⁹⁴ but this interpretation was not borne out by the Panel’s approach to the measure at issue, which involved a prohibition concerning online gambling services. The Panel referred to international materials, including other countries’ legislation, to conclude that gambling regulation could fall within the public morals exception.⁹⁵ It considered domestic materials only to establish that the US measure aimed to address concerns relating to online gambling, such as money laundering and organised crime.⁹⁶ Marwell cites this approach as evidence the Panel took a *universalist* view of the exception.⁹⁷ The *EC — Seal Products* Panel did not provide express guidance on this issue, but took a similar approach to *US — Gambling* by examining both international and domestic materials. The Panel considered international materials in determining whether the general area, namely animal welfare, was a matter of international moral concern.⁹⁸ It considered domestic materials in

⁹² Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [6.465].

⁹³ *Ibid* [6.461]. See also Panel Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/R (12 August 2009) [7.759]; Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.380]–[7.381]; Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.199]–[5.200].

⁹⁴ Nachmani, above n 89, 46.

⁹⁵ Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [6.471]–[6.474].

⁹⁶ *Ibid* [6.481]–[6.486].

⁹⁷ Marwell, above n 89. See also Galantucci, above n 87, 288–9.

⁹⁸ Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.406]–[7.409].

identifying whether the measure was directed at EU public moral concern about the particular welfare risk.⁹⁹

1 *Universalism*

In the lead-up to the *EC — Seal Products* decision, some writers argued that animal welfare is a purely local issue, based on domestic values.¹⁰⁰ As the WTO seems to incorporate some ‘universalist’ elements into its public morals analysis, it is reasoned that this ‘local characterisation’ could prevent animal welfare measures from being justified on public morals grounds. However, the *EC — Seal Products* Panel rejected the ‘local’ view of animal welfare: it examined international materials, including the OIE guidelines on animal welfare, measures taken by other Members and the ‘philosophy of animal welfarism’,¹⁰¹ and stated:

International doctrines and measures of a similar nature in other WTO Members, while not necessarily relevant to identifying the European Union’s chosen objective, illustrate that animal welfare is a matter of ethical responsibility for human beings in general.¹⁰²

In coming to this conclusion the Panel recognised the growing international awareness of animal issues. As discussed above, almost all countries now have animal welfare laws, many of which refer to humankind’s moral obligations to animals.¹⁰³ Further, a proposal to introduce a Universal Declaration on Animal Welfare at the UN has the support of some 43 governments and the OIE.¹⁰⁴ This finding is encouraging, as it suggests the ‘universal’ element will always be present when Members seek to justify an animal welfare measure.¹⁰⁵ Despite this, Members may need to demonstrate that the measure is genuinely based on local moral concerns regarding animal welfare.

⁹⁹ Ibid [7.386]–[7.404].

¹⁰⁰ See, eg, Peter L Fitzgerald, ‘“Morality” May Not be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law’ (2011) 14 *Journal of International Wildlife Law & Policy* 85; Nielsen, above n 22, 7; Laura Nielsen and Maria-Alejandra Calle, ‘Systemic Implications of the EU — Seal Products Case’ (2013) 8 *Asian Journal of WTO and International Health Law & Policy* 41, 44; cf Katie Sykes, ‘Sealing Animal Welfare Into the GATT Exceptions: The International Dimension of Animal Welfare in WTO Disputes’ (2014) 13 *World Trade Review* 471.

¹⁰¹ Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.406]–[7.409].

¹⁰² Ibid [7.409].

¹⁰³ Bowman, Davies and Redgwell, above n 14, 674–6.

¹⁰⁴ Gibson, above n 15, 542–3; World Organization for Animal Health, Resolution No XIV, ‘Universal Declaration on Animal Welfare’, adopted 24 May 2007.

¹⁰⁵ Lurie and Kalinina, above n 42, 450–1.

2 *Unilateralism?*

Although the *US — Gambling* Panel concluded the measure in question was aimed at certain societal ills associated with online gambling,¹⁰⁶ it did not consider whether US residents had moral concerns about these issues. The *EC — Seal Products* Panel, however, specifically considered whether the EU public had moral concerns about seal welfare.¹⁰⁷

Supporters of ‘evidentiary unilateralism’ have argued that Members which base a trade measure on a unilaterally defined moral norm should provide evidence their population genuinely holds the relevant value.¹⁰⁸ The approach of the Panel suggests that, while animal welfare in general is of international moral concern, Members may take an approach of ‘evidentiary unilateralism’ to particular welfare risks. This approach implicitly recognises that moral attitudes towards particular species of animals are not universally held, but are influenced by cultural factors.¹⁰⁹ Although our determinations about the importance of particular species may not be rational or ethically defensible,¹¹⁰ they are based on genuine moral beliefs. On this issue, the AB rejected Canada’s argument that it was necessary to determine the precise standard of animal welfare in the EU across different species and assess whether the seal hunt breached this standard, stating that the EU did not need to demonstrate a risk to public morals as such.¹¹¹ Both the Panel and the AB thus recognised the right of Members to take action based on their domestic animal welfare beliefs.¹¹²

It is unclear whether the Panel intended to impose a general ‘moral concern’ test for animal welfare measures, particularly given that the EU’s formulation of the

¹⁰⁶ Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [6.479]–[6.487].

¹⁰⁷ Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.383]–[7.404].

¹⁰⁸ Marwell, above n 89, 824–6; Nachmani, above n 89, 57–8; Diebold, above n 89, 61–2. See also Tamara Perišin, ‘Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges’ (2013) 62 *International & Comparative Law Quarterly* 373, 394–5.

¹⁰⁹ J A Serpell, ‘Factors Influencing Human Attitudes to Animals and Their Welfare’ (2004) 13 *Animal Welfare* 145.

¹¹⁰ See generally Melanie Joy, *Why We Love Dogs, Eat Pigs, and Wear Cows: An Introduction to Carnism* (Red Wheel Weiser, 2011).

¹¹¹ Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.197]–[5.201].

¹¹² See also Robert Howse, Joanna Langille and Katie Sykes, ‘Pluralism in Practice: Moral Legislation and the Law of the WTO after *Seal Products*’ (2015) 48 *George Washington International Law Review* 81, 115.

Seal Regime's objective essentially forced the Panel to consider this issue.¹¹³ Nevertheless, animal welfare measures are different from the measure considered in *US — Gambling*: rather than being paternalistic moral regulations, animal welfare measures function as an expression of the moral views of the Member taking the measure.¹¹⁴ The expressive function of animal welfare measures means it is reasonable for Panels to consider whether the Member taking the measure genuinely holds the relevant moral concern.

The *EC — Seal Products* Panel deferred to EU legislators in determining the level of moral concern amongst the EU population about the seal hunt, primarily relying on the text and legislative history of the Seal Regime.¹¹⁵ It did consider public survey results submitted by the EU, but asserted they were only informative 'to a limited extent'.¹¹⁶ This was an appropriate approach as it is not within the WTO's remit to assess the legitimacy of policy decisions at the domestic level. As such, to bring a measure within the scope of the public morals exception, Members may need to demonstrate, primarily through the text and legislative history of the measure, that it is based on genuine moral concern.¹¹⁷

In the case of the Australian measures discussed above in Part II, this should not be difficult. In relation to a potential ban on the import of animal-tested cosmetics, the Government's consultation materials recognise that many Australians have 'strong view[s]' about this issue.¹¹⁸ The Explanatory Memorandum to the End Cruel Cosmetics Bill 2014 (Cth), introduced by the Australian Greens, noted that in 2013, '81 per cent of Australians believed that Australia should follow the EU in banning the sale of cosmetics tested on animals'.

Similarly, restrictions on live export from Australia have tended to be introduced after evidence of animal cruelty emerges, as a response to public outcry. For example, the suspension of the live export trade to Indonesia, and the introduction of ESCAS, followed the release of footage of the cruel slaughter of Australian cattle

¹¹³ Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.410].

¹¹⁴ Howse and Langille, above n 63.

¹¹⁵ Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.383]–[7.404].

¹¹⁶ *Ibid* [7.398].

¹¹⁷ Juan He, 'China-Canada Seal Import Deal After the WTO EU-Seal Products Case: At the Crossroad' (2015) 10 *Asian Journal of WTO and International Health Law & Policy* 223, 244.

¹¹⁸ Australian Government Department of Health, 'Ban on the Testing of Cosmetics on Animals — Background Paper' (November 2016) 3.

and the resulting public outrage.¹¹⁹ Opinion polls have demonstrated support for a live export ban: for example, in 2013, 67 per cent of Australians polled said they were more likely to vote for a party or candidate who promised to ban live export.¹²⁰ Further, those who oppose live export frequently state that the trade is ‘immoral’.¹²¹

There thus appears to be significant public support for measures restricting live export and the sale of cosmetics tested on animals, apparently on moral grounds. If this concern is reflected in the text and supporting materials of any legislation, the measures are likely to meet any requirement to demonstrate local moral concern.

In summary, *EC — Seal Products* appropriately integrated universal and unilateral approaches to moral regulation in a way that recognised the rights of Members to legislate for their particular moral and cultural values surrounding the treatment of animals. As such, animal advocates were right to react positively to this decision. As discussed below in Part V, the recent treatment of the animal life or health exception has been similarly positive for animal welfare.

V ANIMAL LIFE OR HEALTH EXCEPTIONS

The protection of animal life or health is expressly recognised as a legitimate objective in both Article XX of the GATT and Article 2.2 of the TBT. Although the Article XX exception might seem ideally suited to animal protection measures, the interpretation of animal life or health has not always been favourable to animal welfare: some writers have relied on the drafting history of Article XX(b) to suggest it was mainly intended to cover sanitary measures,¹²² while others have assumed

¹¹⁹ See, eg, Phillip Coorey and Tom Allard, ‘Live Cattle Ban to Stay’, *Sydney Morning Herald* (online), 8 June 2011 <<http://www.smh.com.au/environment/animals/live-cattle-ban-to-stay-20110607-1fr8b.html>>; Nick Perry, ‘Labor MPs Pushing to Ban Live Exports’, *news.com.au* (online), 7 November 2012 <<http://www.news.com.au/national/breaking-news/labor-mps-pushing-for-live-exports-ban/news-story/b7b83b280840e9a8fc162911a13efdae>>.

¹²⁰ Sue Neales, ‘Banning Exports a Vote Winner’, *The Australian* (online), 14 August 2013 <<http://www.theaustralian.com.au/national-affairs/election-2013/banning-exports-a-vote-winner/news-story/2b98faf7975b4abe5b02971af477254c>>.

¹²¹ See, eg, Glenda Kwek, ‘Live Animal Export Outrage: “Horrendous Slaughter” of Cattle’, *The Sydney Morning Herald* (online), 18 August 2011 <<http://www.smh.com.au/environment/animals/live-animal-export-outrage-horrendous-slaughter-of-cattle-20110818-liz2i.html>>; James Nason, ‘Billboard Blitz Brands Live Exports “A Crime”’, *Beef Central*, 2 February 2015 <<http://www.beefcentral.com/live-export/billboard-blitz-brands-live-exports-a-crime/>>.

¹²² Charnovitz, above n 21, 44–5.

Article XX(b) is an environmental exception.¹²³ However, as will be seen below, a much more positive approach was taken to the exception in *US — Tuna II*.¹²⁴

A Animal Life

Article XX(b) was first invoked in an attempt to protect animal life in *US — Tuna (Mexico)*. In this case, the Panel appeared to accept that Article XX(b) could apply to measures taken to protect the life of dolphins, although the US' argument failed for other reasons.¹²⁵ In the next tuna-related case, *US — Tuna (EEC)*, the parties agreed that a measure taken to protect dolphins could fall within Article XX(b), although the US again failed to justify its measure.¹²⁶ This interpretation of Article XX(b) was confirmed in *US — Tuna II*, where the Panel noted:

In this respect, a measure that aims at the protection of animal life or health need not, in our view, be directed exclusively to endangered or depleted species or populations, to be legitimate. Article 2.2 refers to 'animal life or health' in general terms, and does not require that such protection be tied to a broader conservation objective. We therefore read these terms as allowing Members to pursue policies that aim at also protecting individual animals or species whose sustainability as a group is not threatened.¹²⁷

US — Tuna II thus confirmed that protecting the life or health of individual animals is a legitimate objective, whether or not there is an environmental dimension to the measure.¹²⁸ Although this is largely consistent with statements in *US — Tuna (Mexico)* and *US — Tuna (EEC)*, the confirmation of the reach of the exception is welcome.

¹²³ See, eg, T Alana Deere, 'Balancing Free Trade and the Environment: A Proposed Interpretation of GATT Article XX's Preamble' (1998) 10 *International Legal Perspectives* 1, 24; Bruce Neuling, 'The *Shrimp-Turtle* Case: Implications for Article XX of GATT and the Trade and Environment Debate' (1999) 22 *Loyola of Los Angeles International and Comparative Law Review* 1, 13.

¹²⁴ Despite its name, *US — Tuna II* was actually the *third* instalment of the WTO dispute over US dolphin protection policies. The two prior GATT Panel decisions — *US — Tuna (Mexico)* and *US — Tuna (EEC)* — took place in the 1990s and found that US embargoes against tuna exported from countries without appropriate dolphin-safe tuna fishing policies were not GATT-compliant. GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted); GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted).

¹²⁵ GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) [5.24]–[5.29].

¹²⁶ *Ibid* [5.30]–[5.39].

¹²⁷ Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R, (15 September 2011) [7.437].

¹²⁸ Kelch, above n 62, 131–2; Lurie and Kalinina, above n 42, 441.

The Panel in *US — Tuna II* also rejected Mexico's argument that the objective of the measure was illegitimate because it did not concern itself with the protection of other marine species of animals, noting that Members have a right to determine the legitimate objectives they wish to pursue.¹²⁹ As such, much like *EC — Seal Products*, *US — Tuna II* affirmed the rights of Members to impose different levels of welfare protection for different species of animals.¹³⁰

B *Animal Health*

A more contentious issue is whether animal welfare measures that do not prevent animals from being killed, but rather aim to reduce animal suffering, fall within the animal life or health policy area. Examples include measures intended to prevent excessive suffering during slaughter and measures preventing inhumane treatment of animals during the production process.¹³¹ Prior to *US — Tuna II*, opinions were divided on this issue. For example, Howse and Langille stated that '[t]he meaning of animal health includes mental or psychological health, which is obviously impaired by intense suffering and trauma in the manner of killing.'¹³² Others disagreed: Charnovitz argued that Article XX(b) could not justify the EU's leg-hold trap measure because the issue is not one of animal health.¹³³

In *US — Tuna II* the legitimate objectives of the US included 'contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins'.¹³⁴ The Panel found that 'adverse' effects on dolphins included certain 'unobserved' consequences of setting on dolphins, including acute stress reactions.¹³⁵ The Panel characterised these reactions as a health issue.¹³⁶ This finding suggests psychological impacts such

¹²⁹ Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [7.441]–[7.442].

¹³⁰ Meltzer and Porges, above n 79, 719.

¹³¹ Feddersen, above n 89, 102–3; Peter V Michaud, 'Caught in a Trap: The European Union Leghold Trap Debate' (1997) 6 *Minnesota Journal of Global Trade* 355, 372–3; Edward M Thomas, 'Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction under GATT's Moral Exception' (2007) 34 *Boston College Environmental Affairs Law Review* 605.

¹³² Howse and Langille, above n 63, 419. See also Peterson, above n 41, 282–3; Shapiro, above n 38, 43; Black, above n 27, 91.

¹³³ Charnovitz, above n 87, 737. See also Feddersen, above n 89, 102–3; Van den Bossche, Schrijver and Faber, above n 23, 98–9.

¹³⁴ Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [7.401].

¹³⁵ *Ibid* [7.483]–[7.505]. Note the concept of 'setting on' dolphins was described above in Part III(A).

¹³⁶ *Ibid* [7.499].

as stress may be a component of ‘animal health’, at least where there is also a risk to life or health as such.¹³⁷

This analysis suggests that both of the Australian animal welfare measures discussed in Part II could be considered to be aimed at the protection of animal life or health. It would be difficult to dispute that animal testing of cosmetics involves risks to the life or health of animals. It may be more difficult to argue that restrictions on live export are aimed at protecting animal life. If, as suggested by some animal welfare groups, the live export trade is replaced by a chilled meat trade, the animals would be slaughtered anyway. However, under the analysis in *US — Tuna II*, the psychological impact of cruel handling and slaughter practices would likely be considered a risk to health.

In summary, *US — Tuna II* recognised that the protection of animals is important, even in the absence of environmental concerns. The decision also suggests animal welfare can be an aspect of animal health, although it remains unclear whether an animal welfare concern would be sufficient to invoke the exception in the absence of an actual health risk. As such, this case reflects the WTO’s growing understanding of the importance of animal welfare.

C Non-Discrimination and Necessity

Having discussed the policy content of the public morals and animal life or health exceptions, it is now necessary to consider the limits on WTO Members’ rights to impose animal welfare measures. We first briefly consider the limits arising from the text of the WTO agreements, before moving on to discuss those imposed by the AB in environmental cases.

1 Non-Discrimination

The test contained in the GATT Article XX chapeau, and the even-handedness requirement in Article 2.1 of the TBT, are both broadly identifiable as non-discrimination requirements. The Article XX chapeau requires, relevantly, that a measure must ‘not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.’ The AB read the even-handedness requirement into Article 2.1 on the basis of the sixth preambular recital of the TBT, which is similar in wording to the Article XX chapeau, and an arbitrarily or unjustifiably discriminatory measure will violate Article 2.1.¹³⁸

¹³⁷ Sykes, above n 100, 492.

¹³⁸ Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc WT/DS384/AB/R; WT/DS386/AB/R, AB-2012-3 (29 June 2012) [271]; Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [213].

The current jurisprudence suggests the non-discrimination analysis under these provisions relates primarily, although not solely, to the cause or rationale of the discrimination.¹³⁹ As such, discrimination is ‘arbitrary or unjustifiable’ when it is not rationally connected with the objective of the measure.¹⁴⁰ The measures in both *US — Tuna II* and *EC — Seal Products* failed this analysis, as the relevant measures were not applied even-handedly across all areas of concern.

The Seal Regime allowed market access to most seal products from Greenland through the operation of the IC Exception, but most seal products from Canada and Norway came from commercial hunts and were prohibited.¹⁴¹ The AB found that the animal welfare concerns were the same across IC and commercial hunts, and as such, the discrimination against Canada and Norway was not rationally connected to the objective of the measure.¹⁴²

Similarly, the even-handedness analysis in *US — Tuna II* focussed on the distinction between tuna caught in the ETP by setting on dolphins, which was not eligible for the dolphin-safe label, and tuna caught outside the ETP other than by setting on dolphins, which was always eligible for the label even if dolphin mortality occurred.¹⁴³ The AB found that the decision to fully address the adverse impacts of setting on dolphins in the ETP, but not to address mortality from fishing methods other than setting on dolphins outside the ETP at all, lacked even-handedness.¹⁴⁴

This jurisprudence suggests that animal welfare measures may not be WTO-compliant unless Members address all aspects of a particular animal welfare concern evenly. Governments would be wise to keep this in mind in designing animal

¹³⁹ Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R, AB-2007-4 (3 December 2007) [225]; cf Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.321]; Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Recourse to article 21.5 of the DSU by Mexico*, WTO Doc WT/DS381/AB/RW, AB-2015-6 (20 November 2015) [7.93]–[7.95].

¹⁴⁰ Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R, AB-2007-4 (3 December 2007) [227].

¹⁴¹ Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.316].

¹⁴² *Ibid* [5.338]. The Panel also noted that the moral concerns of the EU public related to all types of seal hunts: Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.445].

¹⁴³ Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [284]. See Part III(A) above for a description of the concept of ‘setting on’ dolphins.

¹⁴⁴ *Ibid* [297].

welfare measures. In particular, in the Australian context, it is noted that Indonesia's complaint about the 2011 suspension of the live cattle trade was that similar animal welfare conditions existed in other nations that imported live animals from Australia. If Australia chooses to address the animal welfare risks of live export on an ad hoc basis, by banning or restricting live export to certain countries without imposing similar restrictions on other countries where animal welfare concerns exist, the measure may be vulnerable to a WTO challenge.

2 Necessity

GATT Articles XX(a) and XX(b) and TBT Article 2.2 require that measures aimed at the protection of public morals or animal life or health be 'necessary' to achieve their objective. The necessity test involves 'a process of weighing and balancing a series of factors', including the importance of the interest or value protected by the measure, the contribution of the measure to its objective and the trade-restrictiveness of the measure.¹⁴⁵ A comparison between the measure and possible alternatives is then undertaken, and if a less trade-restrictive alternative measure is reasonably available, the measure is not 'necessary'.¹⁴⁶

The AB has recognised that Members have the right to determine their desired level of protection of legitimate objectives, meaning that an alternative measure is not 'reasonably available' if it does not achieve the Member's desired level of protection.¹⁴⁷ Despite the inclusion of the importance of the interest or value protected by the measure in the necessity analysis, the necessity test does not require Members to balance the achievement of animal welfare objectives against trade costs.¹⁴⁸ As such, the necessity test does not place a substantive limit on Members' rights to impose animal welfare measures, only limiting the form of the measure chosen.

¹⁴⁵ Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R; WT/DS169/AB/R, AB-2000-8 (11 December 2000) [164].

¹⁴⁶ Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R, AB-2005-1 (7 April 2005) [307]; Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R; WT/DS169/AB/R, AB-2000-8 (11 December 2000) [166].

¹⁴⁷ Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (12 March 2001) [174]; Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [316]; Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc WT/DS384/AB/R; WT/DS386/AB/R, AB-2012-3 (29 June 2012) [373].

¹⁴⁸ Donald H Regan, 'The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing' (2007) 6 *World Trade Review* 347; but see Gisele Kapterian, 'A Critique of the WTO Jurisprudence on "Necessity"' (2010) 59 *International & Comparative Law Quarterly* 89; Gabrielle Marceau and Joel P. Trachtman, 'The Technical Barriers to Trade Agreement, the Sanitary

The AB's findings in both *EC — Seal Products* and *US — Tuna II* prompted the relevant Members to increase their animal welfare protections to bring their measures into compliance. The US now requires certification that no dolphin has been killed or injured for all tuna to be eligible for the dolphin-safe label,¹⁴⁹ while the EU bases the IC Exception on the satisfaction of animal welfare conditions.¹⁵⁰ As such, much like the necessity test, the non-discrimination requirements in Article XX of the GATT and Article 2.1 of the TBT should not be overly problematic for animal welfare measures, and even have the potential to improve animal welfare.

Despite the above analysis, the AB has not always read the WTO Agreements in a way that is favourable to animal welfare. Principles concerning extraterritorial and coercive trade measures, developed in the context of environmental measures, may prove problematic for animal welfare measures. These principles are now discussed further below in Part VI.

VI EXTRATERRITORIALITY AND COERCION

The WTO has traditionally been uncomfortable with unilateral trade measures aimed at environmental practices occurring in foreign countries, apparently believing that such measures are an invasion of the sovereign right of each country to determine its own environmental policies.¹⁵¹ This discomfort has manifested in statements suggesting measures that protect animals outside the jurisdiction of the Member

and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods' (2002) 36 *Journal of World Trade* 811, 826-8, 831-2, 851-3.

¹⁴⁹ Although note that, in compliance proceedings, the AB found that aspects of the amended measure lacked even-handedness and thus violated Article 2.1 TBT. The AB focussed on provisions that allowed the US to require certification of dolphin-safety by an independent observer in some circumstances, and found that these provisions did not provide for the conditions of access to the dolphin-safe label to be reinforced by observer certification in all circumstances of comparably high risk: Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Recourse to article 21.5 of the DSU by Mexico*, WTO Doc WT/DS381/AB/RW, AB-2015-6 (20 November 2015) [7.266]. Compliance proceedings are ongoing.

¹⁵⁰ *Regulation (EU) 2015/1775 of the European Parliament and of the Council of 6 October 2015 amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010* [2015] OJ L 262/1; *Commission Implementing Regulation (EU) 2015/1850 of 13 October 2015 Laying Down Detailed Rules for the Implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on Trade in Seal Products* [2015] OJ L 271/1.

¹⁵¹ Andre Nollkaemper, 'Rethinking States' Rights to Promote Extra-Territorial Environmental Values' in Erik Denters and Paul de Waart Friedl Weiss (ed), *International Economic Law with a Human Face* (Kluwer Law International, 1998) 175, 176-7; Robert Howse and Donald Regan, 'The Product/Process Distinction — An Illusory Basis for Disciplining "Unilateralism" in Trade Policy' (2000) 11 *European Journal*

taking the measure or which aim to influence other countries' policies are impermissible. The decisions in *US — Tuna II* and *EC — Seal Products* did not consider these statements, or considered them only to a limited extent, so the effect of this jurisprudence upon animal welfare is still largely unknown. However, it has the *potential* to be highly damaging to animal protection efforts.

The AB has emphasised that the primary focus of the WTO dispute settlement system's interpretative approach should be the ordinary meaning of the text of the relevant provision.¹⁵² This part suggests that the extraterritoriality and anti-coercion principles are inconsistent with a reading of the GATT and the TBT that is faithful to the ordinary meaning of the text. As such, the AB should clarify that these principles are no longer part of WTO law.

In early decisions concerning environmental measures panels tended to focus on the extraterritoriality issue, although in subsequent decisions the focus changed to the supposed coercive effect of such measures on other countries' policies. The jurisprudence in relation to each of these issues is analysed below.

A Extraterritoriality

1 Extraterritoriality and Article XX(b)

The extraterritoriality principle arose from *US — Tuna (Mexico)*, where the Panel stated that measures taken to protect animals located outside the jurisdiction of the Member taking the measure could not be justified under Article XX(b).¹⁵³ The Panel considered the US tuna embargo to be impermissibly extraterritorial.¹⁵⁴ Most animal welfare measures aim to protect animals located outside the territory of the Member taking the measure, meaning that, under the *US — Tuna (Mexico)* principle, they would not be WTO-compliant.¹⁵⁵

On its face, the text of Article XX(b) contains no jurisdictional limitation,¹⁵⁶ a point acknowledged by the respective Panels in both *US — Tuna (Mexico)* and *US — Tuna*

of International Law 249, 275–6; Axel Bree, 'Article XX GATT — Quo Vadis? The Environmental Exception after the Shrimp/Turtle Appellate Body Report' (1998) 17 *Dickinson Journal of International Law* 99, 122.

¹⁵² Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [114]. See also Howard F Chang, 'Environmental Trade Measures, the Shrimp-Turtle Rulings, and the Ordinary Meaning of the Text of the GATT' (2005) 8 *Chapman Law Review* 25.

¹⁵³ GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) [5.24]–[5.27], [5.30]–[5.32].

¹⁵⁴ *Ibid* [5.24]–[5.27], [5.30]–[5.32].

¹⁵⁵ Stevenson, above n 19, 126.

¹⁵⁶ Catherine Jean Archibald, 'Forbidden by the WTO? Discrimination against a Product When Its Creation Causes Harm to the Environment or Animal Welfare' (2008) 48 *Natural Resources Journal* 15, 32; Chang, above n 152, 36; Andre Nollkaemper, 'The

(*EEC*).¹⁵⁷ The true basis for the extraterritoriality principle appears to be the *US — Tuna (Mexico)* Panel's concern that extraterritorial trade measures could interfere with the 'multilateral framework for trade'.¹⁵⁸ However, the Panels' policy concerns about the functioning of the trading system should not be allowed to override the ordinary words of the agreements, which do not support any territorial limitation on the protection of animal welfare.

Two subsequent cases have taken a more lenient view of extraterritorial measures. In *US — Tuna (EEC)*, the Panel found that measures designed to protect animals located outside the jurisdiction of the Member taking the measure could, in principle, be justified under Article XX(b).¹⁵⁹ The Panel further stated: 'the policy to protect the life and health of dolphins in the eastern tropical Pacific Ocean, which the *United States pursued within its jurisdiction over its nationals and vessels*, fell within the range of policies covered by Article XX(b).'¹⁶⁰

It is unclear what the Panel meant by this statement. Some writers have interpreted *US — Tuna (EEC)* as rejecting any jurisdictional limitation on Article XX(b).¹⁶¹ This interpretation begs the question of why the Panel mentioned the US's jurisdiction to regulate her nationals and vessels.¹⁶² Other writers have interpreted the *US — Tuna (EEC)* Panel as stating that measures can only be justified under Article XX(b) if the Member has legislative jurisdiction to regulate the subject matter of the measure under the rules of international law.¹⁶³

Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC "Ban" on Furs from Animals Taken by Leghold Traps' (1996) 8 *Journal of Environmental Law* 237, 248.

¹⁵⁷ GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) [5.25]; GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) [5.31].

¹⁵⁸ GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) [5.27].

¹⁵⁹ GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) [5.30]–[5.33].

¹⁶⁰ *Ibid* [5.33] (emphasis added).

¹⁶¹ See, eg, Steve Charnovitz, 'Dolphins and Tuna: An Analysis of the Second GATT Panel Report' (1994) 24 *Environmental Law Reporter: News & Analysis* 10567, 10574.

¹⁶² Charnovitz proposes, as an alternative interpretation, that the Panel was stating that the US could regulate the harvesting of tuna by its own nationals and vessels, although this interpretation is 'manifestly absurd' because Article XX is not needed to justify regulation of a State's own nationals: Charnovitz, above n 161, 10579–80.

¹⁶³ Iona Cheyne, 'Environmental Unilateralism and the WTO/GATT System' (1994) 24 *Georgia Journal of International and Comparative Law* 433, 452–59; Thomas J Schoenbaum, 'International Trade and Protection of the Environment: The Continuing Search for Reconciliation' (1997) 91 *American Journal of International Law* 268, 279–80. See also Lorand Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36 *Journal of World Trade* 353; Pietro Manzini, 'Environmental

States may exercise jurisdiction over events occurring within their own territory, and may exercise extra-territorial jurisdiction in certain circumstances where there is a sufficient connection to the regulating state,¹⁶⁴ including, as suggested by the Panel in *US — Tuna (EEC)*, where the subjects of the regulation are the country's nationals or vessels.¹⁶⁵ With the exception of universal jurisdiction for certain serious crimes,¹⁶⁶ states may not exercise jurisdiction over events that have no connection to their territory or nationals. Thus, states cannot regulate the domestic animal welfare practices of foreign states, and the suggestion that the reach of Article XX(b) is coextensive with the scope of Members' legislative jurisdiction would be problematic for many animal welfare measures.

The view that the scope of Article XX(b) is limited by the law of jurisdiction is questionable because trade measures do not directly regulate the conduct of foreign actors. Although trade measures may affect other countries, they only directly regulate importation or exportation processes occurring on the territory of the Member taking the measure.¹⁶⁷ As such, trade measures arguably do not involve extraterritorial regulation. Most of the authors advocating the jurisdictional view of Article XX(b) do not address this argument.¹⁶⁸ Bartels is one exception.¹⁶⁹ He argues that trade measures involve extraterritorial regulation if they are defined by something located or occurring abroad, and result in a denial of opportunities ordinarily available.¹⁷⁰ Bartels further contends the GATT confers a 'right to trade' that is impaired if an extra-jurisdictional trade measure is taken;¹⁷¹ but this argument is circular because it assumes that the rights granted by the GATT are impaired by taking an extra-jurisdictional measure, when that is what the author is seeking to show.¹⁷² As such, no convincing argument has been provided that trade measures involve an exercise of legislative jurisdiction.

Exceptions of Art XX GATT 1994 Revisited in the Light of the Rules of Interpretation of General International Law' in Paolo Mengozzi (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System* (A Giuffrè, 1999) 838–44.

¹⁶⁴ Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 652–96; Laurens Ankersmit, Jessica Lawrence and Gareth Davies, 'Diverging EU and WTO Perspectives on Extraterritorial Process Regulation' (2012) 21 *Minnesota Journal of International Law* (online) 14, 24.

¹⁶⁵ GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) [5.33]; Shaw, above n 164, 659–64.

¹⁶⁶ Shaw, above n 164, 668–73.

¹⁶⁷ Belina Anderson, 'Unilateral Trade Measures and Environmental Protection Policy' (1993) 66 *Temple Law Review* 751, 755; Nollkaemper, above n 151, 188–189; Vranes, above n 21, 166.

¹⁶⁸ Cheyne, above n 163; Schoenbaum, above n 163; Manzini, above n 163.

¹⁶⁹ Bartels, above n 163, 381–3.

¹⁷⁰ *Ibid* 381–3.

¹⁷¹ *Ibid* 382–3.

¹⁷² It is also questionable whether GATT, which is essentially a negative agreement, confers a right to trade: see Howse and Regan, above n 151, 276–7.

Moreover, the jurisdictional view of Article XX(b) is not in accordance with the approach of the Panel in *US — Tuna (EEC)*. The Panel appeared to accept that the US measure could fall within the scope of Article XX(b), even though it was concerned with conduct beyond the reach of the US's legislative jurisdiction, namely the actions of Mexican fishermen.¹⁷³ Cheyne suggests the Panel extended the application of Article XX(b) to measures protecting animals that could theoretically be protected by regulation of the Member's nationals or vessels.¹⁷⁴ If this interpretation is accepted, animal welfare measures with a global or environmental aspect may be justifiable under Article XX(b); yet most animal welfare measures do not fall within this category because they are concerned with domestic practices such as farming and slaughter of livestock.¹⁷⁵

In *US — Shrimp I*, the AB declined to 'pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g)',¹⁷⁶ noting that there was 'a sufficient nexus' between the turtles and the US because the relevant turtle species all migrated through US waters.¹⁷⁷ However, the AB did not state such a nexus was required, leaving the application of the extraterritoriality principle to measures protecting animals residing inside the territory of another WTO Member undetermined.¹⁷⁸

2 *Extraterritoriality and Article XX(a)*

It remains unclear whether public morals measures will ever be relevantly extraterritorial. The difficulty in characterising such measures as extraterritorial arises from the fact that public morals measures, and particularly animal welfare measures, often have a dual focus. They are concerned with conduct occurring abroad, but they are implemented as a response to moral concern arising within the population of the Member taking the measure.

The extraterritorial reach of Article XX(a) has been extensively discussed in the literature, and several writers have drawn a distinction between outwardly-directed measures, which are 'measures used to protect the morals of foreigners residing

¹⁷³ GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) [5.33].

¹⁷⁴ Cheyne, above n 163, 457.

¹⁷⁵ See Cook and Bowles, above n 87, 236; Van den Bossche, Schrijver and Faber, above n 23, 96.

¹⁷⁶ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [133].

¹⁷⁷ *Ibid.*

¹⁷⁸ Van den Bossche, Schrijver and Faber, above n 23, 94; but see Asif H Qureshi, 'Extra-territorial Shrimps, NGOs and the WTO Appellate Body' (1999) 48 *International & Comparative Law Quarterly* 199, 204–5; Nancy L Perkins, 'World Trade Organization: United States-Import Prohibition of Certain Shrimp and Shrimp Products' (1999) 38 *International Legal Materials* 118, 119; Cf Chang, above n 152, 36.

outside one's own country',¹⁷⁹ and inwardly-directed measures, which are used to safeguard the morals of residents of one's own country.¹⁸⁰ It has been suggested that outwardly-directed measures may not be justified under Article XX(a), or will at least require greater scrutiny.¹⁸¹ It is unclear which category animal welfare measures would fall within: it is possible that such measures would be classified as inwardly-directed because they are conditioned on moral concern within the country taking the measure.¹⁸² However, the inwardly-directed/outwardly-directed dichotomy is not based on AB jurisprudence, and some writers have rejected it as contrary to the structure of Article XX.¹⁸³

There is no jurisprudence on the question of the territorial reach of Article XX(a). Unhelpfully, the AB in *EC — Seal Products* declined to determine the issue. Instead, the AB stated:

Finally, we note that, in *US — Shrimp*, the Appellate Body stated that it would not 'pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation'. The Appellate Body explained that, in the specific circumstances of that case, there was 'a sufficient nexus between the migratory and endangered marine populations involved and the United States for the purposes of Article XX(g)'. As set out in the preamble of the Basic Regulation, the EU Seal Regime is designed to address seal hunting activities occurring 'within and outside the Community' and the seal welfare concerns of 'citizens and consumers' in EU member States. The participants did not address this issue in their submissions on appeal. Accordingly, while recognizing the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a), and, if so, the nature or extent of that limitation, we have decided in this case not to examine this question further.¹⁸⁴

Howse, Langille and Sykes have proposed a number of possible interpretations of the above statement.¹⁸⁵ The first is that the parties implicitly agreed that extra-territoriality was not an issue in *EC — Seal Products*, and the AB simply chose not

¹⁷⁹ Charnovitz, above n 87, 695.

¹⁸⁰ Ibid.

¹⁸¹ Ibid 731; Wu, above n 89, 245–8; Feddersen, above n 89, 117.

¹⁸² Cook and Bowles, above n 87, 234; *Contra* Anne-Marie de Brouwer, 'GATT Article XX's environmental exceptions explored: Is there room for national policies? Balancing rights and obligations of WTO members under the WTO regime' in Anton Vedder (ed), *The WTO and Concerns Regarding Animals and Nature* (Wolf Legal Publishers, 2003) 25.

¹⁸³ Howse and Langille, above n 63, 414.

¹⁸⁴ Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.173] (citations omitted).

¹⁸⁵ Howse, Langille and Sykes, above n 112, 124–6.

to deal with the issue.¹⁸⁶ This is probably not the correct interpretation of the AB's decision. Howse, Langille and Sykes go on to say that a 'careful reading' of the above statement suggests that, had the extraterritoriality issue been raised, the AB would have been satisfied that the Seal Regime had a sufficient nexus with the EU.¹⁸⁷ After setting out the relevant statement from *US — Shrimp I*, the AB noted that the Seal Regime was designed to address seal hunting activities both within and outside the EU, and to address the moral concerns of EU citizens and consumers. The AB appears to be implying that, due to one or both of these factors, the Seal Regime had a sufficient nexus to the EU such that it was not impermissibly extraterritorial.

Taking the first of these factors, the AB appears to be suggesting a trade measure based on public morals will not be impermissibly extraterritorial if it is at least partly aimed at addressing conduct occurring within the borders of the country taking the measure. This interpretation is problematic for several reasons. As Howse, Langille and Sykes state, it is unclear why it is relevant whether or not the activity that is the focus of the measure also occurs within the borders of the Member taking the measure. It is quite possible for citizens of a Member nation to have genuine moral concerns about practices that only occur abroad.¹⁸⁸

It is also unclear how the approach of the AB would be applied in practice, particularly in the context of the animal welfare measures discussed above in Parts II and III. Any ban on the import of cosmetics tested on animals would almost certainly be applied in conjunction with a ban on animal testing of cosmetics and cosmetic ingredients in Australia; that certainly appears to be the intention of the government,¹⁸⁹ and it was the approach taken in each of the Private Members' Bills introduced to the Australian Parliament dealing with this issue.¹⁹⁰ On the face of it, then, it appears any such measure would address conduct occurring both within and without Australia. However, it seems that cosmetic animal testing is not currently practiced in Australia.¹⁹¹ Can a measure still be said to regulate activities occurring within Australia, if the activities do not, in practice, occur at the time the measure is put in place?

The situation is even murkier in relation to any restrictions on live export. It may be the ESCAS requirements meet this test. A major objective of ESCAS is to ensure

¹⁸⁶ Ibid 124.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid 124–5.

¹⁸⁹ Australian Government Department of Health, 'Cosmetic Testing of Animals Ban November 2016 Consultations' <[http://www.health.gov.au/internet/main/publishing.nsf/Content/FC9633C2D3C5A4F5CA25805D000B3610/\\$File/November%20workshop%20consultation%20summary.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/FC9633C2D3C5A4F5CA25805D000B3610/$File/November%20workshop%20consultation%20summary.pdf)>.

¹⁹⁰ Ethical Cosmetics Bill 2016 (Cth); End Cruel Cosmetics Bill 2014 (Cth).

¹⁹¹ Australian Government Department of Health, 'Cosmetic Testing of Animals Ban November 2016 Consultations' <[http://www.health.gov.au/internet/main/publishing.nsf/Content/FC9633C2D3C5A4F5CA25805D000B3610/\\$File/November%20workshop%20consultation%20summary.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/FC9633C2D3C5A4F5CA25805D000B3610/$File/November%20workshop%20consultation%20summary.pdf)>.

that handling and slaughter of Australian animals meets the OIE animal welfare standards.¹⁹² Australia also regulates the handling and slaughter of animals within Australia, and in fact, the requirements that apply within Australia are more stringent. What, though, of a ban or suspension of live export, either across the board or in relation to specific countries? It is difficult to see how such a measure could be characterised as addressing activities occurring both within and outside Australia.

Turning to the second factor mentioned by the AB, Howse, Langille and Sykes suggest that, taken in combination with the first factor, the AB was indicating a measure would not be justified under Article XX(a) if it occurred both within and outside the territory of the regulating Member, but the measure only addressed moral concern about the activity taking place abroad. However, as they note, such a measure would not be justified anyway because it would not meet the requirements of the chapeau.¹⁹³

There is another interpretation of the AB's statement: perhaps the AB was saying the Seal Regime was not relevantly extraterritorial because it was designed to address the moral concerns of EU citizens and consumers about seal hunting, whether the seal hunting occurred within the EU or abroad. This is the preferable interpretation of Article XX(a). As we have discussed above, the AB is likely to require, as a condition for justification under Article XX(a), that Members implementing animal welfare measures demonstrate the measure is based upon genuine moral concern within their population. Whether the relevant conduct occurs at home or abroad is not the major issue in the Article XX(a) analysis; it is the moral response of the Member's citizens, which necessarily occurs within the borders of the regulating Member. The characterisation of public morals measures as inwardly-directed or outwardly-directed is thus an artificial distinction: in the relevant sense, all public morals measures are inwardly-directed.

If this preferred interpretation is adopted, the animal welfare measures discussed above in Parts II and III would not be relevantly extraterritorial. Indeed, as discussed throughout this article, it should be relatively easy to demonstrate that these measures are based on Australians' genuine moral concern about the animal welfare outcomes associated with the live export trade and the testing of cosmetics and cosmetic ingredients on animals. In the context of the Seal Regime, Howse, Langille and Sykes make the additional point that the moral concern flowed from EU citizens and consumers purchasing or using seal products and thus being complicit in commercialised seal cruelty.¹⁹⁴ This dynamic is also likely to be present in relation to any Australian animal welfare measures. For example, one argument often raised

¹⁹² Australian Government, 'Exporter Supply Chain Assurance System Report' (January 2015), 2.

¹⁹³ Howse, Langille and Sykes, above n 112, 125–6.

¹⁹⁴ Ibid 126.

against live export is that, by continuing to export live animals to destinations where it is known the animals are cruelly treated, Australia is complicit in that cruelty.¹⁹⁵

In the wake of the *EC — Seal Products* decision, there are reasons to be hopeful that, even if the AB were to continue to apply a territorial limitation to Article XX(b), such a limitation would not apply to Article XX(a). However, this issue remains unclear and clarification by the AB would be welcomed.

Although the reach of the extraterritoriality principle remains murky, it maintains the potential to be a significant barrier to the imposition of animal welfare measures. We have seen the rationale for the principle does not stand up to scrutiny, and on a correct interpretation of the GATT and the TBT there should be no territorial limit on the protection of animal welfare.

B Coercion

Subsequent to *US — Tuna (Mexico)*, Panels tended to focus more on the ‘coercive’ nature of extraterritorial measures, rather than extraterritoriality per se. ‘Coercive’ measures may be broadly defined as measures that seek to force other countries to change their environmental policies;¹⁹⁶ however, as discussed below, it is difficult to identify the precise features of a measure that lead the WTO to conclude it is unacceptably coercive.

The coercion issue was first raised in *US — Tuna (EEC)*. The report states:

The Panel concluded that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be considered ‘necessary’ for the protection of animal life or health in the sense of Article XX(b).¹⁹⁷

The Panel found the US tuna embargo was not justified under Article XX(b) because it was taken to force other countries to change their dolphin protection policies, and the embargo would be ineffective without such change.¹⁹⁸ In *US — Tuna II Mexico* attempted to make a similar argument, stating the objective of the US measure was

¹⁹⁵ See, eg, Mirko Bagaric, ‘Politicians Complicit in Animal Cruelty’, *Courier Mail* (online), 6 June 2011 <<http://www.couriermail.com.au/news/government-complicit-in-animal-cruelty/news-story/895b53f4aeedda7da1c011804e42eb9f?sv=8ddadfc02d9341c9c5aa92ee3ede5a33>>.

¹⁹⁶ Sanford Gaines, ‘The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures’ (2001) 22 *University of Pennsylvania Journal of International Economic Law* 739, 796.

¹⁹⁷ GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) [5.39].

¹⁹⁸ *Ibid* [5.37]–[5.39]. It is unclear why the Panel concluded that the measure would be ineffective without change in other countries’ policies, as it should have had the effect of decreasing the demand for dolphin-unsafe tuna: see Charnovitz, above n 161, 10575;

to ‘coerce’ another Member into changing its practices.¹⁹⁹ The AB rejected this argument since the objective of the measure, which was to protect dolphins, was not coercive.²⁰⁰ *US — Tuna II* suggests coerciveness must be found in the design of the measure, although the AB did not consider this point in detail.

In *US — Tuna (EEC)*, the Panel’s view of the US measure as unacceptably coercive also appeared to be linked to the design of the measure. The measure conditioned imports on the adoption of certain policies by the exporting country (a ‘government policy standard’). Immediately before finding that the measure had a coercive goal, the Panel noted the measure had the effect of prohibiting imports of dolphin-safe tuna if the producer’s country had not adopted appropriate dolphin-safe policies.²⁰¹ Logically, a trade measure can only be regarded as an attempt to force other countries to change their policies if it operates on the basis of those policies. As such, some writers have suggested only government policy standards can be considered coercive.²⁰² The *US — Shrimp I* Panel took this argument to its logical conclusion, stating that government policy standards would never be justifiable.²⁰³ But the AB rejected this view, stating that requiring the adoption of certain policies by exporting countries did not render a measure incapable of justification under Article XX.²⁰⁴ In *US — Shrimp II*, the compliance proceedings relating to the US’s implementation of the *US — Shrimp I* ruling, the AB characterised this statement as ‘central’ to the *US — Shrimp I* ruling.²⁰⁵

In *US — Shrimp I*, the AB did refer to the nature of the measure as a government policy standard in finding it was unacceptably coercive.²⁰⁶ The AB also linked the coercive nature of the measure to its inflexibility, stating that the measure required all

William J III Snape and Naomi B Lefkovitz, ‘Searching for GATT’s Environmental *Miranda*: Are “Process Standards” Getting “Due Process”?’ (1994) 27 *Cornell International Law Journal* 777, 788.

¹⁹⁹ Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [335].

²⁰⁰ *Ibid* [337]–[339].

²⁰¹ GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) [5.24].

²⁰² See Michaud, above n 131, 373; Howse and Regan, above n 151, 277; Charnovitz, above n 41, 68–9.

²⁰³ Panel Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/R (15 May 1998) [7.45]–[7.46].

²⁰⁴ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [121].

²⁰⁵ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products — Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc WT/DS58/AB/RW, AB-2001-4 (22 October 2001) [138]. See also Chang, above n 152, 38.

²⁰⁶ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [165].

other exporting Members to adopt essentially the same policy as the United States.²⁰⁷ The decision suggests that requiring exporting countries to adopt a particular *policy* is unacceptably coercive, but requiring adherence to a particular *standard* is acceptable.²⁰⁸ In practice, this may not be an easy distinction to draw. Comparatively minor amendments to the US certification guidelines convinced the AB in *US — Shrimp II* that the measure was acceptable, suggesting the line between ‘flexible’ and ‘inflexible’ is a fine one.²⁰⁹

It seems the design of a measure, as a government policy standard, is relevant to the coercion analysis, but not determinative.²¹⁰ In addition, *US — Tuna II* suggests measures may be considered coercive even when they are not designed as government policy standards. In this case, the AB suggested the measure’s potential coercive effect on the Mexican fleet was relevant to the analysis, although it did state that this effect could not, of itself, render the measure non-compliant.²¹¹

From a *realpolitik* perspective, extraterritorial regulations will only be experienced as ‘coercive’ where the country imposing the measure is a large economic force.²¹² In all cases where the ‘coercion’ issue was considered, the relevant measure was imposed by the US. It is possible the AB was concerned about the US using her substantial market power to force other Members to change their policies. While the argument against ‘eco-imperialism’ does have some force,²¹³ the anti-coercion principle is nevertheless unjustifiable because it cannot be located in the words of the GATT and the TBT.

In *US — Tuna II* the AB stated that coercion is relevant to the initial discrimination analysis under Article 2.1 of the TBT, suggesting any pressure exerted on Mexico to modify its practices could result in an ‘adverse impact on competitive opportunities for imported products vis-a-vis like domestic products’.²¹⁴ This suggestion rests on a logical fallacy. The exertion of pressure on the Mexican fleet does not result in an alteration of market conditions; rather, the Mexican fleet felt pressure to change

²⁰⁷ Ibid 161.

²⁰⁸ Archibald, above n 156, 41–2.

²⁰⁹ Gaines, above n 196, 794.

²¹⁰ Chang, above n 152, 40–4; Cf Neuling, above n 123, 40.

²¹¹ Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [226]. See also Simon Lester, ‘Anti-Coercion in Tuna’ on *International Economic Law and Policy Blog* (29 May 2012), <<http://worldtradelaw.typepad.com/ielpblog/2012/05/anti-coercion-jurisprudence.html>>.

²¹² Ankersmit, Lawrence and Davies, above n 164, 24–5.

²¹³ See generally Charnovitz, above n 41, 62–3.

²¹⁴ Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [226]; Cf Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [7.369]–[7.373].

its practices *because* the US measure modified the conditions of competition to the detriment of Mexican tuna. Coercion is a result of discrimination, not a cause of it.

In *US — Shrimp*, the AB applied the anti-coercion principle as a component of the chapeau's unjustifiable discrimination analysis.²¹⁵ This approach exhibits the same misunderstanding of the relationship between discrimination and coercion as displayed by the AB in *US — Tuna II*. Further, because coercion is a result of discrimination, not its cause, if discrimination is rationally related to a measure's objective, then any difference in coercive effect should be too. On this basis, any discrimination in a measure's coercive effect should not lack even-handedness or result in arbitrary or unjustifiable discrimination. In particular, the AB in *US — Shrimp* failed to explain how 'coercion' fits into the chapeau analysis.²¹⁶ Rather, the AB conceived of its task as determining a changeable 'line of equilibrium' between the right of Members to invoke Article XX and the rights of other Members under the other 'substantive' provisions of the GATT.²¹⁷ In doing so, the AB reasoned that the US had overstepped the line of equilibrium by making unjustifiable use of her trade power.²¹⁸

By treating the coercive effect of the measure as an independent criterion bearing on its justification under GATT Article XX, the AB in *US — Shrimp* was not faithful to its task of interpreting the ordinary words of the agreement. The AB's attempts to treat coercion as an aspect of unjustifiable discrimination are not grounded in the text of the agreements and should therefore be rejected.

Despite positive signs in recent cases, the 'extraterritoriality' and 'coercion' principles may yet prove to be a barrier to the promotion of animal welfare through trade. The above analysis has sought to demonstrate these principles arise from an interpretation of the WTO Agreements that is not faithful to the ordinary meaning of the text. Rather, they appear to be based on policy decisions about the balance of rights within the multilateral trading system. This article argues that clarification of the reach of these principles is necessary in order to provide certainty for countries wishing to impose animal welfare measures.

VII CONCLUSION

The animal protection movement has been described as 'the next great social justice movement'.²¹⁹ Despite the ancient history of animal welfare concerns, lately there

²¹⁵ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [161]–[165].

²¹⁶ Gaines, above n 196, 796-8; Cf Chang, above n 152, 30.

²¹⁷ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [159].

²¹⁸ Gaines, above n 196, 796–7.

²¹⁹ David Weisbrot, 'Comment' (2007) 91 *Australian Law Reform Commission Reform Journal* 2, 2.

has indeed been increasing international interest in animal welfare issues. Domestically, governments use controls on the use of animals during the production of certain products as a major component of animal welfare regulation. In recent decades, states have considered extending this form of regulation into the international arena by imposing trade measures, but have in some instances been dissuaded by fears these measures may not be WTO-compliant. Indeed, the WTO has the potential not only to prevent Members from imposing trade measures based on animal welfare: it may also interfere with the ability of Members to impose domestic standards. If domestic welfare safeguards are not accompanied by trade restrictions, governments are likely to face fierce lobbying from local producers concerned that their products will be undercut by cheaper, low-welfare imports.²²⁰

Despite the WTO's traditional hostility to animal welfare, this article has argued that in the recent decisions in *US — Tuna II* and *EC — Seal Products*, the WTO accepted animal welfare as a legitimate regulatory objective. In doing so, the WTO recognised that animal welfare is a matter of international moral concern, and interpreted the phrases animal life and animal health to accord with our contemporary understanding of the importance of the wellbeing of individual animals. Although the measures at issue in *US — Tuna II* and *EC — Seal Products* were ultimately non WTO-compliant, this prompted the relevant Members to strengthen their animal welfare protections. As such, for perhaps the first time in its history, the WTO has had a positive influence on international animal welfare.

Nevertheless, there are limits on the ability of Members to take animal welfare measures, and this article has suggested that WTO jurisprudence on extraterritoriality and coercion could be particularly problematic for animal welfare measures. This jurisprudence reflects the WTO's uneasiness about unilateral action on environmental concerns, and represents a reading of the WTO agreements that is based on policy considerations rather than the text of the agreements. As such, this article has argued the AB should clarify that these principles no longer form part of WTO law, allowing Members to use trade leverage to improve animal welfare.

The WTO's recognition of animal welfare as a legitimate policy goal is a step forward for the international animal protection movement. Yet there is no room for complacency as there are still barriers in WTO law that must be removed to ensure Members can continue improving animal welfare through trade.

²²⁰ Stuart Harrop and David Bowles, 'Wildlife Management, the Multilateral Trade Regime, Morals and the Welfare of Animals' (1998) 1 *Journal of International Wildlife Law & Policy* 64, 71–2; Thomas, above n 131, 608–9.

Greg Taylor*

THE JUDICIAL INCOMPATIBILITY CLAUSE — OR, HOW A VERSION OF THE *KABLE* PRINCIPLE NEARLY MADE IT INTO THE FEDERAL CONSTITUTION

ABSTRACT

Until nearly the end of the Convention debates the draft *Australian Constitution* contained a provision that would have prevented judges from holding any federal executive office. The prohibition, removed only at the last minute, would have extended to all federal executive offices but was originally motivated by a desire to ensure that judges did not hold office as Vice-Regal stand-ins when a Governor-General was unavailable, as well as by the feud between Sir Samuel Way CJ and (Sir) Josiah Symon QC. The clause was eventually deleted, but not principally because of any reservations about the separation of judicial power; rather, it was thought difficult to be sure that other suitable stand-ins could always be found and problematic to limit the royal choice of representative. However, this interesting episode also shows that a majority of the Convention and of public commentators rejected the idea of judicially enforcing, as a constitutional imperative, the separation of judicial power from the executive. Presumably, while not rejecting the separation of powers itself, they would have rejected the judicial enforcement of that principle such as now has been established by case law and implication.

I INTRODUCTION

Chief Justice French¹ and Dr Matthew Stubbs² have already drawn attention to the fact that the draft *Australian Constitution* very nearly went to the people with the following clause at the end of Chapter III on the federal judiciary:

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¹ *South Australia v Totani* (2010) 242 CLR 1, 43; Robert French, 'John Forrest: Founding Father from the Far West' (2011) 35 *University of Western Australia Law Review* 205, 224.

² Matthew Stubbs, 'The Constitutional Validity of State Chief Justices Acting as Governor' (2014) 25 *Public Law Review* 197, 200–2. See also J M Finnis, 'Separation of Powers in the Australian Constitution — Some Preliminary Considerations' (1968)

No person holding any judicial office shall be appointed to or hold the office of Governor-General, Lieutenant-Governor, Chief Executive Officer, or Administrator of the Government, or any other executive office of the Commonwealth.³

The clause was inserted in Adelaide on Thursday 22 April 1897 by 19 votes to 11⁴ and not deleted until almost the last working day of the final Constitutional Convention. Its end came on Friday 11 March 1898, and after only two further days of business the Convention disbanded after votes of thanks and other formal business on Thursday 17 March 1898 — after which its work was to be submitted to the people and, once accepted by them, could be altered only by Imperial *force majeure*. Indeed, as late as Friday 4 March 1898 this clause was being amended (the only amendment it suffered) by the addition of the final clarificatory three words ‘of the Commonwealth’ on the motion of Edmund Barton QC.⁵

In what follows I shall refer to the proposed clause as ‘the judicial incompatibility clause’. Forgotten for many decades, and ignored by La Nauze’s standard history of the making of the *Australian Constitution*,⁶ this ghost of a clause has experienced a remarkable afterlife thanks to case law. The incompatibility exception to the *persona designata* exception to the rule that federal judges may exercise only judicial and not non-judicial power is clearly analogous to this clause: the incompatibility principle also operates to prevent judges from holding some executive offices. Given that the *Kable*⁷ principle at state level ‘share[s] a common foundation in constitutional principle’⁸ with the federal incompatibility rules and is sometimes — although not consistently, as Dr Rebecca Ananian-Welsh has noted — applied in a similar way,⁹ there is also an analogy with the *Kable* line of authority. Indeed, the clause goes further than both present-day streams of authority in one respect, for it would have prohibited the holding of any executive office at all by federal judges rather than merely those deemed incompatible with judicial office. Therefore, there would be no doubt under it about whether judges could be federal royal commissioners, for example; the clause peremptorily declares all executive offices to be incompatible with federal judicial office. On the other hand, the wording of the judicial incompatibility clause confined it to the holding of offices, and accordingly mere functions,

3 *Adelaide Law Review* 159, 171, as Dr Stubbs notes (at 200).

³ This is the form of the clause as it existed immediately before its deletion: John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 931.

⁴ *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, 1176.

⁵ See below, n 74.

⁶ J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972).

⁷ Deriving from *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

⁸ *Wainohu v New South Wales* (2011) 243 CLR 181, 228.

⁹ Rebecca Ananian-Welsh, ‘Preventative Detention Orders and the Separation of Judicial Power’ (2015) 38 *University of New South Wales Law Journal* 756, 762.

such as authorising telephone warrants,¹⁰ would not have fallen within its purview. Probably, if the judicial incompatibility clause had remained in the *Australian Constitution*, that distinction between offices and mere functions would have assumed considerable importance in its interpretation, and certainly the federal legislative drafters would have been careful not to create executive offices rather than simply conferring functions on judges.

Despite its high purpose, the judicial incompatibility clause's origins are at first sight little short of ludicrous, for it appears to be a further shot in the long-running and largely one-sided personal campaign conducted by (Sir) Josiah Symon QC against Sir Samuel Way CJ, the Lieutenant-Governor of South Australia. The arguments for and against the clause concentrated on the occupation by Chief Justices of the post of Lieutenant-Governor and other forms of Vice-Regal deputising, as those were the most important additional posts they held and the only roles in the executive to which judges were appointed with some frequency. However, a little more thought shows that the clause would hardly have received the endorsement of the Conventions had it been merely the continuation of a personal feud by other means. At the very end, when it was deleted from the draft by a decisive vote of 11 to 26, some of the greatest names in Australian federalism and both future founding puisne Justices of the High Court of Australia¹¹ defended and sought to save it. This article, as well as outlining the background to the feud just mentioned, will also ask: what (besides the feud just mentioned) motivated the proponents and defenders of this clause? How did its opponents, colonial legislatures and the public at large view this proposal? Why was it finally deleted? And what, if anything, does this episode reveal about the Founders' attitude towards the separation of judicial power and constitutional protections of it?

While this article is agnostic about originalism, even those who reject that approach will surely agree that a greater understanding of the thoughts of the Founders is a matter of inherent interest; and in this case, we can conclude something from what they considered, added and then left out as well as from what they left in the final document.

II THE FEUD

A Background: Chief Justices as Lieutenant-Governors in the 1890s

In the 1890s it had not yet become a matter of course for the Chief Justices of the states (as they were about to become) to be appointed to the office of Lieutenant-Governor, but those that did not hold that office nevertheless sometimes acted as Governors if

¹⁰ The example is, of course, taken from *Grollo v Palmer* (1995) 184 CLR 348.

¹¹ *Minutes of Proceedings of Australasian Federal Convention*, Melbourne, 11 March 1898, 5. As we shall see, Sir Samuel Griffith CJ was against the clause, but was not of course available to vote in Convention.

the need arose.¹² By the mid-1890s, as our judicial incompatibility clause was about to commence its rise and fall, Darley and Way CJJ held the permanent posts of Lieutenant-Governor of New South Wales and South Australia respectively. Victoria had seen Madden CJ act as Governor when the need arose, but he was not to be formally appointed to the permanent post of Lieutenant-Governor until 1899, after the judicial incompatibility clause had lived and died. In Queensland, exceptionally, the former Premier and then President of the unelected Legislative Council, the ailing Sir Arthur Palmer, was permanent Lieutenant-Governor. In Western Australia Onslow CJ had been the subject of some controversy and was only ever made Acting Governor as the need arose. In Tasmania also, Dobson CJ had merely acted as Governor when necessary and Dodds CJ, who succeeded him on his death in 1898, was not appointed Lieutenant-Governor until 1903.¹³ Sir Arthur Palmer died on 20 March 1898, only three days after the federal Conventions closed (unlike Dobson CJ, who died on the very day of their closure); in the following year Griffith CJ was appointed Lieutenant-Governor of Queensland.¹⁴ Thus, while only two Chief Justices held the office of Lieutenant-Governor during the Conventions, at Federation four Chief Justices — Darley, Madden, Griffith and Way CJJ — were Lieutenant-Governors.¹⁵

Unsurprisingly, the Colonial Office continued to reserve for itself the decision about who might step in, should the need arise, for the Governors it appointed — with the coming of responsible government the Chief Justices were all appointed locally rather than by it.¹⁶ Furthermore, at this time the modern party system was only just visible on the horizon, thus increasing the likelihood that difficult decisions would have to be made by the Vice-Regal stand-in, whether a mere acting Governor or a formally appointed Lieutenant-Governor, and thus making the office potentially more sensitive than it is today. Accordingly, it was by no means to be taken for granted in the 1890s that any Chief Justice would be formally constituted Lieutenant-Governor,

¹² Some of the history is briefly but usefully and correctly outlined in David Clark, ‘The Struggle for Judicial Independence: The Motion and Suspension of Supreme Court Judges in Nineteenth Century Australia’ (2013) 12 *Macquarie Law Journal* 21, 57.

¹³ Sir John Quick and Sir Robert Garran, *Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, Sydney 1901) 373–5; Victoria, *Victorian Government Gazette*, No 125, 30 December 1896, 5325; Victoria, *Victorian Government Gazette*, No 45, 16 June 1899, 2261; Queensland, *Queensland Government Gazette*, No 58, 26 April 1893, 1173; entries of the persons named in the National Centre of Biography, *Australian Dictionary of Biography* <<http://adb.anu.edu.au>>. Palmer’s entry in the *Australian Dictionary of Biography* says that he ceased to be Lieutenant-Governor in 1896, but the prefatory pages to that year’s ‘Hansard’ have him still occupying the post in 1897. There is no other evidence that he was deprived of the title although not acting as Governor *sede vacante*; there appears to be confusion in the *Australian Dictionary of Biography* on this point.

¹⁴ *London Gazette*, No 27119, 22 September 1899, 5811.

¹⁵ *London Gazette*, No 11247, 6 November 1900, 6767.

¹⁶ However, the fact that one of the Colonial Office’s last Australian judicial appointments was Boothby J did nothing to increase confidence in its judgement!

and indeed the judicial incompatibility clause recognised this by applying its prohibition at federal level both to permanent Lieutenant-Governors and to Administrators appointed when the need for a stand-in arose.

In South Australia, Way CJ had had to wait nearly fifteen years after his appointment as Chief Justice for the honour of being appointed to the permanent post of Lieutenant-Governor, and when it occurred in early 1891¹⁷ it was considered a marked sign of royal favour and a high personal honour; significantly, the Governor himself had put forward the proposal without reference to the local government, taking the view that the representation of the Crown in South Australia was a matter for London to decide without local interference.¹⁸ At the time it was not quite yet established that the colonies had a right or even a legitimate expectation that they would be consulted before the appointment of the permanent Governor,¹⁹ but it is nevertheless plain that the failure even to mention the proposed elevation of Way CJ to the Premier of the day, the first Thomas Playford, was taken amiss by him.²⁰

B *Objection, your Honour*

Another decidedly underwhelmed spectator of Way CJ's apotheosis was (Sir) Josiah Symon QC. He and Way CJ had fallen out at the time of the latter's advancement to the bench in 1876, as they had been partners in a law firm and Symon felt that his partner should have consulted him before accepting the appointment.²¹ Even 15 years later, Symon QC had not forgiven this conduct, and that despite the fact that he as a practising lawyer naturally had on occasion to appear before Way CJ! Symon QC was, recorded a chronicler of his infamous dispute as federal Attorney-General with the newly constituted High Court of Australia in 1905 over travelling and other expenses, 'a good hater – perhaps the best Australian politics has ever produced';²² although those words were written in 1978 and might accordingly require some qualification today, they were still a large claim when written. The Prime Minister of Australia, writing anonymously as a newspaper correspondent, thought that Symon KC's fight against the judges in 1905 had been 'long, tedious and petty', and Symon KC's decision to continue firing pot-shots on the issue even

¹⁷ *London Gazette*, No 26125, 16 January 1891, 290.

¹⁸ State Records of South Australia, GRG 2/14/2, despatches of 26 November 1890; 3 January 1891; 21 February 1891.

¹⁹ Victoria, Parl Paper No 124 (1889) contains despatches denying such a right; for subsequent developments in which Playford also features, see Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, Leichhardt, 2006), 26–29.

²⁰ State Records of South Australia, GRG 2/14/2, despatch of 21 February 1891; A J Hannan, *The Life of Chief Justice Way* (Angus & Robertson, 1960) 122–6.

²¹ *Ibid* 94.

²² W G McMinn, 'The High Court Imbroglia and the Fall of the Reid-McLean Government' (1978) 64 *Journal of the Royal Australian Historical Society* 14, 15.

after his relegation to Opposition was explicable only by ‘strong ... personal resentment’.²³ Another historian points out Symon QC’s pronounced streak of spitefulness and venom, and refers to his proposal to introduce our judicial incompatibility clause as a continuation of his vendetta against Way CJ.²⁴ This characteristic was not mellowed by age, for in Symon QC’s biography in the *Australian Dictionary of Biography* we find that ‘a Court ordered that certain words in his will, “scandalous, offensive and defamatory to the persons about whom they were written”, be omitted from probate’.²⁵

In Symon KC’s reminiscences on the federal struggle written in 1930 we find a further attack on Way CJ for his actions in the dispute with the Colonial Office on Privy Council appeals — Way CJ having supported their continuation and thus taken the side of the Colonial Office, while Symon QC was one of the leading voices against the Privy Council. By 1930 that dispute was over three decades in the past, and Way CJ had been dead for about half that time.²⁶ Not that our hero waited until passions had cooled to give the world the benefit of his assessment of Way CJ: in 1900 at a public meeting reported in the newspapers he gave a rabble-rousing speech attacking Way CJ for attempting to go behind the *Australian Constitution* as approved at referenda and seeking alterations to ‘the people’s charter by a foreign Parliament, a Parliament in which we are not represented’. He pronounced that this was ‘the first time our freedom had been assailed and the prerogative had been supported by one holding the high office of an English Judge’,²⁷ suggesting that Symon QC’s emotions had got the better of him and he had temporarily forgotten the far greater harm wreaked only a few decades earlier by Boothby J — and also omitted to notice the obvious contradiction between referring to the Imperial Parliament as ‘foreign’ but the Chief Justice of the Supreme Court of South Australia as ‘English’.

It was therefore entirely in character for Symon QC not to rejoice gracefully in the success of others when Way CJ was appointed Lieutenant-Governor and put long-settled disputes to rest, or even take note of this honour in dignified silence, but rather to bide his time and wait for an opportunity to attack an old foe. At least

²³ John Andrew LaNauze (ed), Alfred Deakin, *Federated Australia: Selections from Letters to the “Morning Post” 1900–1910* (Melbourne University Press, 1968) 156.

²⁴ D I Wright, ‘Sir Josiah Symon, Federation and the High Court’ (1978) 64 *Journal of the Royal Australian Historical Society* 73, 79, 85.

²⁵ The author contacted the Probate Registry in the Supreme Court of South Australia and was advised that the offending comments had nothing to do with the topic presently under discussion or any person connected with it.

²⁶ Symon and D I Wright (ed), ‘The Dawn of Federation: Some Episodes, Letters and Personalities and a Vindication’ (1976) 15 *South Australiana* 13, 137.

²⁷ ‘The Commonwealth Bill: Mr Symon Criticizes the Chief Justice’, *South Australian Register* (Adelaide), 16 May 1900, 5. See also John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Oxford University Press, 2001) 241. For interesting comparable views in New Zealand shortly afterwards, see John Tate, ‘The Privy Council and Native Title: A Requiem for *Wi Parata*’ (2004) 12 *Waikato Law Review* 99.

as initially proposed, without the three final words ‘of the Commonwealth’ added towards the end of its life, the judicial incompatibility clause applied, as a matter of language at least, to state judges and state executive offices as well as federal ones, as Symon QC confirmed in moving its insertion;²⁸ if so read literally, it would therefore have compelled Way CJ to relinquish his prized post of Lieutenant-Governor even if he took no federal office. Had the clause been finally accepted without those three words, perhaps it would have come to be understood as limited to federal posts only, but it did not say so on its face, and when the judicial incompatibility clause was being proposed the idea was not yet fully accepted that no interference would be essayed by the *Australian Constitution* in the states’ own constitutional arrangements unless essential for federating. Thus, for example, Alfred Deakin proposed, albeit unsuccessfully, a clause on the same day as the judicial incompatibility clause was inserted requiring the states to communicate with the Imperial authorities through the Governor-General.

C A postlude – s 8 of the Judiciary Act 1903 (Cth)

However, it may be that Symon QC had not merely seized on an entirely random issue as a stick with which to beat Way CJ, for we find him in 1931 deprecating the appointment of Sir Isaac Isaacs as Governor-General because, he claimed, the appointment again sullied the judiciary given that Isaacs had until recently been Chief Justice. Symon KC claimed that the appointment was not merely undesirable, but invalid. Of course, Isaacs’ appointment as Governor-General was controversial for a number of well-known reasons, but Symon KC’s arguments that it was invalid were of a standard usually to be found in vexatious litigants’ submissions or, nowadays, Facebook posts. The argument was in brief that s 8 of the *Judiciary Act 1903* (Cth), which then prohibited a justice of the High Court of Australia from accepting any other office ‘within the Commonwealth, except any such judicial office as may be conferred upon him by or under any law of the Commonwealth’, attached to each judge even after resignation from the judicial office!²⁹

²⁸ *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, 1174. However, Symon QC did say that the clause was ‘particularly desirable’ at federal level, and later realised that applying it at state level was an overreach and modified his opinion: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 358, 364; see also *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 March 1898, 1715. See also the exchange between C C Kingston, Sir John Forrest and Bernard Wise in *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 February 1898, 1704.

²⁹ J H Symon, ‘Governor-General’s Appointment’, *The Advertiser* (Adelaide) 7 February 1931, 16. Equally improbable, although different arguments are advanced by our hero in ‘Appointment of Sir Isaac Isaacs: Sir Josiah Symon Returns to the Charge’, *The Advertiser* (Adelaide), 22 December 1930, 9; J H Symon, ‘Governor-Generalship: ‘Violation of Judiciary Act’, *The Advertiser*, 24 December 1930, 12. See also John Waugh, ‘Appointing the First Australian-Born Governor-General: Legal and Vice-Regal Opposition’ (2012) 23 *Public Law Review* 50, 57, 59.

Symon KC was certainly familiar with s 8. As a senator in 1903 he had pointed out that it did what the judicial incompatibility clause in its final form was meant to do and a little more, namely ‘precluding the possibility of any Judge of the High Court occupying an executive position such as that of Acting Governor-General or Lieutenant-Governor, or any office of similar description within the Commonwealth and, of course, within a State’ — a description with which the government’s Senate Leader, none other than Richard O’Connor QC, completely agreed.³⁰ Accordingly, we can see that although the judicial incompatibility principle was finally rejected as part of the *Australian Constitution*, a version of it made it on to the statute books and survived until 1979. (Section 10 of the *High Court of Australia Act 1979* (Cth) became its successor, with the important difference that the prohibition now is ‘of accepting or holding any other office of profit within Australia’. The rule is now merely that justices of the High Court of Australia — there appears to be no comparable statutory restriction on judges of other federal courts — must not be paid for doing anything else; there is no general statutory principle that they must keep themselves separate from other branches of the government).

Symon KC even pursued his “No Way” obsession³¹ to the length of moving an amendment to change s 8 so that Australian Privy Councillors could not be appointed judges of the High Court of Australia. This was allegedly in the interests of making the Court ‘truly Australian’.³² While, in fairness, this was a clear reference to recent suggestions for an Empire-wide appeals court with colonial representation that the Imperial authorities had used to try to head off restricting the Privy Council’s

³⁰ Commonwealth, *Parliamentary Debates*, Senate, 5 August 1903, 3074; see also Commonwealth, *Parliamentary Debates*, House of Representatives, 30 June 1903, 1565–7, where Deakin A-G states that s 8 will prevent a justice of the High Court of Australia from acting as State Governor. Nevertheless, it could certainly have been questioned whether the expression ‘law of the Commonwealth’ in s 8 had the effect of including state offices.

It is also interesting to note that the government originally went so far as to propose in its Bill that a contravention of s 8 should effect an avoidance of the office of justice of the High Court of Australia until it was pointed out that this was unconstitutional: Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 1903, 1441.

³¹ I am indebted to my friend Valerie Scovell for this clever pun.

³² Commonwealth, *Parliamentary Debates*, Senate, 5 August 1903, 3075; see also the phrase ‘absurd anomaly’: Commonwealth, *Parliamentary Debates*, Senate 31 July 1903, 2945. Nevertheless, it would seem that the amendment missed its mark, for s 8 as enacted continued to include the words ‘within the Commonwealth’ in the prohibition and accordingly appointments to the Privy Council did not debar a judge from appointment to the High Court of Australia. It is strange that Senator Symon KC did not notice this; perhaps others did and refrained from pointing it out to him, realising what game he was playing. A further possible difficulty for Griffith CJ arising from s 8 was disposed of as shown in Patrick Brazil and Bevan Mitchell (eds), *Opinions of the Attorneys-General of the Commonwealth of Australia* (Australian Government Publishing Service, 1981) vol 1, 196. Way CJ did not accept federal judicial office and therefore the question did not arise for him.

jurisdiction in Australia,³³ it will cause no surprise that the principal victims of the ‘truly Australian’ approach would have been Way CJ, who had been appointed to the Privy Council in 1897 in accordance with the *Judicial Committee Amendment Act 1895* (Imp), along with Griffith CJ who had also found a place on the Privy Council as well as, as we shall see, on the enemies list.

At any rate, Symon KC argued in the early 1930s that the prohibition on judges of the High Court of Australia holding non-judicial offices embodied in s 8 continued even after departure from judicial office and prevented Sir Isaac Isaacs from becoming Governor-General. This is such a ridiculously long bow, and indeed inconsistent with something that Symon QC had himself pointed out in the debates on the judicial incompatibility clause in 1898,³⁴ that one is driven to wonder whether Isaacs must also have been on Symon KC’s enemies list; although I know of no clear evidence of that as there is with the earlier cases mentioned, it is noticeable that Isaacs KC was Symon KC’s replacement as federal Attorney-General at the fall of the Reid ministry in 1905, and Isaacs A-G KC conceded virtually all the High Court of Australia’s travelling and establishment demands that had been so stoutly resisted by his predecessor.³⁵ In 1906, moreover, Isaacs took for himself a judicial appointment that might equally have been conferred on another prominent and legally qualified member of the federal movement.³⁶ But another explanation, not even necessarily contradicting the first hypothesis, is that the principle of separating judicial from executive office, even when the two are held consecutively and not concurrently as was the case with Isaacs, was not merely a convenient stick with which to beat Way CJ, although it clearly was that — but that our hero did also hold, as he himself put it after the battle for the judicial incompatibility clause was lost, ‘the very strongest view’ that appointing Chief Justices to Vice-Regal positions constituted ‘an anomaly and blemish on the judicial office’,³⁷ and that he believed this so strongly that it sometimes affected his legal judgment.

³³ David Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833–1986* (Manchester University Press, 1987) 63. When the *Judiciary Act 1903* (Cth) was sent to the Colonial Office, as was then standard practice, it forwarded advice of the Act to the Registrar of the Privy Council but there was no reply from him; neither the Governor-General nor the Colonial Office remarked in any way upon s 8: CO 418/26/740ff (AJCP 2159).

³⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1895 — the prohibition applies to ‘any person in active service’, not to retired judges.

³⁵ McMinn, above n 22, 28; Susan Priest, ‘Archives, the Australian High Court and the “Strike of 1905”’ (2013) 32 *University of Queensland Law Journal* 253. See also Stephen Gageler, ‘When the High Court Went on Strike’ (2017) 40 *Melbourne University Law Review* 1098.

³⁶ Cf Hirst, above n 27, 229; Brian Galligan, *Politics of the High Court* (University of Queensland Press, 1987) 83.

³⁷ Commonwealth, *Parliamentary Debates*, Senate, 31 July 1903, 2945.

III RISE OF THE JUDICIAL INCOMPATIBILITY CLAUSE

After the initial speechifying was over the Adelaide Convention, meeting at the first of the three locations chosen for the honour in 1897–8, formed three committees to consider how to proceed (or how the 1891 Bill could be re-worked). The Judiciary Committee's chairman was Symon QC, but there is no record of any discussion in that committee of a new clause along the lines of the judicial incompatibility clause or even of the general topic.³⁸

Symon QC first raised the topic in full Convention on Wednesday 14 April 1897, when the Convention was discussing what became the latter half of s 4 of the *Australian Constitution* prohibiting an Administrator from receiving a salary from the Commonwealth for any other office. He asked whether the Constitutional Committee or Drafting Committee had considered the issue (which, it transpired, they had not) and suggested that he and Edmund Barton QC should discuss an amendment along the lines of the judicial incompatibility clause. Barton QC responded, '[i]t will give me the greatest pleasure to discuss that question with my learned friend. I think we are somewhat in sympathy on the matter.'³⁹

The records of the Convention include printed drafts of the judicial incompatibility clause dated 17 April 1897, after the Judiciary Committee had reported and disbanded, showing that it was to be proposed in the full Convention not only by Symon QC but also by P M Glynn, his colleague in the legal profession, on the Judiciary Committee and from South Australia.⁴⁰ Both of them were proposing to place the clause at the end of Chapter II on the executive government, which included the provisions about the Vice-Regal representative, rather than in the chapter on the judiciary. There is no record of why they changed their minds, but this suggests that over the next five days, before the clause was moved and added to the draft *Australian Constitution*, they came to see that their primary focus was not the executive office, but the need to keep the judiciary free from non-judicial tasks. That certainly explains why the Judiciary Committee had not dealt with the question, for it was only after its work was done that Symon QC realised that his hobbyhorse was really about the judiciary.

No doubt further discussions occurred behind closed doors before, on Thursday 22 April 1897, the day's debate started with a consideration of the ancestor of s 101 of the *Australian Constitution* giving the Inter-State Commission 'such powers of adjudication and administration' as Parliament determined; Symon QC, who spoke frequently and at length in the debate, showed no anxiety on the separation of powers

³⁸ State Archives of South Australia, GRG 72/8/12; 72/11/5; 72/11/11 (held on microfilm in the State Library of Victoria, MS 8871, MSM 47–49); Williams, above n 3, 491; 'Judiciary Committee', *Sydney Morning Herald* (Sydney) 7 April 1897, 7.

³⁹ *Official Report of the National Convention Debates*, Adelaide, 14 April 1897, 635.

⁴⁰ State Archives of South Australia, GRG 72/12/3/14; 72/12/4 (held on microfilm in the State Library of Victoria, MS 8871, MSM 47–9).

front when confronted with this arguable breach of it.⁴¹ After dealing with some other proposals and most notably rejecting Isaacs A-G's proposal for a referendum as a device to break the deadlock, the Convention agreed after a remarkably short debate and by 19 votes to 11 to insert the judicial incompatibility clause.⁴²

As previously noted,⁴³ Symon QC confirmed that the clause as originally proposed would apply at state level as well, but clearly his focus was on the High Court of Australia as the arbiter between the states and Commonwealth and the interpreter of the *Australian Constitution*; thus, it could not be said that the later express restriction of the clause to offices at the federal level was a major change in its purpose (and even if restricted to the federal level, it could still have been seen as an implied rebuke to State Chief Justices holding the position of Lieutenant-Governor). Two Premiers opposed the clause: C C Kingston from Symon QC's home state and Sir George Turner of Victoria. The former thought that the existing system with Way CJ as Lieutenant-Governor had worked well,⁴⁴ and the latter that in the selection of a representative the Queen's hands should be free and the imperial authorities trusted not to commit improprieties. Sir George Turner proposed extending the prohibition so that not only no judicial, but also no executive or legislative officer could be or act as Governor-General, which Symon QC rightly saw as a wrecking amendment designed to expose the principle he favoured to ridicule. It also failed to take into account that, as he himself had come to realise only a week or two earlier, his concern was not the Vice-Regal office as such but the purity of the judiciary. The proposed extension was rejected without a division and the clause accepted by a majority of eight, including one Premier, Sir Edward Braddon of Tasmania, and both Barton QC and O'Connor QC.⁴⁵ Of the members of the Judiciary Committee which Symon QC had chaired, five voted in favour of his clause and two — including H B Higgins — against, while three were not present. The judicial incompatibility clause was in the draft *Australian Constitution*.

IV COMMENTARY AND REACTION

Fatal to the clause's survival was the fundamental criticism now to be directed at it by Griffith CJ, for which, along with his Honour's other reflections on the drafting style of the Judiciary Chapter, he earned a place on Symon QC's enemies list — a fact which fully explains the latter's extraordinarily tactless, petty and confrontational approach towards the Chief Justice of the High Court of Australia in the lead-up

⁴¹ It was, of course, resolved, although not to universal satisfaction, in *New South Wales v Commonwealth* ('Wheat Case') (1915) 20 CLR 54.

⁴² *Official Report of the National Convention Debates*, Adelaide, 22 April 1897, 1174–6.

⁴³ See the text surrounding footnote 28.

⁴⁴ This view was shared by a future Premier of New South Wales, (Sir) Joseph Carruthers: *Official Report of the National Convention Debates*, Adelaide, 25 March 1897, 89.

⁴⁵ *Official Report of the National Convention Debates*, Adelaide, 22 April 1897, 1174–6.

to the Court's 'Strike' of 1905 already mentioned.⁴⁶ Yet again, 'ἐπιστάμενος ὧν ὡς περιυβρισμένος εἶη πρὸς αὐτῶν, ἐπενόεε τίσασθαι τοὺς διώξαντας.'⁴⁷ Symon QC's own view, expressed behind closed doors to fellow Convention delegate (Sir) William McMillan, was that Griffith CJ's criticisms of his drafting in 1897 were spiteful: he resented interference with his own drafting from 1891 (when he had been Premier rather than Chief Justice of Queensland and thus available to take a leading part in deliberations).⁴⁸

On some points Griffith CJ's criticisms of the 1897 draft completely missed the mark: there was, for example, no prospect of a return to the 1891 draft's indirectly elected Senate that his Honour continued to advocate. But on technical issues relating to the judiciary, his voice naturally carried great weight. He was particularly displeased about the judicial incompatibility clause. It may well have been with it in mind that he wrote in his introductory remarks: 'I fear that the constitutional position and functions of the Sovereign as Head of the Federation were, for the moment, lost sight of'.⁴⁹ Writing on the judicial incompatibility clause in particular, his Honour described it as 'remarkable', by which he did not mean remarkably good, and the arguments in favour of it merely 'on the surface'. '[S]ome' of the arguments against it were that the Sovereign's choice of her representative was an essential personal right; that any comments upon that choice would be best made, if necessary, by parliamentary address; and that there was no obvious candidate for the role of substitute other than judges, especially given that the person must always be available and identifiable by reference to an existing office.⁵⁰ This was certainly a 'remarkable' barrage of criticism to direct publicly at a clause that had received the public support of several eminent Queen's Counsel including the acknowledged leader of the Federation movement.

Broader opinion was divided. Under the process agreed upon for keeping the Federation ball rolling, the Parliaments of the five colonies which had participated in the Conventions (Queensland was the exception) now subjected the Bill to detailed review. The Legislative Assemblies of New South Wales and Victoria both suggested excising the clause. In New South Wales (Sir) Joseph Carruthers, an advocate of the existing system in his colony of judges as stand-in Vice-Regal officers,⁵¹ thought that if there were difficulties with appointing a judge as step-in, they could be provided

⁴⁶ See the text surrounding footnotes 22, 35.

⁴⁷ Herodotus, *Histories*, 2.152.3: 'having concluded that he had been grossly mistreated by them, he decided to avenge himself on his persecutors'.

⁴⁸ Symon QC was able to bring himself to refer to Griffith CJ as possessing 'much facility as a draftsman': Josiah Symon, 'United Australia' (1900) 9 *Yale Review* 129, 137, although he immediately follows this up with an attack on him for misreading the public mood: 138. However his real view is found in Williams, above n 3, 615; and see La Nauze, above n 6, 169; J H Symon, 'Federation and Western Australia', *Sydney Morning Herald* (Sydney) 5 February 1900, 8.

⁴⁹ Williams, above n 3, 616.

⁵⁰ *Ibid* 622.

⁵¹ See n 44.

against later;⁵² in Victoria Griffith CJ's memorandum was quoted at length, and Isaacs A-G was not above making the suggestion that the real aim of the clause was to have the President of the Senate appointed as Vice-Regal stand-in, on the Queensland model — thus possibly enhancing the power of the smaller states.⁵³ The fear was that, if granting a double dissolution involved exercising Vice-Regal discretion, the President of the Senate might be able to boost the Senate's power by refusing one. The debate in the Victorian lower house is also interesting because of the opposition to the clause expressed by a young member named Irvine, later Premier and then Chief Justice of the State. As Chief Justice, he was made Lieutenant-Governor, and administered the State during an interregnum of almost three years, from 1931 to 1934; as Chief Justice also, he was the author of a memorandum, still quoted and applied today, suggesting that judges should not conduct public enquiries for the executive because of the potential for political controversy.⁵⁴

However, the clause also met with parliamentary support: a motion in the Victorian Legislative Council to delete it for the reasons given by Griffith CJ was lost without a division,⁵⁵ and in Tasmania also the Legislative Council supported it after a short speech advocating that the Chief Justice should not be distracted from his judicial duties to act vice-regally.⁵⁶ The Tasmanian House of Assembly let the clause stand without recorded debate,⁵⁷ as did both Houses in Western Australia⁵⁸ and South Australia⁵⁹ — where Symon QC was not a member of Parliament and the local delegation had been divided in the Convention with ministers voting on opposite sides.

The attention of the public was naturally directed to other clauses that were more likely to have a direct effect upon the populace, but three recorded comments outside official fora can be found. In a public lecture to the Law Students' Society of the University of Melbourne on the federal Judiciary, attended by three professors but very few others, H B Higgins (who, it will be recalled, had voted against the clause in Convention) was reported to have said that 'the object of the clause was to secure

⁵² New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 July 1897, 2389.

⁵³ Victoria, *Parliamentary Debates*, Legislative Assembly, 20 July 1897, 542; Victoria, *Parliamentary Debates*, Legislative Assembly, 5 August 1897, 1095.

⁵⁴ Greg Taylor, *Constitution of Victoria* (Federation Press, Leichhardt, 2006) 440.

⁵⁵ Both Victoria, *Parliamentary Debates*, Legislative Council, 20 August 1897, 1656 and 'Parliament: Legislative Council', *The Argus* (Melbourne), 21 August 1897, 11 record neither debate nor division.

⁵⁶ 'Mercury', 20 August 1897, 3 (there were no Tasmanian 'Hansard' reports at this time).

⁵⁷ 'Draft Commonwealth Bill: Further Consideration in Committee', *The Mercury* (Hobart), 13 August 1897, 3.

⁵⁸ Western Australia, *Parliamentary Debates*, Legislative Council, 24 August 1897, 243; Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 August 1897, 294.

⁵⁹ South Australia, *Parliamentary Debates*, Legislative Council, 17 August 1897, 158; South Australia, *Parliamentary Debates*, House of Assembly, 18 August 1897, 458.

Her Majesty's dormant commission for the President of the Senate instead of the Chief Justice, and thereby add a tower of weight to the Senate that would be most improper in the case of a dispute between the two Houses'.⁶⁰

The 'Geelong Advertiser'⁶¹ devoted a short leader to the topic, in which it referred to what was becoming a frequently made point on various issues: that the Convention and the people should trust the federal Parliament and not attempt to tie its hands in advance by conjuring up all sorts of frightening possibilities and then ruling them out by constitutional provision.⁶² The leader ran:

The debate on this clause indicated on the part of the Convention the same distrust of the future in relation to the federal Constitution and Parliament that has characterised the proceedings throughout. For example, the Chief Justices of all the colonies are not to be trusted to sit as a high Court of appeal, and now Her Majesty may not appoint as *locum tenens* of an absent Governor-General any gentleman holding judicial office under the Constitution. It is admitted that the clause is a direct interference with the Queen's prerogative, but that might not be so serious an affair if the Convention had pointed out how the federal government would be carried on in the case of the decease of the Governor-General. It seems to us that the Convention has closed up every possible avenue of selection for such a post, and that a deadlock must necessarily ensue. ... [I]t is certainly possible that the President of the Senate might fill the office. Supposing, for example, that Sir William Zeal occupied that position, will it be pretended that the gubernatorial mantle would fit him as gracefully as our own Chief Justice ... There might come a time when the question would be asked, "Shall there be a

⁶⁰ 'The Federation Proposals', *The West Australian* (Perth), 19 July 1897, 5; similar 'The Western Australian Delegates: The Attendance Doubtful', *South Australian Register* (Adelaide), 17 July 1897, 6. 'A Federal Judicature', *The Age* (Melbourne), 20 July 1897, 7, has him raising the spectre of states' upper houses' Presidents as stand-in Viceroy; perhaps he did that as well, or perhaps he merely drew a federal analogy using states' upper houses' Presidents as Vice-Regal stand-ins. Higgins' papers are held in the National Library of Australia (MS 1057/3), but Mr Andrew Sergeant of that organisation has kindly advised me that there are no records relating to this lecture in them.

⁶¹ 2 February 1898, 2; reprinted in the 'Framing a Constitution', *The Daily News* (Perth), 14 February 1898, 2. Sir William Zeal was President of the Victorian Legislative Council. His biography in the *Australian Dictionary of Biography* suggests that he might not have been well suited to the ceremonial and social aspects of the Vice-Regal role: National Centre of Biography, *Australian Dictionary of Biography* <<http://adb.anu.edu.au/biography/zeal-sir-william-austin-1073>>.

⁶² There is an echo of this view in the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (*The Engineers' Case*) (1920) 28 CLR 129, 151, and, as Gavan Duffy J points out in the *Wheat Case* (1915) 20 CLR 54, 104, this point has been forgotten even in cases which stand till this day. Perhaps Sir Josiah Symon KC came to share this view as well, for in his evidence to the Royal Commission on the *Australian Constitution* (*Minutes of Evidence, Part 4* (Government Printer, Canberra *s.d.*) 1085) he said 'I trust the Judges' to work the provisions relating to the Privy Council, and was therefore now satisfied with them.

dissolution of the House of Representatives alone, or shall there be a dissolution of both Houses simultaneously?”, and it would be a fearful position to put the President of the Senate, or the Speaker of the House of Representatives in, if he were asked to decide. They had gone the length of saying that no judicial officer should be eligible for the position, and they were bound to go the full length, and prohibit anybody who had the slightest interest from getting it.

These were all cogent points, although the writer missed the central purpose of the clause — the preservation of judicial officers in particular from executive contamination.

Even less concerned with the official purpose of the clause was the ‘Bulletin’,⁶³ which condemned the system of Chief Justices as Lieutenant-Governors as an ‘immoral practice’. But this was because, by reason of society gatherings at Governor House, the Chief Justice ‘puts himself on terms of intimacy with the moneyed class’ and accordingly ‘[t]he law lays itself open to be “nobbled” by the Nicest people, and in a great measure it is “nobbled”’ — in a way that was also unheard of in England, where judges were unlikely to know any titled or wealthy person who appeared before them as accused persons. Unconcerned with the constitutional question, the ‘Bulletin’ concluded its ruminations by asking:

Should a Judge be tempted into close society contact with the ruling class which, under any circumstances, must always be a somewhat favo[u]red class? Or should he live up to his professional character by striving to be as unapproachable off the Bench as he is whilst upholding the dignity of his wig?

However much or little justice there may have been in these comments in relation to the State Chief Justices, they did not apply with such force to the federal judges who were the principal targets of the judicial incompatibility clause given that the federal judiciary was likely to be small and conduct few if any trials. Even so, the ‘Bulletin’ is to be reckoned with the supporters of the clause and, indeed, of its extension to state judges; in fact, Senator Sir Josiah Symon KC, in the debates on s 8 of the *Judiciary Act 1903* (Cth), expressed essentially the same view about the undesirability of social contacts between judges and the public as possible litigants only a few years later.⁶⁴

Surprisingly, the appointed guardian of royal interests, the Colonial Office, took only a very muted objection to the clause, suggesting that Australian worries about stepping on royal toes or being unable to find a suitable stand-in outside the ranks of the judiciary might have been overblown. In its comments upon the Bill, the Colonial Office prepared two lists: the first list contained alterations that it considered essential for the Bill’s smooth passage through the Imperial Parliament, and the second was a list of friendly suggestions and comments on less essential matters that had occurred

⁶³ *The Bulletin* (Sydney) 12 March 1898, 7. After the death of the judicial incompatibility clause, *The Bulletin* (Sydney) repeated similar views on 2 September 1899, 7.

⁶⁴ Commonwealth, *Parliamentary Debates*, Senate, 31 July 1903, 2945.

to its staff while reading through the Bill.⁶⁵ The judicial incompatibility clause appeared only on the second list, and the Colonial Office's comments were, in full: 'Is this quite consistent with clause 119? The clause is a limitation on the Queen's prerogative.'⁶⁶ Clause 119 was what is now s 126 authorising the appointment of deputies to the Governor-General. This was a good question which no-one else had picked up on, for the judicial incompatibility clause did not in terms apply to deputies but appointing them might well have become an easy way around it.

V FALL OF THE JUDICIAL INCOMPATIBILITY CLAUSE

On the resumption of the Convention in 1898 the clause initially withstood challenge in a long and 'breezy'⁶⁷ debate on 1 February — the sort of thorough debate which should have taken place when it was first inserted. The debate was noticeable for the manner in which the arguments on either side did not connect: those in favour of the clause argued for the need to keep the judiciary pure, while those against referred to the need to find someone to stand in when necessary and the inadvisability of restricting the royal prerogative. Each side of the debate concentrated on one aspect of the clause while meeting with arguments that attacked only from the flank. A further Premier joined the side of the clause's proponents, namely Sir John Forrest of Western Australia, while another was against — G H Reid of New South Wales.⁶⁸ The latter 'showed justifiable warmth (born of conflicts with his Legislative Council)'⁶⁹ — Sir Alfred Stephen had been both a member of that body until 1891 and Lieutenant-Governor, and the idea of the President of the Senate as a possible candidate for the Vice-Regal office was particularly odious in Reid's nostrils. As will be recalled, the other colony with an unelected upper house, Queensland, still had a Lieutenant-Governor who was President of the Legislative Council.

The circle of the arguments on both sides was, however, neatly closed by Sir John Downer QC, who, responding to the argument that appointing the President of the Senate, for example, as Vice-Regal stand-in might be undesirable, admitted that there might be 'strong reason' for not making such an appointment, but it was 'not a reason that goes to the root of the Constitution', as the separation between judicial

⁶⁵ B K De Garis, 'The Colonial Office and the Commonwealth Constitution Bill' in A W Martin (ed), *Essays in Australian Federation* (Melbourne University Press, 1968) 96–106. It is also interesting to note the suggestion by the Administrator of Victoria, Madden CJ, to seek public endorsement of Australian Federation from other parts of the Empire — although the suggestion itself was not made publicly: *ibid* 114.

⁶⁶ Williams, above n 3, 729.

⁶⁷ 'News of the Day', *The Age* (Melbourne), 2 February 1898, 4. It is unfortunate that a more precise word was not chosen, and we do not know whether the meaning here is 'windy', 'vigorous' or 'mildly jovial'.

⁶⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 355–75.

⁶⁹ 'The Convention Debate', *Bacchus Marsh Express*, 5 February 1898, 2 — this is an obscure newspaper, but the writer states he was personally present at the debate.

and other powers did: ‘the protector of the Constitution’, he continued, ‘must not be a portion of the executive’.⁷⁰ That was why the clause deserved support. Importantly for the future of the clause, Barton QC revealed that his mind had wavered: while he had been ‘strongly’ in favour of it when it was inserted, he had since been ‘very much impressed’ by the argument that the question should be left to the future operators of the *Australian Constitution*, but ‘perhaps it might be better and safer to retain the clause’.⁷¹ He dismissed the argument from the prerogative put forward by Griffith CJ on the ground that it was irrelevant to the merits of the issue. The clause was saved by 25 votes (including two Premiers’) to 20 (three Premiers’). A renewed attempt to extend the prohibition to parliamentarians, moved by the clause’s enemies ostensibly as a way of preventing serving politicians (such as the bogeyman President of the Senate) from taking the role, was then rejected by 17 votes to 20 on the grounds previously urged by Downer QC: such a course might indeed be objectionable in a particular case, but it was not flawed as a basic constitutional principle. According to ‘The Age’,⁷² however, which was still worried about the President of the Senate, the amendment failed because ‘[t]he small States again proved too strong’. The 20 votes against the change had consisted of 15 from the small colonies and five from the two large ones, while the 17 in favour were divided almost evenly (nine from the two large colonies and eight from the three small).⁷³

A month later, on 4 March 1898, the Convention was still, according to Barton QC, of the ‘strong opinion’ that the clause was desirable, and the final three words ‘of the Commonwealth’ were added without a division and with little debate in order to clarify, as he put it, that it prohibited ‘all judicial officers from holding offices in the Commonwealth’.⁷⁴ In earlier discussions there had been, as already noted, some idea that the federal judiciary or the High Court of Australia at least was special, as the arbiter between the states and the Commonwealth; now it was made quite clear that existing Chief Justices holding the office of State Lieutenant-Governor in hypostatic union were to be spared anything more than the implied rebuke constituted by an analogous prohibition at federal level, as an executive office would fall under the constitutional prohibition if it were federal only. However, state judges also were to be ineligible for appointment to federal Vice-Regal and other executive offices.

It was understood, however, that that amendment did not mean that the clause was settled; and on 11 March 1898 it met its end in a debate that was as short as that which had seen it added in the first place.⁷⁵ The most curious incident in it is the dog that did

⁷⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 362.

⁷¹ *Ibid* 368.

⁷² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 February 1898, 4.

⁷³ Recall that Queensland was not represented at the Convention.

⁷⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1895.

⁷⁵ *Official Record of the Debates of the Australasian Federal Convention* Melbourne, 11 March 1898, 2341–3.

not bark — Symon QC was present but said nothing in favour of his clause. He had just spoken, to considerable effect, in debates on the appeals to the Privy Council, which was of course the bigger battle — yet he must have known from behind-the-scenes discussions that the judicial incompatibility clause was a lost cause, or else he would surely have said something to attempt to rescue it. Indeed, the whole debate on it was perfunctory. Symon QC will have comforted himself with the thought that the latter half of s 4 of the *Australian Constitution* prohibiting an Administrator from receiving a salary from the Commonwealth for any other office would deter some judges from taking on that role at least, and we can now also see that he was biding his time and took the question up again with success and the government's support in the debates on the *Judiciary Act 1903* (Cth). It is quite conceivable that he did not defend his clause because it had been suggested to him that his principle would likely meet with success after Federation in being accepted in the ordinary statute law (which was easier to modify if necessary and not subject to quite as much scrutiny in London and thus less of a gamble). Certainly the idea of leaving the matter to be regulated by the new legislature clearly had some appeal even to Barton QC,⁷⁶ who was a co-initiator of the clause⁷⁷ and would vote against its deletion.

In the debates on 11 March 1898 leading to the deletion of the clause from the draft *Australian Constitution*, again the two sides of the argument simply did not share any common ground: for H B Higgins, the clause 'has got nothing whatever to do with Judicature' and should not even be in the chapter of the *Australian Constitution* on that topic — although it is somewhat strained to speak in this debate of there being two sides to the argument, for really no-one sprang to the defence of the doomed clause. It was deleted by 11 votes to 26, a most decisive margin. Except Symon QC, all the members of the Judiciary Committee of April 1897 who were present voted against it. While it could still, as noted, benefit from the votes of the future Justices Barton and O'Connor and of one Premier (Forrest), six of those who had voted for it only a few weeks before, on 1 February 1898, changed sides; the most notable defector was Sir Edward Braddon. Little notice was taken of this change in the press — understandably, given that the appeal to the Privy Council dominated discussions.

VI CONCLUSION — WHAT LESSONS FOR TODAY?

What the rise and fall of this clause means must depend to a large extent on why it eventually fell. Was the principle of judicial separation wholly rejected, or were there other reasons for the clause's demise? The interesting debate in the House of Representatives on the Bill for s 8 of the *Judiciary Act 1903* (Cth) — which, like the debate in the Senate,⁷⁸ was largely a mini-recap of the debate in Convention on what became the judicial incompatibility clause with many of the same cast — suggests,

⁷⁶ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1895.

⁷⁷ *Official Report of the National Convention Debates*, Adelaide, 22 April 1897, 1174–6.

⁷⁸ See the text surrounding footnote 30.

in two pages of ‘Hansard’,⁷⁹ that the Founders had at least four reasons for the final rejection of the clause. This debate is more informative than the short, indeed perfunctory debate in the Convention on the deletion of the clause.

First, Sir Edmund Barton KC (by this stage, of course, the Prime Minister) said that the Convention had decided not against the principle as such, but only ‘against embedding such a provision in the Constitution, principally upon the ground that Parliament should be left free to take its own course’. Parliament does not take any ‘course’ in appointing Vice-Regal stand-ins, so the meaning is that it was not thought right for the principle to be embodied among the eternal principles of the *Australian Constitution* — although also not rejected on its merits as a principle but left open for Parliament to adopt in the statute law, as indeed it was about to do. This is in line with Barton KC’s own expressions of such a view in Convention⁸⁰ and also recalls the ‘trust the future’ slogan of the ‘Geelong Advertiser’. This point of view also clearly explains why it was that the first federal Parliament was willing to adopt the principle only a few years later in s 8 of the *Judiciary Act 1903* (Cth) although it had in the end been decisively rejected for inclusion in the *Australian Constitution*: a statute can be easily amended or even one-off exemptions legislated for, as indeed occurred twice during the Second World War to allow Latham CJ and Dixon J to hold diplomatic posts.⁸¹

H B Higgins — who, it will be recalled, was an opponent of the clause in Convention — gave two or three other reasons for the rejection of the clause there:

It was thought by some of the members of the Convention that the object of the clause, as passed at Adelaide, was obviously to let the President of the Senate be the person who should be nominated by Her Majesty for the office; and several members were opposed to the clause for that reason. The view which I placed before the Convention, and on which there was a division, was that it is our business to leave the Sovereign an absolutely free hand as to whom he shall appoint — that we have no right to dictate as to who shall be the Sovereign’s agent for any purpose. It is not a matter within the area of our constitutional rights ... It is not expedient, in my opinion, for us to dictate as to who shall be the agent of the Sovereign.⁸²

⁷⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 30 June 1903, 1566. The debate is also remarkable because Isaacs KC spoke about the idea of appointing the Chief Justice of the Commonwealth to fill temporarily the Vice-Regal position.

⁸⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1895.

⁸¹ *Judiciary Act 1940* (Cth); *Judiciary (Diplomatic Representation) Act 1942* (Cth). Neither of these faced the wrath of Symon KC, who had died in 1934.

⁸² Commonwealth, *Parliamentary Debates*, House of Representatives, 30 June 1903, 1567.

Higgins begins with an objection to the available alternatives to judges for the post and moves on to the rights of the Sovereign on the one hand and those of the local governments on the other — recalling the more general dispute about whether the states would be consulted upon the choice of Governor to be sent to them. He finishes with a general statement about what is ‘expedient’, which is probably just a summary of the reasons that had gone before. Clearly, however, these reasons were not enough to prevent the insertion of the principle in the *Judiciary Act 1903* (Cth), where admittedly it could be more easily amended if necessary. And once the principle was enshrined in law, even if only the statute law, no-one suggested, as far as I know, that the President of the Senate should be appointed Vice-Regal stand-in.

Of other contemporary witnesses, Quick and Garran record that the clause ‘was eliminated on the ground that it contained an undue limitation of the prerogative of the Crown, and that it might prejudicially restrict the choice of the Crown in the appointment of an Administrator of the government for the time being’.⁸³ Dr Quick was a member of the Convention of 1897–8 and therefore his recollection is also that of a participant in the events described. However, these reasons do not add much to those already advanced by Higgins; they do not, however, conjure up the spectacle of the President of the Senate as designated stand-in.

A further reason for the non-acceptance of the judicial incompatibility clause is noticeably missing from this commentary: that some of the operators of the system, including some state Premiers such as C C Kingston of South Australia,⁸⁴ thought that the system involving Chief Justices was working well. That was not, of course, a point that necessarily could be made in relation to a new polity such as the Commonwealth, and as we saw not all Premiers agreed anyway. Furthermore, the federal judiciary, as the principal arbiter of entrenched federal constitutional provisions, was not necessarily comparable to the states’ judiciaries; and, given that reviews of the arrangements at state level by Premiers were decidedly mixed, much less was made of this aspect.

By way of summary, then, it may be said that there was a hierarchy of reasons behind the deletion of the judicial incompatibility clause from the draft *Australian Constitution*: the most important was that ‘ἀρίστων δὲ ἀνδρῶν οἰκὸς ἄριστα βουλευόμενα γίνεσθαι’⁸⁵ — that all actors, Sovereign, governments and Parliament, could be trusted to behave with sufficient regard to constitutional proprieties and an unalterable constitutional principle was not needed (the question of a statutory rule being reserved for the first Parliament); then, the next most important point was that suitable alternative stand-ins might be hard to find; equally important was that it was not the role of the local polity to dictate to the Sovereign the identity of his or her local representative. Finally, there was a subsidiary and contested view that, in some states, the fissure in the principle of separation of powers involved in temporarily

⁸³ Quick and Garran, above n 13, 403.

⁸⁴ See the text surrounding footnote 44.

⁸⁵ Herodotus, *Histories*, 3.81.3: ‘it is likely that the decision of the best people will be the best’.

combining in one person the offices of head of the judiciary and the local executive had in fact aided in the smooth working of constitutional arrangements.

Although it can be done only with great diffidence, it is therefore necessary to differ from J M Finnis's conclusion that the debates on the judicial incompatibility clause involved a 'rejection of separation'⁸⁶ of powers doctrine. It was not principally a rejection of the idea of the separation of powers that motivated the exclusion of the judicial incompatibility clause, but rather a decision to postpone the issue until the High Court of Australia was actually set up along with the affirmation of other values and principles. Many, if not all of those principles, such as concern for London's role in selecting the Vice-Regal representative, have now passed from the scene; and it is also clear from experience in various states⁸⁷ that, if it is desired to do so, there is nowadays little trouble selecting a non-judicial and non-political Lieutenant-Governor from the much bigger pool of today's Australian population. The system of state Governors holding dormant commissions as federal Administrators has also worked quite well.⁸⁸

Now that many of the principles that motivated those who opposed the judicial incompatibility clause have been consigned to history, and it is only a slight exaggeration to say that history has removed all the objections to it — can we say that the case law on the incompatibility of executive offices and functions with the judicial role has unconsciously reflected historical developments since 1901 and worked out more or less in accordance with the judicial incompatibility clause? This is not necessarily so, for three separate reasons.

First, it is noticeable that the judicial incompatibility clause would have left us with a fairly black-and-white rule. Now of course no rule is entirely determinate — it was suggested in the introduction that one of the major distinctions that might have grown up under the judicial incompatibility clause is that between executive offices (which judges could not hold) and mere functions (which, presumably, they still could exercise); one can even imagine some type of principle developing such as that a set of related functions can be so numerous and extensive that they amount to an office in fact even if the word is avoided for obvious reasons in conferring them. The clause could also have been clearer about whether it applied to state judges, although some of its proponents expressed views on that point to the effect that it did prevent them from holding federal executive offices and the ambiguity might well have been removed in tidying up the drafting in the final days of the Convention, had the clause survived but a little longer.

⁸⁶ Finnis, above n 2, 171.

⁸⁷ I have not conducted a comprehensive survey, but the present Governor of South Australia is a former Lieutenant-Governor, and Victoria also has had satisfactory experiences with non-judicial Lieutenant-Governors recently.

⁸⁸ Thus, it coped even with the extraordinary circumstances recounted in George Winterton, 'The Hollingworth Experiment' (2003) 14 *Public Law Review* 139, 144.

Nevertheless, under the judicial incompatibility clause there would have been a complete prohibition on the holding of executive offices by some or all judges. The *persona designata* doctrine could not have saved any such appointments — at least, given that ‘interpretation’ can occasionally work wonders, not without some major ‘interpretative’ surgery to the plain meaning of the clause which could not be expected except from the boldest spirits. That outcome would be somewhat different from the case law as it has developed, by which the judges have vested in themselves a value judgment, sometimes carried out, as I have attempted to show elsewhere,⁸⁹ on the finest of criteria, about whether the duties and characteristics of an executive office are compatible with judicial office or not. There would certainly be a lot to be said for more certainty on such matters such as would have existed under the judicial incompatibility clause (interpreted honestly), although such certainty would come at the cost of removing judges from consideration for some tasks for which their training, experience and independence fit them admirably. As so often in the law, certainty would come at the cost of flexibility. It would not have been possible, for example, for the Administrative Appeals Tribunal’s president to be a serving federal judge, as was upheld in *Drake v Minister for Immigration and Ethnic Affairs*.⁹⁰ Perhaps we are better off without the judicial incompatibility clause, which was conceived at a time long before there was a considerable demand for judges to hold quasi-judicial executive offices short of the Vice-Regal office — on which, in the 1890s, the arguments for and against the inclusion of the clause in the *Australian Constitution* tended to concentrate.

Secondly, a major difference between the case-law doctrine that has developed and the judicial incompatibility clause is that, in its final form, the latter clearly did not apply to the holding of state offices, only federal ones. Whether or not it would have applied to the rare case of state judges holding federal offices, it would not have applied to state or, for that matter, federal judges holding any sort of state office owing to the words ‘of the Commonwealth’ added in early March 1898⁹¹ (along with a dash of the *eiusdem generis* approach for some of the earlier named offices). Accordingly, there would be no *Kable* doctrine, or at least none expressly authorised by the *Australian Constitution*. Whether such a doctrine would have developed anyway as a supplement to the principle expressed in the judicial incompatibility clause and for the same reasons as it has developed under other provisions of the *Australian Constitution* can only be speculated about; I suggest that *expressio unius* in the judicial incompatibility clause would have been thought to be *exclusio doctrinae Kable*. On the one hand, it is true that the argument for a restriction on the powers that a state Parliament could vest in its courts that succeeded in *Kable* was based on the integrated judicial system envisaged by s 77(iii), and that provision would still have been available as a support for the argument. On the other hand, with the judicial incompatibility clause in place and given that it clearly was meant

⁸⁹ Greg Taylor, ‘“Conceived in Sin, Shaped in Iniquity” — The *Kable* Doctrine as Breach of the Rule of Law’ (2015) 34 *University of Queensland Law Journal* 265.

⁹⁰ (1979) 46 FLR 409.

⁹¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1895.

to apply only to federal offices because of the words ‘of the Commonwealth’, there would have been a powerful — I suggest, irresistible — contrary argument that, if the *Australian Constitution* was intended to restrict what state judges could do, it would have included such a restriction expressly, just as it expressly included the judicial incompatibility clause at federal level while making it clear, by words deliberately inserted during debate for this very purpose, that the restriction applied to federal offices only. This argument would only have been strengthened by the fact that the idea of allowing federal jurisdiction to be invested in state courts emerged in the same month as the judicial incompatibility clause without anyone suggesting that one topic had any relationship or interaction with the other.⁹²

Finally, and perhaps most importantly: while the majority of the Convention may well, as is argued here, have not meant for a moment, by deleting the judicial incompatibility clause, to indicate that the separation of powers was of no importance to them, what they did, however, indicate is that they were willing to trust the ordinary processes of government to ensure that no atrocities were committed, just as is usually the case. Thus, any number of appalling laws could be imagined under most federal powers listed in s 51, but that was not a reason for deleting such powers or inserting a charter of rights nor for reading the powers down today.⁹³ In that sense, J M Finnis is right after all: it was not the principle itself that the majority in the Conventions objected to, but rather the idea of anchoring it in the *Australian Constitution* and making it judicially enforceable as a matter of constitutional law. The inclusion of a version of the judicial incompatibility clause in the *Judiciary Act 1903* (Cth) as originally passed shows clearly that the objection was not to the rule itself but to making it part of the constitutional fabric rather than a rule that was susceptible of adjustment by Parliament as future unforeseeable needs arose.⁹⁴

This does not mean that present-day doctrines are necessarily to be rejected. The tribe of originalists in Australia is small, and a document like the *Australian Constitution* will reveal its full meaning only over decades, if not centuries of operation. But what we can say with certainty is that, by a large majority, the Founders preferred to entrust the protection of the separation of the judiciary from the executive to the good sense of the executive and the Parliament and to the individual judges’ decisions about what offices they could prudently accept.

⁹² For the addition of s 77 (iii) to the draft just before the judicial incompatibility clause emerged, see Williams, above n 3, 485 (Symon QC telegraphed Griffith CJ for advice about it while the Judiciary Committee was sitting: 622).

⁹³ See the text surrounding footnote 62.

⁹⁴ Such as those mentioned in the text surrounding footnote 81.

WHAT CAN I TELL YOU? SHARING PERSONAL INFORMATION IN THE SCHOOLS SECTOR

ABSTRACT

Those working in the schools sector have a duty of care to ensure the safety and wellbeing of teachers and students. Fulfilling this duty often requires the sharing of sensitive personal information about teachers and students across institutional and jurisdictional boundaries. One of the most pressing reasons to share such information is to help identify, prevent and respond to child sexual abuse. This article examines the complex legal policy frameworks that govern the sharing of personal information — including teacher registration systems and privacy legislation — in the eight Australian states and territories. The focus of the study was to identify legal policy approaches that were likely to promote appropriate and timely sharing of information and any approaches that were likely to impede such sharing. Based on this comparative study, the article suggests a number of general regulatory approaches to improve legal frameworks for sharing information in the schools sector. It also proposes a test for legislators and policy makers to consider in developing such legal frameworks that gives due recognition to the human rights that come into tension in this policy context: the right to privacy and the rights of the child.

I INTRODUCTION

The Royal Commission into Institutional Responses to Child Sexual Abuse was established in 2013 with the task of examining where law, policy and practice has failed to protect children from abuse in institutional environments,

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including schools.¹ The Royal Commission has investigated a number of case studies documenting allegations of child sexual abuse in primary and secondary schools across Australia.² The case studies highlight the failure of the schools concerned to appropriately respond to allegations, including the failure to share information about incidents and allegations with other institutions such as the police, education and child protection agencies and other schools. The Royal Commission has consistently highlighted appropriate and timely information sharing between institutions and across jurisdictions as an important step in ensuring the safety and wellbeing of children and young people.

There is a wealth of research into the personal, professional, organisational and technical barriers to professionals and institutions sharing information in relation to child protection issues.³ However, there is a limited amount of research that focusses specifically on the legal frameworks that regulate this activity in the schools sector.⁴ This is critical because the legal framework is foundational and necessary — although as Richardson and Asthana point out, not sufficient⁵ — to establishing a robust information sharing network that correctly balances conflicting rights such as the right to privacy and the rights of the child. In the schools sector, this legal framework includes legislation regulating privacy, child protection, teacher accreditation and registration, and the operation and governance of schools.

¹ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Terms of Reference* (2013) <<http://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference>>.

² Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 23: The Response of Knox Grammar School and the Uniting Church in Australia to Allegations of Child Sexual Abuse at Knox Grammar School in Wahroonga, New South Wales* (2016); Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 32: The Response of Geelong Grammar School to Allegations of Child Sexual Abuse of Former Students* (2016); Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 34: The Response of Brisbane Grammar School and St Paul's School to Allegations of Child Sexual Abuse* (2017).

³ See, eg, Chris Clark and Janice McGhee (eds), *Private and Confidential? Handling Personal Information in Social and Health Services* (Policy Press, 2008); Matthew Keeley et al, *Opportunities for Information Sharing: Case Studies* (Social Policy Research Centre, University of New South Wales, 2015); Susan Richardson and Sheena Asthana, 'Inter-Agency Information Sharing in Health and Social Care Services: The Role of Professional Culture' (2006) 36 *British Journal of Social Work* 657.

⁴ The DeBelle Inquiry in South Australia, which reported in 2013, considered the legal arrangements for sharing information in the schools sector in South Australia: South Australia, Royal Commission 2012–13, *Report of Independent Education Inquiry* (2013).

⁵ Susan Richardson and Sheena Asthana, 'Policy and Legal Influences on Inter-Organisational Information Sharing in Health and Social Care Services' (2005) 13(3) *Journal of Integrated Care* 3, 9.

In order to address this gap in the literature, the authors undertook a comprehensive study of relevant legislation across all eight Australian states and territories that specifically impacts on sharing information between institutions — that is government agencies and private sector organisations — in the schools sector. The study also included the federal *Privacy Act 1988* (Cth), which regulates the handling of personal information by Commonwealth government agencies and private sector organisations, including most non-government schools.

Equivalent provisions in each jurisdiction were analysed in light of existing research on sharing information in institutional settings and, in particular, the recommendations of a number of national and international inquiries into child protection arrangements — such as the Wood Inquiry in New South Wales,⁶ the Munro Review in the United Kingdom,⁷ the DeBelle Inquiry in South Australia⁸ and the Victorian Royal Commission into Family Violence⁹ — with the goal of identifying provisions that were likely to support or impede the flow of information. The primary legislation considered as part of the study is set out in Table 1. The research also involved analysis of delegated legislation and policy documents where these had a direct impact on sharing information.

Each legislative provision identified was examined in order to answer the following questions:

- (1) What types of information may, must or must not be shared?
- (2) Who may, must or must not share information?
- (3) With whom may or must information be shared?
- (4) Are there any other significant requirements or restrictions that might impact on the sharing of information, including any relating to how information may or must be shared?

A comparative analysis of the resulting data was conducted to identify significant similarities and differences between jurisdictions. The various approaches were considered in light of existing literature on sharing information in institutional contexts and tested against the standards established in international human rights law. In addition, the authors analysed the interactions between provisions within each jurisdiction, for example, teacher registration schemes and privacy legislation, to identify potential issues and impediments.

⁶ New South Wales, Special Commission of Inquiry into Child Protection Services in New South Wales, *Report* (2008).

⁷ Eileen Munro, *The Munro Review of Child Protection — Final Report: A Child-Centred System* (2011).

⁸ Royal Commission 2012–13, above n 4.

⁹ Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016).

Table 1: Privacy, child protection and education related legislation and other regulatory instruments considered as part of this study.

Jurisdiction	Privacy	Child Protection	Education
Commonwealth	<i>Privacy Act 1988</i> (Cth)	N/A	N/A
Australian Capital Territory	<i>Information Privacy Act 2014</i> (ACT) <i>Health Records (Privacy and Access) Act 1997</i> (ACT)	<i>Children and Young People Act 2008</i> (ACT)	<i>ACT Teacher Quality Institute Act 2010</i> (ACT) <i>Education Act 2004</i> (ACT)
New South Wales	<i>Privacy and Personal Information Protection Act 1998</i> (NSW) <i>Health Records and Information Privacy Act 2002</i> (NSW)	<i>Children and Young Persons (Care and Protection) Act 1998</i> (NSW)	<i>Teacher Accreditation Act 2004</i> (NSW) <i>Teaching Service Act 1980</i> (NSW)
Northern Territory	<i>Information Act</i> (NT)	<i>Care and Protection of Children Act</i> (NT)	<i>Teacher Registration (Northern Territory) Act</i> (NT)
Queensland	<i>Information Privacy Act 2009</i> (Qld)	<i>Child Protection Act 1999</i> (Qld)	<i>Education (Queensland College of Teachers) Act 2005</i> (Qld) <i>Education (General Provisions) Act 2006</i> (Qld)
South Australia	<i>Information Privacy Principles Instruction 2013</i> (SA)	<i>Children's Protection Act 1993</i> (SA) <i>Information Sharing Guidelines for Promoting Safety and Wellbeing 2013</i> (SA)	<i>Teachers Registration and Standards Act 2004</i> (SA) <i>Education and Early Childhood Services (Registration and Standards) Act 2011</i> (SA)
Tasmania	<i>Personal Information Protection Act 2004</i> (Tas)	<i>Children, Young Persons and their Families Act 1997</i> (Tas)	<i>Education Act 1994</i> (Tas) <i>Teachers Registration Act 2000</i> (Tas)
Victoria	<i>Privacy and Data Protection Act 2014</i> (Vic) <i>Health Records Act 2001</i> (Vic)	<i>Children, Youth and Families Act 2005</i> (Vic)	<i>Education and Training Reform Act 2006</i> (Vic) <i>Education and Care Services National Law Act 2010</i> (Vic)
Western Australia	N/A	<i>Children and Community Services Act 2004</i> (WA)	<i>School Education Act 1999</i> (WA) <i>Teachers Registration Act 2012</i> (WA)

The research identified a range of potential problems with the existing legal policy framework, in particular, a lack of consistency in teacher registration schemes across jurisdictions — despite efforts to develop a national framework — and unnecessary limits on the detail included, and access to information, in these registers.¹⁰ By way of comparison, the study also considered the legal arrangements in place for sharing information in the early childhood services sector in Australia, which provide a different, and in some respects a more coherent, model for sharing information about service providers and supervisors in that sector, particularly where information needs to be shared across jurisdictional boundaries.¹¹

In terms of sharing information about students, both within and across jurisdictions, the key appears to be reform of information privacy law and policy to adopt a shared set of privacy principles regulating the collection, use and disclosure of personal information. This is a particular problem in federations where privacy principles have been developed separately in each jurisdiction based on international standards but differing in detail.¹² It is also necessary to develop information sharing policies that are soundly based on privacy principles and provide clear guidance.

In some cases, the study identified provisions and policies that were likely to unnecessarily impede the exchange of information because they did not draw an appropriate balance between conflicting rights. In these cases, one set of rights — for example, those relating to the handling of personal information — was privileged in law, policy or practice over other rights — such as the rights of children to be protected from physical or mental violence, injury or abuse — or vice versa. This was sometimes because the legislation itself did not draw an appropriate balance or because the balance drawn in legislation was not well understood or was not properly reflected in the policy documents meant to guide those working in the field.

This project did not address those points at which information comes into the school and child protection systems, for example, through mandatory and non-mandatory reporting, inquiries, reports and investigations. Rather, the focus was on the mechanisms in place to allow information to flow between institutions once received into the system to help prevent, identify and respond to issues of child sexual abuse.

A The Need to Share Information

There are a number of circumstances in which it is necessary to share sensitive and personal information about teachers and students in order to meet the duty of care imposed on schools to ensure the safety and wellbeing of students. While it is also

¹⁰ Carolyn Adams and Krista Lee-Jones, *A Study into the Legislative — and Related Key Policy and Operational — Frameworks for Sharing Information Relating to Child Sexual Abuse in Institutional Contexts: Report for the Royal Commission into Institutional Responses to Child Sexual Abuse* (2016) 99–109.

¹¹ *Ibid* 91–98.

¹² Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) 191.

important to ensure the safety and wellbeing of staff, the focus of this study was on child sexual abuse and, therefore, on protecting the student population. It is critical, for example, that information in teacher registers is readily available to those considering applicants for appointments as teachers in schools, including those applicants who move across jurisdictional boundaries. It is also important to share information about students who may pose a risk to other students, particularly when they move schools. Although this article focusses on sharing information about teachers and students, it may also be necessary in some circumstances to share information about other staff — such as administrators, contractors and volunteers — when they move between schools.

Apart from the Royal Commission, a number of other national and international inquiries and reviews have highlighted that failure to share personal information relating to the safety and wellbeing of children can lead to devastating consequences.¹³ In the school context, failure to share information can result in adult perpetrators not being brought to account, instead being able to move from one school to another or from one jurisdiction to another. The Royal Commission's report on Knox Grammar School, for example, dealt with allegations against a number of teachers, five of whom were charged and ultimately convicted of child sex offences against students. A number of these teachers continued teaching at Knox Grammar for years despite serious allegations and disciplinary findings against them. Some were able to move to other schools despite substantiated allegations against them.¹⁴ In New Zealand, a Ministerial Inquiry was established in 2012 to investigate how a convicted sex offender was employed as a teacher in a number of schools between 2004 and 2010, partly on the basis of institutional failures to appropriately share information.¹⁵ In 2014, the Australian Broadcasting Commission reported that almost 1000 cases of children abusing other children had been reported by Australian schools in the previous year.¹⁶ The problem of child sexual abuse in schools is, and continues to be, a serious concern.

In 2009, the Council of Australian Governments ('COAG') endorsed the *National Framework for Protecting Australia's Children 2009–2020*.¹⁷ A central principle

¹³ See, eg, *ibid* 158–159; Coroner's Court of Victoria, *Finding into Death with Inquest: Luke Geoffrey Batty* (28 September 2015) 20, 78, 82–4; Lord Laming, *The Victoria Climbié Inquiry Report* (2003) 9, 368.

¹⁴ Royal Commission into Institutional Responses to Child Sexual Abuse, above n 2, 5–7.

¹⁵ Mel Smith and Judith Aitken, *Ministerial Inquiry into the Employment of a Convicted Sex Offender in the Education Sector: Report to Hon Hekia Parata, Minister of Education* (2012).

¹⁶ Lorna Knowles and Alison Branley, 'Data Reveals Allegations of Children Sexually Abusing Peers at School, Experts Call for Action' *ABC News* (online), 31 July 2014 <<http://www.abc.net.au/news/2014-06-03/calls-for-action-to-halt-child-on-child-sex-abuse/5497196>>.

¹⁷ Council of Australian Governments, *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020* (2009).

of the National Framework is that a single agency is not responsible for keeping children safe and well. The National Framework calls for collaboration and a ‘shared responsibility’ which avoids duplication, coordinates planning and implementation, and involves *better sharing of information*.¹⁸

B *When is the Legal Framework a Problem?*

Legislation has been identified as one of the potential impediments to creating a robust information sharing network that allows shared responsibility to develop among institutions.¹⁹ A number of reviews have found that complexity in the legislative framework can act as an impediment to effective information sharing as it creates confusion and can lead to risk-averse behaviours by those trying to implement information sharing policies.²⁰ For example, the Australian Law Reform Commission (‘ALRC’) noted in its report, *For Your Information: Australian Privacy Law and Practice*, the potential ‘reluctance by organisations and agencies to share information’ due to the inconsistency and fragmentation in privacy regulation across Australia.²¹ One of the key problems identified with such legal frameworks is the often unresolved or misunderstood tension between obligations to protect personal information collected for a specific purpose, and the obligation to share that information to help ensure the safety and wellbeing of children.²²

This might be characterised as a tension between conflicting human rights: the right to privacy of teachers, families and children; and other rights of the child. The right to privacy is enshrined in article 17 of the *International Covenant on Civil and Political Rights* (‘ICCPR’).²³ This paper considers a specific aspect of the much broader right to privacy set out in the ICCPR, that is, the protection of personal information. This aspect of the right to privacy concerns who may collect and use an individual’s personal information and under what conditions such information may be shared. This aspect of the right to privacy is important for a range of reasons. Where personal information is not appropriately protected this can result in embarrassment or discrimination and may also result in individuals being less inclined to provide relevant information. It is therefore important to both the individual and the community that personal information is regulated and handled appropriately.

¹⁸ Ibid 9 (emphasis added).

¹⁹ See, eg, Wood, above n 6, vol 3, [24.89]; Australian Research Alliance for Children & Youth, *Working Together to Prevent Child Abuse and Neglect — A Common Approach for Identifying and Responding Early to Indicators of Need*, (2010) 33.

²⁰ Australian Law Reform Commission, above n 12, 189–232; Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report* (2015) 54–5.

²¹ Australian Law Reform Commission, above n 12, 499.

²² Bob Hudson, ‘Information Sharing and Children’s Services Reform in England: Can Legislation Change Practice?’ (2005) 19 *Journal of Interprofessional Care* 537, 538; Richardson and Asthana, above n 5.

²³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

The rights of the child are enshrined in the *United Nations Convention on the Rights of the Child* ('CRC'). They include the principle that in all actions concerning children, the best interests of the child shall be the primary consideration as well as the right of all children to be protected from 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse'.²⁴

Australia, like most other countries of the world, is a party to both these treaties and is therefore bound in international law to implement these rights in law and policy. McBeth, Nolan and Rice note that in dualist systems, such as Australia, international obligations are not automatically incorporated into domestic law and that Australia has adopted a patchwork approach to the protection of human rights

pieced together from an unplanned and uncoordinated collection of constitutional provisions, common law, legislation, policies and procedures, and institutions, across state, territory and national jurisdictions, with the notable absence of a national human rights law.²⁵

This is certainly the case in relation to the right to privacy and the rights of the child in Australia. While McBeth, Nolan and Rice express the view that such an approach may provide adequate protection for human rights,²⁶ it is sometimes difficult, among the patchwork of law and policy, to determine the extent to which a particular right is protected. Article 17 of the ICCPR, which protects the right to privacy, is one of the few provisions that have been expressly enacted into domestic law. Even then, the protection provided is partial and provided by a patchwork of Commonwealth, state and territory legislation with some gaps in the protective fabric. For example, there is no privacy legislation in Western Australia.

Nevertheless, the international human rights regime does provide a valuable framework for legislators and policy makers to apply in developing law and policy that is consistent with international norms. The international human rights regime establishes that where there are rights holders — for example, school children — there are duty bearers — for example, education agencies — that have responsibility to ensure that relevant rights are respected, protected and fulfilled.²⁷ Where individual human rights, such as the right to privacy and the best interests of the child principle, come into tension — as they do, for example, when the interests of parents or teachers and the interests of children are not congruent — it is necessary to find an appropriate

²⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 19.

²⁵ Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2nd ed, 2017) 301.

²⁶ *Ibid.*

²⁷ The United Nations Children's Fund, *The State of the World's Children 2004: Girls, Education and Development* (2004) 92.

legislative and policy balance between them. This is possible because most rights are not absolute.²⁸

The United Nations Human Rights Committee ('UNHRC'), which monitors compliance with the ICCPR, recognises, for example, that as 'all persons live in society, the protection of privacy is necessarily relative'.²⁹ The UNHRC has made clear that it is consistent with international law to impose limits on the right to privacy where those limits are lawful and reasonable in the particular circumstances. This means that a law or policy that interferes with privacy — by, for example, allowing the sharing of sensitive personal information without consent — must meet two criteria: it must have a legitimate aim, for example, the protection of the rights of the child; and it must be a necessary and proportional means to achieve that aim.³⁰ This approach leaves considerable room to manoeuvre and allows domestic law and policy makers to resolve the tension between conflicting rights in particular contexts. By way of illustration, this test is applied below to some of the provisions considered in our study.

II SHARING INFORMATION ABOUT TEACHERS

A Privacy Regulation Across Australia

The collection, use and disclosure — and thus the sharing — of personal information by public sector agencies and government and non-government schools in Australia is regulated by privacy legislation at the federal, state and territory level. In general terms, the federal *Privacy Act 1988* (Cth) regulates the handling of personal information by Australian Government agencies and by most non-government schools. There is also privacy legislation in most other states and territories that, broadly speaking, regulates the handling of personal information by state and territory public sector agencies, including government schools. In South Australia the handling of personal information by public sector agencies is regulated by Cabinet administrative instructions issued by the government of South Australia.³¹ There is no privacy legislation or similar administrative instruction in Western Australia. Each of these state and territory Acts and the South Australian instructions includes a set of privacy principles regulating the collection, use and disclosure of personal information.

²⁸ McBeth, Nolan and Rice, above n 25, 112–113.

²⁹ Human Rights Committee, *General Comment No 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, UN Doc HRI/GEN/1/Rev.9 (vol I) (8 April 1988) 2 [7].

³⁰ United Nations Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th session, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) 3 [6].

³¹ Government of South Australia, *PC012 — Information Privacy Principles (IPPS) Instruction*, Cabinet Administrative Instruction 1/89 (1989; last amended by Cabinet 6 February 2017).

There is also separate health privacy legislation in the Australian Capital Territory, New South Wales and Victoria and separate health privacy principles in Queensland.³² While the privacy principles set out in the various privacy and health privacy Acts are broadly similar, they are not the same.³³ This level of complexity is mirrored in other federal systems in which privacy policy is developed at both the national and sub-national level, such as Canada and the United States of America.

The complexity of privacy regulation has been regularly identified as an impediment to appropriate and timely information sharing in a range of contexts. This is also an issue for schools, particularly where there is a need to share information across the government/non-government school divide or across jurisdictional boundaries. The need to bring greater consistency to privacy regulation is discussed further below in relation to sharing information about students.

In relation to sharing information about teachers, however, it is possible to rely on a common exception found in privacy principles in every jurisdiction in Australia, and more broadly, that allows personal information to be used and disclosed where the use or disclosure is required or authorised by law. The teacher registration and accreditation systems in all the Australian states and territories are established by legislation and expressly require or authorise the use or disclosure of personal information about teachers, and applicants to teach, in specific circumstances. This mechanism defines a clear relationship between privacy regulation and the teacher accreditation and registration system in each jurisdiction. It is critical, however, that the teacher registration system itself does not set up unnecessary barriers to sharing information between institutions and across jurisdictions.

B Registration and Accreditation of Teachers

Significant efforts are made in Australia, as in many other countries, to ensure that individuals teaching in schools are fit and proper people to carry out teaching duties and that they do not pose a risk to students. Currently, all teachers in Australia are required to be accredited under a national teacher accreditation and registration framework. This accreditation and registration system is one of the key mechanisms for sharing information about teachers between institutions within a jurisdiction and across jurisdictional boundaries. While some essential elements of the teacher registration framework are shared across Australia, the scheme is implemented by separate, and often inconsistent, legislation in each state and territory and this can give rise to problems.

The Australian Institute for Teaching and School Leadership ('AITSL') is responsible for developing and maintaining the Australian Professional Standards for Teachers and for implementing the national accreditation system based on these

³² *Health Records (Privacy and Access) Act 1997* (ACT); *Health Records and Information Privacy Act 2002* (NSW); *Health Records Act 2001* (Vic); *Information Privacy Act 2009* (Qld) sch 4.

³³ Australian Law Reform Commission, above n 12, 161–88.

standards.³⁴ Under the national framework, each state and territory has a Registering Authority which is responsible for implementing the national framework. Each Registering Authority has responsibility for granting, refusing, renewing, suspending or cancelling teacher registrations and maintaining an up-to-date register of this information. The arrangements apply to both government and non-government schools.

Common elements of the registration framework include a requirement that applicants be 'suitable' to be a teacher and to work with children, based on an assessment of character and criminal history. This is judged on the basis of a range of information including a national criminal history check and a working with children check. All teachers, and those applying for positions as teachers, must have an up-to-date national criminal history check. Overseas criminal history checks are also required where an applicant or teacher has resided overseas as an adult. In addition, teachers must pass the relevant state or territory working with children check.

The Royal Commission has considered the working with children check schemes across Australia in detail, finding that they are complex, inconsistent and not nationally integrated. As a result there is inadequate information sharing across the states and territories under the schemes.³⁵ In addition, such schemes are limited by the fact that much abusive behaviour goes unreported and the majority of adult sexual abuse perpetrators detected do not have prior convictions for any form of child maltreatment.³⁶ Thus, other sources of information about teachers and applicants to teach are critical including information about disciplinary matters such as the giving of cautions and the suspension or cancellation of a teacher's registration.

A range of this kind of information is collected and shared by way of teachers registers maintained by the Registering Authority in each state and territory. The efficacy of this mechanism depends on what information is captured in the register and who may have access to the information. Each register must include personal details of registered teachers and information about the suspension or cancellation of a teacher's registration. However, the level of detail in each register and the extent to which the information is shared differs from jurisdiction to jurisdiction.

In the Australian Capital Territory, for example, the Registering Authority — the Australian Capital Territory Teacher Quality Institute ('TQI') — maintains the register of teachers, which includes details of any suspension or cancellation including the grounds for suspension or cancellation. The TQI must, on request, make the information in the register available to a teacher's employer, or prospective employer. However, the grounds for suspension or cancellation must not be disclosed.³⁷ By way

³⁴ Australian Institute for Teaching and School Leadership, *Nationally Consistent Registration for All Teachers* <<http://www.aitsl.edu.au/registration/nationally-consistent-registration-of-teachers>>.

³⁵ Royal Commission into Institutional Responses to Child Sexual Abuse, above n 20, 3.

³⁶ Clare Tilbury, 'Working with Children Checks — Time to Step Back?' (2014) 49 *Australian Journal of Social Issues* 87, 92.

³⁷ *ACT Teacher Quality Institute Act 2010* (ACT) s 42(6).

of contrast, where the TQI suspends or cancels a person's registration the TQI must inform the Registering Authority in every other state and territory and the notification must include the grounds for suspension or cancellation.³⁸ In other words, more detail is provided to the Registering Authorities in other states and territories than to a prospective school employer. The TQI may also make a limited range of information about a teachers' registration status available to the public on request but this does not include the grounds for any suspension or cancellation of registration.

The arrangements for teacher accreditation in New South Wales are more complex than in the Australian Capital Territory, with separate teacher accreditation authorities in relation to government and non-government schools. However, these accreditation authorities must notify the central Registering Authority — the Board of Studies, Teaching and Educational Standards NSW ('the Board') — of their decisions to grant, revoke or suspend accreditation.³⁹ The Board maintains the teachers register, called the roll of teachers, which has two parts: the electoral list and the accreditation list.⁴⁰ The electoral list includes basic information about employment and accreditation, but does not include information about suspensions or cancellations. The public may inspect the electoral list section of the register. Where a person has been suspended or had their registration cancelled they must not be enrolled on the electoral list.⁴¹

The accreditation list must include personal and professional details of each accredited person as well as details of any decision to refuse, revoke or suspend a teacher's accreditation.⁴² The Board is authorised to request and receive such information from teacher accreditation authorities and may also provide information to such authorities. Although the Board is also authorised to share the information on the accreditation list with 'any other person or body prescribed by the regulations'⁴³ no other person or body has been prescribed to date. It appears, therefore, that disciplinary information may not be shared directly with schools. In contrast to the Australian Capital Territory, the Board may, but is not required to, share information about suspensions and cancellations with Registering Authorities in other jurisdictions. In New South Wales, the Secretary of the Department of Education also maintains a list of persons who 'are not to be employed' in the Government Teaching Service.⁴⁴ School principals, deputy principals, assistant principals and school administrative managers may access this list.

Within New South Wales, the limits on information sharing evident in the teacher accreditation and registration legislation are addressed to some extent under the child

³⁸ Ibid s 66.

³⁹ *Teacher Accreditation Act 2004* (NSW) s 22(1).

⁴⁰ Ibid s 16.

⁴¹ Ibid s 17(2).

⁴² Ibid s 18.

⁴³ Ibid s 18(3)(b)(iii).

⁴⁴ *Teaching Service Act 1980* (NSW) s 7(1)(e).

protection legislation, which allows institutions that have responsibilities relating to the safety, welfare and wellbeing of children, including schools, to share information that promotes the safety, welfare or wellbeing of children.⁴⁵ This allows the sharing of information about teachers who might pose a risk to students to be shared directly between education agencies and schools without the need to rely on the teachers register.

In contrast, Victoria takes a more public approach to disciplinary information about teachers in their teacher registration schemes. The Victorian Institute of Teaching ('VIT') maintains the register of teachers and a separate Register of Disciplinary Action which records all disciplinary action — including cautions and reprimands, suspension or cancellation of registration and other information — taken against registered or formerly registered teachers.⁴⁶ The VIT is required to make both registers available for inspection by the public.⁴⁷ The VIT may exclude information from the Register of Disciplinary Action in certain circumstances, including where it is of the view that it is in the public interest to do so.⁴⁸ Although this may be thought necessary, on the basis that the register is public, it does have the potential to give rise to problems if institutions seek to rely on the information in the register. The VIT is also required to publish information about cancellations and suspensions in the Government Gazette and to share the information with Registering Authorities in other states and territories.⁴⁹

Given the different arrangement across the states and territories it is not surprising that the AITSL guide to teacher registration in Australia provides that '[w]here permitted, jurisdictions will share information with regard to discipline and de-registration of registrants.'⁵⁰ The guide recognises that the arrangements for sharing information depend on the legislation in each state and territory and that the information collected and the arrangements for sharing differ across jurisdictions.

In fact, however, all states and territories provide for a level of sharing with the Registering Authorities in other jurisdictions although some Registering Authorities must share information while others are not required to but may share such information. How does a legislator or other policy maker decide whether these provisions should permit or require Registering Authorities to share information? Moving sensitive personal information about teachers across jurisdictional borders does place limits

⁴⁵ *Children and Young Persons (Care and Protection) Act 1998* (NSW) ch 16A.

⁴⁶ *Education and Training Reform Act 2006* (Vic) pt 2.6 div 13A.

⁴⁷ *Ibid* ss 2.6.25, 2.6.54B(2). See also Victorian Institute of Teaching, *Register of Disciplinary Action* (25 August 2017) <<http://www.vit.vic.edu.au/professional-responsibilities/disciplinary-decisions/registry-of-disciplinary-action>>.

⁴⁸ *Education and Training Reform Act 2006* (Vic) s 2.6.54E(2).

⁴⁹ *Ibid* s 2.6.51.

⁵⁰ Australian Institute for Teaching and School Leadership, *Discipline and De-Registration* (2014) <<https://www.aitsl.edu.au/teach/start-your-career/registration/nationally-consistent-teacher-registration>> (emphasis added).

on teachers' right to privacy but is the limit reasonable and therefore consistent with the test provided by the UNHRC?

The first question to ask is whether the restriction on the right to privacy has a legitimate aim. A strong argument could be made to support the sharing of information across jurisdictional borders, including international borders, with the aim of protecting the safety and welfare of children in schools. The second question is whether the restriction is necessary to achieve that aim. In a federation, such as Australia, with a mobile population the sharing of such information across jurisdictional borders is necessary to achieve the stated aim. Is it, however, necessary to *require* registering authorities to share information with each other about all teachers? An argument could be made either way here but, given the mobility of the Australian population, it could be argued that it is necessary to ensure that Registering Authorities across Australia have nationally consistent information and that every jurisdiction receives information about teachers who pose a risk to children to prevent potential adult perpetrators moving across borders with impunity. Indeed, perhaps a more efficient alternative would be to establish a national register, as has been done in the early childhood services sector, discussed below.

Finally, is requiring Registering Authorities to share disciplinary information with other jurisdictions a proportional means of achieving the legitimate aim of protecting the safety and welfare of children in schools? This will depend to some extent on the way that personal information is collected, used and disclosed in those other jurisdictions. Officers of the Registering Authority in New South Wales, for example, may be concerned about sharing information with Victoria or Queensland if that information is going to be put in the public domain.

The second issue for consideration in this scenario is in relation to who may access the information on the various registers within jurisdictions. On this issue the approach across Australia is diverse and inconsistent.⁵¹ In some jurisdictions school authorities are unable to directly access detailed information about disciplinary matters while in Queensland and Victoria such information is a matter of public record.

As discussed above, in order to find an appropriate balance between a teacher's right to have the privacy of his or her personal information protected and the rights of children, the limits placed on the right to privacy must have a legitimate aim and, in addition, must be reasonable, that is, a necessary and proportionate means of achieving that aim. Choosing suitable people to teach in schools and protecting the welfare and safety of children are certainly legitimate aims. Children have the right to a high standard of education⁵² and to be protected from violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.⁵³ In the authors' view, access to detailed information about disciplinary matters, including cautions and

⁵¹ Adams and Lee-Jones, above n 10, 108–109.

⁵² *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 13.

⁵³ *CRC* art 19.

reprimands and the grounds for suspension or cancellation of registration, should be made available to school authorities as a matter of course to ensure that their decision making about employing or continuing to employ teachers is fully informed.

It is a matter for debate, however, whether such detailed information about disciplinary matters should be on the public record. The public, including parents, should be able to check, easily and efficiently, that the teachers with responsibility for their children are appropriately qualified and currently registered. This is achieved by providing access to basic information about registration status on teacher registers, as is done in New South Wales by way of the electoral list. The authors question, however, whether it is necessary to place more detailed disciplinary information on the public record. The question from a rights perspective is whether this is necessary to achieve the legitimate aims identified above, and, in the authors' view, it is not. Parents are not responsible for ensuring that teachers are properly accredited and registered or for employing appropriate teachers in schools. This duty lies with administrators and managers in the schools sector.

C Registration and Accreditation in the Early Childhood Services Sector

The early childhood services sector in Australia has gone further than the schools sector down the path of establishing a national framework for the regulation of the sector and for collecting and sharing information about early childhood service providers and supervisors. The National Quality Framework currently covers long day care, family day care, preschool/kindergarten, and outside school hours care.⁵⁴

The Education and Care Services National Law ('National Law') and the Education and Care Services National Regulations underpin the National Quality Framework. The National Law was an attempt to introduce consistency into state and territory legislation by developing an agreed model Bill, which was originally passed as a law of Victoria⁵⁵ and then adopted by other jurisdictions by way of corresponding legislation. The National Law aims to establish 'a jointly governed, uniform and integrated national approach to the regulation and quality assessment of education and care services'.⁵⁶ This contrasts with the implementation of the national teacher accreditation and registration framework, which is implemented by separate and different legislation in each state and territory.

Under the National Quality Framework, a Regulatory Authority is nominated in each jurisdiction to administer the framework. Regulatory Authorities conduct assessments as to whether providers, services and supervisors meet and maintain minimum quality requirements. Regulatory Authorities have the power to authorise, suspend and cancel approvals and certificates required for persons providing and managing

⁵⁴ Australian Children's Education & Care Quality Authority, *Guide to the Education and Care Services National Law and the Education and Care Services National Regulations 2011* (2017) 11.

⁵⁵ *Education and Care Services National Law Act 2010* (Vic).

⁵⁶ Australian Children's Education & Care Quality Authority, above n 54, 9.

early childhood services. Regulatory Authorities also appoint authorised officers to enter, assess and monitor services and have powers to obtain information, documents and evidence.

Applications for provider and service approvals and supervisor certificates require Regulatory Authorities to consider whether a person or entity is fit and proper to be involved with the provision of early childhood services to children. Individuals must satisfy the Regulatory Authority that they are ‘fit and proper persons’⁵⁷ to be involved in the provision of early childhood services while an entity must satisfy the Regulatory Authority that each person with management or control of a service to be operated by the applicant is a fit and proper person to be involved in providing such services. As in the schools sector, early childhood services Regulatory Authorities are state and territory based and maintain state and territory registers of approved providers, services and supervisors.

The Australian Children’s Education and Care Quality Authority (‘ACECQA’) is established under the National Law and is responsible for overseeing the implementation of the National Quality Framework. The ACECQA establishes and maintains a system of national registers, which are in addition to the state and territory registers, and this is a point of difference with the national teacher accreditation and registration framework. The national registers are publicly available and provide information about: the individual services granted approval to operate as early childhood services; individuals or entities authorised to operate an approved early childhood service; and certified supervisors who are required at every service. It appears reasonable, necessary and proportionate that this level of detail is included in the national, public register for the information of families and others with an interest.

Part 13 of the National Law — called *Information, Records and Privacy* — deals expressly with the establishment of national, state and territory registers, and the publication and sharing of information. Division 6 of part 13, called *Disclosure of Information*, makes clear that Regulatory Authorities, government departments and other public authorities may disclose information to each other for the purposes of the National Law.⁵⁸ Regulatory Authorities may also disclose information to the National Authority.⁵⁹ Finally, Regulatory Authorities may publish information about enforcement actions taken under the National Law such as the issue of compliance notices, prosecutions, and suspension or cancellation of service approvals or supervisor certificates.⁶⁰ The publication of information about enforcement action against entities providing children’s services is likely to be a necessary and proportionate measure to protect the safety and wellbeing of children by keeping families and the community informed about the quality of the services and any history of non-compliance with legislative requirements. Whether or not disciplinary information about individual supervisors should be published is open to debate, but this information should

⁵⁷ *Education and Care Services National Law Act 2010* (Vic) ss 12, 109.

⁵⁸ *Ibid* s 271(1).

⁵⁹ *Ibid* s 271(2).

⁶⁰ *Ibid* s 270(5).

certainly be shared with the Regulatory Authorities in other jurisdictions. This would most efficiently be done by including it in the national register under provisions that require, rather than simply authorise, this exchange of information.

Perhaps the most interesting difference between the schools sector and the early childhood services sector in relation to the legal framework for sharing information is the approach taken to privacy legislation. The National Law has taken a unique approach to privacy regulation by excluding the operation of state and territory privacy legislation in relation to the operation of the National Quality Framework. Instead, the federal *Privacy Act 1988* (Cth) is amended and applied as a law of each state and territory. This approach to privacy, coupled with the express information sharing arrangements in the National Law and Regulations, establishes a high level of consistency and coherence to these arrangements in the early childhood services sector. This contrasts with the complex and fragmented approach in the schools sector, which relies on inconsistent state and territory legislation and does not have national information sharing arrangements or national registers. This workaround does indicate, however, that privacy regulation in Australia is in need of significant reform and this issue is discussed further below in relation to sharing information about students.

III SHARING INFORMATION ABOUT STUDENTS

While it is critical to share information about teachers and applicants to teach, it is also necessary to share information about students when they transfer, or are transferred, from one school to another including across jurisdictional boundaries. In some cases, this may be because a student poses a potential risk to other students. Schools have a common law duty of care to their staff and their students.⁶¹ This duty of care may require schools to collect certain personal information, including sensitive personal information relating to child sexual abuse, and to use and disclose the information.

The sharing of information about students is generally regulated by privacy, child protection and education legislation.⁶² This can give rise to problems because of inconsistency between legislation within particular jurisdictions or across jurisdictional boundaries. Each of these issues will be considered in turn.

A Within a Jurisdiction

In most jurisdictions, sharing of information about students is not expressly addressed in the education legislation — although New South Wales, Queensland and Western

⁶¹ *New South Wales v Lepore* (2003) 212 CLR 511, 522 (Gleeson CJ). The authors note that the duty of care owed to staff is not the same as the duty of care owed to students. The former is not explored in detail here as the focus of this paper is on child sexual abuse and, therefore, on protecting the student population.

⁶² See Table 1.

Australia are exceptions to this — and so information is generally shared under child protection and privacy legislation. In Australia, government schools are covered by the relevant state or territory privacy legislation, where such legislation exists, and non-government schools are covered by the federal *Privacy Act 1988* (Cth), except where they fall within the small business exception, that is, where they have an annual turnover of \$3 000 000 or less.⁶³ This immediately gives rise to issues of inconsistency when sharing information between government and non-government schools within a jurisdiction and also between government schools where they need to share information across jurisdictional boundaries.

The complexity and inconsistency of privacy regulation across Australia and confusion concerning the interaction with other legislation, such as child protection legislation, have been identified as impediments to appropriate and timely information sharing.⁶⁴ This is a clear indication of the need for reform in the privacy landscape. The ALRC has recommended that all jurisdictions adopt a single set of uniform privacy principles, the core of all privacy legislation.⁶⁵ In response to the Commission's report, the Australian Government developed the Australian Privacy Principles and enshrined them in the federal *Privacy Act 1988* (Cth). However, only the Australian Capital Territory has adopted these principles to date. This means that in the ACT, government and most non-government schools are regulated by the same set of privacy principles, even though they are enshrined in two separate pieces of legislation. This is a step in the right direction.

Information about students who might pose a risk to other children, may also be shared to varying degrees under child protection legislation. For example, in the Australian Capital Territory, schools are included in the definition of 'information sharing entity'⁶⁶ under the child protection legislation. Under this legislation, information relevant to the safety and wellbeing of a child must be provided to the central child protection agency upon request and the agency may provide such

⁶³ *Privacy Act 1988* (Cth) s 6D. Non-government schools that fall within the definition of a small business may still, however, be covered by the *Privacy Act 1988* (Cth) in some circumstances. These include where a school holds health information and provides a health service, for example, where a school has an infirmary or a registered nurse on staff. Non-government schools may also choose to be covered by the *Privacy Act 1988* (Cth) by registering in writing under s 6EA of the Act. The *Privacy Compliance Manual* (2016), produced by the Independent Schools Council of Australia and the National Catholic Education Commission also suggests, at paragraph 2.6.3, that all schools should consider adopting the Australian Privacy Principles as a matter of good practice even if they fall within the small business exemption in the *Privacy Act 1988* (Cth).

⁶⁴ Australian Law Reform Commission, above n 20, ch 3; Parenting Research Centre, *Implementation of Recommendations Arising from Previous Inquiries of Relevance to the Royal Commission into Institutional Responses to Child Sexual Abuse* (2015) 95–8; Wood, above n 6, ch 24.

⁶⁵ Australian Law Reform Commission, above n 20, ch 18.

⁶⁶ *Children and Young People Act 2008* (ACT) dictionary.

information to schools and other information sharing entities.⁶⁷ In this model, the child protection agency acts as a hub for information, receiving and distributing information. Whether centralising information in this way is a useful approach to child protection is contested,⁶⁸ but it may become a problem if the centralisation and control comes at the expense of lateral sharing between front line service providers, such as schools.⁶⁹ In the Australian Capital Territory, it is possible for institutions to share information with each other, but only where the head of the child protection agency has established a 'care team' with a defined membership.⁷⁰

By way of contrast, New South Wales has adopted a decentralised approach under its child protection legislation. Both government and non-government schools are defined as 'prescribed bodies' under the legislation and may share information with other prescribed bodies, including each other, in order to promote the 'safety, welfare or wellbeing of children'.⁷¹ Similarly, the Northern Territory, Queensland, Tasmania and Western Australia allow the direct exchange of information between prescribed bodies, including schools, without needing to rely on or refer to the central child protection agency.

Research conducted by the Social Policy Research Centre of the University of New South Wales found that the more open regulatory arrangements in New South Wales support information sharing between schools when the information concerns the welfare of the child and noted that, generally, information is shared appropriately.⁷² The report documented some problems with sharing information in practice but noted that 'where there was trust and/or familiarity between schools and with other agencies, sharing information becomes much more efficient'.⁷³

The interaction between privacy and other legislation, such as child protection legislation, can also give rise to confusion and create an environment in which school managers tend to be risk averse and do not share information when necessary. In New South Wales, any potential confusion between privacy legislation and the child protection legislation has been addressed by s 245H of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). This section states that provisions in other legislation that restrict the disclosure of information do not operate to prevent the disclosure of information under the child protection legislation. In addition, s 245A(2)(d) of the Act provides that because the safety, welfare and wellbeing of children and young people are paramount, the needs and interests of children and

⁶⁷ *Children and Young People Act 2008* (ACT) div 25.3.2.

⁶⁸ Hudson, above n 22; Eileen Munro, 'What Tools do We Need to Improve Identification of Child Abuse?' (2005) 14 *Child Abuse Review* 374.

⁶⁹ Wood, above n 6, 998.

⁷⁰ *Children and Young People Act 2008* (ACT) div. 25.3.2.

⁷¹ *Children and Young Persons (Care and Protection) Act* (NSW) ch 16A.

⁷² Keeley et al, above n 3, 4.

⁷³ *Ibid* 5.

young people, and of their families, take precedence over the protection of confidentiality or of an individual's privacy.⁷⁴

Again, this demonstrates the need for reform in the privacy landscape. While the intention is to make the arrangements as clear as possible in the New South Wales child protection legislation, in the authors' view, it is not necessary to absolutely preference the needs and interests of children over the protection of confidentiality and privacy in this way. Both sets of rights must be given appropriate weight and protection and any limits placed on the rights must be necessary and proportionate.

The school's duty of care to students requires information about a child with harmful sexual behaviours to be shared for the safety and wellbeing of other students. However, how that information is managed, and how the child with the behaviours is 'managed', is critical. It is important to recognise the distinction between a child who exhibits harmful sexual behaviours and an adult with those behaviours and that they are qualitatively different.⁷⁵ In a child, those behaviours originate from a different set of factors.⁷⁶ It is important that in sharing information about such a child, that child should not be stripped of the opportunity for an education as the educational opportunity and the attachments formed through educative processes are known to be protective factors for wellbeing across the life course.⁷⁷

Privacy legislation is not intended to stymie the flow of personal information, but to establish privacy principles that ensure that information is handled appropriately. It is possible to share information in a way that is consistent with privacy principles, which uniformly allow the use and disclosure of information for the primary purpose of collection and, as discussed above, where authorised or required by law. It is important that parents and students are made aware of these purposes at the time information is collected. The stated purposes of collection should always include fulfilling the school's duty of care to students and expediting transfer of students between schools. The Australian Capital Territory Education and Training Directorate's *Personal Information Digest* (2014) makes clear, for example, that one of the purposes of collecting personal information is to expedite the transfer of students' records between government schools within the territory.⁷⁸ This could certainly be broadened to include non-government schools and students moving to another jurisdiction.

⁷⁴ See, eg, *BMY v Department of Family and Community Services* [2016] NSWCATAD 24 [121]–[124].

⁷⁵ Evidence to Royal Commission into Institutional Responses to Child Sexual Abuse, Commonwealth, Sydney, Case Study 45, Day 215, 20 October 2016, 21653 (Wendy O'Brien).

⁷⁶ *Ibid* 21655.

⁷⁷ *Ibid* 21669.

⁷⁸ ACT Government Education and Training Directorate, *Personal Information Digest* (2014) 58.

Privacy principles also allow the use and disclosure of information as required or authorised by law and this provides a point of intersection with child protection legislation and education legislation that includes provisions authorising or requiring that information be shared in certain circumstances. In Queensland, for example, s 385 of the *Education (General Provisions) Act 2006* (Qld) expressly provides for the creation of ‘transfer notes’, which allow for sharing of information about students between government and non-government schools. Transfer notes aim to help schools ensure continuity of education for students and meet the school’s duty of care obligations. The system appears unique in Australia and is another mechanism for helping to ensure consistency with privacy legislation and clarity for administrators and managers.

B Across Jurisdictions

When students transfer to a school in another jurisdiction, the situation is even more complex because of the interaction between inconsistent privacy, child protection and education legislation in the states and territories. Because of this, the Australian Government, state and territory education departments, and the independent and Catholic education sectors have developed the Interstate Student Data Transfer Note (‘ISDTN’) and Protocols under the auspices of COAG.⁷⁹ An ISDTN may include information about a student’s progress and support needs and any behaviour and management issues. Some of this information may indicate that the child may be a risk to other children. The ISDTN protocols note that the safety of students and staff is paramount.

In relation to non-government schools across Australia, the arrangements under the ISDTN scheme are relatively straightforward because they are all potentially covered by the federal *Privacy Act 1988* (Cth) and are therefore in a position to adopt a nationally consistent approach to information sharing. Non-government schools may share information under the ISDTN scheme if they have in place a standard data collection notice that informs parents and students of the ‘purposes of collection’, discussed above.⁸⁰

However, where a student is moving to or from a government school across jurisdictional boundaries, the ISDTN requires the new school to gain the consent of parents or guardians as well as students before requesting information from the previous school. This approach may be a response, at least in part, to the complex web of state and territory privacy legislation that applies to government schools. However, the suggested approach is not consistent with good privacy practice and is likely to

⁷⁹ Council of Australian Governments Education Council, *Interstate Student Transfer Note* <<http://educationcouncil.edu.au/archive/Publications/ISDTN.aspx>>.

⁸⁰ Council of Australian Governments Education Council, *Protocol for Use by Non-Government Schools for Students Transferring from other Non-Government Schools* <<http://educationcouncil.edu.au/archive/Publications/ISDTN/ISDTN---Non-Gov-Schools.aspx>>.

stymy the flow of information between schools necessary to meet the schools' duty of care.

IV CONCLUSION

Currently, there are significant barriers in the Australian legal framework that are likely to be stymying the flow of information necessary for schools to meet their duty of care to students. These barriers are sometimes the result of actual legal impediments in the sharing arrangements but may also be the result of a tendency to caution caused by the complexity and inconsistency in the legislative framework.

Despite efforts to develop a national framework for teacher registration across Australia, there remain many points of inconsistency and possible confusion. As a result of the National Law, a higher level of consistency and coherence is evident in the legal arrangements for collecting and sharing information in the early childhood services sector. In terms of sharing information about students, both within and across jurisdictions, the key appears to be reform of the privacy landscape to, at the very least, introduce a shared set of privacy principles to regulate the collection, use and disclosure of personal information and to develop a better understanding of how the principles are designed to work with other legislation.

It is possible to develop a legal framework that supports timely and appropriate information sharing in the schools sector that is coherent and consistent and finds the correct balance between conflicting rights. The question that needs to be addressed is whether any law or policy that places limits on the right to privacy — including the privacy of teachers, students and their families — is necessary to achieve a legitimate aim and a proportionate means of doing so. This test, developed in the context of international human rights law is an invaluable tool for legislators, policy makers and those implementing information sharing policy in the schools sector who are most affected by the complex and sometimes incoherent legal arrangements and must advocate for reform.

INTEGRITY OF PURPOSE: A LEGAL PROCESS APPROACH TO DESIGNING A FEDERAL ANTI-CORRUPTION COMMISSION

ABSTRACT

This article draws from traditional legal process theory to advance a methodology for the design of a federal anti-corruption commission. Legal process theory stresses the dynamic, evolving, and interactive nature of legal institutions within a systemic context. It highlights the fact that the strength of legal systems depends upon their institutional components functioning harmoniously according to purpose, and observing appropriate institutional boundaries. Drawing from the legal process literature, we articulate a theory of ‘integrity of purpose’: a vision of how institutions can be designed to fulfil their roles through simultaneous pursuit of their mandates and cognisance of their boundaries. We then apply integrity of purpose to inform design choices surrounding several aspects of a potential federal anti-corruption commission: its normative purpose, investigative jurisdiction, and power to conduct formal hearings and issue findings. Our approach treats questions of institutional purpose as inseparable from questions of procedure, and presents a novel means of translating legal analytic principles into a forward-thinking framework for institutional design.

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I INTRODUCTION

The time is ripe for a renewed conversation about the purpose and design of standing anti-corruption commissions across Australia. Such commissions have been prominent fixtures in Australian public and political life at the state level for more than three decades. Their creation in the 1980s and 1990s followed the sweep of ‘new administrative law’ reforms designed to strengthen and increase the accessibility of public accountability mechanisms.¹ Since that time, each state has created a standing anti-corruption commission, and there has been ongoing debate about their proper role and conduct. The Commonwealth government has resisted calls for it to create a federal commission, but in the wake of recent bribery, expenses and foreign donations scandals, pressure to do so is growing.²

Any civic institution having the lifespan, profile, and influence of Australia’s anti-corruption commissions is bound to attract ongoing critical attention. For the most part, this is a good thing: revisiting foundational questions of institutional design is essential to ensuring that anti-corruption commissions remain relevantly faithful to their animating values and limits. Such debates offer a rich and informative base from which to derive questions of institutional purpose and design for a possible federal body. These questions include:

1. What precisely is the impropriety against which standing anti-corruption commissions are directed?
2. How should commissions be integrated with the existing mandates, powers, and activities of institutional counterparts, including, for instance, the police and the processes of criminal law?
3. Should jurisdictional concepts like ‘corruption’ and ‘integrity’ be cast broadly, allowing commissions latitude to investigate and address wrongdoing of diverse varieties, or narrowly, confining the powers of commissions to highly specific mandates?
4. What powers do commissions require to achieve their objectives?
5. Are the specified institutional objectives of commissions best advanced by undertaking their functions in public or in private?

¹ For further discussion of the ‘new administrative law’ reforms in Australia during this period, see: Matthew Groves and Hoong Lee, ‘Australian Administrative Law: The Constitutional and Legal Matrix’ in Matthew Groves and Hoong Lee, *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 1, 12–14.

² This has manifested, for instance, in two recent parliamentary inquiries into the question. See Senate Select Committee on a National Integrity Commission, Parliament of Australia, *Report* (2017); Senate Select Committee on the Establishment of a National Integrity Commission, Parliament of Australia, *Interim Report* (2016).

6. To what extent should the pursuit of those objectives be balanced against possibly harsh effects of the exercise of the commissions' powers on individuals?
7. How can institutional design reconcile the pursuit of the commissions' objectives with higher-order public law principles, including natural justice?

There are no straightforward answers to these questions, and their resolution will ultimately depend on balancing a range of competing priorities in context. That process will nevertheless be aided by linking specific design decisions to coherent and consistent base principles which reflect the commission's essential purpose and its fidelity to values latent in Australia's legal system (and indeed, in the very idea of the rule of law). To this end, we offer an approach rooted in legal process theory.

Legal process theory describes a field of analytic jurisprudence that held broad influence over American legal scholars in the middle of the 20th century. By focusing attention on the manner in which procedure simultaneously enables and bounds public purposes, the legal process school presents a distinct and very pragmatic way of understanding legal institutions and their interrelation. We employ principles from that school to advance our own theory of *integrity of purpose*: a vision of how institutions can be designed so as to fulfil their roles through simultaneous pursuit of their mandates and cognisance of their boundaries.

While the legal process tradition has fallen into relative desuetude, its influence is felt in many familiar legal approaches, including in the conventional account of statutory interpretation, in ascertaining questions of jurisdiction, and in reconciling discrete legal outcomes with higher order principles of law. What our unearthing and deployment of traditional legal process theory reveals is that these methods are useful not only to conventional legal problem-solving, but to informing proactive, pragmatic, forward-looking decisions in the design of legal institutions themselves. It is this goal that we pursue in applying our integrity of purpose approach to advance design features for a future federal anti-corruption commission.

In Part II, we introduce legal process theory and link its tenets to recent scholarship on the 'integrity branch' in Australian law. Legal process theory helps to shed light on the dynamic, interactive, and evolving nature of institutions comprising the integrity branch. We incorporate each of these ideas into our theory of integrity of purpose, outlining an analytic to guide the introduction of new integrity institutions to an existing governance landscape. In Part III, we apply integrity of purpose to address a series of design questions that accompany the creation of a federal anti-corruption commission. Our account moves from the theoretical to the practical: having shared a legal process account of what it means for legal institutions to embody distinct purposes and honour intended boundaries, we offer a series of specific recommendations about the powers and procedures of a new federal commission.³ Several of these recommendations challenge the current design and conduct of anti-corruption commissions at the state level.

³ The recommendations about institutional design made in this article develop those that were made to the Senate Select Committees referred to in above n 2.

II FROM LEGAL PROCESS THEORY TO INTEGRITY OF PURPOSE

A An Introduction to Legal Process Theory

One of the reasons that legal process theory provides a useful starting point from which to consider the design of anti-corruption commissions, and integrity mechanisms more generally, is because at its core is an optimism about the role and capacity of institutions. Legal process theory conceives of law in facilitative terms — as the ‘doing of something’⁴ — and of legal institutions as official embodiments of collective goals. This optimistic, facilitative disposition informs a constructive approach to legal problem-solving and an interest in root questions of institutional design. In addition to lending strong analytic tools to this end, legal process theory complements the view of public power espoused in some of the most influential Australian scholarship on the integrity branch.

The optimism of the legal process school was in part reflective of the time at which it emerged. The Second World War and New Deal ushered the birth of the modern American administrative state, with government assuming an increasingly active role in public life through the proliferation of new administrative and regulatory agencies. The early legal process theorists were immersed in these changes, viewing them as essential to securing widespread social prosperity. Like the legal realists who preceded them, the legal process scholars thus rejected a view of law that demanded rigid adherence to formal principles at the expense of contextual enforcement of legislative objectives.⁵ Unlike some legal realists, however, they did not view legal reasoning as simply instrumental and subordinate to the optimisation of public policy. Legal process theorists retained the view that governance by law involved fidelity to fundamental restraints on power, and that legal reasoning itself had an analytically and normatively distinct quality.⁶ They located the source of this distinctness in the latent qualities of the legal system itself, treating the latter as a complex of procedures effected to rationally further social objectives. The legal process view thus elevated the normative significance of procedure: legal procedure was both the means through which societal goals were defined and pursued, and simultaneously a source of restraint that ensured fidelity of such action to purpose and to the public interest.

⁴ See Henry M Hart and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994) 148 (prepared for publication from the 1958 Tentative Edition by William N Eskridge, Jr, and Phillip P Frickey).

⁵ See Eskridge and Frickey’s discussion in their Introduction to Hart and Sacks’ text (‘An Historical and Critical Introduction to *The Legal Process*’): *ibid* xci. See also David M Kennedy, ‘Henry M Hart, Jr, and Albert M Sacks’ in David M Kennedy and William W Fisher III (eds), *The Canon of American Legal Thought* (Princeton University Press, 2006) 245.

⁶ See, eg, Kennedy, *ibid* 249, and the detailed historical account of the legal process tradition offered in Eskridge and Frickey’s Introduction, above n 4.

The legal process school⁷ is best reflected in the work of Henry M Hart, Jr and Albert M Sacks, whose posthumously published book of course materials — *The Legal Process: Basic Problems in the Making and Application of Law*⁸ — was widely taught in American law schools and influenced a generation of scholars and practitioners.⁹ While intended as a pedagogical text, Hart and Sacks built their materials on two principles of deep analytic significance: the principle of institutional settlement and the principle of reasoned elaboration. We explain each of these principles below before considering their application to integrity institutions in Australia.

1 *Institutional Settlement*

Hart and Sacks considered legal systems to arise from ‘abstract understandings’ about the terms of community existence — that is, understandings about the type of conduct that should be tolerated, encouraged, and disallowed.¹⁰ In their view, at root, legal systems comprise institutionalised means of defining these understandings, implementing or revising them, and resolving ambiguities that arise from their practical enforcement.¹¹ This emphasis on means is the lynchpin of legal process theory. As Hart and Sacks wrote:

substantive understandings or arrangements about how the members of an interdependent community are to conduct themselves in relation to each other and to the community necessarily imply the existence of what may be called *constitutive* or *procedural* understandings or arrangements about how questions in connection with both types of arrangement are settled. The constitutive arrangements serve to establish and govern the operation of regularly working — that is, *institutionalized* — procedures for the settlement of questions of group concern.¹²

Among the constitutive arrangements identified by Hart and Sacks are the familiar institutions of government: elected legislatures, administrative agencies and courts (to name a few). In the legal process view, each of these institutions are composites of *procedure* calibrated to enable particular forms of social action. Thus while the procedures of elections and lawmaking enable the translation of societal goals into law, the procedures of administrative or judicial decision-making allow those goals to gain practical meaning in context. Crucial to the operation of a legal system is that the outcomes of various properly constituted procedures be recognised as authoritative. This is the requirement imposed by the principle of institutional settlement,

⁷ In this article we use the term ‘legal process theory’ to refer collectively to a school of thought that shared common intellectual commitments but was by no means uniform. As Kennedy, above n 5, 245, helpfully writes: ‘The “legal process” was always more a collection of ideas, focal points for inquiry, and characteristic attitudes than a tight method or disciplined school of thought.’

⁸ Hart and Sacks, above n 4.

⁹ See, eg, Kennedy, above n 5, 243; Eskridge and Frickey, above n 4, cxiii..

¹⁰ Hart and Sacks, above n 4, 1–3.

¹¹ *Ibid* 3.

¹² *Ibid* (emphasis in original).

which Hart and Sacks expressed as follows: ‘a decision which is the duly arrived at result of duly established procedures ... “ought” to be accepted as binding upon the whole society unless and until they are changed.’¹³

The principle can be illustrated with a familiar example. An implicit source for the authority of a judicial decision is the procedural quality of the dispute which precedes it. Adjudicative procedure affords disputing parties the opportunity to frame their respective interpretations of the law on their own terms. At least in theory, it structures the disputing parties as equals, empowers them with control over the presentation of a dispute, and obliges a neutral arbiter to issue a decision that rationally accounts for their claims. The structural fairness of this procedure is intended to secure the rational assent of the parties to its outcome, regardless of whether they agree with that outcome in substance.¹⁴

Having observed an adjudicative procedure in deciding a legal dispute, a court’s pronouncement of the law must be accepted as binding unless and until it is overridden by the outcome of another, properly constituted process — for example, legislative intervention on the disputed point of law, which itself relies upon the procedural authority of elections, manner and form requirements for legislative enactment, and so on. Importantly, while a court’s decision binds the parties in the individual resolution of their dispute, it also commands the respect of broader society (including the other institutions of the state) to the extent that it involves pronouncing on a question of law. Respect for the authority of the judicial decision reflects respect for the court’s distinct competency and role-assignment, which is both verified and bounded by the proper observance of judicial procedure.

Legal process theory involves multiplying the principle of institutional settlement at a societal level, recognising its presence in the day-to-day working of myriad institutional arrangements, each interacting with one another to form a coherent whole. The method of legal analysis thus commanded by the theory lies in understanding how the respective authority of distinct procedures interrelate in the resolution of given social problems.¹⁵ From a legal process perspective, this is what lawyers are doing in resolving a range of common legal issues, for example: determining whether a given issue falls to a particular administrative agency for resolution; identifying the

¹³ Ibid 5.

¹⁴ This example is taken from Lon L Fuller’s account in Lon L Fuller ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353, 355–6. For an account of Fuller’s relationship to the legal process school, see David M Kennedy, ‘Lon L Fuller’, in Kennedy and Fisher III, above n 5, 209–17; Eskridge and Frickey, above n 4, c–cii; William N Eskridge Jr, ‘Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms’ (2013) 57 *Saint Louis University Law Journal* 865, 865–6; and Robert G Bone, ‘Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation’ (1995) *Boston University Law Review* 1273, 1276–79.

¹⁵ Hart and Sacks, above n 4, 6.

standard of deference owed to that agency by a court; and navigating the coordinate responsibility of other agencies for common elements in the problem.

It will be readily apparent that none of these questions could be meaningfully addressed without an understanding of the purposes that underlie distinct procedures. This is where the second analytic principle identified by Hart and Sacks — the principle of reasoned elaboration — comes into play.¹⁶

2 Reasoned Elaboration

As discussed above, Hart and Sacks believed that legal systems emerge organically from the need to create authoritative means of promulgating abstract social understandings into concrete forms. In the most obvious sense, this process is embodied in the enactment of a new statute, translating an erstwhile abstract social goal into law through the authoritative complex of procedures signified by elections and legislative action. Inevitably in this process, aspects of the motivating social goal will remain inchoate.¹⁷ A simple example is offered by statutory terms that admit a range of possible interpretations, but which are not defined exhaustively in statutory text. A legislature might thus enact a law prohibiting the use of vehicles in a park,¹⁸ but leaving open the exact scope and meaning of the term ‘vehicle’ as it is to be applied in context.

The principle of reasoned elaboration is intended to guide the interpretation of ‘general directive arrangements’ — which may include individual laws, policies, and principles, but may also comprise amalgamations of these and other sources of directive authority — recognising that these arrangements inevitably contain inchoate qualities.¹⁹ The principle can also be applied as a lens for critiquing the

¹⁶ The principle of reasoned elaboration recurs at several points in *The Legal Process*, but is first introduced and explained by Hart and Sacks in Chapter 1, Part II: ‘The Processes of Official Judgment Involved in the Administration of General Directive Arrangements’: *ibid* 143. See also Eskridge and Frickey, above n 4, xci-xcii.

¹⁷ See Eskridge and Frickey, *ibid*, xciii.

¹⁸ This example of an issue in legal interpretation is taken from H L A Hart’s paradigmatic debate with Lon L Fuller on the moral characteristics of law. See H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593.

¹⁹ Hart and Sacks, above n 4, 113–14. The term ‘general directive arrangement’ is difficult to define without reliance on abstractions. Hart and Sacks identified these arrangements as general ‘understandings’ about the types of process appropriate to addressing various questions in a legal system, and about the existence of institutions authorised to promulgate new authoritative processes for handling certain questions or problems: *ibid*. For the purposes of this article, we confine our attention to laws, policies, principles, and agencies emanating from recognised government sources as species of ‘directive arrangement.’ Hart and Sacks’ definition of the term is broader and deeper, encompassing root sources of social consensus that confer legitimacy on official lawmaking processes themselves.

legal interpretations of public officials in executing their assigned roles.²⁰ It has two key requirements. The first is that new applications of a directive arrangement must be consistent with other established applications of it — that is, officials must build rationally from the interpretations of their predecessors in elaborating the meaning of a directive arrangement in a new context.²¹ The second is that applications of a directive arrangement must align with the arrangement’s specific purpose, and — to the greatest extent possible while honouring that purpose — with higher order values of the legal system.²²

On its face, the principle of reasoned elaboration is not strikingly different from a conventional doctrine of purposive interpretation — and indeed, the approach to legal interpretation developed by the legal process theorists directly influenced modern doctrines of statutory interpretation in the United States and elsewhere.²³ When courts adhere to the precedents established by earlier decisions and search for the underlying purpose of a statutory provision, they are honouring the principle of reasoned elaboration.

However, it must be kept in mind that reasoned elaboration is not just about interpreting statutes *per se*: it is about discerning and implementing the proper role of legal institutions themselves — including administrative agencies, courts, and even legislatures — in terms that align with institutional purpose and honour systemic coherence. The interpretation of statutes is but one instance where the principle of reasoned elaboration must be honoured.

The principle of reasoned elaboration is meant to illuminate an important dimension to the relationship between lawmakers and legal interpreters. Hart and Sacks refer to the officials responsible for implementing directive arrangements as exercising a ‘power’ of reasoned elaboration.²⁴ The term ‘power’ signifies that those officials have been vested with the distinct capacity to give meaning to directive arrangements in context: it has been left to their judgment to determine how inchoate aspects of the arrangements will be realised as a matter of practical reality. In turn, this helps frame one of the chief dilemmas confronting lawmakers in the design and creation of a new directive arrangement. Those officials must ask how much of the directive arrangement to leave inchoate — deferring to the interpretive judgment of future officials — and conversely how much control they wish to exert over the future applications of the arrangement (for example, through the use of highly

²⁰ The principle of reasoned elaboration is most prominent in Hart and Sacks’ treatment of the interpretive roles and comparative institutional advantages of courts. Kennedy’s summary of the principle, for example, references it exclusively in relation to the judiciary: above n 5, 247. It is nevertheless clear from Hart and Sack’s introduction of the principle that they intended it to pertain generally to ‘officials’ charged with elaborating the inchoate qualities of directive arrangements in context: above n 4, 147.

²¹ Hart and Sacks, *ibid* 147.

²² *Ibid* 147–8.

²³ See, eg, Eskridge, above n 14.

²⁴ Hart and Sacks, above n 4, 143.

specific and prescriptive statutory language).²⁵ Hart and Sacks observed of directive arrangements:

they speak out of the past to the present. There are special arts in discerning as truly as possible what the past has to say to the present. There are even more difficult arts in speaking intelligibly and sensibly to the future. These arts are all at the heart of the lawyer's craft.²⁶

The significance of this observation will become clearer in our later discussion of the statutory frameworks governing anti-corruption commissions.

Finally, reasoned elaboration necessarily implies that legal systems, and the individual institutions that comprise them, are dynamic and evolving. A responsibility for officials to apply directive arrangements in a manner consistent with past applications means that, over time, the inchoate qualities of legal institutions will be narrowed as their practical applications are consolidated. Here the principles of institutional settlement and reasoned elaboration are mutually reinforcing. Since the principle of institutional settlement demands respect for the outcomes of settled official procedures, the substantive decisions emanating from such procedures — each of them observing the principle of reasoned elaboration — will in turn provide authoritative guidance which narrows the interpretive scope for future elaboration of the relevant directive arrangements.²⁷

Institutional settlement and reasoned elaboration are thus principles by which various government institutions interpret and exercise their roles recognising each other's corresponding authority, and recognising a duty of fidelity to agency-specific purpose and to the fundamental values of the legal system. One of their greatest analytic strengths is that they treat those institutions as dynamic. Creators of new legal institutions never write on a blank slate, but rather 'reckon with the choices previously made in that society and with the social conditions and institutions that they have brought about.'²⁸ Moreover, when a legislature sets out the framework for a new institution through legislation, this is not the end of the story: the legislation itself must be interpreted and applied, and the officials doing so will give substantive content to the institution's characteristics. For a legal system to function coherently, it is critical that those officials adopt interpretations which respect the authority of institutional counterparts, build logically from the past interpretations of officials who preceded them, align with the animating purposes of their institutions, and honour fundamental values of the legal system itself. This is what the principles of institutional settlement and reasoned elaboration are meant to achieve.

²⁵ Ibid 138–43. Hart and Sacks distinguish between the interpretive latitude afforded to future officials by rules, standards, policies, and principles — each different types of direction that can comprise components of multifaceted directive arrangements.

²⁶ Hart and Sacks, above n 4, 113–14.

²⁷ For an illustration of this narrowing process, see *ibid* 150–1, where Hart and Sacks discuss the mandate of the then US Federal Trade Commission.

²⁸ *Ibid* 111.

B Legal Process Theory, Integrity Systems, and ‘Integrity of Purpose’

The dominance of legal process theory in the middle of the 20th century would ultimately be displaced by a more fragmented landscape of American legal thought brought about by the civil rights movement, which challenged the school’s optimism about the substantive virtue and social legitimacy of duly-constituted procedures.²⁹ The root principles of institutional settlement and reasoned elaboration are nonetheless latent in many modern legal doctrines,³⁰ including, as we have indicated above, the purposive interpretation of statutes. They also have distinct utility in navigating issues related to the design and conduct of integrity institutions, including anti-corruption commissions. This is so for two reasons. The first is that institutional settlement and reasoned elaboration reinforce an essential concept of what it means for integrity institutions to themselves act with *integrity*. The second is that they present a means of ensuring the commissions act *coherently and harmoniously* with institutional counterparts, accounting for their intended role within a legal system. Both of these values have been highlighted as crucial features of Australia’s modern ‘integrity’ institutions of government.

It will be uncontroversial to suggest that anti-corruption commissions must display their own institutional integrity. Australia has seen a growing body of scholarship devoted to the powers and potential of an ‘integrity branch’ of government,³¹ a concept defined most forcefully by the Hon James Spigelman:³²

[I]n any stable polity there is a widely accepted concept of how governance should operate in practice. The role of the integrity branch is to ensure that that concept is realised, so that the performance of government functions is not corrupt, not merely in the narrow sense that officials do not take bribes, but in the broader sense of observing proper practice.³³

²⁹ See Eskridge and Frickey, above n 4, cxviii; Kennedy, above n 5, 249–50; and Kent Roach, ‘What’s New and Old About the Legal Process’ (1997) 47 *University of Toronto Law Journal* 363, 365.

³⁰ On the continuing relevance and influence of the legal process school, see Roach, *ibid*; Eskridge and Frickey, above n 4, cxxv–cxxxiv; Eskridge, above n 4.

³¹ See, eg, the papers delivered at the Australian Institute of Administrative Law’s 2012 Annual Conference, *Integrity in Administrative Decision Making*, in Adelaide on 19–20 July 2012. A list of those papers can be accessed at Australian Institute of Administrative Law, *2012 National Administrative Law Conference* <[http://www.aial.org.au/_literature_145145/Conference_Program_\(2012\)](http://www.aial.org.au/_literature_145145/Conference_Program_(2012))>. The term ‘integrity branch’ is generally credited to Bruce Ackerman, ‘The New Separation of Powers’ (2000) 113 *Harvard Law Review* 633, 694–96.

³² See, eg, J J Spigelman, ‘The Integrity Branch of Government’ (2004) 78 *Australian Law Journal* 724; J J Spigelman, ‘The Significance of the Integrity System’ (2008) 4 *Original Law Review* 39; James Spigelman ‘Institutional Integrity and Public Law: An Address to the Judges of Hong Kong’ (2014) 44 *Hong Kong Law Journal* 779.

³³ Spigelman, ‘The Integrity Branch of Government’, above n 32, 725.

According to this vision, the integrity branch comprises both institutions formally mandated to hold others to account — such as anti-corruption commissions — and more diffuse instruments of integrity, including policies, individual officials, and accountability systems.³⁴ Integrity itself ‘goes beyond matters of legality’, but ‘is not so wide as to encompass any misuse of power.’³⁵ It requires that each public institution observe ‘fidelity to the public purposes for the pursuit of which the institution was created,’ and obey ‘the public values, including procedural values, which the institution [is] expected to obey.’³⁶ Spigelman’s account of the integrity branch thus has two implications for anti-corruption commissions: it both formally places them within the branch as institutions mandated to pursue a particular form of accountability,³⁷ but it also imposes on them, like all government agencies, a duty of institutional integrity.

This duty is framed in terms that echo tenets of legal process theory, stressing the importance of institutional fidelity to purpose and to broader ‘public values’, which in turn are directly linked with ‘procedural values’. Spigelman would appear to treat procedure in a manner reminiscent of Hart and Sacks — that is, as something which effects purpose through simultaneously facilitating and restraining the use of public power. He writes of public law:

Public law is, or should be, primarily concerned with the way the institutionalised governance system *generates* power, rather than focussing, as is often done, on the way in which power is constrained. Constraint is an inextricable component of the *conferral* of government power.³⁸

This complements the legal process position that legal systems at large comprise institutionalised means of effecting collective purpose. Procedure is essential to legal systems in the same manner that grammar is essential to language: it provides the necessary constraints through which meaning can be conveyed.³⁹ Legal process theory is thus highly conducive to assessing the observance of integrity, as both an institutional and a systemic value, in exactly the terms envisaged by Spigelman.

Legal process theory also complements a further important theme to emerge from scholarship on Australia’s integrity branch. It will be recalled that Spigelman’s account of the integrity branch is institutionally pluralistic. The 2005 report of Australia’s

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ See further Tom Bathurst, ‘New Tricks For Old Dogs: The Limits of Judicial Review of Integrity Bodies’ (The James Spigelman Oration 2017, 26 October 2017) 2.

³⁸ Spigelman, ‘Institutional Integrity and Public Law: An Address to the Judges of Hong Kong’, above n 32, 783 (emphasis in original).

³⁹ This analogy is adapted loosely from Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 178, describing the ‘grammar of public law.’ Loughlin’s thesis is cited approvingly in Spigelman, ‘Institutional Integrity and Public Law’, above n 32, 783.

National Integrity Systems Analysis ('NISA')⁴⁰ — still the best available inventory of Australian integrity institutions — deepens this pluralistic account through the metaphor of a bird's nest. The metaphor suggests that integrity is achieved through multiple interlocking measures that, while individually insufficient, reinforce one another to protect something fragile and vital at their core.⁴¹

The authors of the NISA report deliberately declined to advocate for the adoption of *specific* anti-corruption and integrity promoting institutions. Wishing for their study to be useful in a range of jurisdictional settings, they instead highlighted the need for a given matrix of institutions to function together harmoniously and coherently within their respective contexts.⁴² The principles of institutional settlement and reasoned elaboration are similarly agnostic about the specific features of a given legal system; they are concerned rather with ensuring that the system itself is internally coherent and effective, measured against its own purposive underpinnings. By enquiring whether a given exercise of power aligns with its proper purpose, honours appropriate (and limiting) procedure, and coheres with a rational account of relevant public values, the principles of institutional settlement and reasoned elaboration work to ensure the kind of inter-institutional strength highlighted by the NISA study as essential to an effective integrity system.

These observations clarify why legal process theory is useful to scrutinising whether institutions and systems succeed in fostering integrity according to the terms suggested by Spigelman, the NISA study, and other Australian scholars of the integrity branch. Beyond simply providing useful analytic clarity and reinforcement to the themes of that literature, however, legal process theory presents a foundation for design principles which can be proactively adopted to inform the creation of new integrity institutions, such as a federal anti-corruption commission. While institutional settlement and reasoned elaboration were presented by Hart and Sacks as interpretive aids to navigating a legal landscape already in motion, we advocate use of the principles to pre-emptively inform questions of design surrounding a new institution about to be deployed in such a landscape.

Borrowing Spigelman's language, we argue that a new federal anti-corruption commission must be designed to achieve *integrity of purpose*. Integrity of purpose is shorthand for the long-term compliance of a public body with the principles of institutional settlement and reasoned elaboration. It is intended to recognise that institutions evolve over time as their constituting legislation is interpreted and applied, and that institutional fidelity to purpose across time relies on the integrity of communication

⁴⁰ Transparency International Australia and the Key Centre for Ethics, Law, Justice and Governance, 'Chaos or Coherence: Strengths, Opportunities and Challenges for Australia's Integrity Systems' (Final Report, National Integrity Systems Assessment, 9 December 2005).

⁴¹ Ibid 15, citing Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave MacMillan, 2013) 232.

⁴² Ibid.

between legislators and officials.⁴³ As an aide for the design of prospective institutions, integrity of purpose requires that legislators and policymakers anticipate the dynamic and evolving role that a new institution will play in context. Accounting for the institution's place within a system, it requires that the institution exhibit respect for the settled authority of institutional counterparts and that it align with individual animating principles and with the higher order principles of the legal system. Institutional architects are thus challenged to cast their minds into the future, anticipate interpretive challenges that might confront the institution, and ensure the clearest possible forward-looking communication of institutional aims and limits. Crucially, these aims and limits must be embodied in institutionally distinct procedure.

III INTEGRITY OF PURPOSE AND THE DESIGN OF A FEDERAL ANTI-CORRUPTION COMMISSION

In this Part, we consider what the theory of integrity of purpose means for key elements in the design of a prospective federal anti-corruption commission. Our objectives are twofold. First, we wish to illustrate how the theory of integrity of purpose informs principled and pragmatic design choices, thus establishing an approach that can be employed to confront a broader series of issues than those considered in the article. Second, we wish to advocate for a limited number of design features of particular importance. The issues selected to illustrate the application of integrity of purpose reflect areas in which we believe the design of anti-corruption commissions presently lack coherent and principled guidance. Our conclusions thus challenge some of the current design features of state-level commissions.

The questions that we consider in this Part are as follows:

1. Should a basic normative statement be set out in legislation to direct the purpose of the commission, and if so, what should its content be?
2. How should the commission's jurisdiction be defined, both in respect of the substantive issues it is mandated to pursue and the individuals or organisations it is empowered to oversee?
3. How should the commission's hearing powers be defined and exercised, including its powers to publicly examine individuals, investigate various types of misconduct, and publicly report findings?

Two caveats are necessary before proceeding. First, we must acknowledge the limited scope of our own application of integrity of purpose in this article. The starting point of our approach — a survey of the current integrity landscape, with a view to identifying areas of vulnerability that a new anti-corruption commission could fill — is a major research undertaking in its own right. Our own contribution in this respect is preliminary, limited both by the scope of a single article and by our chief goal of

⁴³ See Hart and Sacks, above n 4, 113–14.

proving the merit of integrity of purpose as a design theory. The institutional survey we undertake in this article is thus limited in breadth (the number of institutions considered) and depth (the level of detail in which we analyse individual institutions). We acknowledge that future researchers applying our theory with greater comprehensiveness and depth may come to more richly informed design conclusions.

The second caveat is closely connected to the first. The most rigorous application of integrity of purpose would begin without preconception as to the type of institution that it ultimately recommends. It might thus be determined that enhancement of the integrity landscape is best served by refining the interrelation and design of existing institutions, or that a new commission is warranted but in terms that differ vastly from institutional precedents — for example, by obviating reliance on coercive hearing powers or on legalistic methods of examination and cross-examination. In this article, however, we have employed an integrity of purpose approach in a more tentative manner, with some limited preconceptions about institutional form, which in turn guides our appraisal of what new strengths an anti-corruption commission could contribute. We accept the premise that anti-corruption commissions by their nature will ordinarily require coercive investigative and hearing powers, for example. We also accept the proposition that the unique characteristics of corruption — its covert and potentially systemic nature, and its inherent connection to the abuse of authority — justify the use of extraordinary investigative powers in contrast to other subjects of wrongdoing presently managed through the standing investigative capacities of police and other agencies. We have accepted these starting points for two reasons. The first is an acknowledgement of the current political pressures for the Commonwealth to adopt a federal anti-corruption commission akin to those operating in the states. While a deeper and more rigorous application of integrity of purpose may yield different starting points, this would undermine the immediate usefulness of the approach to informing the shape of the current debate. The second is, while accepting the implication of the current political climate, we nonetheless wish to demonstrate how those starting points, accepted on their own terms, recommend different features of institutional design than those modelled by some state-level commissions.

With these caveats in mind, it is now possible to identify some of the key design features that would attend a new federal anti-corruption commission that honours integrity of purpose.

*A Suppressing Corruption and Fostering Confidence: the Goal and Content
of a Normative Purpose Statement in Legislation*

The first issue for consideration is whether the new commission should be directed by a normative purpose statement in its governing legislation, and if so, what that statement should be. Integrity of purpose clearly supports the inclusion of such a statement in the basic sense, which can only lend clarity and coherence to the operation of an institution provided the statement is well-conceived and meaningfully informs other aspects of the institution's power and procedure. Legislative purpose statements are not uncommon or particularly controversial. With the judicial endorsement of contextual and purposive construction as the dominant approach to

statutory interpretation in Australia, there has been a proliferation of increasingly detailed objects provisions. Integrity of purpose nonetheless reveals the importance of a legislative purpose statement in a different light.

Recognising that the legislative framework for an institution needs to be interpreted and applied by officials, and that institutions evolve in context according to those interpretations, a legal process approach directs legislators to contemplate the degree of interpretive latitude they intend to defer to institutional officials in the future. A statutory framework that gives only a basic, or ‘thin’, statement of institutional purpose leaves considerable latitude for those officials to develop the meaning of the statement in context, evolving the practical conduct of the institution accordingly. Conversely, a more refined and detailed, or ‘thick’, purpose statement reflects an attempt by the legislator to narrow and direct the potential future conduct of the institution.⁴⁴ At the point of design, it provides a stronger anchor by which questions of process, jurisdiction, and power can be based. For the future officials tasked with administering these institutions, it provides a foundational basis on which to interpret and operationalise their processes, jurisdiction, and powers over time. If they do so with fidelity to the goals that have been articulated by legislative drafters, and using procedures appropriate to those goals, they will build public, social, and political legitimacy for their institutions, even as they respond to issues that are not addressed definitively in the legislation itself.

It is helpful to briefly consider the type of institution for which a thin statement of institutional purpose would be appropriate. Imagine, for example, that an administrative body is constituted to confer civic awards on individuals for service to their communities. Here a very limited legislative statement of purpose could be useful in allowing an adjudicative panel maximum discretion to employ their community knowledge and expertise.⁴⁵ A more expansive discretion in such a context also does not pose a danger to the integrity of higher order systemic principles such as individual liberties. An anti-corruption commission is clearly an institution of a different sort: assuming it will be vested with strong investigative powers that engage potentially harsh effects, a more detailed and limiting articulation of institutional purpose will be warranted. The concern is not solely about protecting the rights of those who may be affected by the institution, but about the integrity of the institution itself. A strong normative statement in legislation will safeguard against the institution evolving in a way that undermines public, social, and political legitimacy by provoking conflict

⁴⁴ This discussion of ‘thin’ and ‘thick’ legislative purpose statements is a simplified rendition of the drafting dilemmas identified by Hart and Sacks in distinguishing between rules, standards, principles, and policies as different forms of legal direction — and in exploring their interrelation: above n 4, 138–43. See also Eskridge and Frickey, above n 4, xciii–xciv.

⁴⁵ Hart and Sacks would refer to the panel as exercising a ‘power of continuing discretion’, meaning a power ‘where judgment remains largely unfettered by previous decisions and the necessity of justifying each new decision’ consistently with past decisions: above n 4, 153.

with other institutions, incoherence, or troubling misuses of power. In other words, it helps guard against the institution compromising its own integrity of purpose.

The pursuit of an appropriate legislative purpose statement for a new federal commission thus demands a survey of the institutional landscape into which a new commission will be deployed. It directs us to ask what legislative interpretive aids are appropriate to ensure that the commission will evolve a way that strengthens rather than weakens the existing integrity landscape, contributing a new valuable purpose that is presently missing from it. Answering this question involves two steps. First, it requires an inventory of the relevant existing institutions, with particular attention to those that serve recognised roles in relation to corruption. This serves to identify vulnerabilities or gaps: in what areas could the landscape be strengthened through the incorporation of new public goals and new procedures? Second, it involves translating the results of the survey into a foundational concept of what a new anti-corruption should do and how it should do it. Both the substantive and procedural elements of this account are essential — indeed they are inseparably linked — as we cannot talk meaningfully about why an institution is needed without considering how the institution is to operate distinctly from its counterparts. This foundation will supply the essential content for a normative statement of institutional purpose, which in turn will inform more specific legislative provisions.

As noted above, a detailed and comprehensive survey of the relevant institutions exceeds the scope of this article.⁴⁶ We can nevertheless begin the process by considering four institutions of obvious relevance: the Australian Commission for Law Enforcement Integrity (‘ACLEI’), the Commonwealth Ombudsman, the Auditor-General, and the new Independent Parliamentary Expenses Authority. Even this limited survey proves useful to identifying areas of systemic vulnerability that could form the basis for a new anti-corruption commission.

1 *Surveying the Landscape*

The ACLEI is the clearest federal counterpart to standing anti-corruption commissions that exist at the state level, and thus an appropriate place to begin our survey. While functionally similar to those state counterparts, the ACLEI is distinguished by a narrow jurisdictional focus on Commonwealth law enforcement agencies, including the Australian Crime Commission, the Australian Federal Police, and the Department of Immigration and Border Protection.⁴⁷ This focus nevertheless

⁴⁶ More comprehensive surveys have been undertaken, for instance in the 2017 Senate Select Committee on a National Integrity Commission Report, above n 2, ch 2, and are currently underway as part of the Australian Research Council Linkage Project entitled *Strengthening Australia’s National Integrity System: Priorities for Reform*, which is reviewing Australia’s integrity framework. The 2017 Senate Select Committee’s third recommendation was to review the question of a national integrity commission following this research, and the release of the work of the Open Government Partnership.

⁴⁷ *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 5 (‘Commonwealth Act’).

concerns a field in which the consequences of corruption are particularly acute: the power of these agencies to immediately impact civil liberties, combined with the likelihood that their officials will encounter criminal activity, suggests that they especially warrant strict enforcement of institutional integrity. Within this field, the federal Integrity Commissioner ('the Commissioner') — as head of the ACLEI — has a robust capacity to detect corruption, enforce integrity, and inform the public, as reflected in several features of institutional design.

First is the authority of the Commissioner to initiate investigations on his or her own motion, thus enabling independent scrutiny of law enforcement agencies as and when necessary, without the need for referral by the government or others.⁴⁸ Second is the ability to report dissatisfaction with agency responses to investigations, thus ensuring that recalcitrant officials are exposed, at minimum, to public awareness and pressure to comply with the ACLEI's findings and recommendations.⁴⁹ Third is the standing responsibility to submit a public annual report to Parliament, lending valuable transparency to matters within the Commissioner's ambit of investigation and providing oversight that helps to ensure the ACLEI's own integrity of purpose.⁵⁰

Other than its narrow jurisdiction, the ACLEI suffers from at least one significant flaw: it has an incredibly low public profile. This may be partly on account of the ACLEI's jurisdictional restriction to issues arising within Commonwealth law enforcement agencies, combined with the secrecy with which it necessarily conducts much of its activities. Whatever the reasons for its low profile, it is unfortunate given the significance of the ACLEI in the Commonwealth anti-corruption landscape. If anti-corruption institutions are intended not only to root-out instances of corruption, but to broadly foster confidence in government — a distinction we consider in further detail below — then public awareness and understanding of the institutions is essential.

We next consider the Commonwealth Ombudsman ('the Ombudsman'). The Ombudsman is tasked with reviewing complaints arising from the exercise of official powers by federal agencies and officials.⁵¹ It also serves a standing oversight role in respect of specific powers exercised by certain Commonwealth agencies. Conceived as an integrity institution, the Ombudsman helps to ensure that official powers are not exercised in an abusive manner, and that they conform to relevant legislation, policies, and standards.⁵² It provides an important point of contact for facilitative, confidential

⁴⁸ Ibid s 38.

⁴⁹ Ibid s 57. While this section confers authority on the Commissioner to follow up on government responses to investigations, which ordinarily occur in private, the special reporting power conferred by s 203 of the Commonwealth *Act* likely also provides latitude to report dissatisfaction with government responses to the reports of public inquiries.

⁵⁰ Ibid s 201.

⁵¹ *Ombudsman Act 1976* (Cth) ss 5(1)(a), 15(1).

⁵² Ibid s 15(1), defining the types of wrongdoing or misconduct the Ombudsman may identify in a report.

reporting of concerns related to the Commonwealth public service — including on potential issues of corruption — and lends important values of conciliation, privacy, and problem-solving to the Commonwealth integrity framework.

These characteristics are at once a source of institutional strength and weakness. The privacy that surrounds most of the Ombudsman's work no doubt facilitates candour and provides a secure environment in which problems may be resolved constructively between a complainant and the relevant Commonwealth agency. Perhaps unfairly, this may also limit public awareness of the extent to which the Ombudsman succeeds in fostering integrity within the public service, given that public reporting may result in conflict between the Ombudsman and a department. An emphasis on privacy and 'soft power' may diminish the Ombudsman's capacity to deter the worst instances of corruption. Some features of the Ombudsman's procedural flexibility diminish at least the appearance of independence: this is the case in respect of the Ombudsman's duty to consult a Minister before including findings that are critical of government in a public report.⁵³ It should nonetheless be acknowledged that the Ombudsman has broad reporting powers, including the ability to publicise follow up reports in the face of government inaction on findings and recommendations.⁵⁴

The Auditor-General is an independent officer of Parliament appointed pursuant to the *Auditor-General Act 1997* (Cth). In addition to the financial auditing of Commonwealth departments and agencies, the Auditor-General conducts performance audits evaluating the operations of both specific Commonwealth bodies and entire sectors of Commonwealth activity.⁵⁵ While routine financial auditing is a crucial feature of any government accountability framework, the Auditor-General's performance audit powers provide the most robust and flexible capacity to serve as an integrity-promoting institution. The Auditor-General has the broadest jurisdiction of the federal institutions considered thus far, combined with the strongest institutionalised protections for independence and the greatest transparency attaching to its final reports. Its focus on systemic problems, and capacity to examine issues on a cross-sectoral and inter-institutional basis, lends an indispensable element to the Commonwealth integrity framework.

The Auditor-General is not an intuitive institutional starting point for investigating corruption and integrity concerns, however. Its role does not include the investigation of complaints, and neither public servants nor individual citizens have standing to raise concerns with the Auditor-General. Moreover, the Auditor-General's contact with integrity and corruption issues is largely incidental to a broader mandate relating to the scrutiny of public sector performance and financial management. Despite having a broad jurisdiction, the Auditor-General does not have the institutional flexibility to address integrity and corruption issues in as nuanced or multifaceted way as the ACLEI or the Commonwealth Ombudsman. The Auditor-General may detect and report maladministration, but it does not have a clear institutional mandate to

⁵³ Ibid s 8(9).

⁵⁴ Ibid ss 16–17.

⁵⁵ *Auditor-General Act 1997* (Cth) ss 16–17.

forensically study its cause or to correct misconduct. As a practical matter, instances of corruption that do not involve the management of public funds may simply escape the Auditor-General's scrutiny.

Finally, in 2017, the Commonwealth Parliament passed the *Independent Parliamentary Expenses Authority Act*.⁵⁶ The *Act* establishes the Independent Parliamentary Expenses Authority ('the Authority') with an extremely limited mandate: it has advisory, monitoring, reporting, and auditing functions relating to the various expenses of members of parliament. The Authority has 'power to do all things necessary or convenient to be done for or in connection with the performance of its functions',⁵⁷ and more explicit information gathering powers, specifically to require the production of information or documents,⁵⁸ although the privilege against self-incrimination and legal professional privilege limit this power.⁵⁹

2 *Identifying Vulnerabilities and Gaps*

The institutions surveyed are part of a multifaceted system of governance that includes federal laws, regulations, and policies, standing agencies with their own oversight mechanisms, ad hoc institutions such as commissions of inquiry, administrative tribunals, the courts, and ultimately Parliament itself, particularly through its committees, most notably Senate estimates.⁶⁰ It is nevertheless possible, based on our limited survey, to identify institutional vulnerabilities and gaps that a new anti-corruption commission could serve to fill.

One clear gap in current institutional capacity is the ability to scrutinise the conduct of ministers and parliamentarians. Only the Authority has the express mandate to monitor the conduct of members of Parliament or of government Ministers, and that mandate is limited to the exceedingly narrow issue of members' expenses. The Ombudsman is statutorily restricted from scrutinising parliamentarians, and the Auditor-General's systemic mandate clearly does not embrace such a role. The ACLEI has *incidental* ability to investigate ministers and members of Parliament, and would only exercise such power were such individuals to be implicated in a corruption issue under investigation by the Commissioner.

Traditionally, the exposure of Ministers and other parliamentarians to coercive authority has been confined to hearings constituted by parliamentary committees or commissions of inquiry (including royal commissions), or to proceedings in the criminal justice system. These measures signify the exceptional nature of making parliamentarians answerable for their conduct via coerced hearings. The principle of responsible government, and Parliament's inherent power to pose questions and

⁵⁶ *Independent Parliamentary Expenses Authority Act 2017* (Cth).

⁵⁷ *Ibid* s 13.

⁵⁸ *Ibid* s 53.

⁵⁹ *Ibid* ss 55, 58.

⁶⁰ See also Harry Evans and Rosemary Laing (eds), *Odggers' Australian Senate Practice* (Department of the Senate, 14th ed, 2016) 478.

demand documents from government Ministers, serve as crucial standing mechanisms of accountability. Nevertheless, with the exception of the criminal justice system — which is limited to addressing misconduct that is criminal in nature — all of these accountability mechanisms rely upon the initiative of elected officials themselves. While Parliament’s ability to regulate itself is no doubt an important source of confidence in government, taken alone it may be vulnerable to partisanship or to the calculated self-interest of majority governments — especially where the subject in issue is corruption, which has the potential to taint the public’s perception of an entire administration.

Second, there is a limited ability to investigate government agencies through hearings — whether in public or in private — outside the law enforcement context. While the Ombudsman has a relatively broad jurisdiction (excepting the conduct of Ministers), the Ombudsman does not ordinarily convene formal hearings, let alone public hearings in a manner reminiscent of a royal commission.⁶¹ The ACLEI’s jurisdiction to do so is confined to the law enforcement context. As such, the robust investigative tools of examination and cross-examination are not widely exercised by integrity agencies other than the ACLEI. To the extent that public hearings can help to facilitate transparency, public education and awareness of corruption issues, and to foster deterrence, these effects too are limited beyond the ACLEI.

Third, by parcelling oversight functions and substantive areas of jurisdiction among various agencies, the current federal landscape may lack an instrument for confronting systemic and pervasive corruption that crosses existing oversight boundaries. That is, should a crisis of confidence arise in the integrity of government writ large, implicating multiple different agencies, the only existing tool that could be calibrated to the necessary investigative scope would be an ad hoc commission of inquiry. Given that such inquiries depend on the executive for their creation and for setting their terms of reference, they may provide cold comfort when it is the executive itself that is implicated in public concern.

Finally, there is a seeming lack of coherence in the federal integrity landscape as a whole. A pitfall in diffusing integrity and anti-corruption functions across multiple institutions is that it may deny individuals, including citizens and public service employees, a prominent and accessible point of contact for reporting concerns.

⁶¹ The Ombudsman does have authority to compel the production of information and documents, including the attendance of persons to answer questions, and the power to examine witnesses under oath: see the *Ombudsman Act 1976* (Cth) ss 9, 9(2), and 13. While these parallel the coercive powers of a royal commission, they are not used by the Ombudsman as its chief instruments of investigation, and the forensic scrutiny of facts through formal hearings is not popularly associated with the Ombudsman as it is the case of a royal commission. The Ombudsman’s *Fact Sheet* on investigations indicates that most investigations are conducted informally, with a ‘large majority’ of complaints being resolved without the use of coercive powers: Commonwealth Ombudsman, *Fact Sheet: Ombudsman Investigations* (online) <http://www.ombudsman.gov.au/__data/assets/pdf_file/0030/35598/Ombudsman-Investigations.pdf>.

It may also fail to broker public confidence in and awareness of integrity activities that do not benefit from the profile and publicity of a single, well-known institution. The interrelationship of the institutions under review, including the legal and functional scope of their jurisdiction, is confusing, requiring attention to multiple cross-referenced statutes and interpretive provisions. It is not obvious that a citizen or public servant wishing to report a serious corruption concern would know where best to start.

3 Developing a Legislative Purpose Statement

Accounting for these vulnerabilities and gaps, we may begin to sketch a possible legislative statement of purpose for a new federal anti-corruption commission. The commission could be conceived as a means of exercising broad oversight, including oversight of elected officials, for the purpose of suppressing corruption and fostering public confidence in the integrity of the Commonwealth government. It could also be conceived as a means to expand the availability of strong investigative and hearing powers in settings where those are desirable but currently lacking. Moreover, it could be conceived as a means for introducing a high profile and accessible venue for citizens and public servants to report corruption concerns, bringing greater coherency and simplicity to the integrity landscape.

Each of these ideas engages important counterpoints reflecting the existing strengths of the landscape, however, which serve to narrow a foundational account of institutional purpose. Recognising that the self-regulating character of Parliament is an important source of public confidence in government (indeed, in democracy itself), it may be appropriate that the oversight powers exercised by a new, external agency be limited to specific areas where the standing regulatory capacities of Parliament are thought to be vulnerable. Recognising the Ombudsman's valuable ability to conciliate, problem solve, and encourage candour within the public service, it may be appropriate that the powers of a new commission be sufficiently focused so as to avoid interference with these functions. Finally, recognising that the ACLEI has a specialist ability to investigate not only corruption, but organised criminal activity in an area of public life where its risk is especially pronounced, a new commission's role could be focused in areas that buttress rather than conflict with the ACLEI.

Bringing these considerations together, a foundational account of institutional purpose begins to take greater shape. The new commission could be conceived to exercise broad oversight of government, including parliamentarians, but only with respect to very specific subject-matter. The latter limitation reflects an attempt to preserve the self-regulating power of Parliament, carving out only a narrow purposive exception to that standing authority. It also preserves the capacity of the Ombudsman to continue its work without interference from an additional agency liberally wielding coercive investigative powers. A narrowly drawn substantive focus for the new commission could also reinforce the goal of preserving the existing authority of the ACLEI.

Clearly, the latter two objectives would require further and more detailed legislative specification within a new federal commission's constituting statute, defining the precise fields in which it is to defer to the standing authority of the Ombudsman and

the ACLEI. Given that the ACLEI already performs several of the functions that our survey suggests could be conferred on a new federal commission, we acknowledge the possibility that the ACLEI could be absorbed by a new commission exercising broader oversight responsibility. In this article however, our account of a new federal commission is developed on the basis that its jurisdiction could be reconciled with the ACLEI through specific jurisdictional provisions informed by a foundational account of institutional purpose.

The legal process concerns underlying this exercise will be evident. The identification of institutional vulnerabilities and gaps informs a foundational account of what the new institution is meant to achieve. Conversely, recognition of existing system strengths informs limits required for the new commission to function coherently with its institutional counterparts, supplementing rather than subverting their strengths. The development of a normative purpose statement is thus done with a view to the new commission interacting harmoniously in an existing, purposive framework of institutions.

To this end, one further consideration is important in developing a statement of institutional purpose. We have so far employed the concepts of ‘suppressing corruption’ and ‘fostering confidence in government’ as though they have a straightforward instrumental relationship: if corruption is identified and suppressed, the result will be to strengthen public confidence. In fact the relationship between the two concepts may be more nuanced. Suppressing corruption is a matter of fact, while fostering confidence is a matter of social perception. Certainly public confidence in government is likely to be enhanced by the belief that functioning mechanisms exist to eliminate corruption. Yet the public work of a new commission, including bringing previously undetected instances of corruption into the light, may also impact public confidence in government negatively — at least in the short-term — through the very act of highlighting misconduct.⁶² In this sense, heightened public identification and redress of corruption may paradoxically weaken immediate confidence in government integrity.

A sensible resolution to this paradox could be to suggest that any short-term costs to public confidence are worth the long term gains of suppressing corruption. This resolution depends, however, on the exposed misconduct accurately reflecting subjects of pronounced public concern. A commission that investigates and reports on alleged misconduct too liberally, combining vague interpretive guidelines with robust and highly public investigate powers, could create a sensational and misleading impression that government corruption is widespread. This is a further reason to

⁶² See, eg, Ian McAllister, ‘Corruption and Confidence in Australian Political Institutions’ (2014) 49 *Australian Journal of Political Science* 174, noting an apparent increase in public perception of corruption within Australia’s public sector following several high profile royal commissions in the 1970s. See also Diana Bowman and George Gilligan, ‘Public Awareness of Corruption in Australia’ (2007) 14 *Journal of Financial Crime* 438, 447, noting that public sector agencies may be more vulnerable to public perceptions of corruption in Australia due to their higher levels of institutional scrutiny.

narrow the substantive focus of an anti-corruption commission and to articulate that focus with precision. The potential short term injury to public confidence in government will be justified when misconduct is sufficiently grave that the public has a strong interest in its exposure, while the (hopefully) limited instances in which this arises will build confidence over time. That injury may not be justified, however, and could indeed be exacerbated were a commission to wield public powers of investigation in respect of less grave concerns that are already mitigated by existing integrity measures.

Our limited institutional survey, combined with the twin concerns of fostering confidence and actually suppressing corruption, support a legislative purpose statement allowing the following lines. The statement should capture the goal of establishing a commission with broad responsibility for oversight, public prominence and accessibility, but limited to a specific and well understood substantive focus. Recalling that the legislative purpose statement is a starting point for expressing foundational ideas that will be elaborated by more specific provisions concerning jurisdiction and procedure, we suggest that the following statement could be appropriate for a statute establishing a new federal commission:

The object of this Act is to suppress corruption and foster public confidence in the integrity of the Commonwealth government by empowering an independent commission with authority to investigate Commonwealth government activities, including through the receipt and consideration of public complaints, with the goal of identifying and reporting instances of serious or systemic corruption.

This language reflects the clear goals of establishing a commission with broad oversight over a narrow subject, and that models functional independence and accessibility to public complainants. It establishes a firm foundation for structuring the conduct of a commission in line with the priorities identified above, to be supplemented by more specific jurisdictional and procedural provisions that flesh out the commission's intended relationship with institutional counterparts — for example, by defining areas in which it must defer to the investigative authority of the ACLEI.

The narrow targeting of this statement of purpose to addressing public sector corruption identifies the proposed commission as a 'specialised/bifurcated' institution. This classification draws from Scott Prasser's work, in which he identifies two models for anti-corruption commissions: the 'generalist/merged' model and the 'specialist/bifurcated' model.⁶³ The generalist model performs 'whole-of-government, anti-corruption/misconduct functions including overseeing the public service, police, elected officials and local government and combating organised crime by taking active roles in intelligence gathering and investigations.'⁶⁴ The 'specialist/bifurcated' model, in contrast, separates the agencies responsible for

⁶³ Scott Prasser, 'Australian Integrity Agencies in Critical Perspective' (2012) 33 *Policy Studies* 21, 27.

⁶⁴ *Ibid.*

integrity and crime.⁶⁵ In effect, a generalist/merged model would combine the functions of a proposed national integrity commission and that of the Australian Crime Commission. A specialised/bifurcated model would keep them separate.

Our support for a specialised/bifurcated model flows from two considerations. The first is the potential for a generalist/merged model to confuse the core purpose of the institution. This dilutes integrity of purpose and raises unnecessary ambiguity for officials tasked with interpreting and operationalising the legislative framework. The second consideration is related: the foundational purpose we have identified for a new commission suggests the importance of maintaining the utmost independence from other agencies, including the police.

Finally, the legislative language we have suggested in relation to the commission's investigative focus — 'serious and systemic corruption' — foreshadows a critical jurisdictional limitation. Similarly, the terms 'identifying and reporting' foreshadow aspects of how the new commission is to go about fulfilling its purpose, implying significant procedural restraints. In the next Part, we consider these subjects in light of integrity of purpose, moving from a foundational account of institutional purpose to the practical implications of that account for more specific questions of institutional design.

B Framing and Limiting Jurisdiction to Ensure Integrity of Purpose Over Time

In the preceding section we identified the purposive foundations for a potential federal anti-corruption commission. The commission could be conceived with broad oversight responsibilities, but limited to a specific substantive mandate, for the twin goals of suppressing corruption and fostering public confidence in government. We now begin to consider how this purposive foundation should inform more specific design issues related to the jurisdiction of the new commission, focusing on two interrelated concerns:

- i. The appropriate scope of conduct that should fall within the Commission's investigatory jurisdiction; and
- ii. the agencies and individuals that should fall within the jurisdiction of the Commission.

We have already noted that rooting specific design choices in a strong legislative statement of purpose will help to ensure consistency between a new anti-corruption commission and the existing features of a legal system — what we might refer to as a kind of inter-institutional coherence. The issues considered in this section will also demonstrate how integrity of purpose demands intra-institutional coherence: a mutually reinforcing and informing relationship between the characteristics of the institution itself. Questions of jurisdiction anticipate questions of investigative procedure, for example, because it is difficult to meaningfully determine who should

⁶⁵ Ibid.

be subject to an institution's power without some concept of the form that power will take, and vice-versa. The simple point in this observation is that integrity of purpose forces us to approach design choices in a holistic and integrated manner. The more nuanced point is that this challenges instrumental assumptions that might otherwise inform institutional design. The approach commanded by integrity of purpose amounts to more than simply articulating an institutional purpose statement and then identifying powers and procedures which rationally further that statement. Rather, it involves designing an institution attentive to the fact that its *purpose* and its *manner of achieving that purpose* are inseparably linked: both are definitive of the systemic value contributed by an institution, and both are constraining of its role.⁶⁶

1 *Scope of Conduct*

We suggest that integrity of purpose would be fostered by a new federal commission being limited to investigating matters raising a *reasonable suspicion of serious or systemic corruption*. The key components of this statement must each be addressed in turn. It will be helpful, however, to begin with a global overview of how the statement complements our foundational account of the commission. Integrity of purpose is fostered by the statement on three levels.

First, the statement explicitly ties any extraordinary investigative powers conferred on the commission to the specific needs identified through our institutional survey, ensuring that those powers are exercised only in service of a well-defined mandate which accounts for the corresponding roles of other institutions. Second, recalling that our institutional survey was limited and that integrity of purpose requires consistency with higher order values of the legal system, these jurisdictional limits curtail the possible impacts of investigative powers on individuals and preserve the fundamental principle that individuals should not be exposed to official scrutiny absent a pressing public objective. Third, our incorporation of a 'reasonable suspicion' threshold for the use of investigative powers reflects the broad oversight and confidence-raising goals of the commission. Unlike, for example, a criminal prosecution which requires a high evidentiary onus before it can proceed, the commission should have flexibility to determine whether reported complaints or concerns — which may have only limited initial evidence to support them — point the way to actual instances of corruption. Importantly, while a flexible threshold of 'reasonable suspicion' supports this goal, the actual deployment of investigative powers remains limited by the requirement that the suspicion itself focus on subjects of serious or systemic

⁶⁶ The necessary link between ends and means at the stage of institutional design — that is, the idea that ends and means are mutually informing and thus cannot be considered entirely apart from each other — was developed most forcefully by Lon L Fuller in his essay: Lon L Fuller, 'Means and Ends', in Kenneth I Winston (ed), *The Principles of Social Order: Selected Essays of Lon L Fuller* (Hart, 2001) 61. An excellent modern illustration of Fuller's thesis is provided by Roderick A Macdonald, 'The Swiss Army Knife of Governance' in Pearl Eliadis, Margaret M Hill and Michael Patrick Howlett. (eds), *Designing Government: From Instruments to Governance* (McGill-Queen's University Press, 2005) 203.

corruption. We address the possibility of judicial challenges to this threshold later in this Part.

Different statutory regimes in place across the Australian state jurisdictions already direct their commissions to focus investigative functions on ‘serious or systemic wrongdoing’. However, many of these regimes fail to define such wrongdoing, or to create an enforcement framework around the limit so as to give it any real practical consequence. This was a factor in the controversy that surrounded the New South Wales Independent Commission Against Corruption’s (‘ICAC’) investigation of Margaret Cunneen SC, resulting in the 2015 High Court decision *ICAC v Cunneen*.⁶⁷ Following that decision, an Independent Panel headed by former Chief Justice of the High Court the Hon Murray Gleeson and Bruce McClintock SC recommended that the *Independent Commission Against Corruption Act 1988* (NSW) (‘NSW Act’) be amended to specify that the ICAC can only make *findings* of ‘corrupt conduct’ if it is ‘serious corrupt conduct’.⁶⁸ This change, which was incorporated with the adoption of s 74BA, meant that the ICAC’s investigative powers embraced suspicions of corruption generally, but could only escalate to the formal reporting of adverse findings when the corruption was found to be ‘serious’. This was intended to balance the ICAC’s need for investigative latitude with fairness to the persons affected.⁶⁹

The lingering difficulty with this approach is that ‘serious’ corrupt conduct is nowhere defined in the legislation, nor for that matter is ‘systemic’ corrupt conduct. The same defect is present in every statute governing Australia’s state-level anti-corruption commissions. Failure to define these terms defers significant interpretive latitude to the officials responsible for implementing these commissions. It escalates the risk that the incremental evolution of jurisdiction, as concepts like ‘serious’ and ‘systemic’ are interpreted in new contexts, could lead to missteps that compromise the underlying purpose of a commission. This could include, for example, the commission reaching into spheres better reserved for other institutions, provoking conflict or incoherence and weakening confidence in the system as a whole.

An instructive counter-example to Australia’s state-level commissions is supplied by the Commonwealth *Act*, the legislation governing the ACLEI. That statute supplements its definition of ‘corrupt conduct’ — the abuse of official power or perversion of the course of justice⁷⁰ — with further definitions of ‘serious corruption’ and ‘systemic corruption’. Section 5 defines serious corruption to mean conduct that could result in a charge punishable, on conviction, by a term of imprisonment for 12 months or more. Systemic corruption is then defined to mean instances of corrupt conduct (which may or may not constitute serious corruption) that reveal a *pattern* of corrupt conduct.

⁶⁷ (2015) 256 CLR 1 (‘*Cunneen*’).

⁶⁸ Murray Gleeson and Bruce McClintock, ‘Independent Panel — Review of the Jurisdiction of the Independent Commission Against Corruption’ (Report, NSW Department of Premier and Cabinet, 30 July 2015) (‘Gleeson-McClintock review’) 64 [9.6.6].

⁶⁹ See generally, *ibid* 63–66 [9.6]–[9.7].

⁷⁰ *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 6.

Within the ACLEI statute, these terms inform different investigative powers and responsibilities in relation to different types of corruption issue. For present purposes, we refer to them to make the more limited point that serious and systemic corruption are capable of clear legislative definition. For reasons that will be apparent in our later discussion of a prospective federal commission's hearing powers, we would not support a definition of 'serious corruption' that relies on factual analogies to the criminal law — indeed, we feel this risks confusing the roles of commissions and courts and runs contrary to integrity of purpose. But it is nevertheless possible to differentiate between ideas of 'corruption' that would be mismatched with a commission's strong investigative powers and others that align closely with the commission's motivating purpose.

For example, we do not believe that it would align well with the purpose of a new federal commission were it to wield investigative powers over civil servants suspected of misusing office resources, such as computer access, stationery, or printing supplies for their personal needs. Although this behaviour could be accurately described as 'corrupt' in the sense that it involves the abuse of a position for personal gain, it is hardly likely to impact public confidence in government (unless it becomes systemic, in which case it would satisfy the second branch of our proposed statutory definition). The situation would be different if the same civil servants were falsifying expense accounts to consume public money, or demanding kickbacks from tenderers for government contracts. This conduct would certainly weaken public confidence in the integrity of government, and its detection and suppression would align closely with the foundational purpose of a new federal commission.

As such, in limiting the investigative jurisdiction of a new commission to serious or systemic corruption, we suggest that 'serious corruption' be statutorily defined as corrupt conduct that is likely to threaten public confidence in the integrity of government. 'Systemic corruption' should be defined as it is in the ACLEI statute — that is, as a pattern of corrupt conduct. The significance of including a separate definition for systemic corruption is that such an occurrence will presumptively endanger public confidence, even if the individual acts taken alone would not be considered 'serious'. Corrupt conduct itself should be defined consistently with a common sense understanding of the term: that is, as dishonest or fraudulent use of a public position or of public resources for personal gain. Certainly, each of these definitions leaves interpretive latitude for future commissioners. Perhaps most significantly, it relies on their judgement, integrity, and expertise to determine when an issue rises to the level of threatening public confidence in the integrity of government. The point in developing this statutory language is not to remove the commissioners' judgement, but to inform it with clear interpretive aids concerning the underlying purpose of the institution.

The new commission would thus be able to exercise investigative powers where it had a reasonable basis to suspect the occurrence corruption falling into either of these two categories. Unlike the Independent Panel report on the ICAC, we do not support an initial threshold for investigative powers that is lower than the types of finding the commission may eventually reach. If the commission is to model integrity of purpose and evolve harmoniously within a systemic framework, its legislative statement of

purpose, investigative and reporting powers should each align. A situation in which the commission may initiate an investigation based on mere suspicion of corruption, not reasonable suspicion of the specific *type* of corruption at which the institution has been purposively targeted, invites transgression and incoherence in the use of official power.

It might be objected that a ‘reasonable suspicion’ requirement invites pre-emptive legal challenges to a commission’s jurisdiction by those subject to its investigative powers. As New South Wales Chief Justice Tom Bathurst, speaking extra-judicially, said:

[I]t could be argued that such review exposes the bodies in question to harassment and interferes with their functions by unmeritorious claims designed to frustrate or stifle a legitimate inquiry.⁷¹

Two answers lie to this objection. First, the alternative of requiring something less than reasonable suspicion — for example, the *prima facie* possibility of serious or systemic corrupt conduct — leaves the commission open to applying coercive investigative powers with virtually no initial limit. This is inconsistent with the principled limits placed on such powers throughout the common law. It must be remembered that the use of coercive power during an investigation is exceptional: barring the extraordinary instrument of a royal commission, or limited instances where the public interest has elsewhere justified coercive investigations (such as the anti-terrorism context), investigations conducted by Australian police or other agencies observe traditional common law protections and do not compel individuals to give evidence against themselves. By recognising that departure from this approach is exceptional in the corruption context, we are cautioned against allowing the exceptional power to become unwieldy and endanger the rights of individuals.

Second, characterising such litigation in presumptively negative terms is misleading. Any institution with the power to adversely impact individuals is likely to attract challenges on judicial review, and, indeed, as Chief Justice Bathurst CJ points out, *must* be subject to such challenges.⁷² This would be the case even without a ‘reasonable suspicion’ standard. Integrity of purpose challenges us to recall that the legislative framework governing an institution will always have inchoate elements that gain specific content through the interpretive roles of officials; with time, the indeterminacy of such features will narrow as institutional officials resolve new interpretive challenges in a manner consistent with the decisions of their predecessors. To the extent that judicial challenges may test the decisions of a commission’s early appointees, either affirming their wisdom or refining their interpretation of the commission’s role, they contribute to this process of institutional coalescence. The authoritative precedent of early litigation will narrow the ambit for future challenges to a commission’s decisions on judicial review, especially when courts

⁷¹ Bathurst, above n 37, 8.

⁷² *Ibid.*

display deference to the wisdom of commission officials. The idea that a reasonable suspicion threshold will provoke copious litigation, or that limited early instances of litigation are inherently damaging, are both exaggerated.

The approach advocated here is consistent with recent amendments made to the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) ('Victorian Act'), which removed a former requirement that the Independent Broad-based Anti-corruption Commission ('IBAC') be 'reasonably satisfied' of the occurrence of serious corrupt conduct before it could commence an investigation employing coercive powers.⁷³ 'Reasonably satisfied' connoted a standard approximating 'belief', as opposed to mere suspicion. A special report following the IBAC's first year of operation identified problems with this threshold: it meant that some corrupt conduct allegations that may have been credible were not investigated for failure to meet the threshold, and for want of an appropriate alternative authority to which they could be referred.⁷⁴ The Victorian Act was thus amended to authorise commencement of an investigation on the grounds of reasonable suspicion.⁷⁵

Importantly, the IBAC's coercive investigative powers were also supplemented with new powers of preliminary investigation — which did not include the use of coercive authority — so that complaints and concerns could be minimally investigated in order to inform the decision of whether to launch a coercive investigation.⁷⁶ While such powers of preliminary investigation fall outside the scope of the questions addressed in this article, we would simply note that the use of non-coercive powers of inquiry to give prima facie consideration to subjects properly within a commission's jurisdiction makes imminent sense.

One important difference between our approach and that adopted under the Victorian Act, however, is that the latter equates 'serious corrupt conduct' with criminal misconduct, and thus explicitly directs IBAC officials to consider subjects of criminality in deciding whether to commence an investigation or in reaching adverse findings. We prefer an approach that reinforces a firm distinction between the work of anti-corruption commissions and the criminal law, thus relying on a definition of corruption which does not incorporate criminal law analytic criteria. We return to the importance of distinguishing between the work of an anti-corruption commission and standing processes of criminal law in our later discussion of a commission's hearing powers.

⁷³ See discussion in Parliament of Victoria, 'Integrity Legislation Amendment Bill 2014' (Research Brief No 10, Parliamentary Library and Information Service, October 2014) 7–8, 14–15.

⁷⁴ Ibid, 7–8. See also Independent Broad-Based Anti-Corruption Commission, Parliament of Victoria, *Special Report Following IBAC's First Year of Being Fully Operational* (2014) 25.

⁷⁵ See above n 73, 14–15. See also the Victorian Act s 60(2).

⁷⁶ Victorian Act s 60(2A).

2 Agencies and Individuals Subject to Jurisdiction

We now move to consider the agencies and individuals that should fall within the investigative scope of a new federal commission. Our legislative purpose statement refers not only to the oversight of government agents and officials, but to government ‘activities’. How should the boundaries of government activity be drawn? Should third parties be subject to a commission’s powers, for example, when their activities raise concerns about the integrity of government agencies, officials, or processes? Clearly extending a commission’s powers in this way would further the objective of suppressing corruption in an instrumental sense. Integrity of purpose imposes a more strenuous demand, however, requiring that we match the commission’s jurisdiction precisely to the particular problem that occasions recourse to the exceptional power of a new commission. In other words, do the reasons that justify the creation of a new commission in the first place embrace the oversight of parties outside government?

The Cunneen controversy is again relevant to this question. The High Court’s decision in *Cunneen* turned on the statutory construction of ‘corrupt conduct’ in the then s 8 of the NSW *Act*. The majority of the Court accepted that Ms Cunneen’s alleged conduct did not fall within the statutory definition of ‘corrupt conduct’ because, first, it was alleged to involve Ms Cunneen in her personal capacity (not in her capacity as a Crown prosecutor); and second, while it might have affected or hindered the police officer from conducting the investigation, it did not involve dishonest or improper conduct *on the part of the police officer*.

Justice Gageler, in dissent in the case, noted that the majority’s interpretation of s 8 consequently obstructed the Commission’s power to investigate conduct that might amount to defrauding a public official, state-wide endemic collusion among tenderers for government contracts, and serious and systemic fraud in making applications for licences, permits, or clearances issued under New South Wales statutes.⁷⁷ The type of conduct that Gageler J identified clearly has the capacity to undermine public confidence in government decision-making, even if it involves no improper conduct on the part of government officials. This conduct also has the capacity to affect the integrity of government processes, threatening equality of access to government services and contracts, and undermining accountability for how taxpayers’ money is spent and public assets are utilised. As discussed in Part II, the ICAC had exercised its investigative powers in respect of such conduct in the past, prompting the New South Wales government to pass urgent remedial legislation preserving the authority of these past investigations. The Gleeson-McClintock review also supported the inclusion of certain third party conduct in the ICAC’s investigative jurisdiction,⁷⁸ a view ultimately adopted by Parliament (although the new statutory terms would have excluded the alleged conduct of Ms Cunneen).⁷⁹

⁷⁷ See, eg, *Cunneen* (2015) 256 CLR 1, 36–7 [91]–[92].

⁷⁸ Gleeson and McClintock, above n 68, 39–40 [7.4.13]–[7.4.15].

⁷⁹ NSW *Act* s 8.

Given that third party fraud or subversion of important government activities could endanger public confidence in government, there is a strong *prima facie* basis for including such activities in a commission's jurisdiction. This position is corroborated by our institutional survey, which suggests a limited capacity for existing integrity institutions to impose scrutiny on third parties in response to the types of concern identified above. Nevertheless, whether to extend the investigatory powers of the commission to the conduct of non-government officials is not a straightforward issue.

The extraordinary investigative powers that are conferred on anti-corruption commissions are ordinarily justified on the basis that government corruption is of a peculiar nature: it can be systemic, shrouded in secrecy, and difficult for traditional investigative agencies to uncover. It also inherently involves the abuse of public power. These are the characteristics that differentiate public sector corruption from other types of misconduct, including other forms of criminal activity, which can be mitigated adequately by the standing authority of existing agencies such as the police. The conduct of private individuals and organisations does not necessarily engage the same distinct concerns. Unlike public officials, these actors are not vested with a public trust in the performance of their roles, nor are they vested with official powers capable of abuse. They have not undertaken, as many public officials have, an express commitment to hold their personal conduct to strict standards of scrutiny. The case for preserving traditional common law protections against coercive scrutiny of their conduct is thus stronger than it is for public officials.

Answers to these concerns must be found on two levels. First, the limited investigative focus of the commission mitigates civil liberty concerns, if only partially, by confining the commission's powers to a narrow field associated with a legitimate and heightened public interest. This distinguishes the investigative focus of the commission from other traditional subjects of criminal law: it is the heightened public interest in securing the integrity of government, including in its dealings with private persons, that justifies the superimposition of an additional investigative power where other agencies limited by the traditional common law protections might already hold authority. It follows, however, that the level of incursion on traditional liberties should be tailored to the objective. In addition to narrowing the commission's investigative scope and imposing a reasonable suspicion threshold on the exercise of its powers, the potential injury that can flow from such hearings should be minimised to reflect a focused and purposive incursion on civil liberties.

This can be achieved through careful tailoring of its procedures and ultimate outcomes to purpose. The strong evidentiary and procedural safeguards of the criminal law reflect the exceptional prejudice that can flow from a criminal proceeding — both in terms of outcome (a criminal conviction and suspension of personal liberty), and in terms of intrinsic effects, including the stress and stigma of public accusation. Should a new commission exercise investigative powers without equivalent safeguards, it follows that its outcomes and procedures should similarly reflect a significantly lesser prejudice than criminal proceedings.

We accordingly support the extension of a commission's investigative jurisdiction to persons and organisations outside government whose activities raise reasonable

suspicion of serious or systemic corruption, provided the activity is of such a nature that it would threaten public confidence in government, and subject to further limits on both the manner in which inquiry investigations are conducted and the outcomes that can flow from them. It is to these matters that we now turn.

C Integrity of Hearing Powers

One of the strengths that we considered a new federal anti-corruption commission could add to the Commonwealth integrity landscape is the capacity to hold hearings. Hearings lend the ability to identify and test evidence through the robust instruments of examination and cross-examination. They can also provide individuals under investigation with a forum in which to contest allegations before they crystallise into adverse findings. Finally, they can be a means of ascertaining valuable information to share with the public or with other agencies comprising parts of the integrity system. Here, we consider the precise dimensions of the hearing power that are appropriate to enabling these objectives in line with integrity of purpose.

The power to hold hearings, and the manner in which that power should be exercised, each depend in part on an account of the types of outcomes that hearings may produce. Attentiveness to the outcomes of anti-corruption hearings in turn reinforces purposive considerations about how the commission should interact with the standing processes of criminal law. In this section we thus consider the outcomes that can flow from hearings together with the manner in which hearings are to be conducted. Our analysis is focused on the following issues: (i) whether a commission should be empowered to recommend or initiate criminal charges based on hearing findings; (ii) whether hearings should occur in private or in public; and (iii) what types of public reporting and follow-up powers should flow from commission hearings. We begin with the commission's capacity to recommend or initiate criminal proceedings, as this subject helps bring into focus a commission's intended relationship with the criminal law — a key consideration underlying our recommendations across each of the subjects considered in this section.

1 Maintaining Integrity of Purpose by Prohibiting Findings of Guilt or the Initiation of Prosecutions

It is well established that standing investigative commissions are not courts and do not have the accompanying requirements and safeguards of the judicial process. A federal anti-corruption commission would almost certainly be constitutionally restricted from reaching formal determinations of law, including findings of criminal guilt, as this would usurp the judicial role and violate the separation of powers established by Ch III of the *Australian Constitution*.⁸⁰ An equivalent restriction is also

⁸⁰ The adjudication of criminal guilt under Commonwealth law is a task exclusively for a court established under Chapter III of the Constitution: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1. The High Court has recognised that it is compatible with this principle for non-judicial bodies to determine whether a person has engaged in conduct amounting to a criminal offence,

made explicit in the statutes governing many state level anti-corruption commissions. For example, in Western Australia, s 217A of the *Anti-Corruption Commission Act 1988* states that the Commission must ‘not publish or report a finding or opinion that a particular person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence’, and that a finding or opinion that misconduct has occurred is not to be taken as a finding of guilt.

The constitutional limits enforced at the federal level by Ch III are strongly connected to legal process concerns. By strictly defining and protecting the jurisdiction of the federal courts, the Constitution cements their distinct purpose and institutional competency to determine questions of legal right and to adjudicate criminal guilt. Just as the judicial power is constituted by the separation of powers, so too is it limited in furtherance of the public interests underlying the other two branches. While Ch III thus solves one design issue — whether a commission may reach findings of criminal guilt — more difficult issues lie in locating the precise boundaries between the commission and the criminal law. In particular, should a new commission be empowered to refer criminal suspicions (as opposed to findings) to other agencies, and should it be empowered to lay criminal charges itself?

In the 1990 decision of *Balog v Independent Commission Against Corruption*,⁸¹ the High Court defined the New South Wales ICAC’s function as one of facilitating the actions of other agencies — particularly prosecutorial agencies — by conducting investigations.⁸² The Court emphasised the need for the ICAC to limit itself in drawing conclusions that would express findings of guilt. This reflects similar underlying concerns to those arising from Ch III: expressing findings of guilt could be perceived as the commission usurping a judicial role, and perhaps more importantly, would be tantamount to imposing criminal stigma on individuals absent the safeguards of the judicial process. Both would have detrimental consequences for public confidence in the fairness and integrity of the commission itself. Yet the public might also lose confidence should anti-corruption commissions identify factual misconduct with obvious elements of criminality, but with no further consequences following for the individuals and organisations adversely implicated.

There are three possible resolutions to this quandary. The first is that anti-corruption commissions could be vested with the power to lay criminal charges. This resolution rests on a potentially fraught distinction between laying a charge, which necessarily implies a strong opinion as to criminal guilt, and a formal ‘finding’ of criminal guilt. Some state anti-corruption commissions are currently empowered to commence prosecutions for statutory, disciplinary, and other offences. Under s 50 of the *Crime and Corruption Act 2001* (Qld), the Queensland Crime and Corruption Commission can bring prosecutions for corrupt conduct in disciplinary proceedings before

when that occurs as a step in an administrative process that leads, for example, to the imposition of regulatory sanctions: *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, 371 [33].

⁸¹ (1990) 169 CLR 625.

⁸² *Ibid* 632.

the Queensland Civil and Administrative Tribunal. In Victoria, under s 190 of the Victorian *Act* the IBAC or a sworn IBAC Officer authorised by the Commissioner has the power to bring proceedings for an offence in relation to any matter arising out of an IBAC investigation. In both cases, while commission officials can initiate prosecutorial proceedings, it is ultimately left to a judge or administrative tribunal to decide questions of guilt or regulatory culpability.

In our view, these models are troubling. The division between investigative and prosecutorial functions has deep roots in Australia's tradition of rule of law: it reflects the principle that decisions to prosecute should be informed by the public interest, and taken by independent officials whose distance from an investigation insulates them from preconception and bias. It is not clear why this principle should be disrupted in the case of prosecuting crimes related to corruption. Remember that the distinct characteristics of corruption — its secrecy, potentially systemic nature, and necessary connection to the abuse of power — both justify and purposively limit the exceptional use of coercive power in anti-corruption investigations. Would these characteristics also necessitate the relocation of prosecutorial judgment *after* corruption investigations have already been completed, and a viable basis for charges has been established? Caution must be exercised to ensure that the original basis for one exceptional power is not extended to unduly sustain another. We struggle to identify a reason why the distinct nature of corruption necessitates the commencement of related criminal prosecutions by an agency other than the public prosecutor. The fact that compelled evidence from an anti-corruption commission's investigation will not be admissible in a criminal prosecution corroborates this position: it affirms that the prosecutor's judgment is separate from the preceding investigation, and driven by a different systemic role.

The second possibility is that anti-corruption commissions could refer suspected instances of criminality to other institutional authorities, such as the police. This would spare the commissions from directly opining on criminality, limiting them to simply transferring suspicious or concerning information. At one level, this seems conducive to systemic coherence and to fostering respect for the authority of other institutions: were a federal anti-corruption commission to receive a complaint that is strongly suggestive of criminal conduct, but that does not concern serious or systemic corruption, referral could ensure that the complaint is properly investigated without the commission overstepping its bounds.

The matter is more complicated if the subject of referral is more than a *prima facie* complaint, however. Should the commission exercise extraordinary investigative and hearing powers unavailable to the police, then transfer evidence so obtained to police or to prosecutors, it may enable the latter agencies to do indirectly what they cannot do directly. While evidentiary safeguards lie against the use of derivative evidence in criminal prosecutions, that is, evidence obtained by virtue of separate coercive proceedings, these measures are not perfect in ensuring that police or prosecutors do not 'reverse-engineer' a case from a coerced record.

A final possibility is that anti-corruption commissions could be strictly limited to factual reporting alone. This approach effectively treats the commissions as

internally-coherent and closed processes: their aim is to investigate specific subject-matter, with the power to report on that subject-matter following observance of appropriate procedures and satisfaction of appropriate evidentiary standards. Other agencies may avail themselves of the commissions' reports for the purpose of commencing further investigations, but the commissions themselves have nothing to do with these further actions (or, more importantly, with the exercise of any judgment as to whether such actions are warranted). This approach has the benefit of minimising any risk of institutional overstep or undue interference with civil rights. Its cost may be that it requires such a vigilant separation of institutional duties that it obviates valuable inter-institutional cooperation and information-sharing toward common public goals. Notably, this approach would also imply that the High Court fundamentally mischaracterised the role of anti-corruption commissions in *Balog* when it stressed their capacity to enable prosecutions by other agencies.

We believe that integrity of purpose is best reflected in the middle position, allowing a commission to refer suspected criminality to other authorities without reaching actual findings of criminal wrongdoing or initiating criminal prosecutions. The possible shortcoming of this approach — that referred evidence might be misused by subsequent authorities taking advantage of its coerced origins — must be offset by confidence that those authorities will abide by their own integrity of purpose, adhering to appropriate procedures and principles that safeguard individual liberty in these consequential settings. This confidence is consistent with the view of an integrity system comprising multiple interlocking mechanisms which work together to secure horizontal accountability — the law restricting use of derivative evidence in criminal prosecutions being one such mechanism. Moreover, empowering anti-corruption commissions with the ability to refer suspected criminality to other authorities reflects the values of inter-institutional awareness, respect for jurisdiction, competence, and authority that underlie integrity of purpose. Finally, this approach aligns with the earlier conclusion that in defining a federal commission's investigative jurisdiction, 'serious and systemic corruption' should not import criteria from the criminal law. This properly distinguishes between factual findings, which are the target of the commission, and criminal subjects that are the purview of other agencies to which the commission can make referrals.

2 Integrity of Purpose and Evidentiary Hearings

We now turn to the capacity of a federal anti-corruption commission to hold formal evidentiary hearings. Our focus is on locating an appropriate balance between privacy and publicity in the conduct of hearings. This is perhaps the most controversial element of commission design. Certainly, it is the topic that has attracted the greatest volume of popular commentary and debate in recent years, spurred largely by the impact of ICAC hearings on (now) prominent personalities such as Margaret Cunneen SC, former Labor Minister Eddie Obeid, and former Liberal Premier Barry O'Farrell. This commentary has sadly tended to gravitate to extremes: either commission hearings are thought to require categorical privacy in order to safeguard individual reputations, or to require categorical publicity so as to expose misconduct and deter its recurrence. Neither position reflects considered attention to the distinct role that an anti-corruption commission plays within a legal system.

Our application of integrity of purpose leads us to support private evidentiary hearings in the ordinary course, subject to exceptions responsive to the public interest and to an ultimate power for commissions to issue public reports, which are considered again below. Our reasons for supporting private hearings nevertheless depart from categorical assumptions about the defence of individual reputations or generalisations about commission conduct inspired by discrete instances in which commissions have overstepped. Rather, integrity of purpose supports the use of private hearings because it reinforces the fundamental nature of commissions as investigative institutions — albeit ones vested with exceptional powers.

It should first be acknowledged that credible arguments lie in support of both public and private hearings. Public hearings certainly enhance the public's ability to observe the commission in the conduct of its investigative work. Quite apart from raising awareness of possible corruption issues and potentially deepening public knowledge about the conduct (positive or negative) of officials, the publicity of hearings may lead others with knowledge about subjects under investigation to come forward. Publicity may thus act as an important investigative tool. Moreover, the publicity of hearings may enhance their deterring effect by escalating the costs — especially to political actors — of personal implication in any impropriety. Perhaps most importantly, public hearings may allow a commission that is acting fairly and according to well-conceived procedures to be *seen* doing so, brokering public understanding of its role and confidence in its efficacy.

This optimistic account of public hearings must be tempered, however, by the reality that most hearings are not followed in detail by public observers. Rather, public impressions are shaped almost exclusively by hearing coverage in media. Even when a commission and its officials model procedural and individual integrity, media portrayals may fail to capture the nuances of investigative procedure or honour the need to suspend judgment of witnesses. Public hearings run the inherent risk of being portrayed as trials and perceived as such, with the individuals involved — including those against whom findings of impropriety are never reached — bearing personal indignity and stigma. Even where findings of impropriety are made, the public may conflate such findings with judicial findings of guilt. This misperception is injurious to individuals but also harms the commission itself by fostering misunderstanding of its role.

While public hearings may encourage some individuals to come forward and give evidence to an investigation, it may deter others. This could be the case where corruption relates to systemic failures — that is, breakdowns in administrative systems of accountability and oversight, for which responsibility is diffuse. Individuals may be reluctant to expose themselves to scrutiny for involvement in what are system-wide deficiencies. In such cases, the privacy of hearings may facilitate greater cooperation, voluntary acknowledgment of errors, and candour.

The belief that public hearings have a strong deterrent effect on corruption may also be overstated. Where corrupt acts are calculated and deliberate, it is not clear that their perpetrators would be any more deterred by exposure in a public commission hearing than they would be by exposure to a public criminal trial, and there is scant

evidence that the publicity of prosecution deters criminal activity. Whether the danger of public exposure helps deter the types of system failure that can enable corruption is an open question: perhaps the threat of exposure will spur public officials to be more vigilant in crafting and enforcing accountability measures, but the nature of systemic failures may be such that they defy straightforward assumptions about deterrence.⁸³

Finally, public hearings may jeopardise the ongoing investigations of other authorities, even tainting the capacity to develop pools of unbiased jurors for future criminal trials concerning subjects that have received widespread coverage.

In the previous section, we discussed important distinctions between the roles of investigators and prosecutors, and the higher order principles those distinctions serve. We also highlighted a closely related distinction between investigative commissions and courts — namely that only the latter are empowered to reach formal legal determinations, such as findings of criminal guilt. This distinction is not simply a matter of formality, but reflects foundational ideas about the purposes of the two different institutions. The purpose of courts is to decide legal questions in a manner that is final and consequential for those affected, and court procedures are accordingly tailored to reflect the highest standards of justice and impartiality required for that purpose. These include the fact that judicial hearings occur in public, where they can be exposed to the highest scrutiny, and the fact that participants are entitled to robust procedural rights and evidentiary privileges.

Investigative commissions are not constituted for the purpose of reaching formal legal determinations. As we have conceived of a potential federal commission, its purpose would be to suppress serious and systemic corruption and to foster confidence in the Commonwealth government, goals linked to powers of fact-finding and referral as distinguished from the power to reach legal findings. This distinction also informs the principle that court-like evidentiary privileges, including the privilege against self-incrimination, don't apply in commission hearings: the purpose of the hearings is to ascertain the truth in terms that engage no immediate legal prejudice, and both the pursuit of truth and the lesser individual consequences involved justify more relaxed protections. A necessary implication of this approach is that the individual witnesses in a commission hearing may be subject to even more probing examination than would occur in a court. The key question is whether, in light of this fact, the same principles informing the open court principle pertain to the investigative hearings of an anti-corruption commission.

Most state statutes provide a wide discretion as to whether to hold a public hearing. In New South Wales, s 31 of the *NSW Act* provides that the ICAC may conduct a

⁸³ See, eg, Janet Ransley, 'Preventing Corruption: What are the Frameworks?', Presentation delivered at National Integrity 2017, Brisbane, Australia, 16 March 2017 <<http://transparency.org.au/wp-content/uploads/2017/04/Janet-Ransley.pdf>>. Ransley notes that there is 'limited evidence of deterrent effects' in detecting, investigating and prosecuting corruption, especially in organisational contexts.

public inquiry ‘if it is satisfied that it is in the public interest to do so’. Without limiting the factors to be taken into account in determining whether it is in the public interest, the Commission is directed to consider the following:

- (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
- (b) the seriousness of the allegation or complaint being investigated,
- (c) any risk of undue prejudice to a person’s reputation (including prejudice that might arise from not holding an inquiry),
- (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

The inclusion of this provision in the New South Wales statute reflects a decision by the legislative drafters to defer to the expertise of commissioners to balance privacy and publicity concerns in context, on a case-by-case basis. This is one possible approach to the dilemma at the stage of institutional design.

An alternative approach is offered by South Australia, where there is no power to conduct public hearings. In November 2015, South Australian Commissioner Bruce Lander requested that his governing legislation be amended to allow public hearings into less serious conduct — misconduct and maladministration.⁸⁴ He has renewed that request in response to a serious maladministration investigation that he is currently undertaking.⁸⁵ In contrast, he has accepted that corruption investigations (which involve criminal conduct) should remain private, and that the public should be informed of investigations into serious criminal conduct only when the matter has reached the courts, where the hearing will be (generally) held in public but constrained by the rules of evidence and the availability of privilege claims for witnesses.⁸⁶

The foundation of our position favouring the presumptive privacy of hearings is that a commission is not a court but an investigative agency vested with extraordinary powers. It bears repeating that the purpose of imposing transparency on a court proceeding is to ensure the justice of the process: once an individual has been charged

⁸⁴ See, eg, the comments of Commissioner Lander to the Public Integrity Commission reported in Leah MacLennan, ‘South Australia’s ICAC Commissioner says Fractured Relationship with Police Ombudsman “Improving”’, *ABC News* (online), 10 November 2015 <<http://www.abc.net.au/news/2015-11-10/icac-commissioner-bruce-lander-faces-public-integrity-committee/6927066>>.

⁸⁵ See Sheridan Holderhead, ‘ICAC Investigating Government Agencies over Allegations of “Serious and Systemic” Misuse of Public Resources’, *The Advertiser* (online), 4 June 2016 <<http://www.adelaidenow.com.au/news/south-australia/icac-investigating-government-agencies-over-allegations-of-serious-and-significant-misuse-of-public-resources/news-story/799e2c44ada8f00a9dc44d9d95e2157a>>.

⁸⁶ MacLennan, above n 84.

with a crime, the public interest requires a public hearing to ensure that the state's exercise of its harshest authority is exercised fairly. It could be argued that the same should be true of anti-corruption commission hearings – that is, they should take place in a setting where public scrutiny ensures the fairness and scrupulous impartiality of the presiding commissioner and other officials. By thus equating anti-corruption hearings to a court proceeding, however, we beg the question of why the traditional common law protections of that forum should be stripped. If commission hearings engage similar interests in justice to a court hearing — that is, if the grounds for summoning compelled witnesses can be analogised to 'charges', and if the factual findings of a commission can be analogised to findings of legal culpability — then the case for making them public is certainly strengthened, but so too is the case for granting witnesses court-like evidentiary and procedural safeguards. If, however, that analogy to the judicial forum is rejected — as we believe it should be — then the question remains why the unique concerns justifying the use of coercive powers by *investigators* in the corruption context should also justify their ability to use those powers in public, given the evident risks and harms. To our minds, this additional justification is lacking.

First, it is not clear that the goals of suppressing serious or systemic corruption, or of fostering public confidence in government integrity, rely on commission hearings taking place in public. Assuming that actual findings of corrupt conduct will be publicly reported and explained following those hearings — a matter we consider below — the public will have the benefit of considered findings of fact about government activities. Interim reports might also be used to counteract the concern that a lack of public awareness of inquiry hearings prevents people with valuable evidence from coming forward. The reports and findings of an inquiry, having afforded a full opportunity for individual witnesses to be heard and to respond to adverse allegations, will be less vulnerable to inaccurate or speculative media portrayal. The public will also have reassurance that an investigative body wielding extraordinary powers to compel involuntary testimony does so with respect for the privacy and dignity of those affected, only disclosing their identities where necessary to deliver the public a full and accurate account of actual findings of corruption. This approach would foster systemic harmony and coherence by eliminating the potential that commission hearings could compromise the integrity of judicial proceedings, reinforcing the purposive distinctions between commissions and courts through the observance of distinct procedures.

While thus supporting the use of private hearings in the ordinary course, we would preserve the discretion of a federal commission to convene public hearings in one instance. There may be cases where public concern surrounding an allegation of corruption is so high that it rises to a crisis of confidence in government. Here, the goals of suppressing serious and systemic corruption and of restoring confidence in government may demand immediate and pronounced action, giving the public immediate assurance that a robust investigation is underway. Moreover, the commission's own transparency in the conduct of the investigation may be essential to assuring the public that the commission is not itself susceptible to the troubling issues that are the source of concern.

We suggest the following statutory guidance for such judgement: that public hearings only be convened when a commissioner determines that the subject of an investigation concerns both serious and systemic corruption, and that the subject has provoked a crisis of public confidence in government. Our proposed threshold for the conduct of a public hearing has received some criticism for its workability, as well as perhaps setting the threshold too high as to ‘prevent a crisis of public confidence, as opposed to simply respond[ing] to one.’⁸⁷ In our view, while acknowledging the need for subjective judgement as to when such circumstances have arisen, this can only be exercised in context, relying on the expertise and good faith of a commissioner (or commissioners) and staff. We would also defend the narrowness of our proposed threshold by reference to the concerns that we have outlined above both for the individuals potentially investigated before, and giving evidence at, public hearings, and in relation to the reputation and standing of the commission itself.

Assuming the legislative framework governing the commission otherwise imposes presumptive privacy on hearings, we believe this represents a suitably narrow instance in which legislators may defer to the future judgment of commissioners acting in good faith to pursue the public interest. So empowering the commission is consistent with it fulfilling a systemic role presently lacking from the integrity landscape, as truly pervasive problems with government corruption could impede the affected government from constituting a royal commission for reasons of its own self-preservation, or interfere with faithful exercise of the standing law enforcement powers of other agencies.

In such circumstances, the commission should also take steps to mitigate potentially unfair effects of hearings on witnesses. It can do so by narrowing, as much as possible, the issues to be addressed in evidentiary hearings through thorough pre-hearing investigations and private interviews; prefacing public hearings with public statements by the commissioner clarifying their investigative nature and emphasising that inquiry witnesses have not been ‘charged’ with offences, nor will the hearings result in legal findings; and ensuring full and fair opportunities of reply for any witnesses facing adverse accusations or findings.

3 The Need for Public Reporting and Follow-up Powers

Recalling that the different design features of a new federal commission are to be mutually-sustaining, our position in favour of presumptively closed commission hearings relies on these hearings being complemented by three additional elements. In each case, these elements are intended to ensure public engagement with the commission as a means of fostering understanding of its institutional role and of enhancing public trust.

⁸⁷ Transparency International Australia, Submission No 21 to the Senate Select Committee on a National Integrity Commission, Parliament of Australia, *Inquiry into the Establishment of a National Integrity Commission*, 13 April 2017, 8 (emphasis altered).

First, the commission must be able to publicly report the findings that result from any hearing, including findings of serious and systemic corruption and their relevant factual foundations. This ability is not only consistent with the commission's foundational purpose, it is essential to it. Across Australia, South Australia is unique in not allowing the ICAC to make reports to Parliament on specific investigations. Under ss 40, 41 and 42 of the *Independent Commissioner Against Corruption Act 2012* (SA), the Commissioner may report to Parliament on its more general review and recommendation powers, for example, its evaluation of practices, policies and procedures of government agencies, and recommendations it has made that government agencies change or review practices, policies or procedures. But under s 42(b), a report must not be about, or identify, a particular matter that was the subject of an assessment, investigation or referral under the *Commonwealth Act*. Commissioner Lander has criticised this constraint on his powers to report and bring to the attention of Parliament and the public his findings and recommendations in relation to specific investigations.⁸⁸ We strongly support the Commissioner's criticisms. It is difficult to conceive of how a commission can broker confidence in government if the government itself exercises control over the release of the commission's findings. The incoherence of this approach is patent. Suspending a right of reporting undermines most basic purposive account of a commission's role in fostering public confidence and government integrity; indeed, it weakens integrity through the unseemly implication of executive government serving as gatekeeper in the release of critical findings about its own conduct.

Second, commission hearings (and all aspects of commission conduct, for that matter) must honour procedural fairness. Public confidence in the integrity of private hearings, and the accuracy of conclusions they reach, would be compromised if individual witnesses were not afforded an opportunity of notice and reply to potential adverse findings that may be made against them. It would also be compromised if commissioners weren't held to stringent standards of impartiality. Both of these requirements reflect basic principles of natural justice, and their statutory codification would reinforce consistency between the specific design elements of a new federal commission and the fundamental values of Australia's legal system.

Finally, we recommend that a new federal commission have a statutory power of 'follow-up' — that is, the ability to report publicly on the government's compliance (or lack thereof) with past reports and recommendations. An example of such follow-up powers can be found in s 159 of the *Victorian Act*. Under this provision, the Victorian IBAC may make recommendations to the relevant principal officer, the responsible Minister or the Premier. Sub-section (6) then states:

- (6) The IBAC may require a person (other than the Chief Commissioner of Police) who has received a recommendation under subsection (1) to give a report to the IBAC, within a reasonable specified time, stating—

⁸⁸ Holderhead, above n 85.

- (a) whether or not he or she has taken, or intends to take, action recommended by the IBAC; and
- (b) if the person has not taken the recommended action, or does not intend to take the recommended action, the reason for not taking or intending to take the action.

This power would reinforce the institutional distinctness of a new federal commission in comparison to the discrete decision-making powers of courts, for example, or the temporally limited influence of royal commissions. Even where follow-up on reports and recommendations fails to spur action by government, it may at least force the government to articulate reasons for inaction, fostering positive systemic values of transparency and democratic dialogue.

IV CONCLUSION

This article began with an account of legal process theory, stressing its relevance to Australia's integrity branch of government. The source of that relevance lies in the unique concept of public power expressed by legal process theory — as something effected but also bounded by procedure — and in the tools offered by the theory to foster systemic strength through inter-institutional harmony and coherence. We encapsulated these values in our own theory of integrity of purpose, arguing that the introduction of a new federal anti-corruption commission to the integrity landscape must be informed by awareness of the existing features of that landscape, a distinct and specific concept of institutional purpose, and recognition that the new commission will evolve through the interpretation of its role in context and its interactions with institutional counterparts.

None of these are radical claims. In drawing from the legal process tradition, our thesis is less about challenging conventional legal analysis in relation to questions of governance and institutional design as it is about making that analysis more methodologically express, consistent, and clear on its own terms. While that aim may sound modest, its practical implications are not. Application of integrity of purpose to the design of a prospective federal anti-corruption commission challenges rather than corroborates many of the key features of existing state level commissions. By explicitly probing how the new commission could lend value to the federal integrity landscape, and recognising that questions of purpose and procedure cannot be meaningfully answered in isolation from one another, we have advocated that a new federal commission be bound by a clear legislative statement of purpose; that its jurisdiction, procedures, and outcomes should each be meaningfully differentiated from the standing agencies of criminal law; and that its use of extraordinary investigative powers, including hearing powers, should occur predominantly in private.

There is growing support for a federal anti-corruption commission. Before rushing to introduce such a body or categorically dismissing its merit, it is important to reflect on the current strengths and weaknesses of the federal integrity landscape and to define the contours that a new commission could fill. Just as integrity of

purpose involves recognising that questions of purpose cannot be considered apart from questions of procedure, so too should debates about the need (or lack thereof) for a federal anti-corruption commission be accompanied by a clear, principled, and purposive vision of what such a commission would look like. Beyond advocating for specific design features, we hope that the account developed in this article will aid this debate. Integrity of purpose can be adopted by future scholars and officials to develop more richly informed conclusions about institutional design, and to secure not just a new commission's capacity to combat corruption but to honour its own integrity in the public interest.

COMMUNITY ENGAGEMENT IN THE AGE OF MODERN LAW REFORM: PERSPECTIVES FROM ADELAIDE

ABSTRACT

This article documents the recent community engagement experience of the South Australian Law Reform Institute ('the Institute') in relation to two references: the first concerning discrimination against gay, lesbian, bisexual, transgender, intersex and queer South Australians; and the second relating to family inheritance law. These experiences underscore the importance of successful community engagement for law reform bodies and others involved in public policy making including governments. The Institute's experiences demonstrate that by adopting a range of innovative strategies to generate public interest and trust and facilitate the meaningful sharing of information and knowledge, even modest and resource-stretched bodies like the Institute can achieve strong legislative results that have broad community support.

I INTRODUCTION

Troubled by declining citizen engagement and participation in democratic processes, law makers and law reformers around the world have embraced the idea of 'community engagement', including through 'e-government' initiatives, citizens juries or traditional submission making processes.¹ Successful

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¹ See Jim Macnamara, 'The Quadrivium of Online Public Consultation: Policy, Culture, Resources, Technology', (2010) 45(2) *Australian Journal of Political Science* 227, 228–9. For a discussion of these types of initiatives see Robin Gauld, Shaun Goldfinch, and Simon Horsburgh 'Do They Want It? Do They Use It? The "Demand-Side" of e-Government in Australia and New Zealand' (2010) 27(2) *Government Information Quarterly* 177; Kim Johnston, 'Community Engagement: Exploring a Relational Approach to Consultation and Collaborative Practice in Australia' (2010) 16(1-2) *Journal of Promotion Management* 201; see also Tony Blair, *Prime Minister's Mission for E-Government Unit* (2005 London, UK Cabinet Office); Government of South Australia, *Reforming Democracy: Deciding, Designing and Delivering Together* (13 August 2015) YourSAy <<https://www.yoursay.sa.gov.au/reforming-democracy>>.

community engagement relies upon the generation of interest and trust, and the meaningful sharing of information and knowledge.² It also requires tangible outcomes, if the community is going to engage again with the relevant body in the future. As former Director of the Tasmanian Law Reform Institute Professor Kate Warner has explained:

The fact that law reform bodies are independent of government is what sets the consultation process apart from community consultations conducted by governments. It provides a level of confidence, which is essential to achieving wide community input. While the nature and extent of community engagement depends upon the subject matter of the reference, it is no longer considered enough for a law reform body to publish a discussion or issues paper, schedule a public hearing or two and wait for the submissions to flow in. Greater creativity is expected.³

In this article, I outline how the South Australian Law Reform Institute (‘the Institute’) has grappled with the challenge of community engagement and experienced strong success, particularly in the context of two recent law reform references, despite (or perhaps because of) its limited resources. The insights gained from the Institute’s innovative practices contribute to the body of learning that all law makers should consult when reflecting on how to improve how they engage with the community when developing or reforming our laws.

The South Australian Law Reform Institute is based on the Alberta Law Reform Institute model⁴ and exists without a statutory framework. This flexible structure, which depends upon close collaboration with the local legal profession, the academy and law students, has allowed the Institute to punch above its weight when it comes to the legislative implementation of its key recommendations. This structure also gives the Institute the flexibility and incentive to experiment with new forms of community consultation, which has helped cement the Institute’s growing reputation as a body with a genuine commitment to listening to and reflecting the views of the South Australian community in its law reform work. In addition, while its lack of statutory

² See Macnamara, above n 1, 227; see also Johnston, above n 1, 218–19; Steven Barkan, ‘Race, Issue Engagement and Political Participation: Evidence from the 1987 General Social Survey’ (1998) 1(1) *Race and Society* 63.

³ Kate Warner, ‘Lessons From a Small University-Based Law Reform Body in Australia’ in Michael Tilbury, Simon NM Young and Ludwig Ng (eds) *Reforming Law Reform: Perspectives from Hong Kong and Beyond*, (Hong Kong University Press, 2014), 127.

⁴ The Alberta Law Reform Institute was founded in 1968 under an agreement between the Attorney-General of Alberta, the University of Alberta and the Law Society of Alberta. It is run by a board and a full-time director. Funding and support for the Institute comes from the three signatories as well as the Alberta Law Foundation. For further information see Alberta Law Reform Institute, *About ALRI* (2010) University of Alberta <<https://www.alri.ualberta.ca/index.php/about-alri>>. See also Kate Warner, ‘Institutional Architecture’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (The Federation Press, 2005) 55, 62.

framework may have previously raised questions about the Institute's independence and sustainability, recent experiences among national and international law reform bodies suggest that bodies with non-statutory structures are equally well placed to approach law reform with the type of intellectual independence and rigour as their statutory based cousins.⁵

This article reflects upon the Institute's approach to consultation across two recent references: one relating to the removal of discrimination on the grounds of gender identity, sexual orientation and intersex status ('the LGBTIQ Reference'); and the other concerning the provisions of the *Inheritance (Family Provision) Act 1972* (SA) ('the Family Inheritance Inquiry') which formed part of a broader reference on succession law in South Australia. These two very different references give rise to a number of important insights into what strategies yield the most successful results when it comes to community engagement in law reform or other forms of policy making. These insights continue to guide the work of the Institute, and are relevant to other law reform bodies, governments and others seeking to develop or enhance consultation strategies in resource-limited environments.

Part II of this article reflects upon the 'traditional' approach to consultation adopted by law reform bodies and contrasts this with the range of modern options available to facilitate community engagement. Part III of this article sets out the Institute's approach to consultation in both the LGBTIQ Reference and the Family Inheritance Inquiry. The final part of the article summarises the insights and lessons learnt from the Institute's recent experiences, highlighting their broader relevance for other law reform bodies.

II TOWARDS A MODERN APPROACH TO COMMUNITY CONSULTATION

It is now universally accepted that at least part of the role of any law or policy making body, if not its primary purpose, is to consult broadly with the community in its

⁵ For example, former President of the Australian Law Reform Institute Professor Rosalind Croucher has observed that: 'the essence of effective law reform is independence and that this is *not* about how we are structured — and there are many differences amongst participating law reform agencies represented here — but how we go about our work.' Rosalind Croucher 'Law Reform Agencies and Government — Independence, Survival and Effective Law Reform?' (Speech delivered at Commonwealth Association of Law Reform Agencies, Melbourne, 25 March 2017) <<https://www.alrc.gov.au/news-media/speech-presentation-article/supporting-older-people>>. See also Patricia Hughes, 'Lessons from Law Reform in Ontario and Elsewhere in Canada', in Michael Tilbury, Simon NM Young, Ludwig Ng (eds) *Reforming Law Reform: Perspectives from Hong Kong and Beyond*, (Hong Kong University Press), 2014, ch 6; Terese Henning and David Plater, 'Law Reform on the Smell of an Oily Rag' (Speech delivered at the Australasian Law Reform Agencies Conference, Melbourne, 3 March 2016); Sir Grant Hammond, 'So Where Is It All Going?' (Speech delivered at the Australasian Law Reform Agencies Conference, Sydney, 7 March 2016).

relevant jurisdiction.⁶ The reasons for this are manifold and derive from the role modern law reform bodies play in:

- (i) disseminating information about the law or the public policy and promoting a sense of ‘public ownership’ over the process of law or public policy making;⁷
- (ii) providing the public with a deliberative forum to engage in a ‘civic conversation’ about the content of the law;⁸
- (iii) contributing to social justice by giving people in marginalised groups an opportunity to voice their concerns and be taken seriously;⁹
- (iv) helping to identify and solve legal problems that are ‘invisible’ to those directly involved in legal or policy making processes;¹⁰ and
- (v) presenting law reform and policy options that are ‘intellectually rigorous and practical,’ having considered the evidence of how the law or public policy will or does work in practice.¹¹

However, as discussed below, the need for broad community consultation when engaging in law and policy making was not always accepted, and the extent and form of consultation undertaken has changed considerably over time. This underscores the

⁶ This shared commitment to consultation is described in many of the essays prepared as a result of a Law Reform Conference in Hong Kong in 2011, published in Tilbury, Young and Ng, above n 3. See also Croucher, above n 5.

⁷ Roslyn Atkinson, ‘Law Reform and Community Participation’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005, The Federation Press) 160, 166; Government of South Australia, *Reforming Democracy*, above n. 1; see also Sir Peter North, ‘Problems of Law Reform’ (2002) 3 *New Zealand Law Review* 393, 396; Michael Kirby, ‘The ALRC: A Winning Formula’ (2003) 82 *Australian Law Reform Commission Reform Journal* 58, 60; Neil Rees, ‘The Birth and Rebirth of Law Reform Agencies’ (Paper presented at the Australasian Law Reform Agencies Conference 2008, Vanuatu, 10–12 September 2008) <http://www.lawreform.vic.gov.au/sites/default/files/ALRAC%2BPaper%2B_NeilRees.pdf>.

⁸ See Macnamara, above n 1, 229; Jürgen Habermas, ‘Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research’ (2006) 16(4) *Communication Theory* 411; Marcia Neave ‘Law Reform and Social Justice’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005, The Federation Press) 358, 366.

⁹ See John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998) 4; Marcia Neave, ‘Institutional Law Reform in Australia: The Past and The Future’ (2005) 23 *Windsor Yearbook of Access to Justice* 343.

¹⁰ Neave, ‘Law Reform and Social Justice’, above n 8, 365.

¹¹ Atkinson, above n 7, 166; see also North, ‘Problems of Law Reform’, above n 7, 396; Kirby, ‘The ALRC’, above n 7, 60.

need to continually record and reflect upon the consultation strategies adopted by law reform bodies and public policymakers, to ensure that they remain relevant, effective and capable of living up to the public's expectations.

As a number of scholars have documented, early Australian law reform bodies (which largely took the form of committees) were not concerned with public consultation.¹² The reasons for this were partly practical (members were 'part-time' and very few committees, if any, received funding for administration or research) and partly based on principle (the committees assumed that their work related to 'lawyers' law', and did not concern themselves with policy or political questions).¹³ In other words, these early law reform committees were comprised of lawyers who assumed they were in the business of improving the law for the benefit of other lawyers. They considered the public to be both disinterested in and irrelevant to the task they were undertaking.

However, by the 1970s, powerful new influences from other jurisdictions were changing the way law reform and policy making was viewed in Australia, and highlighting the need to actively seek the views of the community.¹⁴ In the area of law reform this saw a shift towards the view that it was not just lawyers' law that would occasionally need updating¹⁵ but the *whole body* of law that stood potentially in need of reform.¹⁶ This in turn demanded the establishment of permanent bodies to stand ready to review and reform the law, and to actively seek the views of those who may be affected by, or have an interest in, the law being reviewed. Over time, formal law reform bodies were established in most Australian jurisdictions, including at the national level. The Australian Law Reform Commission began to lead the way into a new era where community consultation was quickly identified as an essential ingredient of successful modern law reform.¹⁷ As David Weisbrot reflects:

A deep commitment to undertaking expensive community consultation as an essential part of research and policy development is the sine qua non of a law

¹² See, eg, J.M. Bennett, 'Historical Trends in Australian Law Reform' [1969–70] 9 *University of Western Australia Law Review* 211, 235; Anthony Mason, 'Law Reform in Australia' (1971) 4(2) *Federal Law Review* (1971), 214–17.

¹³ Michael Tilbury, 'A History of Law Reform in Australia' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (The Federation Press, 2005) 3, 10–11 (citations omitted).

¹⁴ See *ibid* 12.

¹⁵ *Ibid* 14.

¹⁶ See *ibid* 12: This was based on the realisation of the 'qualitatively new principle', long advocated in England and the United States, 'that the *whole* body of law stood potentially in need of reform, and there should be a *standing* body of appropriate professional experts to consider reforms continuously' (emphasis added).

¹⁷ See especially Michael Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, 1984) ch 3; see also Michael Kirby, 'The Law Reform Commission and the Essence of Australia' (2000) 77 *Reform* 60, 60.

reform commission. Ultimately, it is the attribute that distinguishes it from other bodies that have a law reform aspect to their work.¹⁸

In recent years, just like modern governments,¹⁹ modern law reform bodies do not just welcome public input into their law reform reports, but are expected to actively ‘encourage, cajole or entice’ members of the public to share their views on a particular law reform reference.²⁰ A failure to adequately consult can severely hamper both the legislative impact and long term reputation of the law reform body.²¹ As Ian Davis explains, a law reform body ‘fails in its work if it cannot fairly demonstrate that it actively sought submissions, even if they ultimately fail to materialise in the scope, number or depth that might have been hoped for.’²²

This can present challenges for busy, understaffed, and under-resourced law reform bodies and public policy making units, particularly when inquiring into areas of law or policy that do not naturally generate strong public interest or engage pre-established networks or interest groups. As discussed below, the Institute grappled with some of these challenges in its Family Inheritance Inquiry.

Encouraging meaningful consultation can also depend upon the law reform or policy body being able to establish relationships of trust with those members of the community most likely to be affected by any changes to the law.²³ As discussed below, this in turn depends upon the real and perceived independence of the law reform body, and its capacity to respond to the particular needs of the group being consulted.²⁴ In addition, as Weisbrot observes:

people must also feel that the time and effort involved in their participation in the law reform process is worthwhile — that is, that they will be given a meaningful opportunity to be heard and there is some reasonable prospect for achieving positive change.²⁵

A similar point was made in 2017 by the then President of the Australian Law Reform Institute, Professor Rosalind Croucher, who observed that ‘the essence of

¹⁸ David Weisbrot, ‘The Future for Institutional Law Reform’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (The Federation Press, 2005) 1, 32; see also Brian Opeskin, ‘Engaging the Public — Community Participation in the Genetic Information Inquiry’ (2002) 80 *Reform* 53, 54.

¹⁹ See, eg, Government of South Australia, *Reforming Democracy*, above n 1.

²⁰ Ian Davis, ‘Targeted Consultations’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (The Federation Press, 2005) 148, 159.

²¹ Neave, ‘Law Reform and Social Justice’, above n 8, 367.

²² Davis, above n 20, 159.

²³ See, eg, Kim A Johnston, ‘Community Engagement: Exploring a Relational Approach to Consultation and Collaborative Practice in Australia’ (2010) 16(1–2) *Journal of Promotion Management* 201, 218–19.

²⁴ Weisbrot, above n 18, 32.

²⁵ *Ibid.*

effective law reform is intellectual independence', which in turn makes the work of law reform bodies so valuable to Government. Professor Croucher explained that:

For a law reform agency, the outcome should never be known until the process has been worked through. This openness facilitates securing stakeholder engagement. This is so important when extensive public involvement in law reform is crucial to the integrity of the process — it is the *sine qua non* accepted among institutional law reform bodies internationally — because it is a demonstration of independence of mind.²⁶

Rapidly expanding communication technologies also provide opportunities and challenges for law reform bodies and policymakers seeking to engage with the community successfully online.²⁷ Some of these opportunities and challenges have been documented in other fields,²⁸ and a number are discussed below in the context of the Institute's recent experiences. As the Hon Michael Kirby observes, mastering the consultative potential of these new technologies can sometimes demand skills not commonly held by lawyers:

Not every lawyer has skills in the use of modern media. Some skills can be learned. Experienced journalists can help. What is needed is a talent for simplification. Commonly, the legal mind sees all the problems and clutters up simplicity with multiple exceptions and qualifications. ... It demands of law reformers a radical abbreviation and simplification of their main proposals.²⁹

Even when successful, these efforts are unlikely to be able to replace the value of face to face consultations, which, as Davis notes, allows individuals and groups the chance to 'talk much more freely about the topics of interest; to explain and amplify their views or the reasons behind them; or to apply nuance where this is inevitably harder to do in writing'.³⁰

As the Institute has learned, care must also be taken in the preparation of written materials by the law reform body, whether as an aide to attracting submissions,

²⁶ Croucher, above n 5.

²⁷ A number of examples of online community engagement are described in Macnamara, above n 1.

²⁸ See, eg, Amy Jo Kim, *Community Building on the Web: Secret Strategies for Successful Online Communities* (Peachpit Press, 2000); Kevin B Wright, 'Researching Internet-Based Populations: Advantages and Disadvantages of Online Survey Research, Online Questionnaire Authoring Software Packages, and Web Survey Services', (2005) 10(3) *Journal of Computer-Mediated Communication* 1; Julie Firmstone and Stephen Coleman 'Public Engagement in Local Government: The Voice and Influence of Citizens in Online Communicative Spaces' (2015) 18(6) *Information, Communication & Society* 680.

²⁹ Michael Kirby, 'Are We There Yet?' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (The Federation Press, 2005), 433, 437.

³⁰ Davis, above n 20, 156.

engaging online or supporting face-to-face discussions. As the Institute has found, a short, well targeted, plain English fact sheet (particularly when accompanied by audiovisual content) can sometimes work just as well as a lengthy, legally referenced discussion paper.

The evolution of Australian law reform bodies since the 1940s demonstrates a decisive shift towards the centrality of community consultation in all aspects of the law reform work that is also mirrored in the experience of modern governments and other policymakers. When consultation is successful, it allows law reform bodies to contribute to the process of enhancing the deliberative nature of the Australian democracy, which Spencer Zifcak has described as ‘that quality of continuing dialogue and debate between government and its constituents about economic, social and governmental purposes which forms the heart of the democratic project’.³¹ As discussed below, the Institute has actively sought to make this type of contribution to South Australia’s democratic character when undertaking its two most recent references, and has experienced the flow on benefits in terms of legislative impact from adopting this approach.

III THE INSTITUTE’S APPROACH TO CONSULTATION IN TWO CASE STUDIES

A The South Australian Law Reform Institute

The Institute is an independent non-partisan law reform body based at the University of Adelaide’s Law School. The Institute is not statutory-based, but rather was established in December 2010 under an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia.³² The Institute’s work is guided by an expert Advisory Board,³³ who are supported by a very modest Secretariat, comprising a part-time Director and Deputy Director, a legally-qualified administrative assistant and a small number of casually appointed research staff. In practice, the Institute regularly relies upon contributions in kind from the South Australian legal profession, academia and law students, as well as

³¹ Marcia Neave, ‘Law Reform in the Age of Managerialism’ (Speech delivered at the Australian Law Reform Agencies Conference, Darwin, 20 June 2002) <<http://www.lawreform.vic.gov.au/publications-and-media/speeches/law-reform-21st-century--some-challenges-future>>, quoting Spencer Zifcak, ‘From Administrative Reform to Democratic Reformation: Accountability in a Post-Managerial Era’ (Speech delivered at the Seminario Internacional A Reforma Gerencia do Estado, Brasilia 17–18 November 1998).

³² See Adelaide Law School, *South Australian Law Reform Institute* (25 July 2017) University of Adelaide <<https://law.adelaide.edu.au/research/law-reform-institute/>>.

³³ Ibid.

occasional grants from the Law Foundation. In this way, the Institute resembles similar non-statutory law reform bodies in Alberta and Tasmania.³⁴

When undertaking its work, the Institute has a number of objectives. These include to identify law reform options that would modernise the law, fix any problems in the law, consolidate areas of overlapping law, remove unnecessary laws, or, where desirable, bring South Australian law into line with other Australian jurisdictions.³⁵ While the Institute can receive references from any of its partner organisations, or even directly from members of the public, it most commonly undertakes inquiries suggested by the Attorney-General.

Two of the most recent references received by the Institute — the LGBTIQ Reference and the Family Inheritance Inquiry — highlight the priority given to creative approaches to community consultation by the Institute in recent years. Being a small law reform body in a small jurisdiction, such an approach is not just desirable but has proved necessary in order to make the most of limited resources and to capitalise on the ongoing support of the local legal profession and academic community.

B *The LGBTIQ Reference*

In January 2015, the Attorney-General of South Australia, the Honourable John Rau MP, invited the Institute to accept a reference to inquire and report on those South Australian laws that discriminated against ‘against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status’.³⁶ The Institute approached the task by firstly undertaking a review of all current South Australian laws to ascertain whether, and to what extent, they discriminated on these grounds. In addition to this desktop audit, the Institute undertook targeted consultations with members of the community to identify which pieces of legislation most impacted upon the lives of affected individuals. This proved to be by far the most compelling evidence of the potentially discriminatory impact of current legislation upon lives. As the Institute’s Audit Report noted:

The lived experience of individuals places, in stark relief, the operation of law on matters that are fundamental to all South Australians. The individuals consulted asked searching questions of the law and the values it enshrines. How does the law assist me to be the person I am? How does it support me to engage, free from discrimination, in the community in which I live? How can I have the relationship

³⁴ See above n 1; University of Tasmania, *Tasmanian Law Reform Institute* (21 March 2017) University of Tasmania <<http://www.utas.edu.au/law-reform>>.

³⁵ See Adelaide Law School, above n 32.

³⁶ Hieu Van Le, ‘Governor’s Speech’ (Speech delivered at the Proceedings of the Legislative Council, Adelaide, 10 February 2015). In particular, the Governor stated that: ‘[m]y Government will invite the South Australian Law Reform Institute to review legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status. Their recommendations will then be considered in the South Australian Parliament.’

with the person I love recognised and start to raise a family in South Australia? These and other questions only served to highlight the discriminatory barriers that members of the LGBTIQ communities face in their daily lives.³⁷

The consultations undertaken by the Institute occurred at multiple stages and involved a range of different techniques, specifically designed to generate trust among those most directly affected by the laws being reviewed and reform options presented, and to facilitate input from a broad range of the South Australian community. For example, as a first step, the Institute held face-to-face private meetings with members of the LGBTIQ community and key service providers to help isolate the priority areas of reform. As a result of feedback received during these consultations, the Institute produced a series of fact sheets that outlined in plain English the state of the current law in five key priority areas: legal recognition of sex; legal recognition of relationships; starting a family and parenting rights; protections against unlawful discrimination; and legal definitions of sex and gender.

These materials were then used to facilitate a public submission and online feedback process facilitated by the South Australian Government's 'YourSay' platform.³⁸ The YourSay website also helped to facilitate further targeted consultations and group discussions, including a forum hosted by Feast Festival's Queer Youth Drop In on 23 July 2015 that provided an opportunity for the Institute to hear the views of LGBTIQ people aged 15–26. This broader consultation assisted in distilling the laws and regulations that had the most significant discriminatory impact on the lives of South Australians, and identified possible reform options. This formed the basis of the first report issued on this reference, the Audit Report, which was reviewed by a specialist Advisory Group established by the Institute for this reference.³⁹

³⁷ South Australian Law Reform Institute, 'Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation' (Audit Paper, September 2015) 7–8. The desktop audit determined that there are over 140 pieces of legislation that, on their face, discriminate against individuals on the basis of sex or gender diversity. The vast majority of the legislation in this category discriminates by reinforcing the binary notion of sex ('male' and 'female') or gender ('man' or 'woman') or excludes members of the LGBTIQ communities by a specific or rigid definition of gender. Rigid, binary concepts of gender are also currently reinforced by the use of the term 'opposite' sex, which can easily be replaced with the more inclusive term 'different' sex without altering the meaning or purpose of the provision. Other laws require clarification to ensure that people who identify as a particular gender are treated with respect under the law, for example, when subject to official body searches. The Institute provides examples of this type of legislation and suggestions for how legislation in this category can be quickly amended or removed.

³⁸ Government of South Australia, *YourSay: LGBTIQ — Removing Discrimination from SA laws* (20 November 2015) YourSay <<http://yoursay.sa.gov.au/yoursay/lgbtiq-removing-discrimination-from-sa-laws>>. SALRI received 49 substantive submissions in response to its online feedback form and more traditional requests for submissions.

³⁹ A specialist Advisory Group was assembled for this Reference, comprised of the Hon Catherine Branson QC, Emerita Professor Rosemary Owens AO and Professor Carol Johnson.

The Audit Report also incorporated comparative research conducted by the students of the University of Adelaide's Law Reform Course.⁴⁰

The Audit Report was followed by a series of four further Reports, each documenting an area identified via the above process as in priority need of reform. These areas were: the legal recognition of sex and gender under South Australian law;⁴¹ parenting rights and access to assisted reproductive treatment ('ART') and surrogacy;⁴² anti-discrimination law;⁴³ and the common law partial defence of provocation.⁴⁴ Each of these reports were accompanied by specific, additional consultation strategies including:

- (i) Subject specific round table discussions with relevant experts. For example, with respect to the Institute's report on the legal recognition of sex and gender; a round table involving representatives from the Office of Births, Deaths and Marriages; endocrinologists and other medical experts; and members of the trans and intersex community was held. This round table generated a range of consensus views that were collated in a Round Table Report which was then published on the Institute's website and used as the basis for broader community consultation.⁴⁵
- (ii) The preparation of an Issues Paper and a dedicated YourSAy social media platform on the issue of South Australia's anti-discrimination laws, and the exceptions to those laws. The platform included an online survey and live

⁴⁰ The yearlong Law Reform Course examines theories, practices and processes for achieving reform of the law. The course is taught by Institute staff and special guests and students participate in the references being undertaken by the Institute. The topics covered in the course include: theories of law reform; the institutions through which the law is reformed; the role of the community, the executive, the parliament, the bureaucracy, law reform bodies commissions and courts in progressing law reform; the role of the news media and new media; the role and function of the South Australian Law Reform Institute and legal policy analysis for law reform. For examples of the use of student work in an Institute report: see, eg, South Australian Law Reform Institute, 'Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status', above n 38, 32–7, Appendix 4.

⁴¹ South Australian Law Reform Institute, 'Legal Registration of Sex and Gender and Laws Relating to Sex and Gender Reassignment' (Report No 5, 2016).

⁴² South Australian Law Reform Institute, 'Rainbow Families: Equal Recognition of Relationships and Access to Existing Laws Relating to Parentage, Assisted Reproductive Treatment and Surrogacy' (Report, May 2016).

⁴³ South Australian Law Reform Institute, "'Lawful Discrimination": Exceptions under the *Equal Opportunity Act 1984* (SA) to Unlawful Discrimination on the Grounds of Gender Identity, Sexual Orientation and Intersex Status' (Report, June 2016).

⁴⁴ South Australian Law Reform Institute, 'The Provoking Operation of Provocation: Stage 1' (Report, April 2017).

⁴⁵ The round table was held on 29 October 2015 at the University of Adelaide Law School, Adelaide, South Australia, hosted by the South Australian Law Reform Institute. The round table was conducted under Chatham House rules.

discussion board, which helped to generate over 430 submissions in response to this aspect of reference.⁴⁶

- (iii) Additional one-on-one meetings with members of the LGBTIQ community and service providers, which assisted in gaining a practical understanding of many of the issues relating to parenting rights and access to ART and surrogacy in South Australia.⁴⁷
- (iv) Direct engagement with government departments responsible with implementing the reforms being considered by the Institute, including through formal presentations to key staff.⁴⁸
- (v) Extensive media engagement by the Institute, including print, online and radio with particular effort given to disseminating accessible information about the current law to different audiences.⁴⁹

The insights gained from adopting this diverse range of consultation strategies are set out below, some of which point to the need for further refinement of these techniques. However, it is clear that the Institute's commitment to sensitive and meaningful public engagement contributed to its strong legislative impact, and helped to establish networks of individuals and organisations who in turn advocated for broader social change in this area, separate from the work of the Institute. For example, following the release of the Institute's reports, the South Australian Government introduced five Bills implementing the key recommendations made by the Institute in this Reference, all of which were passed in 2016 and early 2017.⁵⁰ In addition, on 1 December 2016 the Premier, the Hon Jay Weatherill MP, made a historic apology to LGBTIQ South Australians that was supported by the Opposition. The Premier said that:

When our laws discriminate against a particular group of people, it sends a message that this prejudice written into law justifies treating people differently

⁴⁶ Government of South Australia, *YourSay: LGBTIQ*, above n 39.

⁴⁷ See, eg, South Australian Law Reform Institute, 'Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status', above n 38, Appendix 5.

⁴⁸ See, eg, *ibid.*

⁴⁹ See, eg, Stacey Rowse, 'Reviewing SA's Discriminatory Laws' (2016) 38(2) *Bulletin (Law Society of South Australia)* 19; Sarah Moulds 'How Can SA Balance Fairness and Freedom of Religious Beliefs?' *InDaily* (online) 6 July 2016 <<https://indaily.com.au/opinion/2016/07/06/how-can-sa-balance-fairness-and-freedom-of-religious-beliefs/>>; Sarah Moulds, 'Making SA a Leader in Equality Again' *InDaily* (online) 12 February 2016 <<https://indaily.com.au/opinion/2016/02/12/making-sa-a-leader-in-equality-again/>>.

⁵⁰ See *Adoption Review Amendment Act 2016 (SA)*; *Births, Death and Marriage Registration (Gender Identity) Amendment Act 2016 (SA)*; *Relationship Register Act 2016 (SA)*; *Statutes Amendment (Gender Identity and Equity) Act 2016 (SA)*; *Statutes Amendment (Registered Relationships) Act 2017 (SA)*.

in our day-to-day lives. Such laws do not affect only the LGBTIQ community, they diminish our society as a whole. They diminish us by saying effectively that there are certain people who deserve to be treated differently, whose relationships are worth less, whose families should not exist, who are not entitled to the same fundamental rights as their neighbour.⁵¹

This reflects the broad and deep commitment within the South Australian Parliament to renewing South Australia's position as a leader in promoting substantive equality and protection from discrimination — which was at least in part enlivened by the consultation-intensive work undertaken by the Institute in this area.

C Family Inheritance Inquiry

The Institute's 2017 inquiry into the provisions of the *Inheritance (Family Provision) Act 1972* (SA) is part of its wider work on succession law in South Australia.⁵² The Family Inheritance Inquiry is primarily about investigating whether the current laws that apply to the division of a person's estate upon his or her death following a claim against the will by an eligible family member are fair and effective, and well-tailored to the diversity of modern family structures. The inquiry also has particular relevance for families in regional and rural South Australia who have significant farming estates or other assets that present particular difficulties to testators seeking to fairly divide their assets among their children, which circumstances give rise to added complexity when family provision claims are made.

⁵¹ South Australia, *Parliamentary Debates*, House of Assembly, 1 December 2016, 8313 (Jay Weatherill).

⁵² In 2011, the Attorney-General, the Hon John Rau MP, invited the Institute to identify the areas of succession law that were most in need of review in South Australia, to review each area and to recommend reforms. Funding was also generously provided from the Law Foundation of South Australia for the research and consultation necessary for the Institute's review of succession law. As part of its succession law reference, the Institute has identified seven topics for review, and is in the process of completing reports on each of these issues. This work is ongoing and includes: South Australian Law Reform Institute, 'Dead Cert: Sureties' Guarantees for Letters of Administration' (Issues Paper, South Australian Law Reform Institute, December 2012); South Australian Law Reform Institute, 'Sureties' Guarantees for Letters of Administration' (Final Report, South Australian Law Reform Institute, August 2013); South Australian Law Reform Institute, 'Losing it, State Schemes for Storing and Locating Wills' (Issues Paper, South Australian Law Reform Institute, July 2014); South Australian Law Reform Institute, 'Small Estates: Review of the Procedures for Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes in South Australia' (Final Report, South Australian Law Reform Institute, December 2016); South Australian Law reform Institute, 'Small Fry: Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes' (Issues Paper, South Australian Law Reform Institute, January 2014); South Australian Law Reform Institute, 'Cutting the Cake: South Australian Rules of Intestacy' (Discussion Paper, South Australian Law Reform Commission, December 2015).

For this reason, when commencing this Inquiry, the Institute was keen to develop a consultation strategy that recognised the broad applicability of the *Inheritance (Family Provision) Act 1972 (SA)* to the South Australian community, but also specifically elicited the views of those living in regional and rural areas. In addition, the Institute thought carefully about how to make this area of law interesting and accessible to the non-legal community, given the relative lack of public interest in other aspects of the Institute's succession-related work. Guidance was provided by other law reform bodies who had undertaken similar inquiries, such as the Victorian Law Reform Commission ('VLRC'), which achieved considerable success through the use of audiovisual content on this issue.⁵³

Building on the success of its LGBTIQ consultation strategy and the positive experience of the VLRC, the Institute again utilised the Government's YourSay online platform,⁵⁴ but this time included a range of audiovisual content in addition to the provision of an online survey, discussion board and written materials. The YourSay social media platform effectively became the 'one stop shop' for anyone interested in contributing to the Family Inheritance Inquiry, and catered for a range of audiences including legal practitioners, journalists and members of the community. For example, the YourSay site included a series of plain English fact sheets setting out the key issues arising from the inquiry, such as 'who should be able to make a family provision claim', each of which was accompanied by a short video providing case study examples of the particular issue being addressed. These materials were then linked to relevant questions in the short online survey, meaning that participants could engage quickly with the survey and have 'one click' access to additional written or audiovisual content if they needed further information.

This strategy yielded considerably higher results in terms of non-lawyer input into this Inquiry compared with other succession related inquiries conducted by the Institute. For example, the YourSay website elicited just over 100 individual responses from members of the public, and there were well over 200 individual viewings of the short videos. There were also an average of 40 downloads for each of the fact sheets and together this content received approximately 20 000 views on Facebook.

The Institute's online consultation strategy was supported by a range of face to face consultation activities that were conducted in metropolitan and regional areas. For example, the Institute held a legal profession round table discussion held in Adelaide (that included representatives of the court); legal profession and community round

⁵³ See, eg, Victorian Law Reform Commission, 'Succession Laws: Consultation Paper — Family Provision' (Consultation Paper, December 2012).

⁵⁴ Government of South Australia, *Your Say: Looking After One Another: the South Australian Law Reform Institute's Inquiry in the Inheritance (Family Provision) Act 1972 (SA)* (February 2017) South Australian Law Reform Institute <<http://yoursay.sa.gov.au/decisions/looking-after-one-another/about>>.

tables in the regional towns of Berri and Mount Gambier;⁵⁵ and a series of presentations by Institute staff to events and forums involving the legal profession.⁵⁶ These round tables were preceded by the development of a list of discussion questions and were supported by the written and video content available on the YourSAy site. The round tables were also supported by targeted media campaigns, including interviews with local media in Mount Gambier and Berri,⁵⁷ and built upon networks previously established by the Law Society of South Australia, and in particular, the Society's Country Lawyers Committee. In addition, the involvement of South Australian subject-specific experts, such as Dr Sylvia Villios, greatly assisted in attracting participants to the round tables, which were often accompanied by short continuing professional development presentations (for lawyers) and/or legal information sessions (for non-lawyers). In this way, round table participants experienced both recognition and reward for their contributions to the Institute's inquiry.

An unexpected benefit of the regional round tables was the production of further video content with a regional focus that was then made available to the broader community on the YourSAy site and helped to attract further public submissions. The government has yet to respond to the Institute's report on this Inquiry, however positive feedback has been received with respect to the breadth of the Institute's consultation strategy.

IV INSIGHTS FOR MEANINGFUL COMMUNITY ENGAGEMENT WITH LAW REFORM

As Patricia Hughes, Executive Director of the Law Commission of Ontario has observed, all law reform bodies consult: 'it is the "with whom" and "how" that distinguishes them'.⁵⁸ The above experiences give rise to insights that the Institute is keen to share with its law reform counterparts in other jurisdictions, as well as Government and other public policymakers, particularly those that face resource constraints or are looking for ways to enhance their capacity to engage with key sectors of the community. In particular, the following insights resonate across subject areas and organisational structures and are discussed briefly below:

⁵⁵ The regional city of Mount Gambier is the second-most populous city in South Australia and is located on the in the south-east of the state, about 450 kilometres south-east of the capital Adelaide and just 17 kilometres from the Victorian border. The town of Berri is a regional centre for the South Australian Riverland communities, and is located on the Murray River 238 kilometres north-east of Adelaide.

⁵⁶ For example, Institute Staff presented at the Law Society of South Australia's 2017 Forum in February 2017 in Adelaide, a Law Society Continuing Professional Development Session in May 2017 in Adelaide, and the Administrative Law Practitioners Forum in April 2017 in Adelaide.

⁵⁷ This included media interviews with Institute staff and ABC Riverland, ABC Mount Gambier, 5AA Adelaide, and ABC Adelaide.

⁵⁸ Hughes, above n 5, 90. See also Croucher, above n 5.

- (i) benefits of early consultation planning and investment in consultation resources;
- (ii) developing innovative approaches through meaningful engagement with students;
- (iii) building trust by working with community partners;
- (iv) building consensus and understanding through round table discussions; and
- (v) sharing successes and reflecting on areas for improvement.

*A Benefits of Early Consultation Planning and Investment
in Consultation Resources*

As the Institute's larger counterparts in the eastern states and friends in government can attest, strategic planning is critical for Law Reform Commissions, and equally vital for smaller Institutes.⁵⁹ It is often hard to anticipate precisely what resources may be required to ensure that meaningful consultation occurs at the time a reference is received. However, as a result of its recent experiences, the Institute is aware of the benefit of investing in 'back end' infrastructure, including information and communication technology, media liaison support, and staff capacity to host community forums and develop relationships with community partners.

While they were once seen as an 'optional extra' by resource-stretched law reform bodies, these types of resources are now perceived as critical to engaging in high-quality legal research. In addition, without the capacity to plan and implement consultation strategies, there is a risk that the long established relationships developed with the legal profession and the legal academy will deteriorate, particularly if the law reform body is ignored by the broader community and the political decision makers of the day.

This is not to suggest that additional financial resources need to be provided to law reform bodies such as the Institute to fund community engagement (although that would certainly be welcome). Rather, the Institute's experience suggests that existing information technology infrastructure, such as the government's YourSay site, can be utilised. For all Institutes such as South Australia's, which is based in a university, new relationships can also be established within the university, for example with those with specialist skills in audiovisual production, to address these needs. However, when cost-effective strategies such as these are adopted, care must be taken to ensure the independence of the law reform body is preserved. This may require careful efforts to ensure that the law reform body's social media platforms and other media outreach are clearly differentiated from those of the government of the day or of the university host. Similar considerations should also be applied by government and non-government policymakers seeking to walk the fine line between adopting resource efficient communication technology options and preserving relationships of trust with communities.

⁵⁹ Ibid.

B *Developing Innovative Approaches Through Meaningful Engagement with Students*

One of the most rewarding aspects of the Institute's work is the relationship it has with the University of Adelaide's law students, and in particular, the students from the Law Reform Course. This elective, yearlong course is offered to high-performing students on an invite-only basis and engages students in a range of activities relevant to the work of the Institute. For example, the Law Reform Course provides students with an opportunity to undertake assessment tasks involving comparative legal research and literature reviews on the topics forming the Institute's current references.⁶⁰ It also encourages students to identify consultation strategies and develop law reform options, again with reference to current Institute work. The Course also includes field visits to the Attorney General's Department, where students hear from parliamentary counsel, policy officers and the Attorney General about the law reform process from the government's perspective. The Course also provides opportunities for students to participate directly in the consultation activities of the Institute, for example as participants or minute takers in community round tables.

The work of the students in this Course has led to a range of positive outcomes for the Institute, not least of which is the benefit of quality legal research in a resource-tight environment. However, the work of students in the Course has also led to: the identification of innovative new law reform options that have translated into strong legislative outcomes; the development of new, audience-specific consultation strategies; and an improved capacity to network and build partnerships between the Institute and community organisations. The students have also gained a range of unique institutes into the legislative and law reform process and developed a broader network of contacts with which to forge possible career pathways. Some particularly highperforming students have also gone on to have direct involvement in the Institute's subsequent references, for example as research assistants.

While these insights may appear focused on the experience of university-based law reform bodies, they have application to a broader range of policymakers that rely upon the skills of interns and volunteers. Valuing the input of these 'irregular' members of staff beyond their research or quantitative input role (for example by engaging interns in relationship building and networking) can help add value and — integrity to community engagement.

⁶⁰ Some of the benefits of offering specific Law Reform Courses that encourage students to consider and discuss not just what the law *is* but what it *should be* are discussed in: Douglas L Colbert, 'Broadening Scholarship: Embracing Law Reform and Justice' (2002) 52(4) *Journal of Legal Education* 540–58; Lord Hooson Q.C., 'Reform of the Legislative Process in the Light of the Law Commissions' Work' (Speech delivered at the Annual Conference of the Association of Law Teachers, 7 April 1983), (1983) 17 *The Law Teacher* 67, 89–100; Kate Galloway et al, 'Working the Nexus: Teaching Students to Think, Read and Problem-Solve Like a Lawyer' (2016) 26(1) *Legal Education Review* 95–114; Gabrielle Appleby, Peter Burdon and Alexander Reilly, 'Critical Thinking in Legal Education: Our Journey' (2013) 23(2) *Legal Education Review* 345–77.

C Building Trust by Working with Community Partners

As Marcia Neave has observed, when law reform bodies engage with community organisations and individuals they can ‘provide information enabling people to make informed decision on policy matters and to express their views in ways in which they feel comfortable’ and give ‘people in marginalised groups in the community an opportunity to be treated with dignity and to be have their concerns taken seriously’.⁶¹ This is what the Institute experienced in the two references discussed in this article, and in particular its work with the LGBTIQ communities in South Australia. The Institute’s independent character, and genuine willingness to engage with and listen to the concerns of members of the LGBTIQ communities, were key to building the level of trust needed to enable individuals who had otherwise felt ignored, excluded and even actively discriminated against by the government agencies and state institutions to participate in the law reform process. Great care was also taken to preserve the confidentiality of community participants in the Institute’s round tables and other consultations, and permission was sought before any individual views were attributed or quoted in the Institute’s reports. Round tables were also conducted under Chatham House rules, and followed by opportunities for all participants to review the reports reflecting the discussions before they were made public or otherwise relied upon by the Institute.

Despite the often highly personal nature of the contributions made by a number of participants in the LGBTIQ Reference, the vast majority of individuals consulted were pleased and proud to be identified as contributing to the law reform process, particularly when appropriate support and background information was provided to ensure informed consent. Also important was the understanding that a true partnership involves the Institute providing value to the community organisation (for example through skills development or legal education), in addition to the process of gathering views on law reform.

The Institute’s work in this area was greatly assisted by the relationships and partnerships it was able to develop with community and service based organisations. For example, the Institute liaised closely with Intersex Australia to improve its knowledge of the experience of people born with intersex variants. It also partnered with the Adelaide-based Queer Youth Drop In Centre to facilitate engagement with young LGBTIQ South Australians, and liaised with mental health service providers and endocrinologists to obtain an insight into the lived experience of those transitioning between genders. In addition, the Institute sought assistance from the Women’s Legal Service and the South Australian Office for Women to ensure that it obtained the views of those working in the family violence sector with respect to law reform issues relating to the partial defence of provocation. For example, a special round table was facilitated for survivors of family violence that included onsite professional counselling services to provide a supportive environment participants to share their experiences with the Institute. The round tables also provided a platform for

⁶¹ Neave, ‘Law Reform and Social Justice’, above n 8, 366. See also Uhr, above n 9, 4; Neave, ‘Institutional Law Reform in Australia’, above n 9.

community groups to coordinate their own advocacy for law reform in this area, which contributed to the overall support for the removal of discriminatory laws in South Australia. As Professor Croucher observed in 2017:

The results of public consultation, including submissions, add to the information that provides the evidence base for the conclusions of a law reform inquiry, expressed as recommendations. Governments can decide not to follow the recommendations, but they can see the arguments for and against the policy solutions being advocated. And where formal tabling of law reform reports is required, the arguments are public and can be used as leverage by others who want to push for implementation, if this is not a first order priority for Government.⁶²

The Family Inheritance Inquiry also involved the Institute working closely with partner organisations, in this case, more traditional partners in the form of the Law Society, and in particular, members of the Country Lawyers Association. Supported by strong audio-visual content developed by the Institute and successful local media engagement, these groups paved the way for meaningful engagement with communities in regional South Australia. More than this, the relationships of trust developed by these groups enabled the Institute to host forums in regional centres that not only gathered views on the law reform issues arising from the Inquiry, but also delivered professional development content to the local legal profession and provided community members with access to vital legal information about the drafting of wills and estate planning. This greatly improved the profile Institute outside of metropolitan Adelaide, and generated a much stronger community response to the Inquiry than was received in relation to other aspects of the Institute's succession work.

Law reform bodies and Government policymakers around the country already possess highly developed skills in liaising with experts and building networks, particularly when it comes to the legal profession and the legal academy. However, the Institute's recent references underscore the value of applying these same skills to community organisations, including less traditional organisations such as online youth networks and others who may organise themselves in more dynamic or transient ways. The legislative success of the Institute's recent reports demonstrate that investing resources and energy in a diverse range of community relationships can deliver strong law reform results. A similar strategy appears to be actively employed by other law reform bodies in Australia and overseas, where efforts and resources are being directed towards adopting more inclusive strategies for engaging those likely to be affected by proposals for law reform, beyond those with technical legal skills or expertise.⁶³

⁶² Croucher, above n 5.

⁶³ See, eg, Martin Partington, 'The Relationship Between Law Reform and Access to Justice: A Case Study — the Renting Homes Project', (2005) 23 *Windsor Year Book of Access to Justice* 375; Natalina Nheu and Hugh McDonald, *By the People, For the People? Community Participation in Law Reform* (Law and Justice Foundation of New South Wales, 1st ed, 2010).

Reflecting on the experiences of the past two references, the Institute intends to further improve the scope of its consultations for future inquiries, for example by building partnerships with Aboriginal organisations to enable more meaningful engagement with both metropolitan and regional Aboriginal communities.

D Building Consensus and Understanding through Round Table Discussions

In a step away from the traditional approach of publishing Issues Papers and receiving written submissions, the Institute successfully utilised a round table approach for its past two references. As noted above, this approach involved the preparation of short, plain English written materials (including Fact Sheets, Discussion Questions, Background Papers or Annotated Agendas) and the hosting of a range of subject specific face-to-face⁶⁴ round tables (typically involving between ten and twenty participants) designed to help inform the Institute of the key issues and law reform options arising from its references, and to test whether a consensus view existed among community members and/or particular groups of experts. The round tables provided a safe environment for participants to share their views and discuss issues, and identified a range of innovative law reform options for the Institute to consider. Conducted under Chatham House rules, the round tables did not replace individual submissions or one-on-one meetings with individuals, experts or organisations. However, they facilitated Consensus Reports on key issues that could then be used as the basis of further community consultation by the Institute.

This approach ensured that it was the community — including experts within the community — that were guiding the direction and focus of the Institute’s work, rather than the Institute controlling the parameters of the discussion and reform options to be considered, which often occurs under the traditional Issues Paper approach. As noted above, these round tables also provided important opportunities for community members and groups to collaborate on law reform issues independently of the Institute. The end result were reports with recommendations that experts and community members were actively invested in seeing succeed. This deep level of community support undoubtedly provides significant comfort for parliamentarians considering the legislative implementation of the Institute’s recommendations, as is particularly clear in the case of the LGBTIQ reference. It also helps to build a positive profile for the Institute, which in turn solidifies and enhances traditional and highly valued relationships with the local legal profession and legal academy.

E Sharing Successes and Reflecting on Areas for Improvement

The above insights highlight a range of successful outcomes for the Institute, however further improvements can be made to maximise the quality of future consultations and engagement with the community. For example, ensuring meaningful engagement with small, traditionally underrepresented, or previously ‘invisible’ groups, such as the intersex community in South Australia, remains a challenge for law reform bodies with limited resources and expertise in identifying and supporting

⁶⁴ On occasion interstate experts participated via videoconference.

individuals from these groups engaging with law reform processes. In addition, accessing regional and remote communities can be challenging, even when electronic consultation strategies are employed, particularly if the content of the law reform reference demands considerable background knowledge to facilitate meaningful community engagement. As research undertaken by the Law and Justice Foundation of New South Wales found, participating in law reform is ‘challenging, complex, and time and resource intensive’ and while participation opportunities may be technically available to everyone, ‘the abilities of people, especially disadvantaged people and the organisations that often represent them, do not manifest in substantively equal ways.’⁶⁵

Successfully managing relationships with the media can also present challenges for law reform bodies who are on the one hand keen to take their public education role seriously, and on the other hand are acutely aware of the need to avoid entering into the political discourse on any particular law reform proposal. As the Hon Michael Kirby observed, law reformers can find themselves:

constantly torn between getting too close to politicians and the media, in order to attract interest in, and action on their proposals. Or keeping too great a distance, in order to avoid seduction and so as to maintain product differentiation in the creation of reforming ideas.⁶⁶

These challenges highlight the need for law reform bodies in Australia and elsewhere to regularly share their experiences and document their successes. In sharing these insights, the Institute is conscious that its counterparts around Australia are also achieving strong legislative results and experiencing significant success when it comes to engaging communities in meaningful and innovative ways. The Institute encourages all law reform bodies and policymakers to share these experiences, so that we can all reflect upon how to make the most of limited resources and capitalise on new ways to communicate with the community about law reform and policy ideas.

V CONCLUSION

In order to overcome the cynicism and sense of disempowerment that at times threatens to overcome Western democracies, it is integral that law and policymakers of all stripes embrace community engagement with enthusiasm and rigour. It is also critical that these bodies continually report and reflect on their practices, in order to improve the deliberative quality of their community engagement.

⁶⁵ Nheu and McDonald, above n 64.

⁶⁶ Michael Kirby, ‘Law Reform — Past, Present, Future’ (Speech delivered at the Alberta Law Reform Institute, Edmonton, 2 June 2008) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_2jun08.pdf>; see also Sir Peter North: ‘Law Reform: Problems and Pitfalls’ (1999) 33 *UBC Law Review* 37, 45; Croucher, above n 5.

As noted above, the Institute is a modest law reform body with a flexible structure that has not always enjoyed the admiration of its bigger, eastern state cousins or luminaries of the legal profession. For example, the inaugural Chair of the Australian Law Reform Institute, the Hon Michael Kirby, once described law reform bodies like the Institute as:

under-funded, comprised of serious but over-worked lawyers, performing their law reform tasks at the ‘fag end’ of a busy day. Although some of the work of such bodies makes it into legislation, inevitably the output tends to be small. The pace is cautious. The research facilities (especially for social data) are tiny. The capacity for genuine public consultation is miniscule. And the ability to provide drafts of legislation to give effect to the reform ideas is generally non-existent.⁶⁷

While it is a small, part-time, law reform body, the experiences described above suggest that the Institute is beginning to make a significant mark on the legislative landscape in South Australia, renewing the State’s strong reputation as a jurisdiction of innovative legislative practice and promoter of social justice. The above experiences also point to the Institute playing an important leadership role when it comes to innovation in consultation and community engagement strategies. For once, the Institute looks forward to continuing to prove the Hon Michael Kirby wrong!

⁶⁷ Michael Kirby, ‘Changing Fashions and Enduring Values in Law Reform’ (Speech delivered at the Conference on Law Reform on Hong Kong: Does it Need Reform?, Hong Kong, 17 September 2011) <<http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform>>.

FACT-FINDING AND REPORT WRITING BY UN HUMAN RIGHTS MANDATE HOLDERS

ABSTRACT

In this article, derived and enlarged from a recorded conversation, the participants explore the methodology of United Nations ('UN') human rights mandate holders as earlier examined by Philip Alston, Sarah Knuckey and others in *The Transformation of Human Rights Fact-Finding*.¹ By reference to his experience in the UN Commission of Inquiry ('COI') on Human Rights Violations in the Democratic People's Republic of Korea ('the DPRK' or 'North Korea'), the Hon Michael Kirby explains: the reasons for, and consequences of, the distinctive methodology there adopted; the challenges of coping with often emotional testimony; available mechanisms for dispassion and their limitations; the tradition of public hearings in inquiries in Australia; approaches to 'the moment of decision' on contested issues; the follow-up to the report of the COI on the DPRK; and several general lessons about effectiveness of formal report writing. The article begins with an introduction by Rebecca LaForgia based on an analysis of recent scholarly examinations of the process of international human rights fact-finding.

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¹ This conversation was undertaken with video recording for use in the class conducted by Dr LaForgia on the transformation of human rights fact-finding. The transcript has been amended, edited and elaborated for clarity and sense and to add references and further reading to enhance the value of the conversation. The authors wish to extend their thanks for: the partial funding by the University of Adelaide Law School; the editing of questions by Mr Philip Elms, Multimedia Project Coordinator, Faculty of the Professions; the private funding of this video recording. Both authors acknowledge the assistance they have derived from the recent publication by two Australian scholars in New York, Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding*, (Oxford University Press, 2016). In an earlier life, Sarah Knuckey was an Associate to Justice Kirby in the High Court of Australia. See also Christina Abraham and M Cherif Bassiouni (eds), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies*, (International Institute of Higher Studies in Criminal Sciences, 2013).

I INTRODUCTION

A contested and yet important question in international law is: how do we know facts?² In the absence of a compulsory world court that covers all disputes,³ the question of what we know, how we know it, and who is allowed to say what the ‘truth’ is has legal and political significance.⁴ Whatever the area — international humanitarian law, international human rights, environmental law, use of force, or collective security — fact-finding is central to action, inaction, legal judgment, framing of events, and accountability.⁵

We live in an era that has banished certainty, but in which certainty has lost nothing of its allure. It may therefore come as no surprise that fact-finding as a particular institution of international law is witnessing a new popularity ... it has never seemed more essential for efforts at promoting human rights to develop a clear picture of what actually is going on.⁶

The advent of the internet and social media has increased our capacity for information creation and dissemination across and within borders.⁷ With this new capacity, the critical skill of discerning fact from opinion and assessing the legitimacy of fact-finding processes is vital. In acknowledgement of this need, in 2015 fact-finding was introduced as a topic in the subject of International Law at the University of Adelaide. Within the already full syllabus, an hour was found to lecture on the topic. However, students found it difficult in a brief, one-hour session to enter into broad critical engagement with international fact-finding. Yet, to omit it would be to omit an important analysis of power and international law:

One could say fact-finding is a form of power. Facts are all-important in justifying international action, as we have been reminded at regular intervals from the invasion of Iraq based on the supposed fact that it possessed weapons of mass destruction, to threats of use of force against the Syrian regime that was accused of using chemical weapons against its population. The failure to produce facts

² Alston and Knuckey, ‘*The Transformation of Human Rights Fact-Finding*’ above n 2; M Cherif Bassiouni, ‘Appraising UN Justice-Related Fact-Finding Missions’ (2001) 5 *Journal of Law and Policy* 35.

³ Shiri Krebs, ‘The Legalization of Truth in International Fact-Finding’ (2017) 18 *Chicago Journal of International Law* 83.

⁴ See generally Frédéric Mégret, ‘Do Facts Exist, Can They Be “Found”, and Does It Matter?’ in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford Scholarship Online, 2016) 27.

⁵ Théo Boutruche, ‘Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice’ (2011) 16 *Journal of Conflict & Security Law* 105. However, the turn to legalisation of facts is not necessarily accepted as an unmitigated good: see the empirical work of Krebs, above n 3.

⁶ Mégret, above n 4, 27.

⁷ Ibid 37.

may paralyse action, as when international inaction is justified by the failure to establish that genocide is ongoing (Rwanda, Darfur).⁸

The importance of these examples used by Mégret is largely self-evident. In the context of Iraq, facts, which were later proven to be false, supported the violent invasion of the country. At the other extreme, in the context of Rwanda, facts, which were tragically obvious, did not generate any swift international action. Mégret is alluding to how fact-finding is more than searching for particular truths, it is also the process of constructing consensus around what it is that we believe and consequently what it is that we will act upon. Fact-finding is therefore a complex area of study. This is to be contrasted with traditional fact-finding — for example, within the International Court of Justice. In this context we are on the familiar legal territory of observing the judicial authority to find facts, as part of assessing a dispute. It may well be that a decision is subsequently criticised for the burden of proof or approach the court uses in fact-finding. However, this critique is quite distinct from what it is that we are discussing here. The discussion in the context of this introduction is in the area of fact-finding outside of the compulsory judicial context. As stated above, it is necessary to observe fact finding beyond the compulsory judicial context, as international law often operates without compulsory judicial oversight. There is some responsibility to understand how the truths that are being put before us are being constructed and used to mobilise action and inaction under international law. An approach to this pedagogical problem of how to cover a dense topic in a short time and achieve engagement was to introduce a change in emphasis in the teaching of the topic.

The teaching moved away from covering the topic in broad themes and theory to an emphasis on the case study of an individual fact-finder. The Hon Michael Kirby generously agreed to be interviewed about his experience as Chair of the United Nations ('UN') Commission of Inquiry ('COI') on the Democratic People's Republic of Korea ('the DPRK' or 'North Korea').⁹ This interview was filmed, creating a valuable audiovisual record for the students and the public. The film gave students, in a short space of time, an immediate connection with the Hon Michael Kirby. As his voice and image played in the lecture theatre, or streamed into their homes if they were off-campus, the students watched and listened to him, as a finder of facts, telling the story of grappling with testimony, process and emotion. The aim was to have students engage through the filmed interview in an immediately relatable and practical perspective on fact-finding, in which they could see the fact-finder interviewed about his thoughts, emotions and decision-making — to show, rather than to lecture, and then to link this with supporting scholarly readings.¹⁰ Informal feedback from students confirms that this approach has worked extremely well, and humanised the subject of fact-finding, thereby engaging the students.

⁸ Ibid 28.

⁹ Michael Kirby, 'UN Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea: Ten Lessons' (2014) 15 *Melbourne Journal of International Law* 291.

¹⁰ Ibid.

Following this introduction is an edited written transcript of the Hon Michael Kirby audiovisual interview. However, the edited transcript should not be read simply as a record of a teaching initiative. The interview contributes to some of the deeper themes in the area of international fact-finding. This introduction takes some of the observations and themes from the Hon Michael Kirby interview and places them within several themes that arise from the international fact-finding literature, drawing specifically on the work of Alston and Knuckey¹¹ and three important themes raised by the work of Mégret.¹² This introduction is therefore a brief companion to the record of the transcript of the interview that follows.

Three particular themes will be explored. Firstly, this interview promotes what can be described as an ‘internal perspective’ of fact-finding: it is a firsthand account of the fact-finder’s experience in creating process, in listening to witnesses, and so on. This firsthand experience, as Alston and Knuckey note from their own experiences, naturally promotes questioning and engagement with facts.¹³ Being exposed to these internal reflections is valuable because it naturally promotes engagement and critical questioning, such as: ‘would I have done that?’ or ‘I see why that was done’. This questioning that is promoted in the firsthand account is significant for developing robust methods of fact-finding. Secondly, the interview highlights one of the challenges faced in fact-finding: that of indeterminacy and contestability of facts. The literature deals with this tension. On the one hand, we know that some facts can be contested; yet, on the other, to contest all facts is to leave no consensus, and gives the appearance that legal judgments (based on contested facts) would seem as relativistic legal judgments themselves.¹⁴ One of the methods of distinguishing fact from contested opinion is to engage in a public and legitimate process.¹⁵ The interview with the Hon Michael Kirby is a frank reflection on the importance of process and extracts from the interview will highlight this. Lastly, fact-finding is seen increasingly as based on communication: a cumulative dialogue and engaged activity.¹⁶ It is not a one-off activity in which facts are found and received. To that extent, we are all participants in the communication about facts. This interview, in both the audiovisual and the written versions, is part of that communicative cycle. Lastly, the theme of listening, in the context of facts, is introduced.¹⁷ Facts come from somewhere, and often, at least in the context of international human rights, they are from individuals. The emphasis on listening to individuals is actually part of the ethics of fact-finding.

¹¹ Philip Alston and Sarah Knuckey, ‘The Transformation of Human Rights Fact-Finding: Challenges and Opportunities’ in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford University Press, 2016) 3.

¹² Mégret, above n 4.

¹³ Alston and Knuckey, ‘The Transformation of Human Rights Fact-Finding: Challenges and Opportunities’, above n 11.

¹⁴ Mégret, above n 4.

¹⁵ Ibid.

¹⁶ Ibid 27, 42.

¹⁷ Ibid 27, 47.

We can see this ethic play out when we consider North Korea, in the recent firing of missiles, to represent a fearful existential entity. However, it is also the case that North Korean individuals, like those who have been listened to for the COI, are this existential entity, 'North Korea'. The ethics of listening to facts on which the Hon Michael Kirby reflects during his interview reminds us of these individuals within the state. This does not resolve the existential crisis; however, it does create a centre from which to remind ourselves of the humanity within the State of North Korea.

A Reading the Interview for Internal and On the Ground Experience

The interview that follows is a firsthand account of the chair of the COI on the DPRK, the Hon Michael Kirby. As a firsthand account, it places us closer to the field of decision-making. The questions for the interview were deliberately posed so that they would reach the heart of what it means to be a responsible individual in a fact-finding context. The answers by the Hon Michael Kirby reveal his reflections and thinking as an individual. This is what we might call the 'internal perspective', the idea of being engaged in practically gathering facts. Participation within fact-finding motivated Alston and Knuckey's scholarly work on fact-finding.¹⁸ Their scholarly work originated from questions the authors posed to themselves from the fact-finding they had personally undertaken.¹⁹ The authors noted:

With each investigation, we sought to improve our methods ... yet ... there was little scholarly writing to which we could turn. It became apparent that the richest debates were occurring among the *participants* and subjects of investigations, in the offices of NGOs, over dinner during commission of inquiry investigations, and in other informal locations.²⁰

We can see that in Alston and Knuckey's experience, the cycle of participation drives the critical perspective. One objective in reading the interview is to gain this sense of being a participant, of observing the decision-maker, the fact-finder, at work. Seeing and listening to the firsthand account of the fact-finder — in this case, the Hon Michael Kirby — actually reflecting on his processes leads to a decision-making empathy, raising critical questions organically, such as 'if I was in the commission, how would I find the truth?' and 'what would the truth look like?' Through the interviewee's immediacy and candid observations, we can 'take greater account of what

¹⁸ Alston and Knuckey, 'The Transformation of Human Rights Fact-Finding: Challenges and Opportunities', above n 11.

¹⁹ *Ibid* 4:

'Through Philip Alston's mandate as the UN Human Rights Council's Special Rapporteur on extrajudicial executions, [he and Knuckey] jointly undertook investigations in Brazil, Afghanistan, Kenya, the Democratic Republic of the Congo, Albania, the Central African Republic, Ecuador, Colombia, and the United States. Sarah Knuckey has also carried out investigations in Pakistan, as well as of protesters' rights in the United States, and over a long period of time in Papua New Guinea.'

²⁰ *Ibid* (emphasis added).

actually happens in practice'²¹ and thereby create 'critical approaches'²² beyond what is 'descriptive',²³ thus instilling an engaged inquiring perspective, which is significant for approaching the area of fact-finding.

B *Legitimacy of Facts/Truth?*

One of the other core themes that the fact-finding literature deals with is the indeterminacy and contestability of interpretations and opinions.²⁴ This is not new; the contestability of facts and truth has arisen throughout history. However, radical contestability arises particularly in our time because of the amount of information available and the ability to comment on this information:

The Internet has if anything made facts both less and more accessible, and ensured that every 'fact' is immediately in competition with a variety of 'counter-facts.' ... The vast availability of facts and yet the poverty of what often passes as facts is something that the more institutional and formal exercises of fact-finding must reckon with. One of the ironies of the turn to facts, then, is it occurs against the background of a world in which nothing has ever seemed more virtual, and where it has never seemed as easy to contest the uncontestable.²⁵

An important challenge of fact-finding in international law is therefore how to manage this question of indeterminacy and contestability. Mégret centres on legitimacy achieved in part through due process as a means of countering indeterminacy:

most importantly, facts are derived from certain recognized *methods* of constructing them. Even a perfectly impartial fact-finder would be suspicious if he failed to follow such a method. Opinion is not necessarily without method, but facts adhere to some presumably exacting and recognized procedure. In the judicial context, the fairness of the procedure is in itself seen as a guarantee of proper fact-finding. The loss of the recognizable dispute settlement element that was so central to classical fact-finding, however, means that it is not clear who the parties to a human rights fact-finding exercise are (indeed, that there are parties at all).²⁶

The Hon Michael Kirby speaks of this in several ways. In several sections in the transcript that forms Part II of this article he reflects on how the COI process was undertaken with 'manifest due process', 'fairness' and 'sensitivity to the witnesses', in a 'public forum where the processes and outcomes are subject to informed

²¹ Ibid 3.

²² Ibid 4.

²³ Ibid.

²⁴ Mégret, above n 4; see also, for an interesting empirical response to indeterminacy, Krebs, above n 3, 94.

²⁵ Mégret, above n 4, 37.

²⁶ Ibid 32 (emphasis in original).

scrutiny'. However, one particular comment by the Hon Michael Kirby — 'those who gather the evidence can themselves be judged' — encapsulates the point Mégret was making on the importance of process.²⁷ The willingness — indeed, the inherent openness to being judged — seems to encompass a certain acceptance of contestability and indeterminacy; that is, all may not be perfect always. Yet, at the same time, the comment remains faithful to developing something other than mere opinions or impressions towards a publicly verifiable factual position. Reading this section of the interview in particular plays out in a practical context the theoretical dilemmas and observations in the literature on fact-finding, regarding indeterminacy, legitimacy and process.²⁸

C Communication and Fact-Finding

The method of communication²⁹ is also a central to fact-finding. For Mégret, facts are 'social construction',³⁰ which, in turn, leads to a 'slow accumulation'.³¹ Communication is, according to Mégret, how facts can become 'plausible'.³² We are ourselves part of the construction of facts as we communicate and discuss. The implication of Mégret's views is not that communication would lead to a constant revisiting of the conclusions of the COI. Mégret's point is that the communication of facts assists in them becoming socially relevant facts. Therefore, this interview, which is forming part of teaching, is itself a commitment to this approach to fact-finding. If this is the case, we can see that this interview operates as a case study of how to communicate facts. The Hon Michael Kirby's act of communicating in this interview makes knowledge egalitarian.³³ It is publicly available and produced in an accessible audiovisual form. The interview with the Hon Michael Kirby can be seen as not separate from the COI report but part of this slow accumulation,³⁴ part of the social construction. It is open to anyone to read the interview, including: political scientists, journalists, and lay readers.

²⁷ Ibid 31, 42, 45. Michael Kirby, 'Where does Truth Lie? Challenges and Imperatives of Fact-Finding in Trial, Appellate, Civil and Criminal Courts and International Commissions of Inquiry' (2018) 41(2) *University of New South Wales Law Journal* (forthcoming).

²⁸ Ibid.

²⁹ Ibid 41–2.

³⁰ Ibid 41.

³¹ Ibid 42.

³² Ibid 44.

³³ Krebs, above n 3. Here, Krebs notes the difficulty in representing the truth in legal terms, which she describes as a 'price tag' lacking, she alleges, 'participatory value': at 83. In this sense, the COI counters those tendencies in the way it communicates. See also the difference between determining and disseminating facts: at 136.

³⁴ Mégret, above n 4, 42.

D *The Ethics of Listening as Part of Facts*

Lastly, there is an important ethical dimension to fact-finding. It is a form of listening to the other:

there is *also an ethical dimension to facts*. Refusing to believe what one has no way of disproving, asking for perfection in fact-finding, excluding facts that provoke narrative dissonance, always assuming the worse [sic] in others, engaging in conspiracy theories: all such behavior that presents itself as based on a critique of knowledge may in the end merely reveal moral ineptitude. [The person who does this] is perhaps less a flawed scientist/historian than he is someone who has distanced himself *from the ability to listen to witnesses*, hear sad stories of pain and grief, and, fundamentally, empathize with humanity.³⁵

The intersection between listening and facts is a subtle but significant one. Listening has a lineage in political theory.³⁶ Mégret's observation is, however, a contained idea of the ethical role for the consumer of facts. Mégret is not referring to a direct link which asserts a rehabilitative or cathartic role that listening will play for victims. Indeed, in the example that he gives of the Holocaust many of the victims are dead. Nevertheless, he suggests that there is still an ethical requirement that we remain open to their suffering.³⁷ The primary intimate listening for the COI on the DPRK has been performed predominantly by the Hon Michael Kirby. Indeed we can see this in reflections of the Hon Michael Kirby in Part II of this article regarding the value of listening in the fact-finding process: 'the COI on the DPRK gave a voice to people who had never previously been *listened to* with respect for their suffering and the affront to their human dignity. They had not previously enjoyed respect for their voices'. Now what remains is listening by the class, the reader, the public of this testimony. It is this remaining element which Mégret suggests has an ethical dimension. He is asking that we do not dispute, deny or require 'perfection', that we remain open to listening to facts and suffering of others. This is a powerful and unifying concept by Mégret: facts are created by the 'ability to listen', and we ourselves participate in the 'ethics' of fact-finding through our 'ability to listen'.

³⁵ Ibid 46–7 (emphasis altered).

³⁶ See Susan Bickford, *The Dissonance of Democracy: Listening, Conflict, and Citizenship* (Cornell University Press, 1996); Andrew Dobson, *Listening for Democracy: Recognition, Representation, Reconciliation* (Oxford University Press, 2014).

³⁷ '[A]ttention requires a profound stilling of the self ... To be genuinely open to another, "all that I call 'I' has to be passive"': Bickford, above n 43, 145 quoting Simone Weil, *Gravity and Grace* (Octagon Books, 1979) 171. See also David Beard, 'A Broader Understanding of the Ethics of Listening: Philosophy, Cultural Studies, Media Studies and the Ethical Listening Subject' (2009) 23 *International Journal of Listening* 7; Jerry Catt-Oliason, 'Essay: On *The Dissonance of Democracy: Listening, Conflict, and Citizenship*' (2005) 19 *International Journal of Listening* 48.

E Conclusion

The interview transcript that follows enables the reader to see the internal point of view and the moments of decision for a fact-finder; it also reveals the importance of process. Further, the interview acts as a form of open communication and endorses, both explicitly and in the humanity with which the process is described, the ethics of listening in fact-finding. The interview therefore reflects major themes present in the broader debates in fact-finding, in an accessible manner. For the teaching of fact-finding at the University of Adelaide, we are indebted to the openness of the Hon Michael Kirby in describing his experiences and reflections and recording them audiovisually and in writing.

II DIALOGUE ON THE REPORT OF THE COI ON THE DPRK

*A REBECCA LAFORGIA: The report of the COI on the DPRK
was in some ways unique both in content and in style.
What were the basic reasons for the differences?*³⁸

THE HON MICHAEL KIRBY: The usual way that inquiries are conducted for the UN, in the environment of the Human Rights Council ('HRC') (or other similar environments), is that they are undertaken according to the techniques of the civil law tradition. That is to say, they are usually conducted in a private inquisitorial manner by appointees, usually professors or diplomats. I am not against professors, being myself an honorary professor of various universities. Nor do I disrespect officials. The inquisitorial technique is generally cost-effective. The evidence is basically gathered in confidential sessions, conducted in secret by a process of investigative interrogation.³⁹

That is not the usual common law way. The common law technique for eliciting evidence was originally to do so in the presence of a jury, sitting in public. Members of the concerned public were able to watch the proceeding and to judge the effectiveness and fairness of the process and also to assess the accuracy of the outcome. Later, juries were generally replaced by judges sitting alone. But they too performed most

³⁸ Please note these are not direct quotes from the original questions — which were much longer and open-ended. These questions as replicated in Part II have been edited down to reflect the core nature of the question asked. This was done to enable the subtitles to be made so that the interview was accessible in class. For assistance in the editing of questions the authors are grateful to Mr Philip Elms, Multimedia Project Coordinator, Faculty of the Professions.

³⁹ See Christian Henderson (ed) *Commissions of Inquiry: Problems and Prospects* (Bloomsbury, 2017). See especially, for a description and illustration of the variety of COIs, Théo Boutruche, 'Selectivity and Choices in Human Rights Fact-Finding: Reconciling Subjectivity with Objectivity?' in Christian Henderson (ed) *Commissions of Inquiry: Problems and Prospects* (Bloomsbury, 2017) 287; Alison Bisset 'Commissions of Inquiry and Procedural Fairness' in Christian Henderson (ed) *Commissions of Inquiry: Problems and Prospects* (Bloomsbury, 2017) 309.

of their functions in public. There is a lot to be said for the common law system.⁴⁰ This is especially so in the area of international human rights disputes and allegations of serious human rights violations.

Of their nature, if such issues have come, or may in future come, before an international court, tribunal or inquiry, such matters are generally going to involve horrifying or distressing subjects. Therefore, it is important that they be carried out, as far as possible, dispassionately, with manifest due process, with fairness to everybody involved, with sensitivity to the witnesses, and in a public forum where the processes and outcomes are subject to informed scrutiny. In this way, those who gather the evidence can themselves be judged. The international community can judge, with greater assurance, the fairness of the process and the accuracy of the outcome.

B REBECCA LAFORGIA: In the nature of COIs for the UN HRC, the evidence is often going to be heart-rending. How did you cope with such testimony and preserve dispassion, essential to writing an accurate and convincing report?

THE HON MICHAEL KIRBY: I am told by my partner, Johan van Vloten, that in the course of our lives together — more than 48 years — I have become more remote and reserved. This is not unusual for people who have held judicial and other similar responsibilities. You have, to some extent, to make sure that you are not allowing yourself to get too emotional about the issues before you. Otherwise, the blood may rush to your head and you will not be concentrating on what is objectively being demonstrated by the testimony. Feelings and emotions are inescapable in any system of human endeavour. However, they should not be allowed to overwhelm dispassion and accurate analysis. This is true of the work of judges and lawyers in national courts and tribunals. It is also true of decision-makers in international commissions of inquiry.

My partner's assessment of me is probably right. Over the years, I have become less emotional. At high school, an excellent teacher, Ron Horan, wrote on my annual report, 'Michael is a good student. But he will need to become more analytical in thought.'⁴¹ I puzzled over this comment at the time; but I came to take it seriously. The law and the law's requirements of due process require you to do that. Otherwise, you might get so upset by the wrongs and horrors that you are being told that you do not concentrate on the anterior questions: Who is responsible for this? Who (if anyone) should be rendered accountable for this? Are the people who are under your spotlight actually the guilty parties in respect of the complaints? All of these questions, and many more, need to be kept in mind in the decision-making process.

⁴⁰ Michael Kirby, 'The UN Report on North Korea: How the United Nations Met the Common Law' (2015) 27 *New South Wales Judicial Officers' Bulletin* 69.

⁴¹ A J Brown, *Michael Kirby: Paradoxes & Principles* (Federation Press, 2011) 40.

C REBECCA LAFORGIA: Do any particular instances of testimony in the COI on the DPRK illustrate any special challenge to dispassionate reporting that you faced?

THE HON MICHAEL KIRBY: On two occasions in the course of the hearings of the UN COI on the DPRK I felt that I was on the brink of breaking down because the evidence was so awful and so shocking to me. As someone who had served as an Australian judge for 34 years, I had not expected that I would ever face anything quite like what I was hearing. These occasions arose during evidence about the horrible conditions of the detention camps for political prisoners established in North Korea. According to that testimony, people and their families were put into frightful living and working conditions. Often they were not given adequate food. Detainees were dying overnight of starvation. Their bodies were collected in the morning, just like the bodies in the concentration camps of the Nazis.⁴² Then there was the case of a woman who was forced to drown her own baby when she was returned to North Korea from the People's Republic of China ('China').⁴³ This was because she had left her homeland illegally and her baby was the child of a Han Chinese father. North Koreans are often racist in their attitudes towards non-Koreans, especially in the case of interracial births. As an Australian, raised in the era of the White Australia policy,⁴⁴ I was aware of that attitude. I was sensitive to such evidence.

These were terrible facts. They were so graphically, quietly and apparently dispassionately told by the witnesses that you felt you had to rebuke yourself that you were overreacting, whereas the witnesses did not appear to do so. They had gone through their stories in their own mind so many times. They told their stories unemotionally. That was the way the testimony came out. It seemed strange and even a little unreal that those who had suffered and witnessed such suffering could be so apparently dispassionate and even uninvolved in the horrors they were recounting. However, I came to conclude that this was way they had learned to endure the unendurable. If one visits a Holocaust museum and views the filmed interviews recorded

⁴² United Nations Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, 25th sess, Agenda Item 4, UN Doc A/HRC/25/CRP.1 (7 February 2014) ('*Report of the Detailed Findings of the COI on the DPRK*') 244 [780]–[781].

⁴³ *Ibid* 125–6 [432].

⁴⁴ The immigration policy of the Commonwealth of Australia based on the near total exclusion of immigrants of non-Caucasian ethnicity. One of the first legislative measures to enforce the Policy was adopted in colonial times by the Parliament of Victoria in 1855. By this Chinese immigration was restricted. An inter-colonial conference in 1896 concluded that the same policy should apply to other non-'white' races. Despite resistance by the British Secretary of State for the Colonies because of Imperial sensitivities, he eventually suggested the use of a dictation test. This applied until 1958. The Commonwealth followed the colonial practice, which enjoyed broad cross-political support. See, eg, *Pacific Island Labourers Act 1901* (Cth). The Policy was gradually abandoned after 1958. Peter E Nygh and Peter Butt (eds), *Butterworths Australian Legal Dictionary* (Butterworths, 1997) 1266.

by survivors of the Nazi brutalities displayed there, one sees examples of a similar phenomenon. Human memory and feelings discover ways to cope with horrifying experiences. In any case, in some circumstances the quest for total dispassion may be illusory and impossible.

D REBECCA LAFORGIA: In producing the COI report did you follow methods learned from your earlier responsibilities in Australia?

THE HON MICHAEL KIRBY: Sir Zelman Cowen,⁴⁵ who was a part-time Commissioner of the Australian Law Reform Commission ('ALRC') in the 1970s (1976–77), once told me that I had to avoid the problem of the centipede. Having so many legs, there was a risk that it might not make up its mind as to which leg it would use first to move forward. In that quandary, it might not move at all: even for example, when it needed to move, when there was a predator around or an urgent obligation to be fulfilled. That was one of his lessons for us in the ALRC. It was a lesson I put to good use in the COI on the DPRK.

Perfection is often the enemy of the good. If you wait forever for perfect and overwhelming evidence, you may never get the report written. In the meantime, injustice will keep happening. You have to recognise that you are a human being. You may make mistakes. You may even reach serious mis-assessments of the truthfulness of a witness: as to the accuracy or inaccuracy of what you have been told. Yet still you cannot dilly-dally. You have to get on with it. I did not have difficulty doing that. Nor did the COI. We produced our report, on time, within budget and with unanimity.

Remember that, on my appointment, I had already had 25 years — a quarter of a century — of experience as an appellate judge in Australia. My entire judicial career was even longer. I had experience as a young lawyer, as an articled clerk, as a solicitor, a barrister, seeing and taking part in contested cases before Australian courts and tribunals. That was at a time when orality was the dominant feature of the daily practice of Australian law. Most cases were conducted in continuous oral trials: in court, and often before a civil or criminal jury. The case always had its own momentum. It was designed to reach a conclusion with defined parameters as to time and procedures. You just had to get on with it and do the best you could, sometimes with the imperfect and incomplete materials presented during the hearing. The job of the lawyer was to help the process reach its conclusion: hopefully favourable to one's client. And to make sure that the most convincing evidence available was tendered and admitted to fulfil that objective. Training of this kind promotes attention to an efficient methodology. The effective use of the limited available time for a hearing is an important element of the daily practice of litigation before Australian (and other) national courts.

⁴⁵ (1919–2011); Former Dean of Law at Melbourne University, Vice Chancellor University of New England and University of Queensland, and Governor-General of Australia (1977–82): A J Brown, above n 48, 112.

When I served on the High Court of Australia (and in the Court of Appeal of New South Wales) I was always working efficiently towards the end product — reasons for judgment supported by detailed, and hopefully persuasive, evidence and arguments. Justice D L Mahoney, in the Court of Appeal, taught me that the appellate judge should never waste his or her time. You should always be trying to identify at least what the problems were which you needed to solve. So I continued a mode of preparation that basically followed a methodology I had adopted as a law student. I continuously drew tree diagrams of arrows and sub-arrows and sub-sub-arrows identifying the issues. I did this to stimulate and focus my mind. To make sure that I addressed precisely the many questions I had to answer. This also helped identify the big branches of the tree, to ensure that I would retain a focus on the big picture and the overall concepts that were in play, as well as the smaller problems that I had to solve that fed into the resolution of the big picture.⁴⁶

My service of ten years in the ALRC was also very instructive. In the early years of that service I was taught by a Professor of the University of Adelaide, David St L Kelly, how to conceptualise issues. There I was in the COI on the DPRK, bombarded by a huge number of diverse facts relevant to North Korea. However, my mind was constantly being directed towards particular factual and legal ends. One such legal end was: Does this evidence, if accepted, amount to ‘genocide’ in international law?⁴⁷ Does this evidence, if accepted, amount to a ‘crime against humanity’ in international law?⁴⁸ If so, what are the categories in which the evidence ticks that box? Are there any categories where it fails to meet the legal requirements? Do the facts justify such a serious conclusion? Or do they prove a different human right violation, which does not amount to a ‘crime against humanity’? All of this is going on in your mind, in my case working all the while with the tree diagrams. Now I come to the final point.

⁴⁶ A photograph of one such tree diagram (photo 28.1) appears in *ibid*, 390.

⁴⁷ The COI on DPRK received submissions about the alleged commission of ‘genocide’. These submissions were analysed in the *Report on the Detailed Findings of the COI on the DPRK*, UN Doc A/HRC/25/CRP.1, 350–1 [1155]–[1159]. The COI concluded that, in accordance with the definition of ‘genocide’ in the *Convention on the Prevention and Punishment on the Crime of Genocide*, opened for signature 9 December 1948, 1021 UNTS 278 (entered into force 12 January 1951) art 2 (and the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) art 6) genocide had not been established by the evidence. The COI members favoured a broader modern content to ‘genocide’ to include ‘politicide’: *Report on the Detailed Findings of the COI on the DPRK*, UN Doc A/HRC/25/CRP.1, 351 [1158]. But it was determined that this was not the present state of international law and that, accordingly, genocide had not been established: at 350 [1157].

⁴⁸ The definition of ‘crimes against humanity’ under international law was explained by reference to the *Charter of the International Military Tribunal at Nuremberg*, opened for signature 8 August 1945, 251 UNTS 280 (entered into force 8 August 1951) and the jurisprudence of the Nuremberg and Tokyo Tribunals and more recent international criminal tribunals for the former Yugoslavia and Rwanda; see *Report on the Detailed Findings of the COI on the DPRK*, UN Doc A/HRC/25/CRP.1, 320–22 [1026]–[1032].

How the mind responds to a particular factual dispute or legal dispute constitutes something of a puzzle. There is not much written about it. Judges do not tend to write about it. I wrote an article on the topic many years ago after a speech I gave at Charles Sturt University. It is published in the *Australian Bar Review*.⁴⁹ It addresses what I called ‘the moment of decision’. How does one arrive at the ‘moment of decision’? How, when one is moving towards a particular conclusion, do some features of the law or of the facts suddenly come at the decision-maker like an unexpected iceberg? The *Titanic* of one’s mind is moving towards this iceberg. You have got to get out of the way as quickly as possible because your postulated decision simply does not work and, if it collides with the proposed reasoning it will manifestly bring the forward momentum of one’s reassuring to a shuddering halt. You realise that your initial conclusion was wrong or at least, unconvincing. That conclusion will not stand. It will not convince you. And if it does not convince you, it will almost certainly not convince others.

Why is there so little written about ‘the moment of decision’ and how judges make decisions? Or in this case, about how a UN COI makes a decision? It is, I think, because the judicial or other formal decision-maker is like the centipede. You just run forward and you get the task done. Then you look back on the reasons you have prepared for the conclusion you have preferred. You redraft and redraft them yet again; and redraft them yet once more or many times. In the High Court of Australia, I believe that I typically redrafted my reasons more than other judges. Taking pains over making one’s text accessible and understandable is a very important duty of any formal decision-maker. Certainly, I have always taken clarity and accessibility of my reasons very seriously. Clarity will help argumentation. Either it will reveal why the reasoning should be accepted. Or it will disclose the weaknesses which, unrepaired, will make the reasoning unconvincing either as a matter of fact or of law or both.

E REBECCA LAFORGIA: Have there been any immediate outcomes to the report of the COI on the DPRK?

THE HON MICHAEL KIRBY: After the report of the COI on the DPRK was delivered to the HRC, I went to New York on another mandate⁵⁰ that I received from

⁴⁹ Michael Kirby, ‘Judging: Reflections on the Moment of Decision’ (1999) 18 *Australian Bar Review* 4.

⁵⁰ The reference is to the appointment of the Hon Michael Kirby in 2015 as a member of the UN Secretary-General’s High-Level Panel on Access to Essential Medicines and as Chair of the Expert Advisory Group of that panel (2015–16). The report of the UN Secretary-General’s High-Level Panel on Access to Essential Medicines was delivered in September 2016. It also undertook public hearings in London and Johannesburg, the latter with telecommunication links to Bangkok: Ruth Dreifuss and Festus Gontabanye Mogae (co-chairs), ‘Report of UN Secretary-General’s High-Level Panel on Access to Essential Medicines’ (Final Report, UN Secretary-General’s High-Level Panel on Access to Health Technologies, 14 September 2016) annex 2 (*How the High-Level Panel Reached its Conclusions*). Earlier, in Judith Levine, ‘Rights, Risks, Health’ (Final Report, UN Development Programme, Global Commission on HIV and the Law, 9 July 2012), a similar methodology of public

the Secretary-General, Ban Ki-moon. I was received by him, and he again made the point that the report of the Commission of Inquiry on North Korea was an extremely important document in the UN system. Many of the people who work in human rights have been impressed by our COI's adoption of common law procedures. This is not the usual way that the UN human rights mandates are discharged. The usual way involves inquisitorial investigation behind closed doors. The common law methodology places a premium on the adoption of procedures that are undertaken in public and are manifestly fair.

The English, it is often said, were obsessed with procedure. So much so that they sometimes failed to pay enough attention to the outcome itself and what was actually being decided. Their concern was that the impugned decision should be conducted fairly, lawfully and without irrationality. However, experience tends to show that if one has sound procedures, it is much more likely that the decision-maker will reach sound outcomes. The sound procedures adopted by the UN COI on the DPRK, and our way of conducting the inquiry is now regarded by many observers as a kind of 'gold standard' for the system. Certainly, it has revealed new and different methodologies that COIs in the future may consider and adapt as appropriate. So that is one good outcome that has already happened.

Other inquiries in the UN system have copied the COI on the DPRK in this respect. I believe that, in the future, we will see more commissions of inquiry following similar techniques, adapted to their particular circumstances. There are quite a lot of COIs in operation — at the present time — for example there are COIs on human rights abuses in the Central African Republic, Syria, Tunisia, and Eritrea. I expect that at least some of these COIs will experiment with, and use public hearings.⁵¹ They will use the transcript of the public hearing, as the COI on the DPRK did, quoting it in the report. Doing this gave a direct voice to the persons claiming to be victims who came to the UN to provide their testimony and to register their human rights complaints and accusations.

Secondly, the report of the COI on the DPRK has already led to the establishment of a field office in Seoul, Republic of Korea ('South Korea').⁵² In a sense, this is continuing the work of the Commission of Inquiry itself. If the DPRK's human rights abuses are not referred in the short to medium term to the International Criminal

hearings was adopted. Earlier still, the ALRC adopted the distinctive methodology of public hearings: see Australia Law Reform Commission, *Annual Report, 1975* (Report No 3, Australian Law Reform Commission, 1975), 40–1 [83]–[84]; Australian Law Reform Commission, *Annual Report, 1976* (Report No 5, Australian Law Reform Commission, 1976), 49–50 [93]–[94].

⁵¹ The COI on Human Rights in Eritrea (chaired by an Australian diplomat, Mike Smith) made a limited use of public hearings in conducting that inquiry.

⁵² The COI on the DPRK recommended the establishment of a field office ('structure') to document and gather testimony of victims and witnesses: see *Report on the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN Doc A/HRC/25/CRP.1, 371 [1225](c).

Court (or to some other UN tribunal or some other body and prosecuted) I still have confidence that in due course prosecutions will happen.

When prosecutions are ready to happen, the relevant material will have been gathered and recorded in a format that can be used as a statement for a prosecutor's brief in an international tribunal with jurisdiction to deal with such international crimes. The preparatory work is already occurring. To that extent, accountability is already progressing. That was a suggestion made to the COI on the DPRK by Prince Zeid Raad Hussein Sayed, the present UN High Commissioner for Human Rights ('HCHR'). He urged that human rights mandate holders, where appropriate, should gather testimony in the form of a prosecutor's brief so that it could later be picked up when accessibility to jurisdiction arrives.⁵³

Thirdly, and more basically, the COI on the DPRK gave a voice to people who had never previously been listened to with respect for their suffering and the affront to their human dignity. They had not previously enjoyed respect for their voices. They had been harassed and brutalised in North Korea. Even when they arrived in South Korea, they were members of a relatively small minority community. To some extent they could not express themselves in a way that commanded attention, understanding, respect and the prospect of redress.

Most of the testimony one sees today in Holocaust museums around the world will never result in the stories being legally vindicated or considered with a view to establishing individual accountability. This is simply because of the passing of too much time since the events deposed to, the death or disappearance of the perpetrators, accusers, witnesses and so on. Nevertheless, there is still a value, including an educative value, in dignifying the individual human beings who tell their versions of what they have gone through. It is educative because that is a way new generations will learn. It is the way we can ensure that those who come later will not forget what has happened even though they will not be able to secure accountability for the cruelty and wrongs that have happened. Conferring to and recording the histories is important for the peace of mind of victims themselves and for us also to see and hear them. In the case of the DPRK, it becomes part of the history of the people of the Korean Peninsula. Collected and recorded to await the time that will come when it will be accessible for the lessons that it teaches.

This has already been an achievement of the COI on the DPRK. If we had just seen witnesses in private and talked with them, taken a few notes and summarised their complaints in a briefer report, it would not have had the same impact on the international community. Sometimes just going through a transparent procedure and doing it in a formal and respectful way, has an importance in itself. When the COI on the DPRK had a female witness, I generally asked Sonja Biserko, one of the COI commissioners, to take that witness through her statement. I did this in case there was a cultural problem of a woman speaking to a male. I was there, presiding.

⁵³ This recommendation was made to the COI on the DPRK by Prince Zeid before his appointment as HCHR, during the COI's consultations in New York.

However, I just fell silent. I believe that this variation in the procedure worked well. The women appeared more comfortable and forthcoming in answering questions from a woman who was a member of the COI then they would have been in answering questions from me.

All of the commissioners adopted the common law methodology although two of them, respectively from Indonesia and Serbia, were from countries that followed the civil law procedural traditions. In the absence of North Korea or its officials whom we had invited to participate in the public hearings, we gathered the oral testimony of the witnesses by the technique of examination-in-chief. There was no cross-examination unless the COI arrived at a point where we did not fully believe what was being said or needed more information. Generally, our questions were: ‘And what did you do then?’ or, ‘What happened then?’ or, ‘What did you see?’ In the result, the voice of the evidence remained the authentic voice of the people who are coming to complain of human rights violations and crimes against humanity by the DPRK. Their voices and their versions of the facts; not ours.

F REBECCA LAFORGIA: Are there any general lessons as to the effectiveness of the COI on the DPRK that can be drawn at this time?

THE HON MICHAEL KIRBY: The chief lesson of the COI on the DPRK is, I suppose, that the UN has imperfections. Human beings appointed to commissions of inquiry, like myself, have imperfections. Yet the world has to address the ongoing challenges of crimes against humanity, and genocide where it applies, and other human rights violations. It has to respond. The world is dangerous. The nuclear weapons and long-range missile delivery systems that exist in North Korea today are an indication of how potentially dangerous that country is for its own people and for others in its region and potentially beyond. The human rights situation in the DPRK is closely interconnected with dangers for international peace and security and with dangers for the attainment of justice — another objective of the UN, expressed in the *Charter of the United Nations* (‘*Charter*’).⁵⁴

We conducted our enquiry in the manner described. We took pains to ensure that our report would be readable. I consider that the UN report on the DPRK is a ‘page turner’. I possess a privately bound version of the report. However, it should be on sale at airports around the world. It is very readable. Moreover, the world needs to know about our findings. This is because of the dangerous situation in North Korea.

Three years after the report was delivered to the UN, it twice came before the UN Security Council. In March 2014 the report was discussed at a formal meeting of the Council and the Office of the High Commissioner for Human Rights was authorised to brief the Council.⁵⁵ In late February 2016, the Security Council unani-

⁵⁴ Preamble para 3.

⁵⁵ The events leading up to and including the 7355th Meeting of the Security Council in December 2014 are described in Jawoon Kim and Alan Bloomfield, ‘Argumentation, Impact, and Normative Change: Responsibility to Protect after the Commission of

mously imposed increased sanctions on North Korea.⁵⁶ That resolution secured the affirmative vote of the Russian Federation (‘Russia’) and China. This indicates that, when people who have very great responsibilities — including the five permanent members of the Security Council — meet together in the one place, the propinquity, the presentation of the dangers, and the existence of a compelling report will sometimes compel humanity to respond.

Critics may say: ‘Well, the Security Council has not referred North Korea to the International Criminal Court’. ‘The UN has not set up a special tribunal’. ‘No actual person or perpetrator has been rendered accountable, still less convicted and punished.’ All of this is true. However, these are still comparatively early days. The abuses described in the COI report have been going on for almost 70 years. In the past, the world turned away. Now the world is not turning away. The world has commissioned, and received, a detailed report. The report is not just addressed to politicians and to national leaders. It is addressed to the people of the world and to the UN as a whole.

The people of the world are the expressed foundation of the UN *Charter*.⁵⁷ The *Charter* begins, ‘We, the people of the United Nations.’ When the members of the COI were writing the report, we had in mind the realities. We had in mind the difficulties. We targeted the report in a way that we hoped would be compelling to anyone who read it, or even part of it. One of the ways of making it compelling was to speak over the heads of the leaders, to the citizens of the world community. It was the reaction of the people of the world community to the horrors of the Second World War and of the instances revealed of genocide that helped produce the UN *Charter* in 1945, the establishment of the UN and to Eleanor Roosevelt’s *Universal Declaration of Human Rights* in 1948.⁵⁸ Unless humanity builds a world that respects and upholds universal human rights, we will never have peace and security. Addressing global human rights is therefore a most urgent necessity for human survival.

Another positive feature of the COI report, I think, is that virtually everything that the COI asked of the UN to do was basically done. So far, if it was within the power of

Inquiry Report on North Korea’, (2017) 9 *Global Responsibility to Protect* 173, 190.

⁵⁶ The UN Security Council has imposed sanctions on the DPRK in a series of resolutions. Additional sanctions were imposed in 2016 and 2017, the last being the most severe so far, adopted unanimously, with the concurring votes (15–0–0) of the five permanent (‘P5’) members of the Council: SC Res 2270, UN SCOR, 7638th mtg, UN Doc S/RES/2270 (2 March 2016); SC Res 2276, UN SCOR, 7656th mtg, UN Doc S/RES/2276 (24 March 2016). This followed the fifth nuclear test conducted by the DPRK and the launch of a long-range missile towards Japan. In pursuance of the last-mentioned resolution, China announced that it was curtailing importation of coal from the DPRK in 2017, previously a major source of hard currency.

⁵⁷ *Charter*, preamble para 1.

⁵⁸ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

the UN and its officials, almost everything the COI recommended has been followed up. We can therefore be pleased that this global institution, established 70 years ago, is shown to be working for the good of peace and security. But also for the good of universal human rights.⁵⁹ If the Security Council has not yet referred the case of the DPRK to a prosecutor of the ICC this is inferentially the result of the veto power in the *Charter*. To that extent it represents not a failure of the *Charter* but the operation of that instrument as it was intended in 1945. This may be disappointing. However, it is virtually certain that, without the veto power for the permanent members neither the United States nor the Soviet Union would have ratified the *Charter*. The present situation demands the redoubling of efforts to persuade China and Russia to endorse the referral of the DPRK and some of its identifiable officials to a prosecutor of the ICC or some other UN tribunal. The steady increase in the severity of sanctions imposed by unanimous votes of the Security Council demonstrates, time, patience, persuasion and circumstances can sometimes result in outcomes that were seriously unattainable.

G REBECCA LAFORGIA: You have said that the report of the COI on the DPRK is readable. Why is this important? How can reports of inquiries, judgments and other legal documents be made readable? Are there any simple lessons that lawyers and law students should follow?

THE HON MICHAEL KIRBY: The COI report on the DPRK was written in the English language. It was translated (at least in summary) into the other UN languages: Arabic, Chinese, French, Spanish and Russian. Informal translations have also been made in Korean and Japanese languages. However, inescapably the idiom and style is English. English is a peculiar language. We have recently celebrated the anniversary of the death of William Shakespeare, 400 years ago. He was the greatest example of English as a language of literature. However, it is also now a language of global politics, economics, technology and of human rights. English represents the marriage of two linguistic streams. These are the basic Anglo-Saxon language of the Germanic tribes of the north of Europe, and the Latinist French language that was brought to England by the clerks of William the Conqueror in 1066. The dual services of the language makes English a powerful language for poetry and literature. Yet it can be devilishly ambiguous. Ambiguity is good for lawyers because, out of ambiguity, comes many problems of the law: interpretation, misunderstandings, uncertainty and so on.

Generally speaking, those who speak English as their first language have a different vocabulary in the kitchen, where they speak as the Anglo-Saxons did. However,

⁵⁹ The key recommendation of the COI that ‘the Security Council should refer the situation of the [DPRK] to the International Criminal Court for action in accordance with that Court’s jurisdiction’ is found in *Report on the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, UN Doc A/HRC/25/CRP.1, 370 [1225](a). However, another recommendation in the same sub-paragraph, that ‘the Security Council should also adopt targeted sanctions against those who appear to be most responsible for crimes against humanity’ has, in part, been fulfilled.

when they write English, especially in the law or other formal contexts, they tend to do so in the manner of the Norman clerks who wrote in mediaeval French. I try to write substantially as I speak. I do this consciously because that is the simple language that is normally spoken. If my writing is clearer, it may be because I have a different balance than many in the expression of the English language. I try to make it very direct. I try to write as I speak. This is the way the report of the COI is written: in a plain, simple version of English; direct, unadorned, understandable. A great language for communication. I do not know how the COI report on the DPRK reads in Chinese or Arabic. But in English I regard it as clear and powerful. This style tends to demand an effective response, prompt accountability and follow-up. Nothing less will do in the context.

There are some simple rules that lawyers, law students and UN report writers need to learn. Avoid use of the uncertainties of the passive voice. Utilise short sentences. Adopt direct speech. Take out the obscurities. Make the text short and clear. That is what I try to do. That is why I kept revising my reasons as a judge: to try and get it as clear and direct as I could make it. Sometimes I was a bit longwinded because I became interested in a particular issue of law or some particular facet of the facts. But I did try to write clearly. For some reason, that seems to have been effective. At least scholars and students have told me so. Sir Anthony Mason, past Chief Justice of the High Court of Australia, once said: ‘If you want to know what a case is really about, you start with the Kirby judgment’. Maybe in the Palace of the Supreme Leader of the DPRK in Pyongyang, Kim Jong-un is complaining about the clarity and readability.

**PROTECTING DEMOCRATIC INTEGRITY:
RE DAY [NO 2] (2017) 343 ALR 181**

I INTRODUCTION

Section 44(v) of the *Australian Constitution* is one of several express provisions imposing candidacy restrictions for the Australian Federal Parliament, and has an important role to play in the protection of representative and responsible government. This particular section operates to disqualify any person with a pecuniary interest in an agreement with the Commonwealth Public Service, from being elected or sitting as a Commonwealth parliamentarian. The provision had previously only been considered by the High Court of Australia once, in the case of *Re Webster*,¹ in which an interpretation so narrow as to rob the provision of all practical impact was adopted. Following decades of criticism, the High Court adopted a broader construction of s 44(v) in the case of *Re Day [No 2]*,² a constitutional challenge to the eligibility of an Australian Senator.

This case note, after reviewing the background of *Re Day [No 2]*, turns to analysis of the Court's decision and the resulting ramifications. For so long, the narrow interpretation of s 44(v) has rendered the provision functionally inert and without purpose. While *Re Day [No 2]* leaves significant ambiguity regarding s 44(v)'s outer limits, it nevertheless marks a long overdue development in the interpretation of the *Australian Constitution*, by extending the provision to the prohibition of certain conflicts of interest for Commonwealth parliamentarians. This broader construction of s 44(v) reinforces the duty of Australian elected representatives to serve the interests of the people above their own — yielding a positive outcome for the protection of representative and responsible government.

* Student Editor 2017, *Adelaide Law Review*, the University of Adelaide.

¹ (1975) 132 CLR 270.

² (2017) 343 ALR 181. The preceding instance of this case was heard before Gordon J sitting alone, and was heard to determine whether any of the additional findings of facts sought by Anne McEwen should be made: *Re Questions Referred to the Court of Disputed Returns Pursuant to Section 376 of the Commonwealth Electoral Act 1918 (Cth) Concerning Robert John Day AO* (2017) 340 ALR 368.

II BACKGROUND

A The Rise and Fall of Mr Day

In the Australian federal election on 7 September 2013, Robert Day was elected as a Senator of the 44th Parliament of Australia, representing South Australia as a Family First Party candidate.³ The 44th Parliament was dissolved on 9 May 2016 by a double dissolution of both the House of Representatives and the Senate.⁴ In the federal election on 2 July 2016, Mr Day was narrowly re-elected, and returned to the Senate in the 45th Parliament.⁵

On 1 November 2016, amidst concerns regarding the liquidation of Home Australia Pty Ltd (a building company which Mr Day founded and managed)⁶ Mr Day resigned from the Senate.⁷ Shortly thereafter, the Senate passed a resolution referring the following questions to the High Court,⁸ sitting as the Court of Disputed Returns:

- (a) Whether, by reason of s 44(v) of the Constitution, or for any other reason, there is a vacancy in the representation of South Australia in the Senate for the place for which Robert John Day was returned?
- (b) If the answer to Question (a) is ‘yes’, by what means and in what manner that vacancy should be filled?
- (c) Whether, by reason of s 44(v) of the Constitution, or for any other reason, Mr Day was at any time incapable of sitting as a Senator prior to the dissolution of the 44th Parliament and, if so, on what date he became so incapable?
- (d) What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference?
- (e) What, if any, orders should be made as to the costs of these proceedings?⁹

³ Australian Electoral Commission, *2013 Federal Election* (25 November 2014) <http://www.aec.gov.au/Elections/federal_elections/2013/>.

⁴ Parliament of Australia, *Double Dissolution* <http://www.aph.gov.au/Parliamentary_Business/Double_dissolution>.

⁵ Australian Electoral Commission, *2016 Federal Election* (20 April 2017) <http://www.aec.gov.au/Elections/Federal_Elections/2016/>.

⁶ Mr Day resigned due to the concerns surrounding the liquidation of Home Australia Pty Ltd. However, this was not the basis of the constitutional challenge to his eligibility as a Senator in *Re Day [No 2]*.

⁷ Stephanie Anderson and Mathew Doran, ‘Bob Day Tenders Resignation as Family First Senator’, *ABC News* (online), 1 November 2016 <<http://www.abc.net.au/news/2016-11-01/bob-day-resigns/7983088>>.

⁸ See generally *Commonwealth Electoral Act 1918* (Cth) s 376.

⁹ *Re Day [No 2]* (2017) 343 ALR 181, 183 [1] (Kiefel CJ, Bell and Edelman JJ).

B *Central Issue — Pecuniary Interest in an Agreement with the Public Service*

The referred questions centred around whether Mr Day had an indirect pecuniary interest in an agreement with the Public Service of the Commonwealth, specifically the lease agreement for his electorate office. If Mr Day had such an interest, he would be disqualified from sitting as a senator under s 44(v) of the *Australian Constitution*, which provides that:

Any person who:

...

- (v) has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.¹⁰

C *The Pecuniary Interest*

When Mr Day was elected in 2013 he became entitled to office accommodation at the Commonwealth's expense.¹¹ Mr Day wished to use 77 Fullarton Road, Kent Town as his office,¹² a property owned at that time by B & B Day Pty Ltd (controlled and owned by Mr Day) as trustee of the Day Family Trust (of which Mr Day was a beneficiary).¹³ In 2014, ownership of 77 Fullarton Road passed from B & B Day Pty Ltd to Fullarton Investments Pty Ltd (trustee of the Fullarton Road Trust, of which the Day Family Trust was a beneficiary).¹⁴

On 1 December 2015, the Commonwealth entered into an agreement with Fullarton Investments Pty Ltd to lease 77 Fullarton Road for use as Mr Day's electorate office.¹⁵ It was undisputed that this was an agreement with the Commonwealth Public Service.¹⁶

On 26 February 2016, Mr Day's executive assistant, acting on behalf of Fullarton Investments Pty Ltd, directed the Commonwealth to pay rent under the lease to a

¹⁰ *Australian Constitution* s 44(v).

¹¹ *Parliamentary Entitlements Act 1990* (Cth) s 4(1), sch 1 pt 1 item 7.

¹² *Re Day [No 2]* (2017) 343 ALR 181, 208 [134] (Keane J).

¹³ *Ibid* 184 [6] (Kiefel CJ, Bell and Edelman JJ).

¹⁴ *Ibid* 184 [7] (Kiefel CJ, Bell and Edelman JJ).

¹⁵ *Ibid* 185 [8] (Kiefel CJ, Bell and Edelman JJ).

¹⁶ *Ibid* 217 [185] (Keane J).

bank account named Fullarton Nominees.¹⁷ Mr Day owned both this bank account and the Fullarton Nominees business name.¹⁸

III DECISION OF THE HIGH COURT

A Mr Day Disqualified as a Senator

The Full Court of the High Court unanimously held that Mr Day was disqualified from being elected or sitting as a Senator by reason of s 44(v) of the *Australian Constitution*, on the basis that he had an indirect pecuniary interest in the lease agreement.¹⁹

1 *Departing from Re Webster*

In reaching this decision, the Full Court adopted a significantly broader interpretation of s 44(v), departing from the only previous High Court decision that considered this constitutional provision — *Re Webster*.²⁰

In *Re Webster*, Barwick CJ, sitting alone as the Court of Disputed Returns, adopted an extremely narrow interpretation of s 44(v),²¹ which ‘significantly limited its operation.’²² His Honour took a purposive approach, regarding s 44(v) as having the same purpose as a similar United Kingdom provision,²³ which his Honour considered to be the ‘precise progenitor’ of s 44(v).²⁴ Specifically, his Honour interpreted s 44(v)’s purpose as being solely to secure the independence of Parliament from the Crown’s influence, as opposed to preventing conflict between Members of Parliament’s duties and their personal financial interests.²⁵

Notably, *Re Webster* was a decision of a Chief Justice sitting alone, an unusual feature for matters involving the *Australian Constitution*.²⁶ Moreover, the decision did not rest on a principle reinforced in successive cases. Accordingly, the Court in *Re Day [No 2]* deemed it appropriate to reconsider the decision in *Re Webster*.²⁷

¹⁷ Ibid 210 [144] (Keane J).

¹⁸ Ibid 185 [9] (Kiefel CJ, Bell and Edelman JJ).

¹⁹ Ibid 197 [76] (Kiefel CJ, Bell and Edelman JJ), 200 [92] (Gageler J), 219 [195] (Keane J), 234 [277] (Nettle and Gordon JJ).

²⁰ (1975) 132 CLR 270.

²¹ Ibid 278–80.

²² *Re Day [No 2]* (2017) 343 ALR 181, 190 [38] (Kiefel CJ, Bell and Edelman JJ).

²³ *House of Commons (Disqualification) Act 1782* (UK) 22 Geo 3, c 45, s 1.

²⁴ *Re Webster* (1975) 132 CLR 270, 278.

²⁵ Ibid 278–9.

²⁶ *Re Day [No 2]* (2017) 343 ALR 181, 191–192 [44] (Kiefel CJ, Bell and Edelman JJ); Transcript of Proceedings, *Re Day* [2017] HCATrans 15 (7 February 2017) (Kiefel CJ).

²⁷ *Re Day [No 2]* (2017) 343 ALR 181, 191–193 [43]–[52] (Kiefel CJ, Bell and Edelman JJ).

In *Re Day [No 2]*, the Court was critical of Barwick CJ's approach, regarding his Honour's interpretation of s 44(v) as too narrow.²⁸ Having regard to the Convention Debates,²⁹ the Court indicated that while the similar United Kingdom provision was indeed a 'progenitor' of s 44(v), it was not its 'precise progenitor'.³⁰ Section 44(v) had undergone a 'substantial change in its terminology'³¹ from its United Kingdom progenitor, such that its purpose also extends to preventing Parliament members' conflict between their duties to the people and their personal interests.³² Accordingly, the Full Court elected to depart from the narrow construction of the section in *Re Webster*, in favour of a broader interpretation.³³

2 A Broader Interpretation of s 44(v)

Although the exact expression varies across the four judgments of *Re Day [No 2]*, in substance, each of the Full Court's judgments adopted largely the same broad construction of s 44(v).

Turning to the interpretation of an '*indirect pecuniary interest* in any agreement with the Public Service of the Commonwealth',³⁴ Kiefel CJ, Bell and Edelman JJ held that beneficiaries of a discretionary trust which benefit from such an agreement may be considered to have an indirect pecuniary interest.³⁵ Accordingly, their Honours rejected Mr Day's proposition that individuals must be party to such an agreement to have an interest in it.³⁶ Additionally, in light of their view of s 44(v)'s purpose, their Honours rejected Mr Day's argument that due to the penal consequences for breach,³⁷ the provision should be narrowly construed.³⁸

In defining 'indirect pecuniary interest', Gageler J adopted the formulation of Gavan Duffy J in *Ford v Andrews*:

²⁸ *Re Day [No 2]* (2017) 343 ALR 181, 193 [51]–[52] (Kiefel CJ, Bell and Edelman JJ), 201–202 [98] (Gageler J), 212 [161] (Keane J), 233–234 [272]–[276] (Nettle and Gordon JJ).

²⁹ *Official Report of the Australasian National Convention Debates*, Adelaide, 15–21 April 1897; *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 21 September 1897; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 March 1898.

³⁰ *Re Day [No 2]* (2017) 343 ALR 181, 189 [30] (Kiefel CJ, Bell and Edelman JJ), 233 [273] (Nettle and Gordon JJ).

³¹ *Ibid* 189 [30] (Kiefel CJ, Bell and Edelman JJ).

³² *Ibid* 192 [48] (Kiefel CJ, Bell and Edelman JJ).

³³ *Ibid* 193 [51]–[52] (Kiefel CJ, Bell and Edelman JJ), 201–202 [98] (Gageler J), 212 [161] (Keane J), 233–234 [272]–[276] (Nettle and Gordon JJ).

³⁴ *Australian Constitution* s 44(v) (emphasis added).

³⁵ *Re Day [No 2]* (2017) 343 ALR 181, 194–195 [62].

³⁶ *Ibid* 197 [75].

³⁷ *Australian Constitution* s 46.

³⁸ *Re Day [No 2]* (2017) 343 ALR 181, 196 [72].

A man is directly interested in a contract if he is a party to it, he is indirectly interested if he has the expectation of a benefit dependent on the performance of the contract; but in either case the interest must be in the contract, that is to say, the relation between the interest and the contract must be immediate and not merely connected by a mediate chain of possibilities.³⁹

Without seeking to improve on Gavan Duffy J's formulation, Gageler J made two observations regarding its application to s 44(v).⁴⁰ Firstly, that the interest must be pecuniary, meaning capable of sounding in 'money or money's worth', and more than trivial.⁴¹ Secondly, that the existence of an expectation of receiving a benefit must be determined objectively with reference to the practical consequences of the agreement's performance or non-performance.⁴²

Justice Keane likewise noted the need to have regard 'to practical as well as legal effect'⁴³ in considering whether an indirect pecuniary interest exists. Emphasising that an individual need not be party to an agreement,⁴⁴ his Honour held that an expectation of gain or loss generated by a promise, even without a legally enforceable entitlement, is sufficient for an indirect pecuniary interest:⁴⁵ 'it is enough that the person's pockets were or might be affected.'⁴⁶

Justices Nettle and Gordon adopted a similar interpretation,⁴⁷ emphasising the aforementioned requirement that the connection between the pecuniary interest (direct or indirect) and the agreement be immediate, and not merely connected by a chain of possibilities.⁴⁸ Their Honours stated that s 44(v)'s central test is:

whether, because of that interest in that agreement, that person could conceivably be influenced in the exercise of their functions, powers and privileges, or in the performance of their duties, as a member of Parliament.⁴⁹

Each Justice, in their own way, broadly interpreted that s 44(v) applies beyond immediate legally enforceable interests, to the practical benefits and detriments of an agreement's performance.⁵⁰

³⁹ Ibid 204 [108], quoting *Ford v Andrews* (1916) 21 CLR 317, 335.

⁴⁰ *Re Day [No 2]* (2017) 343 ALR 181, 204 [110].

⁴¹ Ibid 204 [111].

⁴² Ibid 205 [113].

⁴³ Ibid 218 [192], quoting *Crump v New South Wales* (2012) 247 CLR 1, 26 [60].

⁴⁴ *Re Day [No 2]* (2017) 343 ALR 181, 213–214 [167].

⁴⁵ Ibid 218 [191]–[192].

⁴⁶ Ibid 218 [191].

⁴⁷ Ibid 228–231 [251]–[267].

⁴⁸ Ibid 229 [255]–[256].

⁴⁹ Ibid 230 [258].

⁵⁰ Ibid 197 [75] (Kiefel CJ, Bell and Edelman JJ), 204 [108]–[110] (Gageler J), 218 [192] (Keane J), 229 [255] (Nettle and Gordon JJ).

3 *Application of a Broader Interpretation to Mr Day*

The Full Court was unanimous in holding that Mr Day had an indirect pecuniary interest prior to his July 2016 re-election, triggering s 44(v) to disqualify Mr Day from being elected or sitting as a senator.⁵¹ Yet curiously, despite being largely unified in its interpretation of s 44(v), the Court was divided regarding exactly how and when the indirect interest came into existence. A majority of four Justices held that the pecuniary interest arose on 26 February 2016, when the Commonwealth was directed to make payment directly to Mr Day's own bank account.⁵² The remaining three Justices held that it arose on 1 December 2015, when the lease was entered into, on the basis that arrangements were such that Mr Day would financially benefit from rent payments under the lease.⁵³

Notably, the disparity in the Court's view of when the interest arose seemingly does not denote any distinction in the scope of s 44(v)'s application. Given that 26 February 2016 was itself prior to Mr Day's re-election, the majority simply deemed it unnecessary to determine whether a pecuniary interest arose any earlier.⁵⁴

B *Filling the Senate Vacancy*

The High Court was unanimous in following *Re Wood*,⁵⁵ and holding that the Senate vacancy should be filled by analogous application of s 273(27) of the *Commonwealth Electoral Act 1918* (Cth),⁵⁶ meaning that it should be dealt with in the same way as if a deceased candidate's name appeared on the ballot paper. Specifically, the Court decided that a special count of the ballot papers should be held, such that above the line votes for Mr Day would instead be counted to Ms Lucy Gichuhi, the only other Family First Party candidate for the Senate.

⁵¹ Ibid 197 [76] (Kiefel CJ, Bell and Edelman JJ), 200 [92] (Gageler J), 219 [195] (Keane J), 234 [277] (Nettle and Gordon JJ).

⁵² Ibid 197 [76] (Kiefel CJ, Bell and Edelman JJ), 219 [195] (Keane J).

⁵³ Ibid 200–201 [92]–[93] (Gageler J), 234 [277] (Nettle and Gordon JJ).

⁵⁴ Kiefel CJ, Bell and Edelman JJ concluded that Mr Day had a pecuniary interest in the lease from 26 February 2016, and never expressly assessed whether such an interest existed any earlier than this. Keane J concluded the same, and expressly indicated that it is unnecessary to consider whether such an interest existed any earlier: ibid 197 [76] (Kiefel CJ, Bell and Edelman JJ), 219 [195] (Keane J).

⁵⁵ (1988) 167 CLR 145.

⁵⁶ *Re Day [No 2]* (2017) 343 ALR 181, 197–198 [77]–[80] (Kiefel CJ, Bell and Edelman JJ), 201 [93] (Gageler J), 221–222 [206]–[211] (Keane J), 236–239 [291]–[306] (Nettle and Gordon JJ).

IV RAMIFICATIONS

A Immediate Political Ramifications

Ordinarily, a challenge to an individual's capability to sit as a Senator is brought to remove them from office.⁵⁷ *Re Day [No 2]* is distinct in this regard, in that Mr Day's Parliamentary eligibility was challenged *after* he had formally resigned from his seat.

Consequently, the immediate political impact of the decision instead turns on who would be selected to replace Mr Day in the Senate. If Mr Day had been validly elected, the South Australian Parliament would have chosen a nominee of the Family First Party to fill the vacancy caused by his resignation.⁵⁸ Instead, with Mr Day invalidly elected, a special count of the ballot papers was conducted,⁵⁹ confirming Ms Gichuhi, the other Family First Party candidate for the Senate, as elected.⁶⁰ Shortly thereafter, the High Court rejected a citizenship-based challenge to Ms Gichuhi's eligibility as a Senator,⁶¹ leaving her free to fill the Senate vacancy.

Prior to the judgment, much uncertainty surrounded how the vacancy would be filled if Mr Day had been invalidly elected. This included speculation that a different party's candidate may fill the vacancy, such as Labor's Anne McEwen or One Nation's Steven Burgess.⁶² Such a change could have had consequences for the Coalition Government's legislative agenda given that Mr Day had consistently voted with the Coalition, which did not have firm control of the Senate.⁶³ *Prima facie*, the short-term

⁵⁷ For example, the challenges brought against various Senators over the past several decades, referred to the High Court whilst they were still in office, such as James Webster, Robert Wood and Rod Culleton: see, eg, *Re Webster* (1975) 132 CLR 270; *Re Wood* (1988) 167 CLR 145; *Re Culleton [No 2]* 341 (2017) ALR 1.

⁵⁸ See *Australian Constitution* s 15.

⁵⁹ See generally Transcript of Proceedings, *Re Day [No 2]* [2017] HCATrans 85 (11 April 2017).

⁶⁰ Parliament of Australia, *Senator Lucy Gichuhi* <http://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=270552>; Chris Uhlmann and Matthew Doran, 'Family First's Lucy Gichuhi Set to Replace Bob Day in South Australian Senate Seat', *ABC News* (online), 13 April 2017 <<http://www.abc.net.au/news/2017-04-13/family-first-lucy-gichuhi-replaces-bob-day-in-senate/8442564>>.

⁶¹ Transcript of Proceedings, *Re Day* [2017] HCATrans 86 (19 April 2017); Matthew Doran, Henry Belot and Joanna Crothers, 'Family First Senator Lucy Gichuhi Survives ALP Challenge over Citizenship Concerns', *ABC News* (online), 20 April 2017 <<http://www.abc.net.au/news/2017-04-19/labor-party-to-challenge-eligibility-of-senator-elect/8452514>>.

⁶² See, eg, Tom McIlroy and Michael Koziol, 'The Bob Day Controversy Explained', *The Sydney Morning Herald* (online), 2 November 2016 <<http://www.smh.com.au/federal-politics/political-news/the-bob-day-controversy-explained-20161102-gsg061.html>>.

⁶³ *Ibid.*

political ramifications of *Re Day [No 2]* were less impactful than some observers predicted, as Ms Gichuhi, a Family First Party member, filled the vacancy regardless.

However, shortly after filling the vacancy, Ms Gichuhi declined to join Cory Bernardi's Australian Conservatives Party when it absorbed the Family First Party in April 2017.⁶⁴ Instead, Ms Gichuhi decided to sit as an independent Senator, leaving her political allegiances somewhat uncertain. It remains to be seen what impact Ms Gichuhi's influence may have over the 45th Parliament's life.

B *Long-Term Ramifications of a Broader s 44(v)*

1 *Positive Change for Representative and Responsible Government*

Chief Justice Barwick's narrow interpretation in *Re Webster* has long been criticised for interpreting s 44(v) such that it had almost no effect at all.⁶⁵ The High Court's embracing of a broader interpretation marks a welcome remedy to these criticisms.

As acknowledged in *Re Day [No 2]*, s 44(v)'s purpose extends to preventing conflict between parliamentarians' duties to the people, and their own personal interests.⁶⁶ Indeed, as Kiefel CJ, Bell and Edelman JJ remarked:

there is much to be said for the view that the provision has a special status, because it is protective of matters which are fundamental to the Constitution, namely representative and responsible government in a democracy.⁶⁷

The operation of s 44(v) is central to the protection of representative and responsible government in Australia. It is a key democratic principle that elected officials discharge their duties in the pursuit of the people's interests, and not merely their own. With the judgment in *Re Day [No 2]*, this constitutional provision will at last extend to such fundamental protection, insofar as regards agreements with the Public Service of the Commonwealth (over which parliamentarians possess degrees of influence). This protection is not total, but remains as:

an irreducible minimum of protection against the possibility that the personal pecuniary interests of parliamentarians might be allowed to compete with the

⁶⁴ Louise Yaxley, 'Cory Bernardi's Australian Conservatives to Amalgamate with Family First', *ABC News* (online), 26 April 2017 <<http://www.abc.net.au/news/2017-04-25/cory-bernardi-australian-conservatives-family-first-to-merge/8471244?sf73113548>>.

⁶⁵ See, eg, Bob Bennett, 'Candidates, Members and the Constitution' (Research Paper No 18, Parliamentary Library, Parliament of Australia, 2002); Commonwealth, *Parliamentary Debates*, House of Representatives, 10 June 1999, 6720-35 (Mr Neil Andrew); J D Hammond, 'Pecuniary Interest of Parliamentarians: A Comment on the *Re Webster* Case' (1976) 3 *Monash University Law Review* 91.

⁶⁶ (2017) 343 ALR 181, 192 [48] (Kiefel CJ, Bell and Edelman JJ).

⁶⁷ *Ibid* 196 [72].

interests of the people they represent, and so ‘cynically turn public debate into a cloak for bartering away the public interest’.⁶⁸

Consequently, Commonwealth parliamentarians must exercise greater caution in avoiding financial interests (direct or indirect) in agreements with the Public Service, lest they be disqualified. Complex trust or corporate structures, creating degrees of separation between an elected representative and their interest, will no longer suffice to prevent disqualification.⁶⁹

2 Difficulties of a Broader s 44(v)

While a broader s 44(v) is logically a positive shift for democratic integrity, concerns exist that this interpretation may extend to disqualification for perfectly innocent arrangements with the Commonwealth Public Service.⁷⁰ Alleviating this issue, the Court in *Re Day [No 2]* limited s 44(v) from extending to agreements which are ‘ordinarily made between government and a citizen.’⁷¹ However, exactly how this distinction should be drawn remains uncertain.⁷²

Moreover, the Court in *Re Day [No 2]* declined to define the outer limits of s 44(v),⁷³ leaving much uncertainty regarding exactly what arrangements the broader application captures. At present, a current or potential Commonwealth parliamentarian, even with noble intentions, may run afoul of this provision, with ‘automatic and draconian consequences.’⁷⁴ Compounding this issue, Australian electoral law experts observe that smaller party candidates are more likely to inadvertently breach s 44 disqualification provisions as they lack the comprehensive constitutional advice afforded by major parties.⁷⁵

Nevertheless, this ambiguity accords with the ‘judicial self-restraint’ doctrine, wherein constitutional questions are only decided where doing so is judicially

⁶⁸ Ibid 216 [183] (Keane J) quoting *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 159.

⁶⁹ *Re Day [No 2]* (2017) 343 ALR 181, 194 [61] (Kiefel CJ, Bell and Edelman JJ).

⁷⁰ For example, Mr Day proposed that a broad s 44(v) would disqualify an individual who subscribes for a government bond: *ibid* 219 [197] (Keane J).

⁷¹ *Ibid* 196 [69] (Kiefel CJ, Bell and Edelman JJ); see also *ibid* 202 [102] (Gageler J), 220 [200]–[201] (Keane J).

⁷² Cf Gageler J noted the importance of s 44(v) having a sufficiently clear meaning such that individuals can ‘gauge the constitutional propriety of their affairs,’ given that the provision has a ‘blunt and limiting effect on democratic participation’: *ibid* 201 [97].

⁷³ *Ibid* 203 [106] (Gageler J), 220 [201] (Keane J), 230 [260] (Nettle and Gordon JJ).

⁷⁴ *Ibid* 201 [95] (Gageler J).

⁷⁵ ABC Radio National, ‘Senator Bob Day’s Disqualification’, *The Law Report*, 11 April 2017 (Graeme Orr) <<http://www.abc.net.au/radionational/programs/lawreport/hca-disputed-returns/7333944>>.

necessary.⁷⁶ Here, defining the provision's outer limits was unnecessary and inappropriate, as Mr Day's interest fell squarely within its scope.⁷⁷ Over time, future cases will further define s 44(v)'s outer limits, alleviating the present ambiguity.

V CONCLUSION

The High Court's broader interpretation of s 44(v) in *Re Day [No 2]* marks a significant positive change in the interpretation of the *Australian Constitution*, speaking to contemporary needs of preventing conflicts of interests in elected representatives. Indeed, the decision reinforces the fundamental responsibility of Australian elected representatives: 'the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community.'⁷⁸

The Court's adoption of a broader interpretation is a worthy response to decades of criticism of the narrow view in *Re Webster*. While *Re Day [No 2]* presents concerns regarding s 44(v)'s uncertain outer limits, it yields a positive impact on the preservation of democratic integrity that will echo throughout future years.

⁷⁶ George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law & Theory: Commentary and Materials* (Federation Press, 6th ed, 2014) 476–7.

⁷⁷ *Re Day [No 2]* (2017) 343 ALR 181, 203 [106] (Gageler J), 220 [201] (Keane J), 230 [260] (Nettle and Gordon JJ).

⁷⁸ *R v Boston* (1923) 33 CLR 386, 400 (Isaacs and Rich JJ) (emphasis in original).

RE CULLETON [NO 2] (2017) 341 ALR 1

I INTRODUCTION

In *Re Culleton [No 2]*,¹ the High Court of Australia, sitting as the Court of Disputed Returns, considered whether a vacancy existed in the representation of Western Australia in the Senate for the place held by Senator Rodney Culleton. The Court found that, by virtue of s 44(ii) of the *Australian Constitution*, Culleton was ‘incapable of being chosen’ as a senator as he was subject to be sentenced, and that a Senate vacancy consequently existed.² This case note explains the Court’s reasoning and considers the effects of this decision.

II THE FACTS

In April 2014, a tow truck driver visited a New South Wales property owned by Mr Culleton to repossess a truck. During a confrontation with the driver, Mr Culleton removed the truck key from the ignition. The key was subsequently lost, and Mr Culleton was reported for stealing it and charged with larceny.³

Mr Culleton did not appear when the charge was heard in the Armidale Local Court on 2 March 2016. He had appeared the day before at a hearing for a similar charge in Western Australia, and claimed it was ‘logistically and geographically impossible’ to travel to New South Wales in time.⁴ In his absence, Mr Culleton was convicted of larceny under s 117 of the *Crimes Act 1900* (NSW)⁵ and thus was liable to imprisonment for up to two years.⁶ As the Local Court was prohibited from imposing a sentence of imprisonment on an ‘absent offender’,⁷ the Court instead

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¹ *Re Questions Referred to the Court of Disputed Returns Pursuant to Section 376 of the Commonwealth Electoral Act 1918 (Cth) Concerning Senator Rodney Norman Culleton [No 2]* (2017) 341 ALR 1 (‘*Culleton [No 2]*’).

² *Ibid* 3 [4] (Kiefel, Bell, Gageler and Keane JJ).

³ ‘High Court Challenge a Farce’ on *Senator (in Exile) Rodney Culleton for Western Australia* (20 November 2016) <<http://www.senatorculleton.com.au/single-post/2016/11/20/High-Court-Challenge-a-farce>>.

⁴ *Ibid*.

⁵ *Culleton [No 2]* (2017) 341 ALR 1, 3 [2] (Kiefel, Bell, Gageler and Keane JJ).

⁶ *Criminal Procedure Act 1986* (NSW) ss 268(1), 268(1A), sch 1 table 2 item 3.

⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25(1)(a) (‘*Sentencing Procedure Act*’).

issued a warrant for Mr Culleton's arrest so he could be brought before the Court for sentencing.⁸ Mr Culleton lodged an appeal against his conviction three weeks later.⁹

In the months that followed, Mr Culleton was endorsed by Pauline Hanson's One Nation party as a candidate in the 2016 Federal Election, and was declared elected to the Senate on 2 August 2016.¹⁰ Throughout the election period, Mr Culleton did not respond to the arrest warrant and his appeal remained pending.

On 8 August 2016, Mr Culleton appeared at the Armidale Local Court where the warrant was executed and an annulment of his conviction was granted under s 8 of the *Crimes (Appeal and Review Act) 2001* (NSW) ('*Appeal and Review Act*').¹¹ At a fresh hearing on 25 October 2016, the Local Court found Mr Culleton guilty of larceny on his own plea. However, the charge was dismissed without proceeding to a conviction.¹²

On 8 November 2016, the President of the Senate referred a number of questions regarding Mr Culleton's election to the Court of Disputed Returns — including whether, by reason of s 44(ii) of the *Australian Constitution*, there was a vacancy for Mr Culleton's place in the Senate.¹³

III 'INCAPABLE OF BEING CHOSEN'

Section 44(ii) of the *Australian Constitution* provides that any person who 'has been convicted and is under sentence, or subject to be sentenced' for an offence punishable under Commonwealth or state law 'by imprisonment for one year or longer' will be 'incapable of being chosen' as a senator. The High Court recalled that the words 'shall be incapable of being chosen' refer to 'the process of being chosen', a process which constitutes the period of time from the date of nominations until the return of the electoral writs.¹⁴ It was not contentious that, if Mr Culleton was found to be incapable of being chosen, this 'disability' existed throughout the 2016 electoral process.¹⁵

⁸ *Culleton [No 2]* (2017) 341 ALR 1, 4 [6] (Kiefel, Bell, Gageler and Keane JJ).

⁹ 'High Court Challenge a Farce', above n 3.

¹⁰ *Culleton [No 2]* (2017) 341 ALR 1, 4 [8] (Kiefel, Bell, Gageler and Keane JJ), citing Australian Electoral Officer for Western Australia, *Writ for the Election of Senators for Western Australia*, 2 August 2016.

¹¹ *Culleton [No 2]* (2017) 341 ALR 1, 4 [9] (Kiefel, Bell, Gageler and Keane JJ).

¹² *Ibid.*

¹³ *Culleton [No 2]* (2017) 341 ALR 1, 4 [10], (Kiefel, Bell, Gageler and Keane JJ), citing Letter from the President of the Senate to the Chief Executive and Principal Registrar of the High Court, 8 November 2016.

¹⁴ *Culleton [No 2]* (2017) 341 ALR 1, 5 [13] (Kiefel, Bell, Gageler and Keane JJ), 12 [53] (Nettle J), quoting *Sykes v Cleary [No 2]* (1992) 176 CLR 77, 100, 108, 130, 132.

¹⁵ *Culleton [No 2]* (2017) 341 ALR 1, 5 [13] (Kiefel, Bell, Gageler and Keane JJ).

IV THE HIGH COURT CHALLENGE

Mr Culleton's primary argument against disqualification was that even if, as a matter of fact, he had been convicted and was subject to be sentenced throughout the electoral process, he was not 'incapable of being chosen' as a matter of law.¹⁶ He advanced three submissions in support of this argument:¹⁷

1. although he had been convicted, he had not been sentenced at any time during the electoral process;
2. his conviction did not exist throughout the electoral process due to its annulment with retrospective effect; and
3. he was not, at any time throughout the electoral process, subject to be sentenced for any offence punishable by imprisonment.

In a catch-all argument, Mr Culleton sought to rely on s 364 of the *Commonwealth Electoral Act 1918* (Cth) ('*Commonwealth Electoral Act*') to require the Court to decline to answer the questions referred by the President of the Senate.¹⁸

Two judgments were delivered: the majority of Kiefel, Bell, Gageler and Keane JJ, and a concurring judgment of Nettle J.

A Not 'Subject to be Sentenced'

In his primary argument, Mr Culleton submitted that he was not 'subject to be sentenced' because a sentence of imprisonment had not been imposed at the date of his nomination.¹⁹ Mr Culleton contended that the absence of the phrase 'or subject to be sentenced' in a paragraph of *Nile v Wood*²⁰ and in *The Annotated Constitution of the Australian Commonwealth*,²¹ to which their Honours in *Nile v Wood* referred, indicated it was a mere reiteration of the words 'under sentence'.²²

Whilst the majority conceded that references to s 44(ii) in the quotations employed by Mr Culleton were not complete, they noted that this was because *Nile v Wood* had not turned on whether Senator Wood was 'subject to be sentenced'.²³ Furthermore, the Court noted that their Honours in *Nile v Wood* had expressly stated that

¹⁶ Ibid 5 [15].

¹⁷ Ibid.

¹⁸ Ibid 9 [37] (Kiefel, Bell, Gageler and Keane JJ).

¹⁹ Ibid 5–6 [16].

²⁰ (1988) 167 CLR 133, 139.

²¹ John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 492.

²² *Culleton [No 2]* (2017) 341 ALR 1, 6 [16], [19] (Kiefel, Bell, Gageler and Keane JJ).

²³ Ibid 6 [20] (Kiefel, Bell, Gageler and Keane JJ).

‘[t]he disqualification operates on a person who ... is under sentence *or subject to be sentenced*’.²⁴ The majority held it was apparent that their Honours in *Nile v Wood* did not view the phrase as a mere repetition of ‘is under sentence’, remarking that s 44(ii) ‘cannot sensibly be read in that way’.²⁵

Justice Nettle referred to a passage from *The Annotated Constitution of the Australian Commonwealth*, which his Honour considered to make plain that ‘the purpose of s 44(ii) was to disqualify a person convicted of any offence ... if the person either has been sentenced and is still to complete the sentence, and so is “under sentence”, or remains to be sentenced, and so is “subject to be sentenced”’.²⁶ In agreement with the majority, Nettle J characterised Mr Culleton’s argument as ‘unsound’.²⁷

B Annulment of the Conviction

In his second submission, Mr Culleton contended that the annulment on 8 August 2016 had rendered his conviction void *ab initio*, and therefore his conviction did not legally exist throughout the electoral process.²⁸

In addressing this submission, the majority recalled Windeyer J’s remarks in *Cobiac v Liddy*,²⁹ where his Honour stated that, by setting aside a conviction, ‘the court holds that the accused was not lawfully convicted and that the conviction ought not to stand, *not that there never was in fact a conviction*’.³⁰ The majority held that a combined reading of the provisions of the *Appeal and Review Act*³¹ indicates that the effect of an annulment under that Act ‘does not purport retrospectively to treat the conviction as if it had never occurred’.³²

Justice Nettle reached a similar conclusion. However, in his view, the annulment had retrospective operation to the extent that, for the purpose of a person’s convict status *after* annulment, the person is to be regarded as never having been convicted.³³ Hence, if Mr Culleton’s conviction had been annulled *before* the election period, Mr Culleton would have been eligible to nominate — even if the larceny charge

²⁴ *Nile v Wood* (1988) 167 CLR 133, 139, quoted in *Culleton [No 2]* (2017) 341 ALR 1, 6 [17] (Kiefel, Bell, Gageler and Keane JJ), 16 [65] (Nettle J) (emphasis added).

²⁵ *Culleton [No 2]* (2017) 341 ALR 1, 6 [21] (Kiefel, Bell, Gageler and Keane JJ).

²⁶ *Ibid* 16 [65]–[66] (Nettle J), citing Quick and Garran, above n 21, 490.

²⁷ *Ibid* 16 [65] (Nettle J).

²⁸ *Ibid* 7 [23] (Kiefel, Bell, Gageler and Keane JJ).

²⁹ (1969) 119 CLR 257.

³⁰ *Ibid* 272, quoted in *Culleton [No 2]* (2017) 341 ALR 1, 8 [29] (Kiefel, Bell, Gageler and Keane JJ) (emphasis added).

³¹ *Appeal and Review Act* ss 4(1), 8(2)(c), 9(2)(a), 9(3), 10(1), discussed in *Culleton [No 2]* (2017) 341 ALR 1, 7–8 [26]–[29] (Kiefel, Bell, Gageler and Keane JJ).

³² *Culleton [No 2]* (2017) 341 ALR 1, 8 [29] (Kiefel, Bell, Gageler and Keane JJ).

³³ *Ibid* 15 [61] (Kiefel, Bell, Gageler and Keane JJ).

remained pending.³⁴ In reaching this conclusion, his Honour considered the need for ‘order and certainty’ in the electoral process, in light of the principles of representative and responsible government.³⁵ Furthermore, his Honour noted that limited mechanisms for annulment had existed at the time the *Australian Constitution* was written — according with his view that s 44(ii) is ‘directed to a conviction in fact’, regardless of whether it is annulled.³⁶

C ‘For Any Offence ... Punishable by Imprisonment’

Mr Culleton’s third argument was that even if the annulment operated only prospectively, he was not subject to be sentenced as his status as an ‘absent offender’³⁷ precluded the Local Court from imposing a sentence of imprisonment on him.³⁸

The majority held that, although Mr Culleton was not liable to sentencing on his conviction date, the processes of the law that might lead to his lawful imprisonment had been ‘set in train’.³⁹ The majority opined that, had these processes taken their course, Mr Culleton would have been present when sentenced and therefore been able to be sentenced pursuant to s 25(1)(a) of the *Sentencing Procedure Act*.⁴⁰ Thus, despite being an absent offender, Mr Culleton remained subject to be sentenced.

D Section 364 and the ‘Good Conscience’ of the Court

The Court also considered Mr Culleton’s catch-all argument regarding s 364 of the *Commonwealth Electoral Act*, which provides that the Court of Disputed Returns ‘shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities’.⁴¹ Mr Culleton argued that ‘good conscience’ required the Court to decline to answer the President of the Senate’s questions due to a delay in attending the reference and his conviction being a matter of public record.⁴² The Court swiftly rejected this argument, noting that s 364 does not provide any basis for avoiding the Court’s obligation under s 376 to determine matters referred to it.⁴³

³⁴ Ibid.

³⁵ Ibid 14 [59] (Kiefel, Bell, Gageler and Keane JJ).

³⁶ Ibid 13 [57] (Kiefel, Bell, Gageler and Keane JJ).

³⁷ *Sentencing Procedure Act* s 25(1)(a).

³⁸ *Culleton [No 2]* (2017) 341 ALR 1, 9 [32], [33] (Kiefel, Bell, Gageler and Keane JJ).

³⁹ Ibid 9 [36] (Kiefel, Bell, Gageler and Keane JJ).

⁴⁰ Ibid.

⁴¹ *Commonwealth Electoral Act* s 364.

⁴² *Culleton [No 2]* (2017) 341 ALR 1, 9 [37] (Kiefel, Bell, Gageler and Keane JJ).

⁴³ Ibid 10 [38] (Kiefel, Bell, Gageler and Keane JJ), 17 [67] (Nettle J).

V FILLING THE VACANCY

Having found that Mr Culleton was incapable of being chosen, the Court considered how the resulting Senate vacancy should be filled. The Attorney-General submitted that a special count of the ballot papers would be appropriate, and that any necessary directions to give effect to the count should be made by a single justice.⁴⁴ Mr Culleton did not contest these submissions.⁴⁵

In determining how to fill the vacancy, the Court considered whether a special count would ‘result in a distortion of the voters’ real intentions’,⁴⁶ rather than reflecting ‘the true legal intent of the voters’ as consistent with the *Australian Constitution* and the *Commonwealth Electoral Act*.⁴⁷ The Court noted that 96.04 per cent of Mr Culleton’s votes had been ‘above the line’ votes in favour of Pauline Hanson’s One Nation party, and therefore concluded that a special count would not distort the intent of the voters.⁴⁸ Thus, the Court endorsed the Attorney-General’s submissions.⁴⁹

VI COMMENT

The decision in *Culleton [No 2]* was not of practical significance to Mr Culleton, given a separate finding his ineligibility to be chosen as a senator by the Full Court of the Federal Court.⁵⁰ Nevertheless, the High Court’s opinion should not be overlooked.

The majority’s conclusion that the annulment of a conviction under the *Appeal and Review Act* operates only prospectively may have effects far beyond election eligibility. Depending on the statutory context of the term ‘annulment’, this decision may impact determinations of disqualification in New South Wales from public office, holding a statutory licence, or working with children — regardless of whether a conviction has been annulled.⁵¹ Furthermore, this conclusion stands at odds with the fact that a successful appeal of a conviction would produce an entirely different outcome. By endorsing the decision in *Commissioner for Railways (NSW) v*

⁴⁴ Ibid 10 [40] (Kiefel, Bell, Gageler and Keane JJ).

⁴⁵ Ibid 10 [42].

⁴⁶ *Sykes v Cleary [No 2]* (1992) 176 CLR 77, 102; *Free v Kelly* (1996) 185 CLR 296, 302–4, quoted in *Culleton [No 2]* (2017) 341 ALR 1, 10 [43] (Kiefel, Bell, Gageler and Keane JJ).

⁴⁷ *Re Wood* (1988) 167 CLR 145, 166, quoted in *Culleton [No 2]* (2017) 341 ALR 1, 10 [43] (Kiefel, Bell, Gageler and Keane JJ).

⁴⁸ *Culleton [No 2]* (2017) 341 ALR 1, 10–11 [44] (Kiefel, Bell, Gageler and Keane JJ).

⁴⁹ Ibid 11 [46] (Kiefel, Bell, Gageler and Keane JJ), 17 [67] (Nettle J).

⁵⁰ See *Culleton v Balwyn Nominees Pty Ltd* [2017] FCAFC 8 (3 February 2017).

⁵¹ For further discussion see Jeremy Gans, ‘Catch-22 in the Court of Disputed Returns: *Re Culleton (No 2)*’ on Melbourne Law School, *Opinions on High* (8 February 2017) <<https://blogs.unimelb.edu.au/opinionsonhigh/2017/02/08/gans-culleton/>>.

Cavanough,⁵² the majority acknowledged that, had Mr Culleton's conviction been quashed on appeal, he would be considered to have never been convicted.⁵³ The logic for distinguishing between the effects of an annulment and an appeal for the purposes of s 44(ii) is unclear. If certainty of eligibility for election is paramount, as suggested by Nettle J,⁵⁴ it is surely equally compromised by the possibility of a successful appeal.

Also of note is the Court's conclusion that s 44(ii) applies strictly to offences for which the maximum penalty is one year of imprisonment or more, regardless of the seriousness of the offence in fact. Curiously, the Court stated that the s 44(ii) disqualification exists to protect against those who 'might not be able to sit' for one year or more.⁵⁵ The Court did not address the possibility that the disqualification is a measure of unacceptable criminal history for elected representatives. Whilst Mr Culleton was technically liable to up to two years of imprisonment,⁵⁶ the Local Court ultimately considered the offence to be trivial — evidenced by its decision not to record a conviction. Bearing in mind the Local Court's obligation to consider appropriate alternative punishments to imprisonment,⁵⁷ it is unlikely that Mr Culleton was ever liable to be imprisoned for his offence. Thus, regardless of whether s 44(ii) was intended to bar from election those who might not be able to sit or those with an unacceptable criminal history, the facts of Mr Culleton's case should not have been captured by the provision. Nevertheless, the High Court implicitly concluded that s 44(ii) was framed with regard to the worst form of a class of offence, irrespective of the offence *actually* committed. Although far from a radical interpretation of s 44(ii), when combined with the Court's conclusion that Mr Culleton was, at the time of the election, 'subject to be sentenced', Mr Culleton's disqualification is surely an unintended outcome of s 44(ii) — a provision considered to have been clearly designed to apply only to serious offences such as a 'felony or any infamous crime'.⁵⁸ The Court missed an opportunity in *Culleton [No 2]* to read some sense into s 44(ii) by concluding that trivial offences do not fall within its ambit.

VII CONCLUSION

Though irrelevant for Mr Culleton's political career, *Culleton [No 2]* raises a number of noteworthy issues. The ramifications in New South Wales of the High Court's decision on the prospective operation of annulments remain to be seen. If the Court

⁵² (1935) 53 CLR 220, 224.

⁵³ *Culleton [No 2]* (2017) 341 ALR 1, 8 [30] (Kiefel, Bell, Gageler and Keane JJ).

⁵⁴ *Ibid* 13 [57], 14 [59] (Nettle J).

⁵⁵ *Ibid* 6–7 [22] (Kiefel, Bell, Gageler and Keane JJ).

⁵⁶ *Criminal Procedure Act 1986* (NSW) ss 268(1), 268(1A), sch 1 table 2 item 3.

⁵⁷ *Sentencing Procedure Act* s 5(1).

⁵⁸ Quick and Garran, above n 21, 490, quoted in *Culleton [No 2]* (2017) 341 ALR 1, 16 [66] (Nettle J); See also Tony Blackshield, 'Incapable of Being Chosen' on *AUSPUBLAW* (6 February 2017) <<https://auspublaw.org/2017/02/incapable-of-being-chosen/>>.

considers the issue of retrospectivity again, the justification for a distinction between the effects of an appeal and an annulment may also be brought into question. Finally, the Court's hesitancy to expand the interpretation of s 44(ii) highlights the potentially nonsensical results of the lack of discretion afforded by the provision, as well as, perhaps more notably, the Court's reluctance to read certainty into a provision concerning the election of our parliamentary representatives.

**AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION V RECKITT BENCKISER (AUSTRALIA)
PTY LTD (2016) 340 ALR 25**

I INTRODUCTION

In *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd*,¹ the Full Court of the Federal Court of Australia imposed the highest ever corporate penalty to date for misleading or deceptive conduct under the *Australian Consumer Law*.² Justices Jagot, Yates and Bromwich ordered Reckitt Benckiser (Australia) Pty Ltd ('Reckitt Benckiser') to pay a revised \$6 million penalty, upholding an appeal by the Australian Competition and Consumer Commission ('ACCC').³ The decision is one of several recent multi-million dollar 'victories' by the ACCC,⁴ and has prompted calls for maximum penalties to be increased under the *Australian Consumer Law*.⁵

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¹ (2016) 340 ALR 25 (*ACCC v Reckitt Benckiser*).

² *Competition and Consumer Act 2010* (Cth) sch 2.

³ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 28 [9], 64 [165], 67 [179]–[180].

⁴ See also *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liquidation) [No 3]* [2017] FCA 1018; Australian Competition and Consumer Commission, 'Get Qualified Australia to Pay \$8 Million Penalty' (Media Release, MR 145/17, 30 August 2017); *Australian Competition and Consumer Commission v Acquire Learning & Careers Pty Ltd* [2017] FCA 602; Australian Competition and Consumer Commission, 'Court Orders Acquire to Pay \$45 Million Penalty' (Media Release, MR 79/17, 30 May 2017); *Australian Competition and Consumer Commission v Yazaki Corporation [No 3]* [2017] FCA 465; Australian Competition and Consumer Commission, 'Penalties Ordered Against Yazaki for Collusive Conduct' (Media Release, MR 64/17, 9 May 2017); Australian Competition and Consumer Commission, 'ACCC Appeals Yazaki Corporation Penalty Decision' (Media Release, MR 78/17, 30 May 2017); *Australian Competition and Consumer Commission v Valve Corporation [No 7]* [2016] FCA 1553; Australian Competition and Consumer Commission, 'Valve to Pay \$3 Million in Penalties for Misrepresenting Gamers' Consumer Guarantee Rights' (Media Release, MR 2/17, 3 January 2017).

⁵ Lauren Hartley and Rachel White, 'Reckitt Benckiser's Nurofen Nightmare Continues: \$1.7 Million Penalty Increased to \$6 Million' on Addisons Lawyers, *Knowledge Bank* (23 January 2017) <[http://www.addisonslawyers.com.au/knowledge/Reckitt_Benckiser%E2%80%99s_Nurofen_nightmare_continues__\\$1-7_million_penalty_increased_to_\\$6_million962.aspx](http://www.addisonslawyers.com.au/knowledge/Reckitt_Benckiser%E2%80%99s_Nurofen_nightmare_continues__$1-7_million_penalty_increased_to_$6_million962.aspx)>.

This case note analyses the differing approaches taken by the primary judge and the Full Court to the assessment of the appropriate penalty to be imposed on Reckitt Benckiser. Specifically, it examines the quantification of the loss suffered by consumers, Reckitt Benckiser's state of mind, and, significantly, the finding that the original penalty was manifestly inadequate. It concludes by considering the wider ramifications of the decision in the context of a recent 'penalties trend' across several corporate regulatory regimes.

II BACKGROUND

Reckitt Benckiser is the manufacturer of Nurofen, an over-the-counter ibuprofen-based medicine for the temporary relief of pain.⁶ In 2006, Reckitt Benckiser began to market and sell the Nurofen Specific Pain Range throughout Australia.⁷ The range consisted of Nurofen Back Pain, Nurofen Period Pain, Nurofen Migraine Pain, and Nurofen Tension Headache.⁸ The packaging of each product made representations that the product was solely or specifically formulated to treat a particular type of pain.⁹ The same representations were made on two webpages on the Nurofen website, though in considerably greater detail.¹⁰

There was, in fact, no pharmacological difference between any of the four products.¹¹ Each was of the same formulation, contained the same active ingredient, and had been approved by the Australian Register of Therapeutic Goods as being suitable for treating a wide variety of pain types.¹² None of the four products was any more or less effective than the others in treating the type of pain specified on the packaging.¹³ Moreover, each product in the range was identical to standard Nurofen, yet was marketed and sold at approximately double the price.¹⁴ The range attracted criticism

⁶ *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [No 4]* [2015] FCA 1408 [4] ('*ACCC v Reckitt Benckiser [No 4]*').

⁷ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 32 [17]; *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408 [5].

⁸ *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408 [5].

⁹ *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [No 7]* (2016) 343 ALR 327, 329 [1] ('*ACCC v Reckitt Benckiser [No 7]*').

¹⁰ *Ibid* 329 [1].

¹¹ *Ibid* [1]; *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408 [2].

¹² *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 329 [1]; Stephen Corones, 'Misleading Premium Claims' (2016) 44 *Australian Business Law Review* 188, 197.

¹³ *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408 [2]; *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 329 [1].

¹⁴ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 62 [158].

from the media,¹⁵ consumer advocacy groups,¹⁶ and regulators¹⁷ for misleading millions of consumers.¹⁸ The publicity prompted the ACCC to launch an investigation, which ultimately gave rise to the Nurofen litigation.¹⁹

III DECISION

A Primary Judgment

In March 2015, the ACCC commenced proceedings in the Federal Court of Australia, alleging that Reckitt Benckiser had contravened various provisions of the *Australian Consumer Law*.²⁰ Despite initially denying the substantive allegations, Reckitt Benckiser admitted to contraventions of ss 18 and 33 of the *Australian Consumer Law* at the commencement of the trial.²¹

At first instance, Edelman J delivered a judgment in respect of Reckitt Benckiser's liability.²² His Honour determined that the representations on the packaging and the website contravened s 18 because they were misleading or deceptive, or likely to

¹⁵ See, eg, The Checkout, *Episode 5 Synopsis* (18 April 2013) Australian Broadcasting Corporation <<http://www.abc.net.au/tv/thecheckout/episodes/ep05.htm>>; *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 33 [23].

¹⁶ See, eg, CHOICE, *Shonky Awards: Nurofen* (2010) <<https://www.choice.com.au/shonky-awards/hall-of-shame/shonkys-2010/nurofen>>; Paul Tatnell, 'Shonkys: the Award that No Company Wants', *The Sydney Morning Herald* (online), 26 October 2010 <<http://www.smh.com.au/business/media-and-marketing/shonkys-the-award-that-no-company-wants-20101026-171ih.html>>; *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 32–3 [18]–[20].

¹⁷ See, eg, Therapeutic Goods Administration, Department of Health (Cth), 'Nurofen — Reckitt Benckiser (Australia) Pty Ltd — Complaints No. 2012-08-010 and 2012-10-024' (Decision, 9 May 2014) <<https://www.tga.gov.au/node/39>>; *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 33 [25]–[29].

¹⁸ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 32–3 [19]–[29].

¹⁹ *Ibid* 33 [27], 33–4 [30].

²⁰ *Ibid* 34 [31], [36]; *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408 [3]; *Australian Consumer Law* ss 18, 33, 29(1)(g).

²¹ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 34 [34]–[35]. Section 18(1) of the *Australian Consumer Law* provides that '[a] person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.' Section 33 of the *Australian Consumer Law* provides that '[a] person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.'

²² Justice Edelman delivered two separate judgments. The first, *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408, determined Reckitt Benckiser's liability; the second, *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, assessed the appropriate penalty to be imposed on Reckitt Benckiser.

mislead or deceive; and s 33 because they were liable to mislead the public as to the nature, the characteristics, or the suitability for purpose of the products in the Specific Pain Range.²³ Accordingly, Edelman J made various orders, including injunctions restraining like conduct for a period of three years, corrective advertising, and amendments to Reckitt Benckiser's existing compliance programme.²⁴

Pursuant to s 33 of the *Australian Consumer Law* — a civil penalty provision under which the court may impose a maximum penalty of \$1.1 million on a body corporate for each contravention²⁵ — Edelman J delivered a separate judgment, which imposed a penalty of \$1.7 million on Reckitt Benckiser.²⁶

Despite accepting that Reckitt Benckiser 'plainly engaged' in the marketing and promotion of the products 'with the intention of increasing profits',²⁷ Edelman J concluded that because the ACCC had failed to plead a state of mind, the penalty ought to be assessed as though the contravening conduct was innocent.²⁸ His Honour further acknowledged that because there were at least 5.9 million contraventions,²⁹ the statutory maximum penalty would be 'many, many millions of dollars' and an 'overly crushing burden' on Reckitt Benckiser.³⁰ The contraventions were therefore characterised as involving 'two courses of conduct', consisting of \$1.2 million for the packaging representations and \$500,000 for the website representations.³¹ Justice Edelman was also influenced by the 'commendable and significant cooperation with the ACCC' provided by Reckitt Benckiser,³² and concluded that the harm to consumers caused by the contravening conduct was not physical and only monetary

²³ *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408 [14]–[15], [20]. Justice Edelman also concluded that the relevant contravention period was five years commencing on 1 January 2011 and ending on 11 December 2015: *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, [47]. The Full Court clarified that although the contravening conduct in fact commenced in 2007, s 228(2) of the *Australian Consumer Law* applied a limitation period of six years from the commencement of the proceedings: *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 27 [3].

²⁴ *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408 [21]–[24].

²⁵ *Australian Consumer Law* ss 33, 224(1).

²⁶ *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 331 [8], 349 [98].

²⁷ *Ibid* 340 [55].

²⁸ *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 340 [54], 341 [56], cited in *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 54 [121].

²⁹ Both the Full Court and Edelman J derived this figure from the sale of 5.9 million units of the Nurofen Specific Pain Range products over the contravening period: *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 35 [43]; *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 343 [66].

³⁰ *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 334–5 [24]–[25], quoting *Johnson v R* (2004) 205 ALR 346, 355.

³¹ *Ibid* 349 [95], [98].

³² *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 60 [146], citing *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 343 [68].

in nature.³³ His Honour noted that the penalty would have been ‘far greater’ but for these factors,³⁴ which provided the fundamental grounds for an appeal by the ACCC.

B Appeal to the Full Court of the Federal Court

The ACCC appealed to the Full Court of the Federal Court against the quantum of the penalty imposed by Edelman J. Justices Jagot, Yates and Bromwich unanimously allowed the appeal and imposed a penalty of \$6 million on Reckitt Benckiser.³⁵ The following analysis will compare the reasoning of the Full Court and Edelman J in respect of the quantification of the loss suffered by consumers, the characterisation of the impugned conduct, Reckitt Benckiser’s state of mind, and the conclusion that the \$1.7 million penalty was manifestly inadequate.

1 Assessment of Consumer Loss

The ACCC challenged Edelman J’s assessment of consumer loss on three separate grounds. The first ground contended that Edelman J failed to take into account, or give adequate weight to, the loss suffered by consumers as mandated by s 224(2)(a) of the *Australian Consumer Law*.³⁶ At first instance, Edelman J concluded that it would be ‘impossible’ and ‘useless’ to quantify the extent of Reckitt Benckiser’s profit and the loss suffered by consumers.³⁷ The Full Court accepted that although the ACCC’s approach to quantification was ‘over-complicated’, it was sufficient to rebut Reckitt Benckiser’s proposition that it derived ‘no financial benefit’ from the contravening conduct.³⁸ However, the Full Court noted that Edelman J focused only on the total revenue figure of \$45 million,³⁹ and did not subtract what ‘the revenue would have been if the same sales had taken place of standard Nurofen’, which was sold at approximately half the price.⁴⁰ Their Honours therefore adopted a figure of \$26.25 million as a useful ‘starting point’ for the assessment of the appropriate penalty.⁴¹

³³ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 51 [111], 52 [115], citing *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 349 [97]; cf *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44.

³⁴ *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 349 [94].

³⁵ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 28 [9], 64 [165], 67 [179]–[180].

³⁶ *Ibid* 40 [60].

³⁷ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 40 [60]; *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 330 [5], 340 [53], 343 [66].

³⁸ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 40 [63].

³⁹ Reckitt Benckiser yielded revenue of approximately \$45 million from the sale of 5.9 million units of the Nurofen Specific Pain Relief products over the contravening period: *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 28 [7].

⁴⁰ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 41 [65].

⁴¹ *Ibid* 62 [158], 41 [65].

The Full Court was critical of Edelman J's 'implicit acceptance of the conceptual framework established by Reckitt Benckiser' that consumers would be willing to pay a price premium for the Specific Pain Range products due to product placement and advertising.⁴² Their Honours surmised that there was 'no rational reason to speculate in favour of Reckitt Benckiser that consumers might have been willing to pay twice as much for the same product but for the contravening conduct'.⁴³ Rather, the contraventions were the 'material reason that consumers ... purchased [the impugned] products rather than standard Nurofen'.⁴⁴ Accordingly, the Full Court concluded that Edelman J materially erred in his assessment of consumer loss.⁴⁵ The only 'reasonable inference' was that the difference between total sales of the impugned products and equivalent sales of standard Nurofen had been lost to consumers as a direct result of Reckitt Benckiser's conduct.⁴⁶

The ACCC further challenged Edelman J's conclusion that the harm to consumers was only monetary.⁴⁷ The Full Court readily accepted that the conduct caused 'the loss or at least serious distortion of genuine consumer choice', which created an additional risk of physical harm from 'double-dosing' by a person suffering from two types of pain.⁴⁸

2 Courses of Conduct

The ACCC reiterated its submission that Reckitt Benckiser's contraventions involved six courses of conduct — 'one for each of the four identical products and one for each of the two webpages'.⁴⁹ The Full Court agreed that the primary judge gave undue weight to the courses of conduct principle such that the penalty did not reflect the nature and extent of the conduct.⁵⁰ Their Honours preferred to focus on the sheer volume of contraventions, which occurred 'each and every time a consumer saw the packaging'⁵¹ and became 'increasingly serious over time as Reckitt Benckiser's compliance procedures failed to respond to public criticism'.⁵² However, the Full

⁴² Ibid 43 [76].

⁴³ Ibid 45 [85].

⁴⁴ Ibid 45–6 [85].

⁴⁵ Ibid 42 [70].

⁴⁶ Ibid 48 [98].

⁴⁷ Ibid 51 [111], 52 [115]; *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 349 [97].

⁴⁸ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 52 [114].

⁴⁹ *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 337 [32]; *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 58 [140].

⁵⁰ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 58 [139]–[140], 59 [145], 62 [157].

⁵¹ Ibid 59 [144]–[145].

⁵² Hartley and White, above n 5; *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 57 [134].

Court effectively disregarded the multi-trillion dollar theoretical maximum penalty,⁵³ noting that the figure ‘was so great that there was no maximum penalty’.⁵⁴

3 *State of Mind*

The Full Court considered Edelman J to have erred in finding that Reckitt Benckiser’s conduct was neither deliberate nor reckless, but innocent.⁵⁵ Their Honours disagreed with the primary judge that to do otherwise would deny procedural fairness to Reckitt Benckiser. Their Honours considered that deliberateness of the contravening conduct ‘has always been a matter relevant’ to the penalty assessment,⁵⁶ and that Edelman J had in fact identified deliberateness as a factor to which the court must have regard.⁵⁷ In addition, the ACCC had put Reckitt Benckiser ‘fairly on notice’ that its state of mind would be in issue by seeking a penalty.⁵⁸

Moreover, the Full Court highlighted that even if neither party could establish a particular state of mind, Edelman J was ultimately obliged to form his own view based on the evidence before him.⁵⁹ By merely accepting that the conduct was innocent due to a lack of pleading, Edelman J failed to discharge an ‘essential judicial function’.⁶⁰ In forming its view, the Full Court refused to characterise Reckitt Benckiser’s conduct as innocent, highlighting that it had ‘deliberately persisted’⁶¹ with a ‘fiction[al]’ marketing strategy for a period of five years, despite ‘pointed criticism’.⁶² Rather, their Honours concluded that Reckitt Benckiser did, at the very least, ‘court the risk’ of the contraventions — in the sense of being objectively reckless — but stopped short of suggesting that the contraventions were intentional.⁶³

⁵³ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 62 [157].

⁵⁴ *Ibid* 27 [3].

⁵⁵ *Ibid* 52 [116], 56 [130]; *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 341 [56].

⁵⁶ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 54 [123]–[124], citing *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44; *Trade Practices Commission v CSR Ltd* [1990] FCA 521; *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285; *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 4 FCR 296, 297–8.

⁵⁷ *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 333 [21], citing *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44 [124]–[126]; *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 54 [122].

⁵⁸ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 54 [121].

⁵⁹ *Ibid* 56 [132].

⁶⁰ *Ibid* 57 [133].

⁶¹ *Ibid* 26 (vii), 57 [134].

⁶² *Ibid* 57 [134]; *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 341 [56].

⁶³ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 57 [136].

4 *Manifest Inadequacy*

In addressing the fundamental basis of the appeal — that the penalty imposed by Edelman J was manifestly inadequate — the Full Court highlighted the general deterrence objective of civil penalties. Their Honours were concerned to ensure that ‘other “would-be wrongdoers” think twice and decide not to act against the strong public interest’ in making similar misleading representations about non-prescription medicines,⁶⁴ noting that a greater sanction is required where the risk of consumers being misled and the prospect of gain to the contravener is higher.⁶⁵ Moreover, it was recognised that a failure to sanction Reckitt Benckiser adequately ‘de facto punishes all who do the right thing’.⁶⁶

The Full Court nonetheless emphasised a ‘substantial’ need for specific deterrence,⁶⁷ informed by Reckitt Benckiser’s attitude to the contraventions.⁶⁸ Their Honours had regard to the fact that Reckitt Benckiser repeatedly denied the contraventions and continued to sell the products for its own commercial benefit well after the proceedings commenced, ‘only admit[ting] liability at the last possible moment’.⁶⁹ As these actions evidenced a distinct lack of genuine remorse or contrition, the Full Court viewed a penalty discount as inappropriate.⁷⁰

The Full Court concluded that the \$1.7 million penalty was indeed manifestly inadequate,⁷¹ and would ‘reinforce a view that the price to be paid for the contraventions ... was no more than a cost of doing business’.⁷² Setting aside the decision of the primary judge, the Full Court imposed a \$6 million penalty on Reckitt Benckiser, consisting of \$5 million for the packaging representations and \$1 million for the website representations.⁷³ Perhaps surprisingly, their Honours concluded that the figure was ‘modest’⁷⁴ and ‘at the bottom of the appropriate range’.⁷⁵

⁶⁴ Ibid 60 [150].

⁶⁵ Ibid 60 [151].

⁶⁶ Ibid 61 [152].

⁶⁷ Ibid 60 [149].

⁶⁸ Ibid 63 [159].

⁶⁹ Ibid 27, 62 [158], 63 [160], 67 [177].

⁷⁰ Ibid 63 [160], [163].

⁷¹ Ibid 64 [165].

⁷² Ibid 64 [164].

⁷³ Ibid 64 [165].

⁷⁴ Ibid 67 [178].

⁷⁵ Ibid 67 [179], 64 [165].

C *Special Leave Application to the High Court*

Reckitt Benckiser subsequently applied for special leave to appeal the decision to the High Court of Australia, on the basis that the Full Court had erred in its assessment of consumer loss and the finding of manifest inadequacy. Justices Gageler and Keane of the High Court dismissed the application.⁷⁶

D *Consumer Class Action in the Federal Court*

The decision of the Full Court of the Federal Court also prompted the commencement of a consumer class action against Reckitt Benckiser.⁷⁷ Despite optimism that the proceedings would not be ‘a walk in the park’ for Reckitt Benckiser,⁷⁸ the parties agreed to settle the matter for \$3.5 million.⁷⁹ It is notable that the settlement sum is but a fraction of the \$26.25 million aggregate consumer loss estimated by the Full Court.⁸⁰ Consequently, those customers who purchased Specific Pain Range products between 2011 and 2015 will receive only a partial refund, despite being conclusively misled and deceived by Reckitt Benckiser.

IV RAMIFICATIONS

The Full Court’s decision is likely to have significant ramifications for compliance with, and enforcement of, the *Australian Consumer Law* and other regulatory regimes.⁸¹ The ACCC has announced its intention to capitalise on the ‘momentum’ created by a number of successful high profile decisions by taking a ‘more bullish view’ in

⁷⁶ *Reckitt Benckiser (Australia) Pty Ltd v Australian Competition and Consumer Commission* [2017] HCASL 86 (5 April 2017) [2].

⁷⁷ *Keith Hardy v Reckitt Benckiser (Australia) Pty Ltd*, NSD 273/2016, 24 February 2016. See also Bannister Law, ‘Bannister Law — Affected Nurofen Specific Pain Relief Products — Class Action’, (Press Release, 24 December 2015) <<http://nurofenclassaction.com.au/news/press-releases/bannister-law-affected-nurofen-specific-pain-relief-products-class-action-2/>>.

⁷⁸ Hartley and White, above n 5.

⁷⁹ The Deed of Settlement was approved by Nicholas J of the Federal Court on 20 September 2017: *Hardy v Reckitt Benckiser (Australia) Pty Ltd [No 3]* [2017] FCA 1165 [1]. See also Bannister Law, *Keith Hardy v Reckitt Benckiser (Australia) Pty Ltd: Federal Court of Australia Proceedings No 273/2016* (31 July 2017) Nurofen Class Action <<http://nurofenclassaction.com.au/>>; Rebecca Armitage, ‘Nurofen to Pay \$3.5 Million Compensation to Customers who Bought “Misleading” Pain Relief’, *ABC News* (online), 3 August 2017 <<http://www.abc.net.au/news/2017-08-03/nurofen-offers-3.5-million-compensation-to-customers/8770910?section=health>>.

⁸⁰ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 41 [65], 62 [158].

⁸¹ Leigh Howard, *Public Law Update — Civil Penalties, Inferences and Loss: ACCC v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181* (15 February 2017) List G Barristers <<https://www.listgbarristers.com.au/publications/public-law-update-civil-penalties-inferences-and-loss-accv-reckitt-benckiser-australia-pty-ltd-2016-fcafc-181>>.

the pursuit of higher penalties for breaches of the *Australian Consumer Law*.⁸² The regulator will have ample opportunity to do so, having already commenced proceedings against several multinationals, including Kimberly-Clark, Pental, Volkswagen and Heinz.⁸³ Encouraged by the comments of Jagot, Yates and Bromwich JJ that the \$6 million penalty could have been ‘considerably greater’,⁸⁴ ACCC Chairman Rod Sims has foreshadowed advocating for penalties that are ‘commercially relevant’ and which send a ‘strong message’ to ensure companies consider them as more than an acceptable cost of doing business.⁸⁵

The decision has also prompted calls for increased maximum penalties for contraventions of the *Australian Consumer Law*, which the ACCC has consistently criticised as being too low.⁸⁶ In its recent *Consumer Law Enforcement and Administration* report,

⁸² David Benson and Sam Fiddian, ‘The ACCC’s 2017 Compliance and Enforcement Priorities for Consumers and Small Businesses’ (2017) 21 *Inhouse Counsel* 55, 55; Robert Baxt ‘Does the ACCC Need Further Powers? Are the Penalties in the *Competition and Consumer Act* Sufficient?’ (2016) 90 *Australian Law Journal* 703, 703–4; Tom Jarvis and Christopher Stones, *The Push to Increase Penalties for Breaches of the Australian Consumer Law* (March 2017) Johnson Winter & Slattery <<https://www.jws.com.au/en/acumen/item/904-the-push-to-increase-penalties-for-breaches-of-the-australian-consumer-law>>.

⁸³ Benson and Fiddian, above n 82, 55; Jenny Stathis, ‘ACCC Enforcement Action in 2016 — Some Highlights’ (2016) 20 *Inhouse Counsel* 199, 201; Australian Competition and Consumer Commission, ‘ACCC Takes Court Action on “Flushable” Wipes’ (Media Release, MR 236/16, 12 December 2016) <<https://www.accc.gov.au/media-release/accc-takes-court-action-on-flushable-wipes>>; Australian Competition and Consumer Commission, ‘ACCC Takes Action against Volkswagen over Diesel Emission Claims’ (Media Release, MR 157/16, 1 September 2016) <<https://www.accc.gov.au/media-release/accc-takes-action-against-volkswagen-over-diesel-emission-claims>>; Australian Competition and Consumer Commission, ‘ACCC Takes Action against Heinz over Nutritional Claims on Food for 1–3 Year Olds’ (Media Release, MR 110/16, 21 June 2016) <<https://www.accc.gov.au/media-release/accc-takes-action-against-heinz-over-nutritional-claims-on-food-for-1-3-year-olds>>.

⁸⁴ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 67 [178]–[179].

⁸⁵ Benson and Fiddian, above n 82, 55; Stathis, above n 83, 199, 202; Michael Corrigan and Alexander Vial, *Full Court Increases “Manifestly Inadequate” Civil Penalty for Australian Consumer Law Breaches* (2 February 2017) Clayton Utz <<https://www.claytonutz.com/knowledge/2017/february/full-court-increases-manifestly-inadequate-civil-penalty-for-Australian-Consumer-Law-breaches>>; Peta Stevenson and Jessica Waters, ‘Increased Penalties, a General Safety Law and Complaints Database Among Recommendations for Consumer Law Reform’ (2017) 21 *Inhouse Counsel* 61. See also Australian Competition and Consumer Commission, ‘ACCC Appeals Yazaki Corporation Penalty Decision’ (Media Release, MR 78/17, 30 May 2017) <<https://www.accc.gov.au/media-release/accc-appeals-yazaki-corporation-penalty-decision>>.

⁸⁶ Productivity Commission, ‘Consumer Law Enforcement and Administration’ (Research Report, Productivity Commission, March 2017) 99; Australian Competition and Consumer Commission, Submission No 23 to Productivity Commission, *Consumer Law Enforcement and Administration*, 31 August 2016, 9; Stevenson and Waters, above n 85, 61; Australian Competition and Consumer Commission, ‘Full

the Productivity Commission noted concerns that current penalties are insufficient to deter breaches, particularly where ‘profit from [the] breaching behaviour outweighs the penalty’,⁸⁷ such that larger companies can absorb the penalty as a cost of doing business.⁸⁸ In *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd*, Gordon J commented that although ‘[i]t is a matter for the Parliament to review ... current maximum penalties are arguably inadequate’ for large corporations.⁸⁹ Mr Sims of the ACCC has ‘long’ and ‘loudly’ advocated for legislative intervention to increase maximum penalties under the *Australian Consumer Law* to mirror those that apply to contraventions of the competition provisions of the *Competition and Consumer Act 2010* (Cth).⁹⁰ This approach would impose a corporate penalty of the greater of up to \$10 million, three times the value of the benefit the company received from the breach, or 10 per cent of its annual turnover in the preceding 12 months if the benefit cannot be determined.⁹¹ The Productivity Commission ultimately concluded that there is a ‘strong case for increasing the maximum financial penalties’,⁹² and foreshadowed alignment with the competition provisions.⁹³

Such reform to the *Australian Consumer Law* is part of a broader ‘penalties trend’ across a number of corporate regulatory regimes. In October 2016, the Federal Government announced an Australian Securities and Investments Commission

Federal Court Orders \$6 Million Penalty for Nurofen Specific Pain Products’ (Media Release, MR 244/16, 16 December 2016) < <https://www.accc.gov.au/media-release/full-federal-court-orders-6-million-penalty-for-nurofen-specific-pain-products>>.

⁸⁷ Productivity Commission, above n 86, 140; Australian Communications Consumer Action Network, Submission No 6 to Productivity Commission, *Consumer Law Enforcement and Administration*, 30 August 2016.

⁸⁸ Productivity Commission, above n 86, 140; Andrew Leigh, Submission No 1 to Productivity Commission, *Consumer Law Enforcement and Administration*, 23 August 2016, 1; CHOICE, Submission No 11 to Productivity Commission, *Consumer Law Enforcement and Administration*, 30 August 2016, 9; Terry Fogarty, Submission No DR33 to Productivity Commission, *Consumer Law Enforcement and Administration*, 18 January 2017; Consumers’ Federation of Australia, Submission No 19 to Productivity Commission, *Consumer Law Enforcement and Administration*, 31 August 2016, 3.

⁸⁹ *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 [106]; Productivity Commission, above n 86, 141; Corrigan and Vial, above n 85.

⁹⁰ Stevenson and Waters, above n 85, 61; Rod Sims, ‘CCA Compliance in Interesting Times’ (Speech delivered at the Committee for Economic Development of Australia Conference, Sydney, 24 February 2017); Corrigan and Vial, above n 85.

⁹¹ Productivity Commission, above n 86, 143; *Competition and Consumer Act 2010* (Cth) s 76(1A).

⁹² Productivity Commission, above n 86, 11; Benson and Fiddian, above n 82, 55.

⁹³ Productivity Commission, above n 86, 143; Consumer Affairs Australia and New Zealand, ‘Australian Consumer Law Review’ (Interim Report, Consumer Affairs Australia and New Zealand, October 2016) 180; CHOICE, above n 88, 6.

(‘ASIC’) Enforcement Review Taskforce to review ASIC’s enforcement regime, including an examination of the adequacy of civil and criminal penalties for serious corporate and financial sector misconduct.⁹⁴ The Taskforce, consisting of senior members of ASIC, Treasury, the Attorney General’s Department and the Commonwealth Director of Public Prosecutions, will assess the current regulatory tools available to ASIC with respect to corporations, financial services, credit, and insurance.⁹⁵ The announcement follows former ASIC Chairman Greg Medcraft’s criticism of current ‘weak’ penalties for bad behaviour among bankers and life insurers.⁹⁶ He has advocated for a tougher penalty regime to ‘put the fear of God into’ wrongdoers.⁹⁷ Royal Commissioner Dyson Heydon has echoed Mr Medcraft by recommending that maximum penalties for breaches of directors’ duties under the *Corporations Act 2001* (Cth)⁹⁸ be increased.⁹⁹ Following the recent appointment of new ASIC Chairman James Shipton,¹⁰⁰ the Taskforce has recommended tripling penalties under the *Corporations Act*, as well as requiring corporations to forfeit profits derived from wrongdoing.¹⁰¹ These moves are intended to ‘re-energise’ the corporate regulator and promote cultural change.¹⁰²

⁹⁴ Kelly O’Dwyer MP, ‘ASIC Enforcement Review Taskforce’ (Media Release, 19 October 2016); Patrick Durkin, ‘Corporate Penalties for Wrongdoing to be Tripled’, *Australian Financial Review* (online), 22 October 2017; Productivity Commission, above n 86, 143 n 81.

⁹⁵ O’Dwyer, above n 94; Productivity Commission, above n 86, 143 n 81.

⁹⁶ Emma Alberici, ‘Penalties Too Weak to Discourage Bankers’ Bad Behavior, ASIC Boss Greg Medcraft Says’, *ABC News* (online), 19 October 2016 <<http://www.abc.net.au/news/2016-10-18/penalties-too-weak-to-discourage-banks-bad-behaviour:-asic-boss/7944570>>.

⁹⁷ *Ibid*; Michael Sill, *Penalties for Banking Sector Need to Put the Fear of God into People: ASIC* (19 October 2016) Mentor Adviser <<https://www.mentor.edu.au/blog/2016/10/19/penalties-banking-sector-need-put-fear-god-people-asic/>>.

⁹⁸ (‘the *Corporations Act*’).

⁹⁹ Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015), vol 5, 200, 216; Ben Butler, ‘Dyson Heydon: Beef Up Fines for Breach of Directors’ Duties’ *The Australian* (online), 31 December 2015 <<http://www.theaustralian.com.au/business/dyson-heydon-beef-up-fines-for-breach-of-directors-duties/news-story/7469b91be732c77e6642914691aa624a>>.

¹⁰⁰ Kelly O’Dwyer MP, ‘Appointment of the Australian Securities and Investments Commission Chair’ (Media Release, 17 October 2017); Patrick Durkin, ‘James Shipton Appointed ASIC Chairman’, *Australian Financial Review* (online), 17 October 2017.

¹⁰¹ Australian Securities and Investments Commission, ‘ASIC Enforcement Review: Strengthening Penalties for Corporate and Financial Sector Misconduct’ (Position Paper No 7, Australian Securities and Investments Commission, 2017) 45–53; Patrick Durkin, ‘Corporate Penalties for Wrongdoing to be Tripled’, *Australian Financial Review* (online), 22 October 2017.

¹⁰² Durkin, above n 101.

In addition to proposed reforms to foreign bribery offences,¹⁰³ recent reforms to combat false accounting practices¹⁰⁴ have created severe maximum corporate penalties of \$18 million, three times the value of the benefit obtained, or 10 per cent of the annual turnover of the company if the benefit cannot be determined.¹⁰⁵ More recently, the Australian Transaction Reports and Analysis Centre ('AUSTRAC') has commenced proceedings in the Federal Court against the Commonwealth Bank of Australia under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) — which imposes a maximum pecuniary penalty of \$18 million on a body corporate for each contravention¹⁰⁶ — for 'serious and systemic non-compliance' with the legislation.¹⁰⁷ AUSTRAC has alleged 53 700 contraventions by the bank over a three year period, implying a theoretical maximum civil penalty of \$960 billion.¹⁰⁸

¹⁰³ Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (Cth).

¹⁰⁴ *Criminal Code Act 1995* (Cth) ch 10 pt 10.9 div 490.

¹⁰⁵ Robert Wyld, *Likely New Corporate Offence of Failing to Prevent Foreign Bribery* (26 May 2017) Johnson Winter & Slattery <<https://www.jws.com.au/en/legal-updates-archive/item/944-likely-new-corporate-offence-of-failing-to-prevent-foreign-bribery>>; Robert Wyld, *New Criminal Offence: False Accounting Practices* (December 2015) Johnson Winter & Slattery <<https://www.jws.com.au/en/legal-updates-archive/item/717-new-criminal-offence-false-accounting-practices>>; Clayton Utz, *Australia's New False Accounting Laws Boost Foreign Bribery Regime, so Review Accounting Safeguards* (15 March 2016) <<https://www.claytonutz.com/knowledge/2016/march/australia-s-new-false-accounting-laws-boost-foreign-bribery-regime-so-review-accounting-safeguards>>; Rani John and Alexandra Cameron, *Australia Introduces New False Accounting Offences in the Quest to Better Combat Foreign Bribery and Corruption* (3 March 2016) DLA Piper <<https://www.dlapiper.com/en/australia/insights/publications/2016/03/new-accounting-offences-to-combat--corruption/>>.

¹⁰⁶ *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ss 41(2), (4), 175(4); *Crimes Act 1914* (Cth) s 4AA; Australian Transaction Reports and Analysis Centre, *Penalty Units* (13 July 2017) AUSTRAC <<http://www.austrac.gov.au/enforcement-action/penalty-units>>.

¹⁰⁷ Australian Transaction Reports and Analysis Centre, 'AUSTRAC Seeks Civil Penalty Orders against CBA' (Media Release, 3 August 2017) <<http://www.austrac.gov.au/media/media-releases/austrac-seeks-civil-penalty-orders-against-cba>>.

¹⁰⁸ *Ibid*; Peter Ryan, 'CBA Risks Massive Fines over Anti-Money Laundering, Terrorism Financing Law Breaches', *ABC News* (online), 3 August 2017 <<http://www.abc.net.au/news/2017-08-03/cba-risks-massive-fines-over-law-breaches/8770992>>; Clancy Yeates, 'Austrac Alleges CBA in "Serious" Breach of Money Laundering Act', *The Sydney Morning Herald* (online), 3 August 2017 <<http://www.smh.com.au/business/banking-and-finance/austrac-alleges-cba-in-serious-breach-of-money-laundering-act-20170803-gxoirw.html>>. Although the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) came into force in 2006, a \$45 million civil penalty was recently imposed on gaming company Tabcorp for failing to notify AUSTRAC of suspicious behaviour over five years: Peter Ryan, 'Tabcorp Fined \$45 Million for Breaching Money Laundering, Terror Financing Laws', *ABC News* (online), 16 March 2017 <[http://www.abc.net.au/news/2017-03-16/tabcorp-fined-\\$45-million-for-breaching-money-laundering-laws/8360164](http://www.abc.net.au/news/2017-03-16/tabcorp-fined-$45-million-for-breaching-money-laundering-laws/8360164)>. However, some

Though ‘beefing up’ maximum penalties has obvious political appeal, it does not necessarily follow that higher penalties will result.¹⁰⁹ The court ultimately determines the magnitude of any penalty to be imposed¹¹⁰ — the statutory maximum is but one factor to be considered.¹¹¹ In the context of the *Australian Consumer Law*, the ACCC will be guided by the Full Court’s comments regarding the need to focus on, and better describe, the extent of the loss suffered by consumers,¹¹² and the benefits derived by the offending company.¹¹³ Enforcement efforts are likely to be supported by courts that are ostensibly prepared to treat consumer law contraventions ‘in a very serious way’.¹¹⁴ Some commentators have observed a ‘growing willingness’ by judges to take a ‘more punitive approach’ to such breaches compared to five or ten years ago.¹¹⁵ Such observations reflect an increased focus by courts and regulators on poor corporate compliance culture, particularly when assessing penalties.¹¹⁶ As Wigney J observed in *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group*, there is a ‘legitimate community expectation’ that ‘major corporations act as exemplary corporate citizens’ and ‘develop and maintain a good corporate culture’.¹¹⁷

commentators are skeptical as to whether a penalty so large relevant to the size of the bank would actually be imposed: James Frost, ‘CBA Fine Could Range from Zero to Billions’, *Australian Financial Review* (online), 7 August 2017 <<http://www.afr.com/business/banking-and-finance/financial-services/cba-fine-could-range-from-zero-to-billions-20170807-gxqnsb>>; Christopher Joye, ‘Commonwealth Bank Money-Laundering Drama is Overblown’, *Australian Financial Review* (online), 7 August 2017 <<http://www.afr.com/business/banking-and-finance/the-cba-money-laundering-drama-is-overblown-20170807-gxqtyr>>.

¹⁰⁹ Butler, above n 99.

¹¹⁰ Productivity Commission, above n 86, 143, citing *Markarian v The Queen* (2005) 228 CLR 357, 383 [65] (McHugh J), quoting *R v Geddes* (1936) SR (NSW) 554, 555–6 (Jordan CJ).

¹¹¹ Productivity Commission, above n 86, 143; *Markarian v The Queen* (2005) 228 CLR 357, 359, 361, 369 [20], 372 [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

¹¹² *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 41 [65], 62 [158]. But see Howard, above n 81.

¹¹³ Jarvis and Stones, above n 82.

¹¹⁴ Stephen Corones, ‘Competition Law and Market Regulation’ (2016) 44 *Australian Business Law Review* 216, 217.

¹¹⁵ *Ibid*; Benson and Fiddian, above n 82, 55.

¹¹⁶ See, eg, *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44 [124], cited in *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 333 [21]. See also *Australian Securities and Investments Commission v Chemeq Ltd* (2006) 234 ALR 511, 531 [84]–[86], 532–3 [93].

¹¹⁷ *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group* [2016] FCA 1516 [123].

V CONCLUSION

The decision of the Full Court in *ACCC v Reckitt Benckiser* has received widespread support as a significant victory for the ACCC.¹¹⁸ Although the comments of Jagot, Yates and Bromwich JJ seem to foreshadow a modern judicial shift towards the imposition of increased penalties for serious contraventions of the *Australian Consumer Law*,¹¹⁹ confirmation of this trend will fall to future proceedings. It is hoped that the ACCC's pursuit of higher penalties will influence the behaviour of large companies that seek to engage in systemic misconduct.¹²⁰ The publicity surrounding the Full Court's decision places these companies, and their officers, on notice that marketing strategies, compliance programmes and business practices may need to be reviewed and amended.¹²¹ Ultimately, recent and future penalty reform — under the *Australian Consumer Law* and other corporate regimes — will only effect meaningful change on corporate compliance culture if larger penalties are combined with an increased likelihood of detection and 'strong and visible' enforcement action by regulators.¹²²

¹¹⁸ It is also worth noting that in New Zealand, Reckitt Benckiser (New Zealand) Ltd was fined NZ\$1.08 million for contraventions of provisions analogous to ss 18 and 33 of the *Australian Consumer Law* relating to the Specific Pain range: see, eg, *Commerce Commission v Reckitt Benckiser (New Zealand) Limited* [2017] NZDC 1956; Commerce Commission New Zealand, '\$1m Penalty for Misleading Nurofen Specific Pain Range Claims' (Media Release, 3 February 2017) <<http://www.comcom.govt.nz/the-commission/media-centre/media-releases/detail/2017/1m-penalty-for-misleading-nurofen-specific-pain-range-claims>>.

¹¹⁹ *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 64 [165], 67 [178]–[179].

¹²⁰ Benson and Fiddian, above n 82, 55.

¹²¹ Stathis, above n 83, 202; Benson and Fiddian, above n 82, 57.

¹²² Stathis, above n 83, 202; Benson and Fiddian, above n 82, 55; Productivity Commission, above n 86, 142; Fogarty, above n 88, 1; Australian Toy Association, Post-Draft Submission No 42 to Productivity Commission, *Consumer Law Enforcement and Administration*, 23 January 2017.

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